

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: SB 100

INTRODUCER: Senator Steube

SUBJECT: Tobacco Settlement Agreements

DATE: January 24, 2017

REVISED: 01/25/17

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Oxamendi</u>	<u>McSwain</u>	<u>RI</u>	<u>Pre-meeting</u>
2.	<u></u>	<u></u>	<u>JU</u>	<u></u>
3.	<u></u>	<u></u>	<u>RC</u>	<u></u>

I. Summary:

SB 100 repeals s. 569.23, F.S., which provides limitations upon the amount of security (i.e., appeal bond) required in appeals of civil actions against a signatory, successor, parent, or affiliate of a signatory to Florida's 1997 landmark \$368.5 billion tobacco settlement agreement in *State of Florida v. American Tobacco Co.*, No. 95-1466AH (Fla. 15th Cir. Ct.).

Under s. 569.23(2), F.S., the total value of security required to stay the execution of a judgment against the settling tobacco companies may not exceed \$100 million for all appellant tobacco companies collectively, regardless of the total amount of the judgment.

Section 569.23(3), F.S., applies to appeals by the settling tobacco companies in lawsuits brought in Florida by or on behalf of plaintiffs who were part of a decertified class action lawsuit against those companies. That subsection requires a trial court to automatically stay the execution of any judgment involving settling tobacco companies during the pendency of all appeals, once security for the judgment being appealed is provided. The amount of security required in those cases is equal to the lesser of the judgment amount or an amount calculated based on the total number of such judgments, and is specified in s. 569.23(3)(a)2., F.S.

The bill provides an effective date of July 1, 2017.

II. Present Situation:

Florida's Tobacco Settlements

In February 1995, the State of Florida sued a number of tobacco manufacturers, and others, asserting various claims for monetary and injunctive relief. The defendants included: American Tobacco Company, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., Philip Morris Inc., Liggett Group, Inc., Brooke Group, Ltd., Lorillard Corporation, British

American Tobacco Co., Ltd., and Dosal Tobacco Corp, Inc. On March 3, 1996, Florida, as one of five settling states,¹ entered into a settlement agreement with Liggett Group, Inc., Brooke Group, Ltd., and Liggett & Myers, Inc. (collectively herein referred to as Liggett). In August, 1997, the “Big Four” tobacco companies (Phillip Morris, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corp., and Lorillard Tobacco Company) entered into the landmark \$368.5 billion tobacco settlement agreement.

At the time of the settlement, the settling manufacturers held approximately 97.35 percent of the tobacco market share in the U.S.² The remaining market share was held by various, smaller producers who were not named in the state’s suit as defendants. Dosal Tobacco Corp. Inc., was subsequently dismissed from the lawsuit. The annual tobacco settlement payments are based on several factors, including the total volume of U.S. cigarette sales, and national market share.

Subsequent to Florida’s settlement, the “Big Four” tobacco companies settled with 46 states, the District of Columbia, and five U.S. territories in November 1998, by entering into the Master Settlement Agreement (MSA).³ The “Big Four” tobacco companies are known as the Original Participating Manufacturers or OPMs. Forty-five additional tobacco manufacturers, including Liggett, have since joined the MSA, but have not reached a comparable settlement with Florida.⁴ These manufacturers are known as Subsequent Participating Manufacturers or SPMs. The manufacturers that have not joined the MSA or otherwise settled with a state are known as Non-Participating Manufacturers or NPMs. Florida, Minnesota, Mississippi, and Texas are not parties to the Master Settlement Agreement.

Engle Progeny Litigation

In 1994, a Florida resident, Howard Engle, filed a national class-action lawsuit against R.J. Reynolds Tobacco Co., and the other “Big Four” tobacco companies. The plaintiff smokers alleged that the tobacco companies had misled consumers about the dangers of their cigarettes. The class was later limited to Florida residents.⁵

In May 2000, a Florida jury found the companies liable for misleading consumers and awarded the plaintiffs \$145 billion in damages, one of the largest jury awards ever in the U.S. The tobacco companies appealed and argued that the class of plaintiffs was too diverse and the punitive damage award was excessive. In 2003, the Florida Third District Court of Appeal agreed and reversed the judgment of punitive damages and decertified the class.⁶ On July 6, 2006, the Florida Supreme Court affirmed the reversal of the punitive damages and the

¹ The five states that entered into the March 3, 1996, settlement agreement are West Virginia, Florida, Mississippi, Massachusetts, and Louisiana.

