HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 6011 Tobacco Settlement Agreements
SPONSOR(S): Burgess, Jr. and others
TIED BILLS: None **IDEN./SIM. BILLS:** SB 100

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice & Claims Subcommittee	14 Y, 1 N	MacNamara	Bond
2) Appropriations Committee			
3) Judiciary Committee			

SUMMARY ANALYSIS

In civil litigation, a successful party may execute (initiate collection activities) on a judgment entered by the trial court. An appeal does not restrict the right of the successful party to collect the judgment unless the court enters a stay of execution pending the appeal. A stay is automatically granted if the appealing party posts a bond or other surety in an amount equal to the judgment plus two years' interest, except as otherwise provided by law.

In 1997, the state and four large tobacco companies entered into a settlement agreement for all past, present, and future claims by the state. Current law caps the total required amount of all appeal bonds in civil actions filed against one of the four companies by private individuals at $200 million and requires that a stay entered by the lower tribunal remain in effect during the pendency of all review proceedings. In addition to the cap on appeal bonds, current law provides procedural rules related to changing or collecting bonds posted by these companies, and imposes reporting requirements on the four tobacco companies and the Supreme Court in connection with these appeals.

Separately, current law provides a means by which a judgment debtor may ask the court for a lower bond, caps the appeal bond at $50 million, adjusted for inflation, for a single defendant in a civil action, and caps class action appeal bonds at the lesser of 10% of net worth or $100 million. These laws are not affected by this bill.

This bill repeals the appeal bond limit for appeals by any of the four companies, subjecting these appeals to the Rules of Appellate Procedure, except as otherwise provided by law. The bill also repeals the procedural rules and reporting requirements mandated under current law.

This bill does not appear to have a fiscal impact on state or local governments. See Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Any trial court judgment may be appealed by the unsuccessful party. An appeal does not restrict the right of the successful party to initiate collection unless the trial court enters a stay of execution pending the appeal. Stays of execution are governed by applicable law and by the Florida Rules of Appellate Procedure.[1] In the case of appeals of judgments for the payment of money, a stay of execution is conditioned on the posting of an appeal bond.

Appeal Bonds in General

Rule 9.310(b)(1) 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 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.[2] A "supersedeas" is often defined as either a suspension of the power of the trial court to issue an execution on a judgment or decree from which an appeal has been taken or, if execution has issued, a prohibition emanating from the appellate court against further proceedings under the execution.[3]

The supersedeas bond required for an automatic stay of execution may be made in the form of cash, deposited into the registry of the circuit court in the county where the judgment was entered,[4] or may be in the form of a surety bond that is posted with the court. Posting or depositing this security serves to protect the successful party from being adversely affected against the consequences of the supersedeas or stay when a money judgment or decree is appealed. Specifically, if a judgment debtor loses the appeal, the cash or bond deposited or posted with the court is used to satisfy the judgment.

Following a decision by the appellate court, this stay is lifted, however, and unsuccessful appellants are required to demonstrate likelihood on the merits in the Supreme Court and irremediable harm should a stay pending review in that Court not be granted.[5]

A court clerk is entitled to fees for examining bond certificates issued by surety companies, and also for receiving registry deposits, which would occur if a party deposited cash as their form of security. [6] Court clerks ordinarily have discretion to deposit such cash receipts with their local depository institution, commingled with county funds, unless in a particular case a court enters specific escrow orders.

Exceptions to Bond Requirement

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[1] Fla. R. App. P. 9.310(a) to (f).

[2] As of January 1, 2017, the interest rate on judgments, set by the Chief Financial Officer pursuant to s. 55.03, F.S., is 4.97% per annum or 0.01361644% per day. *See* http://www.fldfs.com/aadir/interest.htm. By way of comparison, the interest rate on judgments in 2003, when s. 569.23, F.S. was enacted, was 6% per annum. In 2009, when the statute was amended, the interest rate on judgments was 8% per annum.

[3] The term "supersedeas" though not used in the rule, is often used by the courts to refer to a stay pending review.

[4] *See* Fla. R. App. P. 9.310(c)(1).

[5] *See* Fla. R. App. P. 9.310, Committee Notes; *See also State ex rel. Price v. McCord*, 380 So.2d 1037, 1039 (Fla. 1980) ("The effect of these rules is to make the decisions of the district courts of appeal presumptively final in money judgment (as well as most other) matters, subject to an applicant's showing that there is both a likelihood of success in the Supreme Court and irremediable harm by the denial of a stay pending review in that Court. Only upon such a showing will the stay entered by the trial court remain in effect to protect the applicant.")

