SB 307

SFIN

FILE

SB 307

was referred to the Senate Finance Committee

Hearing(s) were held

The bill did not move from Committee

ALASKA STATE SENATE

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SENATE JUDICIARY COMMITTEE

Senator Ralph Seekins, Chairman
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Senate Bill 307 Sponsor Statement

"An Act relating to the amount of bond required to stay execution of a judgment involving a signatory to the tobacco product Master Settlement Agreement."

The Tobacco Master Settlement Agreement ("MSA") delivers millions of dollars in revenues annually to Alaska and 45 other participatory states. However, the continued receipt of these funds is threatened by the huge judgments that have been awarded against the tobacco companies that are funding the settlement. Defendants facing large judgments almost always have a right to appeal them. And in many cases their appeals are successful, either in terms of obtaining a reduced judgment or in overturning the judgment entirely.

But in order to stay the execution of a money judgment on appeal, a defendant must post a supersedeas (appeal) bond which, in the diminishing number of states that do not have limits on appeal bonds, usually equals the amount of the judgment. In Alaska, the bond required is ordinarily the amount of the judgment remaining unsatisfied, plus appeal costs and interest.

Senate Bill 307 would set a $100 million limit on the supersedeas bond that MSA signatories, successors, and affiliates must post to stay the execution of a judgment in Alaska. This bond limit would not change any other aspect of the law. It does not change the rules by which the trial is conducted. It does not affect who ultimately wins or loses the lawsuit. And it does not affect the rights of plaintiffs to recover fully the damages to which they are entitled if the judgment is upheld on appeal.

Plaintiffs are also protected by the provision in the proposed legislation that allows the court to require a bond amount up to the value of the judgment *if the appellant is dissipating its assets to avoid paying a judgment*. SB 307 thus would not injure plaintiffs in any way, and it would protect the state by ensuring that it will continue to receive its MSA payments while the tobacco companies fully appeal an adverse judgment.

In this instance Alaska will join 26 other states which have passed legislation or amended court rules to limit the size of the required appeal bond in cases involving large judgments. By joining these states we promote our collective interest with respect to preserving the revenue stream mandated by the Master Settlement Agreement.

April 15, 2004

Alaska Should Join Other States To Limit The Size Of Appeal Bonds and Protect Its Tobacco Settlement Revenues

The Tobacco Master Settlement Agreement ("MSA") is vitally important to Alaska and to the 45 other states who are parties to the settlement. It delivers millions of dollars in revenues to Alaska annually, and it will continue to do so for years to come. It also delivers real benefits to the state through its non-monetary provisions which restrict advertising by participating (but not by non-participating) manufacturers and are designed to help reduce youth smoking.

Yet the continued receipt of these funds is threatened by litigation against the tobacco companies that are funding the settlement. The ability of the tobacco companies to meet their obligations under the MSA ultimately depends upon their financial viability. It may seem far-fetched to worry about the financial viability of tobacco companies, but the litigation onslaught they are currently facing presents a real risk to their ability to make MSA payments.

This memorandum explains what Alaska can do to minimize that risk and protect the state's ongoing receipt of MSA money.

A. The Enormous Litigation Risks Confronting The MSA Signatories Threaten Alaska's Master Settlement Agreement Revenues

Within the last several years, the tobacco companies have faced gargantuan judgments. In 2000, the Engle class action in Florida resulted in a verdict of $145 billion, which was reversed on appeal in May 2003. In California, two individual suits resulted in verdicts of $28 billion and $3 billion respectively, although both of these verdicts were reduced by the trial judge. In March 2003, a judge in the case of Price v. Philip Morris in Illinois ordered one tobacco company to pay compensatory damages of $7.1 billion and punitive damages of $3 billion in a class action. This decision is currently being appealed.

As the Engle case demonstrates, many extraordinarily large verdicts are reduced or overturned on appeal. In order for a verdict to be overturned, however, a defendant must be able to appeal and do so while remaining in business. The problem is that in most states, a defendant must post an appeal bond at least equal to the size of the judgment in order to stay the execution of the judgment during the appeal. In Alaska, the bond required to stay the execution of a money judgment is ordinarily the amount of the judgment remaining unsatisfied, plus appeal costs and interest.[1] But Alaska courts are permitted to set the bond in a different amount or to order alternate security for good cause shown -- meaning that judges may theoretically set the bond at any amount they deem appropriate, even if that amount exceeds the total judgment.[2]

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1 Alaska R. App. P. 204(d).

2 Id.

If a defendant cannot afford to post an appeal bond in the amount set by the court, a plaintiff could potentially seize the defendant's bank accounts, or its manufacturing facilities, or any property located anywhere that the plaintiff can find, even though the defendant may be in the middle of an appeal. In order to stop the plaintiff from taking its assets during the appeal, the defendant may have no alternative other than to file for bankruptcy, which carries with it an automatic stay of the debtor's obligation to pay its creditors.