² “Tobacco Settlement and Declining State Revenues,” *Trends Alert*, The Council of State Governments, March 2002, page 5. A copy is available at: <http://www.csg.org/knowledgecenter/docs/TA0203Tobacco.pdf> (last visited January 10, 2017).

³ Master Settlement Agreement (Nov. 1998), is available at the Internet website for the National Association of Attorneys General at: http://www.naag.org/naag/about_naag/naag-center-for-tobacco-and-public-health/master-settlement-agreement/master-settlement-agreement-msa.php (last visited January 10, 2017).

⁴ A complete listing as of December 21, 2016 of the SPMs under the MSA can be found at: http://www.naag.org/assets/redesign/files/msa-tobacco/2016-12-21%20PM%20List_2.pdf (last visited January 10, 2017).

⁵ *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

⁶ *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. 3rd Dist. Ct. App. 2003).

decertification of the class, but it allowed former class members to file individual lawsuits. The Florida Supreme Court also permitted the individual plaintiffs, known collectively as the “*Engle* progeny,” to rely on the factual findings in the original lawsuit under the legal principal of *res judicata*.⁷ As a result, the individual plaintiffs would not have to prove that the tobacco companies misled consumers, but would have to prove that they relied on those misleading representations and were harmed.⁸ More than 8,000 lawsuits were subsequently filed in the Florida state courts and in U.S. District Courts in the state.⁹

On March 14, 2013, the Florida Supreme Court held that relying on the findings of fact in the original *Engle* case under the *res judicata* doctrine in *Engle* progeny cases in Florida state courts did not violate the tobacco companies' due process rights.¹⁰

Federal Settlements

In October 2013, Liggett and its parent company, Vector Group, Ltd., agreed to pay \$110 million to settle 4,900 of the then 5,300 lawsuits pending in Florida federal courts.¹¹ In February 2015, R.J. Reynolds Tobacco Co. and Philip Morris USA each agreed to pay \$42.5 million to resolve those cases, and Lorillard Inc., agreed to pay \$15 million. This agreement affected 415 of the pending cases in the Middle District of Florida.¹²

These settlements do not affect the pending lawsuits filed in Florida's state courts.

Pending State Court Cases

There are approximately 3,000 cases pending in state courts.¹³ According to representatives for “*Engle* progeny” plaintiffs’ attorneys, 225 cases, not including mistrials, have resulted in a verdict, and 144 of those cases have resulted in a judgment for the plaintiff. More than 144 appeals have resulted because some of the cases have multiple appeals. The defendant tobacco companies have paid 56 of the plaintiffs’ judgments, and have appealed 26 judgments to the Florida Supreme Court and 15 judgments to the United States Supreme Court. Some of the appealed verdicts and jury awards have been reversed, reduced, or remanded for further proceedings.¹⁴

⁷ “*Res judicata*” refers to the legal concept that once a point in a controversy has been legally determined by a court judgement, it cannot be contested again by the parties in the same action or in or subsequent proceedings. See BLACK’S LAW DICTIONARY, FIFTH EDITION (1979).

⁸ *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), cert. denied, 552 U.S. 941 552 U.S. 941, 128 S. Ct. 96, 169 L. Ed. 2d 244 (2007).

⁹ For a review of the “*Engle* progeny” litigation, see *What is the “Engle Progeny” Litigation?*, Tobacco Control Legal Consortium, September 2015, available at: <http://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-engle-progeny-2015.pdf> (last visited January 11, 2017).

¹⁰ *Philip Morris USA, Inc., v. Douglas*, 110 So3d 419 (Fla. 2013).

¹¹ Dye, Jessica, *Liggett Group to Pay \$110 million in Tobacco Settlement*, Reuters.com, October 23, 2013, available at: http://www.journalnow.com/business/business_news/local/reynolds-may-face-lower-damages-in-engle-verdict/article_62e3647d-9457-5b0b-a1d6-38a7d6333e69.html (last visited January 11, 2017).