[6] *See* s. 28.24(10)(a)(1-2), F.S. (Allowing the clerks of circuit courts to charge of a fee in an amount equal to 3% of the first $500 received plus 1.5% on each subsequent $100 received.). *See also* s. 28.231, F.S. (Granting any state appellate or county or state trail court the power collect fees as the clerk of the circuit court.); s. 28.24(14), F.S. (Provides for a fee of $3.50 for validating certificates or bonds).

Florida law has several exceptions to the requirement to post an appeal bond pursuant to Rule 9.310:

- Section 45.045(2), F.S., provides that a party seeking a stay of execution may move the court to reduce the amount of supersedeas bond required to obtain such stay on equitable grounds.

- Section 45.045(1), F.S., applies a $50 million bond cap, for each appellant, on all supersedeas bonds required in any civil action brought under any legal theory, regardless of the judgment appealed. This figure is adjusted for inflation, the cap is approximately $59.5 million presently.

- Section 768.733, F.S., dealing with class action lawsuits, sets a cap of the lessor of either the amount of the punitive damages judgment, plus twice the statutory interest rate or 10% of the appellant's net worth to stay execution pending appeals on punitive damages awards. In either instance, the bond required is capped at $100 million.

Tobacco Lawsuits

In 1995, the state sued the "Big Four" tobacco companies (Phillip Morris, R.J. Reynolds, Brown and Williamson, and Lorillard), asserting various claims for monetary damages and injunctive relief.[7] The suit was resolved in 1997 through a settlement agreement, imposing both monetary and non-monetary sanctions on the tobacco companies. Under the terms of the agreement, the state was to receive $12.1 billion over 25 years along with 5.5% of the unadjusted amounts in perpetuity. Subsequent to the state's settlement, the Big Four and some other smaller tobacco producers settled with 46 states,[8] the District of Columbia, the Commonwealth of Puerto Rico and four U.S. territories, referred to as the Master Settlement Agreement ("MSA"). The total unadjusted cost of the state settlements ranges between $212 billion to $246 billion over the first 25 years, subject to numerous adjustments ranging from inflation to fluctuations in cigarette consumption and market share. From FY 2016-2017 through FY 2025-2026, the state estimates it will receive approximately $3.75 billion in tobacco settlement payments under the agreement.[9]

In March of 2003, an Illinois trial court ordered Phillip Morris Inc. to post a $12 billion bond to file an appeal in a class-action tobacco lawsuit.[10] Following the court's ruling, there was speculation that Phillip Morris would not be financially able to post the bond, could default on its $2.6 billion obligation under the MSA,[11] and therefore might seek bankruptcy protection.[12] Phillip Morris filed a Request for Reduction of Bond and Stay of Enforcement of the Judgment, in which a Brief of *Amici Curiae* signed by the chief law enforcement officers of 37 jurisdictions, and by the National Conference of State Legislatures ("NCSL"),[13] was filed urging the court to exercise its discretion to reduce the appeal bond so as not to interfere with the interests of the states in receipt of the settlement payments. The court in *Price* entered an order substantially reducing the appeal bond and no MSA payments were missed.

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[7] *See State of Fla. et al. v. Am. Tobacco Co., et al.*, Case No. 95-1466 AH (Fla. 15th Cir. Ct.).
[8] Like Florida, the states of Texas, Minnesota and Mississippi also entered into earlier individual settlement agreements.
[9] State of Florida Revenue Estimating Conference for Tobacco Settlement Payments, *Executive Summary* (8/5/2016)
[10] *See Price v. Phillip Morris, Inc.*, Cause No. 00-L-112 (Ill. 3d Cir. Ct. 2003) At issue in this class-action lawsuit was whether the defendant had violated the Illinois Consumer Fraud Act and the Uniform Deceptive Trade Practices Act in its manufacturing, promoting, marketing, distributing and selling Marlboro Lights and Cambridge Lights and allegedly declaring them safer for consumers than "regular" cigarettes. The court found in favor of the plaintiffs and awarded the sum of $7.1005 billion in compensatory damages. In addition, the court ordered the defendant to pay punitive damages in the amount of $3 billion to the State of Illinois. Enforcement could be stayed only if an appeal bond was presented and approved pursuant to Illinois court rule in the amount of $12 billion.
[11] Under the MSA, Phillip Morris' next payment following the judgment was due April 15, 2003.
[12] *See, e.g.*, Associated Press, "Attorneys general ask to lower Phillip Morris bond," BRADENTON HERALD, April 8, 2003; Ameet Sachdev, "Phillip Morris appeals ruling: Seeks to subtract punitive damages of $3 billion," CHICAGO TRIBUNE, April 5, 2003; Editorial, "Legal trouble for tobacco," BOSTON HERALD, April 5, 2003; Sun-Times Springfield Bureau, "Thompson: Cap tobacco bond ; Says $12 bil. appeal cost can hurt state," CHICAGO SUN-TIMES, March 26, 2003.
[13] NCSL is a bipartisan organization that serves the legislators and staff of the legislatures as an advocate for the interests of the states, providing research, technical assistance and information exchange among policymakers on important state issues. In the *amicus* brief, NCSL's interest in the case is stated as "protecting state finances during the most difficult state budget period in fifty years."