However, a stay in bankruptcy is indiscriminate: while it would allow tobacco companies subject to huge judgments to appeal while the stay is in place without fear that plaintiffs could seize their assets, it would also prevent the companies from making their payments to Alaska and the other states under the MSA. This potential problem has been most vividly demonstrated by the ongoing Price case in Illinois. In March 2003, the judge in that case set the appeal bond at $12 billion -- an amount that the company could not possibly have posted.[3] If the company had been forced to post such a large bond, it most likely would not have been able to continue to make the billions of dollars in payments that it owes under the MSA. Because of concern about this disastrous result, 37 state attorneys general (including Alaska's) and the National Conference of State Legislatures petitioned the Price court to allow a lower bond to be posted so that MSA payments would not be jeopardized. The bond was eventually lowered to $6.8 billion, but even this reduced amount would bankrupt many companies.

As the Price case demonstrates, the state has a vital interest in ensuring tobacco companies can appeal massive judgments in Alaska by posting a bond under state law, rather than being forced into bankruptcy.

B. Other States Have Recognized The Risks That Litigation Against MSA Signatories Pose To Their Continued Receipt Of Tobacco Settlement Funds, And They Have Enacted Appeal Bond Caps

Increasingly, states have become aware of the potential consequences of high appeal bonds and have imposed reasonable limits on the size of these bonds. In 2000, legislators in Florida became concerned because the Engle class action against the tobacco companies was proceeding in that state. It was estimated that the punitive damages awarded in the case could be so large that these companies could not afford to post a bond, thereby forcing the companies to seek a stay from the bankruptcy court. While legislators had no particular sympathy for tobacco companies, they recognized that these companies, like every defendant, are at least entitled to a full and fair appeal, and they also recognized that Florida and every other state might lose an important income stream from the MSA payments if the companies were driven out of business. Thus, the legislature enacted a cap on the size of the appeal bond that would have to be posted with regard to the punitive damages aspect of any judgment. The cap limited appeal bonds to the

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[3] "Confidential Talks Continue on $12 Billion Bond Issue in Light Cigarette Class Action," Mealey's Litigation Report: Tobacco (Apr. 14, 2003).

lower of the punitive damages judgment plus twice the statutory rate of interest, ten percent of a defendant's net worth, or $100 million.[4]

As noted above, the jury in Engle eventually awarded the plaintiffs $145 billion in punitive damages. Under Florida's previous appeal bond rules, the defendants would have had to post an $181 billion bond to appeal this judgment, which would have bankrupted any company or group of companies. But because the legislature had passed the appeal bond cap, the tobacco companies were able to post a much lower bond and appeal the verdict. Their appeal was ultimately successful: on May 21, 2003, a Florida appeals court decertified the Engle class and set aside the jury's decision in the case. In an emphatic opinion, the court ruled that the class action approach for Engle was completely improper. But if the legislature had not acted to limit the appeal bond prior to the trial court's judgment in Engle, the previous bonding requirement would have bankrupted the entire industry, thrown thousands of people out of work, and deprived each state of its tobacco settlement revenues.

Florida did not act alone. Twenty-nine other states have also passed limits on the size of appeal bonds, two of them by court rule and the rest through legislation. Five other states (Connecticut, Maine, Massachusetts, New Hampshire and Vermont) automatically stay a judgment upon the filing of a notice of appeal. As a result, over half of the states currently limit the appeal bond requirement. The approaches taken by the states have differed somewhat, as summarized below.

In the year 2000, along with Florida, four other states enacted limits on the size of appeal bonds.[5] These states were Kentucky ($100 million limit) and Georgia, North Carolina and Virginia ($25 million limits). In each of these states, the limit applied only to the bond for the punitive damages portion of a judgment. Each of these states was concerned that if the Florida legislature did not act, the Florida plaintiffs might seek to seize tobacco company assets in these other states. Thus, these states limited the size of bonds for judgments entered by courts within their states, and further provided that if a plaintiff with an out-of-state judgment came to their state to collect on that judgment, the defendant could stop the plaintiff until the appeal was completed by posting the bond required in that state. These states were worried that the tobacco settlement proceeds might be threatened before an appeal could ever be completed, and they were also worried about the jobs that could be lost in their states if the tobacco companies were put out of business before they could appeal.

In 2001 Louisiana, Nevada, Oklahoma and West Virginia passed legislation that limited the size of the appeal bond that signatories of the Master Settlement Agreement would have to post to appeal a damages verdict of any kind, be it compensatory or punitive damages.[6] Again,

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[4] Fla. Stat. § 768.733 (2002).

[5] Florida (Fla. Stat. § 768.733), Georgia (Ga. Code Ann. § 5-6-46), Kentucky (Ky. Rev. Stat. Ann. § 205.1), North Carolina (N.C. Gen. Stat. § 1-289), and Virginia (Va. Code Ann. § 8.01-676.1 J.) each passed legislation in 2000.

[6] Louisiana (La. Rev. Stat. Ann. § 98.6), Nevada (Nev. Rev. Stat. § 20.035.1); Oklahoma (Okla. Stat. Ann. tit. 12 § 990.4 B.5); and West Virginia (W. Va. Code § 4-11A-4).

a primary motivating factor for these states was their financial interest in ensuring that settlement proceeds under the state tobacco settlement were not threatened because of an inability of the tobacco companies to appeal a judgment. The Oklahoma appeal bond cap was $25 million; the caps in Nevada and Louisiana were $50 million; and West Virginia's cap was $100 million for punitive damages and $100 million for compensatory damages.