¹² *More Engel Cases Dropped in Florida, Including at Least 11 Involving Reynolds*, Winston-Salem Journal, June 14, 2015, available at: http://www.journalnow.com/business/business_news/local/more-engel-cases-dropped-in-florida-including-at-least-involving/article_3539064d-f379-5c66-9e06-60c262c6b159.html (last visited January 11, 2017).

¹³ See note 9.

¹⁴ *Id.*, citing Kolker, Carlyn, *The Tobacco Litigation that Wouldn't Die*, THE AMER. LAW, May 25, 2015.

Stays During Appeal and Bond Requirements for Settling Manufacturers

Florida Rules of Appellate Procedure set forth the requirements for obtaining a stay of execution of a monetary judgment pending review. Rule 9.310 of the Florida Rules of Appellate Procedure provides that, if the judgment is solely for the payment of money, a party may obtain an automatic stay of execution pending review, without the necessity of a motion or order, by posting a good and sufficient bond (a supersedeas bond) equal to the principal amount of the judgment plus twice the statutory rate of interest on judgments on the total amount on which the party has an obligation to pay interest. Multiple parties having common liability may file a single bond. Under the rule, the lower tribunal is given specific continuing jurisdiction to determine the actual sufficiency of any such bond.

In 2000, prior to the trial court in *Engle* entering the \$145 billion judgment, the Legislature enacted s. 768.733, F.S., relating to bonds in class action lawsuits.¹⁵ Section 768.733, F.S., provides:

(1) In any civil action that is brought as a certified class action, the trial court, upon the posting of a bond or equivalent surety as provided in this section, shall stay the execution of any judgment, or portion thereof, entered on account of punitive damages pending completion of any appellate review of the judgment.

(2) The required bond or equivalent surety acceptable to the court for imposition of the stay shall be the lower of:

(a) The amount of the punitive-damages judgment, plus twice the statutory rate of interest; or

(b) Ten percent of the net worth of the defendant as determined by applying generally accepted accounting principles to the defendant's financial status as of December 31 of the year prior to the judgment for punitive damages;

provided that in no case shall the amount of the required bond or equivalent surety exceed \$100 million, regardless of the amount of punitive damages.

As a result of the 2000 legislation, the five tobacco companies' bond to appeal the \$145 billion class action judgment in *Engle* was limited to \$100 million.

In 2003, the Legislature enacted s. 569.23, F.S., to provide:

See also, Craver, Richard, *Reynolds May Face Lower Damages in Engle Verdict*, Winston-Salem Journal, January 6, 2017, available at: http://www.journalnow.com/business/business_news/local/reynolds-may-face-lower-damages-in-engle-verdict/article_62e3647d-9457-5b0b-a1d6-38a7d6333e69.html (last visited January 11, 2017), and Craver, Richard, *More Engel Cases Dropped in Florida, Including at Least 11 Involving Reynolds*, Winston-Salem Journal, June 14, 2015, available at: http://www.journalnow.com/business/business_news/local/more-engel-cases-dropped-in-florida-including-at-least-involving/article_3539064d-f379-5c66-9e06-60c262c6b159.html (last visited January 11, 2017).

¹⁵ Section 4, ch. 2000-128, Laws of Fla.

(1) In any civil action involving a signatory or successor or an affiliate of a signatory to the tobacco settlement agreement . . . , the appeal bond to be furnished during the pendency of all appeals or discretionary appellate reviews of any judgment in such litigation shall be set pursuant to applicable laws or court rules, except that the *total bond for all defendants may not exceed \$100 million, regardless of the total value of the judgment.*¹⁶

In 2009, after the decertification of the *Engle* class, the Legislature amended s. 569.23(1), F.S., to define “tobacco settlement agreement” as “any settlement agreement, as amended, entered into by the state and one or more cigarette manufacturers in settlement of *State of Florida v. American Tobacco Co.*, No. 95-1466AH (Fla. 15th Cir. Ct. 1996).”¹⁷

At the same time, section 569.23(2), F.S., was amended to provide that the security (i.e., appeal bond) required during the pendency of all appeals or discretionary appellate reviews, including appeals to the United States Supreme Court, of any judgment against the settling tobacco companies must be set pursuant to the applicable laws or court rules, except that the total value of security for *all appellants (i.e., defendants) collectively* may not exceed \$100 million, regardless of the total value of the judgment.¹⁸

In civil actions brought by or on behalf of the “*Engle* progeny” plaintiffs, s. 569.23(3), F.S., requires the trial courts to “automatically stay the execution of any judgment in any such actions during the pendency of all appeals or discretionary appellate reviews of such judgment in Florida courts, upon provision of [the] security” specified in that subsection.