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.[14]

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.[15]

On July 6, 2006, the Florida Supreme Court affirmed the reversal of the punitive damages and the decertification of the class, but it allowed former class members to file individual lawsuits.[16] 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*.[17] 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.

Tobacco Lawsuits and Appeals Post-*Engle*

In 2003, s. 569.23, F.S. was enacted,[18] requiring trial courts to automatically stay the execution of judgments entered in favor of class members during the pendency of civil appeals involving any of the four major tobacco companies that entered into the settlement agreement with the state in 2003 following the posting of the required supersedeas bond. The supersedeas bond required to stay the execution of judgment for appeals involving the four tobacco companies was capped at $100 million, collectively.

At the time the Supreme Court decertified the *Engle* class, there was an estimated 7,000 former members of the class who could file individual lawsuits. According to records provided by the Supreme Court, approximately 3,000 individual trial court lawsuits filed by former class members are currently pending.[19]

Current Law on Appeal Bonds of Certain Tobacco Companies

In 2009, s. 569.23, F.S. was amended[20] to extend the application of the statute to include civil actions against the four major tobacco companies brought by persons who are members of the decertified *Engle* class.[21] This amendment increased the supersedeas bond cap to $200 million dollars, collectively, and placed a limit on the amount of each bond in actions filed by members of the decertified class. Specifically, it capped the total cumulative value of all security based upon or equal to

[14] *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. 3d DCA 1996).
[15] *Liggett Group, Inc. v. Engle*, 853 So.2d 434 (Fla. 3d DCA 2003).
[16] *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).
[17] "*Res judicata*" refers to the legal concept that once a point in controversy has been legally determined by a court judgment, it cannot be contested again by the parties in the same action or in subsequent proceedings. *See* BLACK'S LAW DICTIONARY, FIFTH EDITION (1979).
[18] Ch. 2003-133, L.O.F. (SB 2826)
[19] *Id*.; *See also* What is the "Engle Progeny" Litigation?, Tobacco Control Legal Consortium, September 2015, available at: publichealthlawcenter.org/sites/default/files/resources/tclc-fs-engle-progeny-2015.pdf
[20] Ch. 2009-188, L.O.F. (SB 2198)
[21] Prior to the decertification, the class action suit would have been covered by the supersedeas bond cap in s. 569.23, F.S. However, the separate lawsuits were not covered by the statute, which meant that the tobacco companies would have had to post supersedeas bonds in accordance with state law and rules of court, in any lawsuit filed by a former member of the class.

the appellant's proportionate share of liability in all cases pending appeal plus twice the statutory rate of interest.[22] The amount of the security (or bond) required is based on the following chart:

Appeal Bond Caps		
TIER-Number of Judgments	Amount of Security per Judgment	Maximum Total Security
1-40	$5,000,0000	$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
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

Additionally, "the trial courts shall 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."[23] As such, supersedeas bonds posted by these four companies act to stay the execution of monetary judgments during all appellate review proceedings, without a showing of likelihood of success on the merits and irremediable harm.

In a 2011 opinion the First District Court of Appeal determined that s. 569.23(3), F.S., may have a "broader application than the *Engle* progeny cases."[24] In other words, under the current language of the statute, the bond cap may potentially be applied to judgments entered against one of the big four tobacco companies in lawsuits filed by individuals who are not members of the decertified *Engle* class.

In addition to capping the supersedeas bonds in such actions, s. 569.23, F.S. mandates that all security be posted or deposited with the clerk of the Supreme Court. As sole recipient of securities from the tobacco companies, the clerk must collect fees for receipt of security as authorized by law. All fees collected are to be deposited in the State Courts Revenue Trust Fund and the clerk is required to utilize the services of the Chief Financial Officer, as needed, for the custody and management of the security posted or deposited with the clerk.

The statute also provides rules for the payment of judgments following an appeal and procedural requirements for changing the amount of security required. Lastly, the statute imposes several reporting and record retention requirements on the tobacco companies and the Clerk of the Supreme Court with respect to these lawsuits and the amount of security posted or paid.[25] Section 569.23, F.S. was found constitutional in *R.J. Reynolds Tobacco Co., v. Hall*, 67 So. 3d 1084 (Fla. 1st DCA 2011).