As these states were doing their work, the Mississippi Supreme Court amended its court rules, which govern appeal bonds in that state, to limit the bond that a defendant of any kind would have to post to stay a punitive damages judgment while it appeals.[7] The amount of the limit in Mississippi was the lower of $100 million, 125 percent of the punitive damages award, or 10 percent of the defendant's net worth.

In 2002 three states enacted limits on the size of appeal bonds. Ohio adopted a $50 million limit,[8] while Indiana and Michigan[9] adopted a $25 million limit. These bond limitations were not tied in any way to tobacco companies or to the MSA. Rather, in each state, the limit that was adopted applies to damages of all kinds, including the costs a defendant might incur to pay for equitable relief, and it applies to any kind of defendant.

In 2003 Arkansas, California, Colorado, Idaho, Kansas, Missouri, New Jersey, Oregon, Pennsylvania, South Dakota, Tennessee, Texas and Wisconsin adopted appeal bond caps.[10] The Arkansas, Colorado, Tennessee, Texas and Wisconsin statutes apply to all litigants in civil litigation regardless of legal theory. The other states' laws are more limited in scope. Idaho's $1 million cap, for example, applies to all litigants in civil litigation but covers only the punitive damages portion of the appeal. The Kansas cap applies to appellants who are signatories or successors of signatories to the tobacco Master Settlement Agreement; California, Missouri, New Jersey, Oregon and Pennsylvania extend this application to also include affiliates of signatories to the tobacco Master Settlement Agreement. The amounts of the caps enacted in these states range from $25 million to $100 million.[11] In addition, the South Dakota Supreme Court amended its court rules to limit the bond required to stay the execution of a judgment during an appeal to $25 million.[12] Lastly, North Carolina and Florida broadened their existing

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7 Mississippi Rule of Appellate Procedure 8.

8 Ohio Rev. Code Ann. § 2505.09 (2002).

9 Ind. Code Ann. § 34-49-5-3 (2002); Mich. Comp. Laws. Ann. § 600.2607(1) (2002).

10 Ark. Code § 16-55-214 (2003); Cal. Health & Safety Code § 104558 (2003); Colo. Rev. Stat. 13-16-125 (2003); Idaho Comp. Stat. Ann. § 13-202 (2003); Kan. Stat. Ann. § 50-6a05 (2003); Mo. Rev. Stat. § 512.085 (2003); N.J. Stat. Ann. § 52:4D-13 (2003); 2003 Or. Laws 804 (not yet codified); Pa. Stat. Ann. tit. 35, § 5701.309 (2003); Tenn. Code § 27-1-124 (2003); Tex. Civ. Proc. & Rem. Code § 52.006(b) (2003); Wis. Stat. § 808.07 (2003).

11 Arkansas, Colorado, Kansas and Texas agreed to cap their appeal bonds at $25 million, while Missouri and New Jersey set their caps at $50 million. Tennessee set its cap at $75 million. The Pennsylvania and Wisconsin bills capped bonds at $100 million, and California and Oregon each set a cap of $150 million.

12 S.D.C.L. 15-26A-26.

statutes in 2003 to limit the appeal bond for money judgments under any legal theory, not just punitive damages.

Thus far in 2004, four states have acted to solve the appeal bond problem. The legislatures in Utah, Nebraska, and Iowa have all adopted general bond cap legislation that applies to all litigants in all civil actions. The cap adopted in Nebraska is the lesser of the fifty percent of the appellant's net worth or $50 million; the cap in Utah is $25 million; and the cap in Iowa is $100 million.[13] In addition, the South Carolina legislature passed a bill eliminating the bond requirement entirely for MSA signatories, successors, and affiliates.[14]

Like these other states, the Alaska legislature should act to solve the problems caused by high appeal bonds immediately. While some states have passed broader measures that apply to any defendant in any kind of litigation, a bill limiting the appeal bond in cases involving signatories, successors of signatories, or affiliates of signatories to the MSA would be sufficient to solve the most problematic aspects of Alaska's current law. The legislature, in its role as the protector of the state's finances, has the authority to adopt such a measure,[15] which is important not only for Alaska, but also for all other states who are relying on the continued stream of tobacco revenues for vital public projects.

C. The Appeal Bond Limitation Laws Provide No Substantive Legal Protections To A Tobacco Company In Litigation, But They Do Protect Plaintiffs

A key point for each of the states discussed above is that, in limiting the bond, none of them changed their substantive law in any way. Bond limitation laws only ensure that defendants can fully exercise their right to an appeal without going into bankruptcy or being forced to settle with the plaintiffs. So, for example, had the tobacco companies lost their appeal in the Engle case in Florida, they would have had to pay the full amount of the judgment. Nothing in the bond limitation statute passed in Florida would have prevented that. In addition, virtually all of the laws passed in each state allow a judge to require a much larger bond if it is

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[13] Utah H.J.R. 16 (2004); Iowa S.B. 2306 (2005); Neb. L.B. 1207 (2004). The Iowa bill is pending the governor's signature.

[14] S.C. H.B. 4823 (2004). The South Carolina bill is pending the governor's signature.

