SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: SB 2826

SPONSOR: Senator Haridopolos

SUBJECT: The Tobacco Settlement Agreement

DATE: April 18, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Roberts	Roberts	JU	Favorable
2.				
3.				
4.				
5.				
6.				

I. Summary:

This bill limits the amount of an appeal bond that may be ordered in any civil action involving a signatory or successor or an affiliate of a signatory to the tobacco settlement agreement, as defined in s. 215.56005(1)(f), F.S., to no more than $100 million, regardless of the total value of the judgment. The bill provides that if after notice and hearing a plaintiff proves by a preponderance of the evidence that a defendant to such an action is purposefully dissipating assets outside the ordinary course of business to avoid payment of the judgment, the court may enter any necessary order to protect the plaintiff, including increasing the appeal bond to the full amount of the full judgment.

The bill provides that the act shall take effect on July 1, 2003, and shall apply to all cases pending or filed on or after that date.

This bill creates the following section of the Florida Statutes: 569.23.

II. Present Situation:

In February 1995, the State of Florida sued a number of tobacco manufacturers and other defendants, asserting various claims for monetary and injunctive relief on behalf of the state of Florida. In March 1997, the State settled all of its claims against the Liggett Tobacco Company. In August, 1997, the "Big Four" tobacco companies: Phillip Morris, Reynolds Tobacco, B&W American Brands, and Lorillard entered into a landmark settlement with the State for all past, present, and future claims by the State including reimbursement of Medicaid expenses, fraud, RICO and punitive damages. (*See*, *State v. American Tobacco Co. et al*., Case # 95-1466AH, Fla. 15th Cir. Ct. 1996) The Florida Revenue Estimating Conference has estimated these cigarette

producers hold approximately 92% of the tobacco market share in the U.S. The remaining share of the market is held by various, smaller producers who were not named in the State's suit as defendants and, therefore, are not a part of the settlement.

Under the settlement agreement, as subsequently amended by a Stipulation of Amendment[1], there are non-monetary and monetary sanctions imposed on the tobacco manufacturers. The non-monetary provisions involve restrictions or limitations on billboard and transit advertisements, merchandise promotions, product placement, and lobbying, relating to all tobacco products. Subsequently, statutory guidelines were established to govern the expenditure of the tobacco settlement proceeds. *See* Ch. 98-63, L.O.F. As authorized by the Act, the Comptroller (Chief Financial Officer) is responsible for the enforcement of the Tobacco Settlement Receipts ("payments") from the depository institution to which the tobacco companies submit their payments in Electronic Fund Transfer form.

Florida is to receive $12.1 billion over the first 25 years of the agreement. The state will also receive an additional $1.5 billion over the 5-year period ending in 2003 as a result of a most favored nation clause in the settlement agreement as amended.[2]The amounts of these tobacco settlement receipts (or payments) are based on a consideration of volume of U.S. cigarette sales, share of market, net operating profits (undefined in the agreement), consumer price indices, and other factors as to each year payment is made. Any adjustment to those payments are based on a formula set forth in an appendix to the settlement agreement and involve a ratio of volume of U.S. cigarette sales as existed in 1997 and volume of such sales in the applicable year. Apart from other first year payments, Florida is to receive 5.5 percent of the unadjusted amounts in perpetuity.

In November 1998, 46 States, the District of Columbia, the Commonwealth of Puerto Rico, and four United States territories joined in signing the Master Settlement Agreement ("MSA") to settle the State's tobacco-related claims against the major tobacco companies, Phillip Morris, Reynolds Tobacco, B & W American Brands, and Lorillard and other smaller tobacco producers.[3]The MSA provided states with funding to prevent smoking and control tobacco sales. The agreement required tobacco companies to take down all billboard advertising and advertising in sports arenas, to stop using cartoon characters to sell cigarettes and to make available to the public specified documentation. The tobacco companies also agreed to not market or promote their products to young people. The 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.

[1] Florida negotiated a *Most Favored Nations* clause in the settlement, which provided the state with additional monies for a period of time after the state of Minnesota settled with the defendants on terms more favorable than Florida's.
[2] Florida Revenue Estimating Conference of August 2001.
[3] In addition to Florida, three other states had reached separate settlement agreements with the major tobacco companies prior to the MSA: Mississippi, Minnesota, and Texas.

What the tobacco companies and the settling state governments have difficulty in factoring is the estimated cost of dozens of individual lawsuits and class action suits. On March 21, 2003, an Illinois circuit court judge ordered Philip Morris Inc. to put up a $12 million bond to file an appeal in a class-action tobacco lawsuit. *See Price, et al v. Philip Morris Incorporated*, Cause No. 00-L-112, (Circuit Court, 3rd Judicial Circuit, Madison County, Illinois).[4]Subsequent to the court's ruling, a great deal of publicity and speculation was generated that Philip Morris would not be financially able to post the bond, would possibly default on its' April 15th installment of the MSA[5] and might seek bankruptcy protection. 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 States and territories of the United States and the Commonwealth of Puerto Rico and the National Conference of State Legislatures ("NCSL")[6]was filed urging the court to exercise its discretion to reduce the appeal bond so as not to interfere with the states vital interests.[7] On April 14, 2003, the court in *Price* entered on order effectively reducing the appeal bond by half - $6.8 billion. Philip Morris accepted the new appeal bond and confirmed it would also meet the April 15th, MSA payment deadline.