Currently there are 40 tobacco appeals pending in the state, totaling approximately $470 million in trial court judgments entered against the tobacco companies. In these cases, the tobacco companies have posted roughly $170 million in bonds. In all, 91 appeals on judgments totaling approximately $950 million have been filed by the tobacco companies since the Supreme Court decertified the *Engle* class in 2006. These companies have posted over $400 million in appeal bonds in connection with these appeals.[26]

Effect of Repeal

[22] s. 569.23(3)(a)2, F.S.
[23] s. 569.23(3)(a)1, F.S. In contrast, supersedeas bonds posted pursuant to Fla. R. App. P. 9.310(e) only have the effect of staying monetary judgments during the initial appellate courts review. *See* footnote 5.
[24] *R.J. Reynolds Tobacco Co. v. Hall*, 67 So.3d 1084, 1092 (Fla. 1st DCA 2011).
[25] s. 569.23(3)(e), F.S.
[26] Data used for calculating total appeal bonds and judgements in such actions was provided by the Supreme Court and may be found on the Court's website. *See* www.floridasupremecourt.org/clerk/bonds.shtml (Last accessed 1/26/17)

This bill repeals the supersedeas bond cap that limits the amount of the supersedeas bond the four major tobacco companies are required to post and requires them to post a bond in accordance with the Florida Rules of Appellate Procedure, except as otherwise provided by law. Furthermore, these bonds will no longer be required to be posted with the clerk of the Supreme Court. Rather, bonds will be posted with or deposited in the registry of the clerk of court in the county where the judgment was entered.

While the remaining number of *Engle* progeny cases is declining, the statute may be applied to cases filed by individuals who were not members of the *Engle* class.[27] Therefore, the total number of cases affected by the repeal is unknown.

B. SECTION DIRECTORY:

Section 1 repeals s. 569.23, F.S., relating to tobacco settlement agreements.

Section 2 provides an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have an impact on state government revenues.

2. Expenditures:

The bill does not appear to have an impact on state government expenditures. However, the bill would reduce the workload for the Clerk of the Supreme Court by approximately five hours a month.[28]

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have an impact on local government revenues.

2. Expenditures:

The bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate fiscal impact on litigants filing suit against a tobacco company as well as the tobacco companies themselves. It appears that this bill may increase costs to tobacco companies for premiums required to post a surety bond, and would correspondingly increase revenues to bonding companies.

D. FISCAL COMMENTS:

Under current law, when an appeal bond is deposited with the clerk of a circuit court in the form of cash, clerks may collect a percentage of the cash deposit as a fee.[29] If, however, a surety bond is

[27] *See R.J. Reynolds Tobacco Co. v. Hall,* 67 So.2d at 1092. ("Section 569.23(3)...was specifically intended to apply to the *Engle* litigation and, at the time of the passage, the scope of the statute's application was limited to that litigation. This is clear from the statute's legislative history. However, the statute is not limited to judgments entered in favor of *Engle* plaintiffs; it applies in any civil case against an FSA signatory brought by or on behalf of a member of a decertified class action.") (emphasis added).
[28] Office of the State Court Administrator 2017 Judicial Impact Statement, HB 6011 (January 19, 2017).
[29] *See* s. 28.24(10)(a)(1-2), F.S. (Allowing the clerks of circuit courts to charge of a fee in an amount equal to 3% of the first $500 received plus 1.5% on each subsequent $100 received.)

posted with the clerk, they are entitled to a flat fee.[30] As such, if any of the four tobacco companies satisfied their appeal bond obligations by depositing cash with a clerk of court, the local government would see an increase in revenue. However, since the amendments to s. 569.23, F.S., none of the tobacco companies have satisfied their appeal bond obligations by depositing cash with the clerk of the Supreme Court; all have done so by posting a surety bond.[31]

Attorney General Pam Bondi has opined that s. 569.23, F.S., "serves a vital, statewide public purpose by protecting a significant stream of income to the state." Specifically, the Attorney General's position is that the statute prevents the tobacco companies from having to post such large bonds that they may default on their payments to the state.[32]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   The bill does not appear to require counties or municipalities to take action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

The bill does not create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

[30] *See* s. 28.24(14), F.S. (Provides for a fee of $3.50 for validating certificates or bonds) and s. 28.24(19), F.S. (Provides for a fee of $8.50 for approving bonds).
[31] *See* footnote 28.
[32] *See Amanda Jean Hall, etc. v. R.J. Reynolds Tobacco Company*, Case No.: SC11-1611, "Brief of the State of Florida as Amicus Curiae in Support of Respondent," p.1-4 and appendixes, filed June 1, 2012.