[15] Although Article IV, section 15 of the Alaska constitution gives the Supreme Court primary authority over rules that affect court procedure, the Court upholds legislative enactments if the main subject of the statute is substantive with only an incidental effect on procedure. See, e.g., Ware v. City of Anchorage, 439 P.2d 793, 794 (Alaska 1968)(upholding statute requiring a non-resident plaintiff to provide security for the costs of litigation). An important part of the inquiry into whether the statute is substantive or procedural is "whether the rule or statute under scrutiny is more closely related to the concerns that led to the establishment of judicial rule making power, or to matters of public policy properly within the sphere of elected representatives." Nolan v. Sea Airmotive, 627 P.2d 1035, 1042-43 (Alaska 1987). Since the purpose of the appeal bond cap is to "secure and protect the monies to be received as a result of the Master Settlement Agreement," which is a substantive goal clearly within the purview of elected representatives, the legislature has the power to enact this statute.

shown that a defendant is dissipating its assets to avoid a judgment. Thus, plaintiffs are protected under these bills in two ways: because the amount of the appeal bond even as limited is large in and of itself, and because in a case where the defendant is misbehaving, the court may require a larger bond.

Alaska should adopt legislation limiting the size of appeal bonds that MSA signatories, successors and affiliates must post to $100 million, regardless of the value of the judgment. Plaintiffs would be protected by the large but limited bond that is required and by the provision in the bill allowing a judge to require a higher bond if a defendant is improperly dissipating assets. A defendant's right to appeal would also be fully protected, by mandating a large but not impossibly high appeal bond. And Alaska and the other states would be protected, by ensuring that the MSA signatories can fully appeal an adverse judgment, thereby avoiding the necessity of seeking a stay in the bankruptcy court. This, in turn, will benefit Alaska and its citizens by preserving the uninterrupted flow of tobacco settlement revenues.

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January 16, 2004

Alaska Should Join Other States To Limit The Size Of Appeal Bonds and Protect Its Tobacco Settlement Revenues

The Tobacco Master Settlement Agreement ("MSA") is vitally important to Alaska and to the 45 other states who are parties to the settlement. It delivers millions of dollars in revenues to Alaska annually, and it will continue to do so for years to come. It also delivers real benefits to the state through its non-monetary provisions, which restrict advertising by participating (but not by non-participating) manufacturers and are designed to help reduce youth smoking.

Yet the continued receipt of these funds is threatened by litigation against the tobacco companies that are funding the settlement. The ability of the tobacco companies to meet their obligations under the MSA ultimately depends upon their financial viability. It may seem far-fetched to worry about the financial viability of tobacco companies, but the litigation onslaught they are currently facing presents a real risk to their ability to make MSA payments.

This memorandum explains what Alaska can do to minimize that risk and protect the state's ongoing receipt of MSA money.

A. The Enormous Litigation Risks Confronting The MSA Signatories Threaten Alaska's Master Settlement Agreement Revenues

Within the last several years, the tobacco companies have faced gargantuan judgments. In 2000, the Engle class action in Florida resulted in a verdict of $145 billion, which was reversed on appeal in May 2003. In California, two individual suits resulted in verdicts of $28 billion and $3 billion respectively, although both of these verdicts were reduced by the trial judge. In March 2003, a judge in the case of Price v. Philip Morris in Illinois ordered one tobacco company to pay compensatory damages of $7.1 billion and punitive damages of $3 billion in a class action. This decision is currently being appealed.

As the Engle case demonstrates, many extraordinarily large verdicts are reduced or overturned on appeal. In order for a verdict to be overturned, however, a defendant must be able to appeal and do so while remaining in business. The problem is that in most states, a defendant must post an appeal bond at least equal to the size of the judgment in order to stay the execution of the judgment during the appeal. In Alaska, the bond required to stay the execution of a money judgment is ordinarily the amount of the judgment remaining unsatisfied, plus appeal costs and interest.[1] But Alaska courts are permitted to set the bond in a different amount or to order alternate security for good cause shown -- meaning that judges may theoretically set the bond at any amount they deem appropriate, even if that amount exceeds the total judgment.[2]

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2 Id.

Provided by Mr. Keith Teel representing Philip Morris and others

If a defendant cannot afford to post an appeal bond in the amount set by the court, a plaintiff could potentially seize the defendant's bank accounts, or its manufacturing facilities, or any property located anywhere that the plaintiff can find, even though the defendant may be in the middle of an appeal. In order to stop the plaintiff from taking its assets during the appeal, the defendant may have no alternative other than to file for bankruptcy, which carries with it an automatic stay of the debtor's obligation to pay its creditors.

However, a stay in bankruptcy is indiscriminate: while it would allow tobacco companies subject to huge judgments to appeal while the stay is in place without fear that plaintiffs could seize their assets, it would also prevent the companies from making their payments to Alaska and the other states under the MSA. This potential problem has been most vividly demonstrated by the ongoing Price case in Illinois. In March 2003, the judge in that case set the appeal bond at $12 billion -- an amount that the company could not possibly have posted.[3] If the company had been forced to post such a large bond, it most likely would not have been able to continue to make the billions of dollars in payments that it owes under the MSA. Because of concern about this disastrous result, 37 state attorneys general (including Alaska's) and the National Conference of State Legislatures petitioned the Price court to allow a lower bond to be posted so that MSA payments would not be jeopardized. The bond was eventually lowered to $6.8 billion, but even this reduced amount would bankrupt many companies.