III. Effect of Proposed Changes:

This bill places a cap on appeal bond requirements for tobacco settlement agreement signatories, successors, and affiliates. 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 the 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. The bill does provide that if after notice and hearing a plaintiff can prove by a *preponderance of the evidence*[8] that the defendant who

[4]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*. 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 of the judgment could be stayed only if an appeal bond was presented and approved pursuant to Illinois court rule in the amount of $12 billion.

[5] Under the MSA, Philip Morris is obligated to make annual payments each April 15th. The payment due on April 15, 2003 to the states under the MSA was for $2.6 billion.

[6] 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." *See* page 2 of the Brief of Amici Curiae, Claim No. 00-L-112 (Circuit Court, 3rd Judicial Circuit, Madison County, Illinois).

[7] Generally, the interest of the states expressed in the amicus brief was that of preserving the value of the tobacco settlements and preventing the lawsuit from prejudicing those settlements. Specifically, the points raised in defense of a reduction in the appeal bond in the amicus brief can be outlined as follows:(1) failure by Philip Morris to make its $2.6 billion payment on April 15, 2003 would irreparably injure vital public health and safety interests of the states in that more than 50% of MSA payments are being used to support public health and education programs and (2) any substantial delay in the receipt of Philip Morris's payment would severely prejudice the states in that most states operate on a fiscal year or biennium budget that ends on June 30 and that state expenditure authorization is limited to the amount of funds actually received by the state during that fiscal period. In sum, if the states did not receive their payments as scheduled, they would be forced to cut programs or reappropriate funds from other priorities to cover the revenue shortfall.

[8] 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.

posted the bond is purposefully dissipating assets outside the ordinary course of business to avoid payment of the judgment, 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.

The effective date of the bill is July 1, 2003 and is stated to apply to all cases *pending* or filed on or after that date.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require the counties or cities to spend funds to take an action requiring the expenditure of funds.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Florida Rules of Appellate Procedure set forth the requirements for obtaining a stay of execution of a monetary judgment pending review. *See* Fla.R.App.P. Rule 9.310.Under the rule, 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[9] *equal to the principle 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.

Whereas the Legislature has authority to create substantive law, the Florida Supreme Court has sole and preemptive constitutional authority to promulgate rules of practice and procedure. *See* Art. V, s.2(a), Fla. Const. Although the Legislature cannot enact law that amends or supersedes existing court rules, it can repeal them by a 2/3 vote. *See Markert v. Johnston*, 367 So.2d 1003 (Fla. 1978). With few exceptions, it is not always clear or definitive as to what constitutes substantive law versus practice and procedure. Generally, substantive laws create, define and regulate rights. Court rules of practice and procedure prescribe the method or process by which a party seeks to enforce or obtain redress. *See Haven Federal Savings & Loan Assoc v. Kirian*, 579 So.2d 730 (Fla. 1991). The courts have tended to decide the distinction on a case-by-case basis although they have tended to

[9] A "good and sufficient bond" is further defined in the rule as a "bond with a principal and a surety company authorized to do business in the State of Florida, or cash deposited in the circuit court clerk's office."

find certain provisions consistently constitutionally infirm. *See Ash v. Singletary*, 687 So.2d 968 (Fla. 1st DCA 1997) and *Military Park Fire Control Tax District N.4 v. De Marois*, 407 So.2d 1020 (Fla. 4th DCA 1981) (creating priorities among types of civil matters to be processed or appealed); *Knealing v. Puelo*, 674 So.2d 593 (Fla. 1996) (timing and sequence of court procedures such as offer and acceptance of judgment); *State v. D.H.W.*, 668 So.2d 1331 (Fla. 1996), and *Watson v. First Florida Leasing, Inc.*, 537 So.2d 1370 (Fla. 1989) (attempting to supersede or modify existing rules of court). Nevertheless, over the years, the courts have also shown some willingness to adopt a procedural statute as a court rule, particularly when the court finds the legislative intent or underlying legislative policy benefits the judicial system. In these situations, the court will typically invalidate the procedural statute as constitutionally infirm but then adopt the substance of the invalid section as a court rule. *See TGI Friday's Inc. v. Dvorak*, 663 So.2d 606 (Fla. 1995). The courts may also adopt the substance of an invalid section as an emergency rule. *See* Fla. R. Jud. Admin. 2.130(a).

To the extent that this bill is not construed as circumventing or otherwise interfering with the Supreme Court's constitutional authority to administer the court system and to adopt rules for the practice and procedure in all courts, the separation of powers doctrine under section 3 of article II of the Florida Constitution is not implicated.

The retroactive application of the bill to *all cases pending on July 1, 2003* may implicate due process considerations under section 9 of article I of the Florida Constitution. There is a two-prong query for determining whether a statute should be retroactively applied, i.e., whether there is clear legislative intent to apply the statute retroactively, and whether it's constitutionally permissible. *See Metropolitan Dade County v. Chase Federal Housing Corp.*, 737 So.2d 494 (Fla. 1999). It is unknown how a court would construe this provision.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The fiscal impact of the provisions of this bill relating to the cap on certain appeal bonds on private sector plaintiffs in such cases is indeterminate at this time.

C. Government Sector Impact:

The fiscal impact of the provisions of this bill relating to the cap on certain appeal bonds on public sector plaintiffs in such cases is indeterminate at this time.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.