Section 569.23(3)(a)2., F.S., also provides the procedure for determining the amount of the bond based on the number of judgments and the process for making claims against the bond. The amount of the security (or bond) required for *Engle* progeny cases is based on the following chart:¹⁹

TIER— NUMBER OF JUDGMENTS	AMOUNT OF SECURITY PER JUDGMENT	MAXIMUM TOTAL ALL SECURITY
1-40	\$5,000,000	\$200,000,000
41-80	\$2,500,000	\$200,000,000
81-100	\$2,000,000	\$200,000,000
101-150	\$1,333,333	\$199,999,950
151-200	\$1,000,000	\$200,000,000
201-300	\$666,667	\$200,000,100
301-500	\$400,000	\$200,000,000

¹⁶ Chapter 2003-133, Laws of Fla. (Emphasis added.)

¹⁷ Chapter 2009-188, Laws of Fla.

¹⁸ *Id.*, and Summary of Legislation Passed (2009 Regular Session), CS/SB 2198, pp. 173-4.

¹⁹ *Id.*; see s. 569.23(3)(a)2., F.S.

TIER— NUMBER OF JUDGMENTS	AMOUNT OF SECURITY PER JUDGMENT	MAXIMUM TOTAL ALL SECURITY
501-1,000	\$200,000	\$200,000,000
1,001-2,000	\$100,000	\$200,000,000
2,001-3,000	\$66,667	\$200,001,000

After notice and hearing, if a plaintiff proves by a *preponderance of the evidence*²⁰ that the defendant who posted the bond is purposefully dissipating assets outside the ordinary course of business to avoid payment of the judgment, then the court has the discretion to enter necessary orders to protect the plaintiff, including ordering an appeal bond to be posted in an amount up to the full amount of the judgment.²¹

Section 569.23, F.S., applies to all cases pending or filed on or after the July 1, 2003.²²

Section 569.23, F.S., does not apply to any past, present, or future action brought by the State of Florida against the settling manufacturers.²³

Section 569.23, F.S. (2009), included a provision in subsection (3)(f) for the expiration of subsection (3) on December 31, 2012.²⁴ The 2011 Legislature repealed the expiration provision that had been contained in subsection (3)(f). The legislation which repealed the expiration provision made the following legislative finding:

The Legislature finds that hundreds of millions of dollars appropriated annually in support of the state's Medicaid program and other critical health programs come directly from revenues resulting from the settlement in *State of Florida v. American Tobacco Co.*, No. 95-1466AH (Fla. 15th Cir. Ct.), that maintaining those revenues is critical to the health of this state's residents, that s. 569.23(3), Florida Statutes, protects the continued receipt of those revenues, that the sunset of s. 569.23(3), Florida Statutes, will undermine financial support for the state's Medicaid and other critical health programs, and that the sunset of that subsection should therefore be repealed.²⁵

III. Effect of Proposed Changes:

The bill repeals s. 569.23, F.S.

²⁰ With respect to the burden of proof in civil cases, this is defined as meaning the greater weight of the evidence, or evidence which as a whole, shows that the fact sought to be proved is more probable than not. *See* BLACK'S LAW DICTIONARY, SIXTH EDITION.

²¹ Section 569.23(4), F.S.

²² *See* s. 2, ch. 2003-133, Laws of Fla.

²³ Section 569.23(5), F.S.

²⁴ Section 569.23(3)(f), F.S. (2009)

²⁵ Section 16 (1), Ch. 2011-61, Laws of Fla.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The tobacco companies that were signatories to the tobacco settlement agreements, or their successor, parent, or affiliates would be required to furnish an appeal bond which may be equal to the amount of the judgment for all individual judgments, as provided under Rule 9.310 of the Florida Rules of Appellate Procedure. The amount of such judgements and the amount of any required appeal bond is indeterminate at this time.

C. Government Sector Impact:

The Office of the State Courts Administrator does not anticipate that the bill will have a fiscal impact.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill repeals section 569.23 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