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B. Other States Have Recognized The Risks That Litigation Against MSA Signatories Pose To Their Continued Receipt Of Tobacco Settlement Funds, And They Have Enacted Appeal Bond Caps

Increasingly, states have become aware of the potential consequences of high appeal bonds and have imposed reasonable limits on the size of these bonds. In 2000, legislators in Florida became concerned because the Engle class action against the tobacco companies was proceeding in that state. It was estimated that the punitive damages awarded in the case could be so large that these companies could not afford to post a bond, thereby forcing the companies to seek a stay from the bankruptcy court. While legislators had no particular sympathy for tobacco companies, they recognized that these companies, like every defendant, are at least entitled to a full and fair appeal, and they also recognized that Florida and every other state might lose an important income stream from the MSA payments if the companies were driven out of business. Thus, the legislature enacted a cap on the size of the appeal bond that would have to be posted with regard to the punitive damages aspect of any judgment. The cap limited appeal bonds to the

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a primary motivating factor for these states was their financial interest in ensuring that settlement proceeds under the state tobacco settlement were not threatened because of an inability of the tobacco companies to appeal a judgment. The Oklahoma appeal bond cap was $25 million; the caps in Nevada and Louisiana were $50 million; and West Virginia's cap was $100 million for punitive damages and $100 million for compensatory damages.

As these states were doing their work, the Mississippi Supreme Court amended its court rules, which govern appeal bonds in that state, to limit the bond that a defendant of any kind would have to post to stay a punitive damages judgment while it appeals.[7] The amount of the limit in Mississippi was the lower of $100 million, 125 percent of the punitive damages award, or 10 percent of the defendant's net worth.

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statutes in 2003 to limit the appeal bond for money judgments under any legal theory, not just punitive damages.

Like these other states, the Alaska legislature should act to solve the problems caused by high appeal bonds immediately. While some states have passed broader measures that apply to any defendant in any kind of litigation, a bill limiting the appeal bond in cases involving signatories, successors of signatories, or affiliates of signatories to the MSA would be sufficient to solve the most problematic aspects of Alaska's current law. The legislature, in its role as the protector of the state's finances, has the authority to adopt such a measure,[13] which is important not only for Alaska, but also for all other states who are relying on the continued stream of tobacco revenues for vital public projects.

C. The Appeal Bond Limitation Laws Provide No Substantive Legal Protections To A Tobacco Company In Litigation, But They Do Protect Plaintiffs

A key point for each of the states discussed above is that, in limiting the bond, none of them changed their substantive law in any way. Bond limitation laws only ensure that defendants can fully exercise their right to an appeal without going into bankruptcy or being forced to settle with the plaintiffs. So, for example, had the tobacco companies lost their appeal in the Engle case in Florida, they would have had to pay the full amount of the judgment. Nothing in the bond limitation statute passed in Florida would have prevented that. In addition, virtually all of the laws passed in each state allow a judge to require a much larger bond if it is shown that a defendant is dissipating its assets to avoid a judgment. Thus, plaintiffs are protected under these bills in two ways: because the amount of the appeal bond even as limited is large in and of itself, and because in a case where the defendant is misbehaving, the court may require a larger bond.

Alaska should adopt legislation limiting the size of appeal bonds that MSA signatories, successors and affiliates must post to $25 million, regardless of the value of the judgment. Plaintiffs would be protected by the large but limited bond that is required and by the provision in the bill allowing a judge to require a higher bond if a defendant is improperly dissipating assets. A defendant's right to appeal would also be fully protected, by mandating a large but not impossibly high appeal bond. And Alaska and the other states would be protected, by ensuring

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that the MSA signatories can fully appeal an adverse judgment, thereby avoiding the necessity of seeking a stay in the bankruptcy court. This, in turn, will benefit Alaska and its citizens by preserving the uninterrupted flow of tobacco settlement revenues.

ENACTED APPEAL BOND LEGISLATION

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Arkansas	HB 1038	3/27/2003	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
California	A 1752	8/9/2003	Master Settlement Agreement signatories, successors, and affiliates	The lesser of 100% of the judgment or $150,000,000	Applies to all judgments in civil litigation regardless of legal theory
Colorado	HB 1366	5/20/2003	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Florida	HB 1721	5/9/2000	All litigants in class actions	$100,000,000	As passed in 2000, applied to judgments for non-compensatory damages. Broadened in 2003 to apply to all money judgments under any legal theory
	SB 2826	6/10/2003	Master Settlement Agreement signatories, successors, and affiliates	$100,000,000	
Georgia	HB 1346	3/30/2000	All litigants	$25,000,000	Applies to punitive damages only
	SB 411	*Pending Governor's signature*	All litigants	$25,000,000	Expands current law to apply to all forms of judgments in civil litigation
Idaho	HB 92	3/26/2003	All litigants	$1,000,000	Applies to punitive damages only
Indiana	HB 1204	3/14/2002	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory

Notes

* Created by court rule rather than legislation.

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Iowa	SB 2306	*Pending Governor's signature*	All litigants	Gives court discretion to exceed 110% of the judgment, but caps bond at $100 million	Applies to appeals from money judgments
Kansas	SB 64	4/21/2003	Master Settlement Agreement signatories and their successors	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Kentucky	SB 316	3/29/2000	All litigants	$100,000,000	Applies to punitive damages portion of a judgment
Louisiana	HB 1807 HB 1819	6/25/2001 7/2/2003	As passed in 2001, covered Master Settlement Agreement signatories only; broadened in 2003 to include "affiliates"	$50,000,000	Applies to all money judgments
Michigan	HB 5151	5/8/2002	All litigants	$25,000,000 plus COLA every 5th year	Applies to all judgments in civil litigation
Mississippi	Rule 8	4/26/2001	All litigants	$100,000,000	Applies to all litigation subject to court rule
Missouri	SB 242	7/10/2003	Master Settlement Agreement signatories, successors, and affiliates	$50,000,000	Applies to all forms of judgments in civil litigation
Nebraska	LB 1207	4/15/2004	All litigants	The lesser of the following: 1. Amount of the money judgment. 2. 50% of appellant's net worth. 3. $50 million.	Applies to all forms of judgments in civil litigation
Nevada	AB 576	5/29/2001	Master Settlement Agreement signatories	$50,000,000	Applies to all forms of judgments in civil litigation

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
New Jersey	SB 2738	11/21/2003	Master Settlement Agreement signatories, successors, and affiliates	$50,000,000	Applies to all forms of judgments in civil litigation
North Carolina	SB 2 SB 784	4/5/2000 4/23/2003	All litigants All litigants	$25,000,000	As passed in 2002, applied to judgments for non-compensatory damages. Broadened in 2003 to apply to all money judgments under any legal theory
Ohio	SB 161	3/28/2002	All litigants	$50,000,000	Applies to all forms of judgments in civil litigation
Oklahoma	SB 372	4/10/2001	Master Settlement Agreement signatories	$25,000,000	As passed in 2001, applied to all forms of judgments in civil litigation involving MSA signatories
Oregon	HB 2368	9/24/2003	Master Settlement Agreement signatories, successors, and affiliates	$150,000,000	Applies to all judgments in civil litigation regardless of legal theory
Pennsylvania	HB 1718	12/30/2003	Master Settlement Agreement signatories, successors, and affiliates	$100,000,000	Applies to all judgments in civil litigation regardless of legal theory
South Carolina	HB 4823	*Pending Governor's signature*	MSA signatories, successors, and affiliates	Appeal automatically stays execution of judgment - no bond required	Applies to all forms of judgments in civil litigation
South Dakota	Sup. Ct. R. 03-13	9/29/2003	All litigants	$25,000,000	Applies to money judgments
Tennessee	SB 1687	6/5/2003	All litigants	$75,000,000	Applies to all forms of judgments in civil litigation

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Texas	HB 4	6/11/2003	All litigants	The lesser of 50% of the judgment debtor's net worth or $25,000,000	Applies to money judgments
Utah	HJR 16	Passed House on 2/17/04; Passed Senate on 3/2/04	All litigants	$25 million collectively (lesser of (1) $5 million + 10% of the judgment award, or (2) $25 million for any single appellant)	Applies to all forms of judgments in civil litigation
Virginia	HB 1547 HB 430/ SB 172	3/10/2000 4/8/2004	All litigants All litigants	$25,000,000 $25,000,000	As passed in 2000, applied only to punitive damages portion of a judgment; as passed in 2004, expanded to apply to all forms of judgments in civil litigation
West Virginia	SB 661 S 671	5/2/2001 4/6/2004	As passed in 2001, applied only to Master Settlement Agreement signatories; amended in 2004 to clarify that the appeal bond limitations extend to appellants who control or are under common control with signatories to the master settlement agreement	$100,000,000 for all portions of a judgment other punitive damages; $100,000,000 for the punitive damages portion of a judgment	Applies to all civil litigation and provides that consolidated or aggregated cases shall be treated as a single judgment for purposes of the appeal bond limits
Wisconsin	AB 548	12/12/2003	All litigants	$100,000,000	Applies to all judgments in civil litigation regardless of legal theory

JURISDICTIONS THAT DO NOT REQUIRE BONDS

Jurisdiction	Governing Rule
Connecticut	Proceedings to stay noncriminal judgments shall be stayed automatically until the final determination of the cause. Conn. R. App. P. § 61-11.
Maine	The taking of an appeal operates as a stay of execution upon the judgment, and no supersedeas bond or other security shall be required. Me. R. Civ. P. 62.
Massachusetts	The taking of an appeal from a judgment shall stay execution upon the judgment during the pendency of the appeal. Mass. R. Civ. P. 62(d).
New Hampshire	No execution of a judgment shall issue until the expiration of the appeal period. N.H. Rev. Stat. Ann. § 527:1.
Vermont	The taking of an appeal operates to stay execution of the judgment during the pendency of the appeal; no supersedeas bond or other security is required. Vt. R. Civ. P. 62(d)(1).
Puerto Rico	Once a bill of appeal is filed, all further proceedings in lower courts regarding a judgment or any part thereof which is appealed, or the issues contained therein, shall be stayed, except for an order to the contrary, issued on its own initiative or by petition of a party thereto by the court of appeals. P.R. R. Civ. P. 53.9.

COVINGTON & BURLING representing Phillip Morris USA + others January 5, 2004

ENACTED APPEAL BOND LEGISLATION

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
California	A 1752	8/9/2003	Master Settlement Agreement signatories, successors, and affiliates	The lesser of 100% of the judgment or $150,000,000	Applies to all judgments in civil litigation regardless of legal theory
Colorado	HB 1366	5/20/2003	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Florida	HB 1721	5/9/2000	All litigants in class actions	$100,000,000	As passed in 2000, applied to judgments for non-compensatory damages. Broadened in 2003 to apply to all money judgments under any legal theory
	SB 2826	6/10/2003	Master Settlement Agreement signatories, successors, and affiliates	$100,000,000	
Georgia	HB 1346	3/30/2000	All litigants	$25,000,000	Applies to punitive damages only
Idaho	HB 92	3/26/2003	All litigants	$1,000,000	Applies to punitive damages only
Indiana	HB 1204	3/14/2002	All litigants	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Kansas	SB 64	4/21/2003	Master Settlement Agreement signatories and their successors	$25,000,000	Applies to all judgments in civil litigation regardless of legal theory
Kentucky	SB 316	3/29/2000	All litigants	$100,000,000	Applies to punitive damages portion of a judgment

Notes

* Created by court rule rather than legislation.

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Louisiana	HB 1807 HB 1819	6/25/2001 7/2/2003	As passed in 2001, covered Master Settlement Agreement signatories only; broadened in 2003 to include "affiliates"	$50,000,000	Applies to all money judgments
Michigan	HB 5151	5/8/2002	All litigants	$25,000,000 plus COLA every 5th year	Applies to all judgments in civil litigation
Mississippi	Rule 8	4/26/2001	All litigants	$100,000,000	Applies to all litigation subject to court rule
Missouri	SB 242	7/10/03	Master Settlement Agreement signatories, successors, and affiliates	$50,000,000	Applies to all forms of judgments in civil litigation
Nevada	AB 576	5/29/2001	Master Settlement Agreement signatories	$50,000,000	Applies to all forms of judgments in civil litigation
New Jersey	SB 2738	11/21/2003	Master Settlement Agreement signatories, successors, and affiliates	$50,000,000	Applies to all forms of judgments in civil litigation
North Carolina	SB 2 SB 784	4/5/2000 4/23/2003	All litigants All litigants	$25,000,000	As passed in 2002, applied to judgments for non-compensatory damages. Broadened in 2003 to apply to all money judgments under any legal theory
Ohio	SB 161	3/28/2002	All litigants	$50,000,000	Applies to all forms of judgments in civil litigation
Oklahoma	SB 372	4/10/2001	Master Settlement Agreement signatories	$25,000,000	As passed in 2001, applied to all forms of judgments in civil litigation involving MSA signatories

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
Oregon	HB 2368	9/24/2003	Master Settlement Agreement signatories, successors, and affiliates	$150,000,000	Applies to all judgments in civil litigation regardless of legal theory
Pennsylvania	*HB 1718*	*12/30/2004*	*Master Settlement Agreement signatories, successors, and affiliates*	*$100,000,000*	*Applies to all judgments in civil litigation regardless of legal theory*
South Dakota	Amend. to Sup. Ct. R. 15-26A-26	9/29/2003	All litigants	$25,000,000	Applies to money judgments
Tennessee	SB 1687	6/5/2003	All litigants	$75,000,000	Applies to all forms of judgments in civil litigation
Texas	HB 4	6/11/2003	All litigants	The lesser of 50% of the judgment debtor's net worth or $25,000,000	Applies to money judgments
Virginia	HB 1547	3/10/2000	All litigants	$25,000,000	Applies to punitive damages portion of a judgment
West Virginia	SB 661	5/2/2001	All Master Settlement Agreement signatories	$100,000,000 for all portions of a judgment other punitive damages; $100,000,000 for the punitive damages portion of a judgment	Applies to all civil litigation and provides that consolidated or aggregated cases shall be treated as a single judgment for purposes of the appeal bond limits
Wisconsin	AB 548	12/12/2003	All litigants	$100,000,000	Applies to all judgments in civil litigation regardless of legal theory

STATES THAT DO NOT REQUIRE BONDS

State	Governing Rule
Connecticut	Proceedings to stay noncriminal judgments shall be stayed automatically until the final determination of the cause. Conn. R. App. P. § 61-11.
Maine	The taking of an appeal operates as a stay of execution upon the judgment, and no supersedeas bond or other security shall be required. Me. R. Civ. P. 62.
Massachusetts	The taking of an appeal from a judgment shall stay execution upon the judgment during the pendency of the appeal. Mass. R. Civ. P. 62(d).
New Hampshire	No execution of a judgment shall issue until the expiration of the appeal period. N.H. Rev. Stat. Ann. § 527:1.
Vermont	The taking of an appeal operates to stay execution of the judgment during the pendency of the appeal; no supersedeas bond or other security is required. Vt. R. Civ. P. 62(d)(1).

COVINGTON & BURLING representing Phillip Morris USA and others April 5, 2004

Public Health Groups' Opposition to Appeal Bond Limits Is Misplaced

Several public health groups, such as the American Cancer Society and the American Heart Association, have recently spoken out in opposition to appeal bond caps. Representatives from these groups have testified in front of state legislative committees considering bond cap bills, and at least one group has posted a statement on its website criticizing bond caps.[1] It is unclear why these groups are spending their members' resources to vigorously oppose appeal bond cap bills. Bond caps do not involve any public health issue whatsoever, and they have nothing to do with preventing cancer or reducing smoking rates. Instead, bond caps merely ensure that defendants facing large judgments are able to appeal without being forced to declare bankruptcy, thereby enabling the tobacco companies to continue to make the payments they owe to every state under the Master Settlement Agreement ("MSA") and other settlements while the tobacco companies appeal large judgments against them. The health groups' lobbying efforts should be directed at legislative measures that directly relate to the core purposes of these organizations, instead of what is fundamentally a fiscal issue.

Whatever the reasons behind the health groups' opposition to bond caps, the arguments that they have advanced against appeal bond caps are misguided and unpersuasive, as demonstrated below.

1. Argument: Bond caps would limit the tobacco industry's liability.[2]

This is simply wrong.

- Appeal bond bills do not change the substantive law in any way, meaning that they do not affect who ultimately wins or loses the lawsuit or the rule by which the trial is conducted. As a result, the bills would not take away any plaintiff's right to sue a tobacco company, nor do they limit the amount of compensatory or punitive damages that a plaintiff can collect from a tobacco company.

2. Argument: By seeking to appeal a jury verdict, instead of simply paying a multi-million dollar judgment in full, an MSA participant is perpetrating a "ruse" that "drags out the process," just to delay paying the money it owes to the plaintiffs.

All defendants have a right to appeal verdicts against them, and bond caps merely ensure that they will be able to exercise that right.

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[1] American Cancer Society, Changing the Rules: Philip Morris Blackmails States, *available at* http://www.cancer.org/docroot/GI/content/GI_3_11x_Changing_the_Rules.asp? sitearea_GI (last visited March 18, 2004).

[2] See id. ("The Society has consistently opposed state legislation that would cap tobacco industry liability.")

- Bond caps guarantee that large damage awards will be reviewed by the appellate courts to determine whether they were legally justified, which is what these courts were created to do in the first place. Even the *New York Times* has recognized the importance of "making sure that cigarette makers, like other unpopular parties, are given the full protection of constitutional due process .... [I]n making an appeal so prohibitively costly ... the right to an appeal [is rendered] nearly meaningless, thus violating the defendant's due process rights. The plaintiffs may hope that the situation forces [an MSA signatory] to settle now, but such pressure would be akin to extortion."[3]

3. Argument: Bond caps that apply only to MSA signatories, successors, and affiliates offer "special protection" to the tobacco industry.

While MSA-specific bond caps do treat tobacco companies differently than other defendants, the ultimate goal of this differential treatment is to protect the State's fiscal integrity.

- The purpose of appeal bond legislation is to ensure that tobacco companies can remain solvent during the appeals process, so they can continue to make their MSA payments to the states until a final determination is reached on their liability. Since many large judgments are reduced or overturned on appeal, there is no reason to prematurely force the defendants into bankruptcy and interrupt their MSA payments before all appeals are complete. By protecting the uninterrupted flow of the MSA payments that have become so important to states' annual budgets, appeal bond bills ensure that states can continue to meet all of their fiscal obligations and serve their citizens.

4. Argument: The health groups have asserted that the appeal bond issue should be a "wake up call to the states," and that state legislators should use this occasion to "break their dependence on settlement funds, by devoting more of their settlement payments to tobacco prevention and cessation programs."[4]

This argument misses the point; if anything, it helps to demonstrate why the health groups should support bond caps.

- Appeal bond legislation does not have any effect on how a state elects to spend its tobacco settlement revenue. However, most states do devote a significant amount of their MSA payments to health-related programs and expenses: for example, New York spends more than half of its $800 million annual revenue stream from the MSA on public health matters. If a state's MSA funds are reduced because one of the signatories cannot afford to post an exorbitant appeal bond, then the state will have even fewer funds to devote to public health

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3 "Too Costly an Appeal," N.Y. Times, at A20 (Apr. 4, 2003).

4 Id. See also Coalition for a Tobacco Free Hawaii Testimony, Hawaii House Finance Committee (Feb. 26, 2004) ("In settling [the MSA], "the 46 states involved, including Hawai'i, indicated the funds would be used to reduce the impact of tobacco use. The Coalition urges the Legislature to honor their original intent to provide funding for the state's number one preventable cause of death -- tobacco use.")

concerns. Thus, by opposing bond caps, the health groups are actually working against the interests of public health.

5. Argument: If forced to post a high bond, the companies should "curtail marketing, suspend dividends and stock buybacks, and cut political contributions to accept the responsibility for the damage their products have caused."[5]

This argument does not reflect the realities of the tobacco industry.

- First of all, the vast majority of tobacco companies' marketing costs are not directed at consumers. According to the most recent FTC report, the top six cigarette manufacturers spent a total of $11.22 billion on advertising and promotional expenditures, but traditional advertising aimed at consumers (*i.e.*, newspapers, magazines, billboards, and direct mail) accounted for only about 3 percent of this total in 2001. By contrast, merchandising and promotional expenditures -- promotional allowances paid to retailers, coupons and retail-value-added (*e.g.*, "buy one get one free") costs -- accounted for approximately 88% of the companies' expenditures.[6]

- If MSA signatories stopped competing for market share among adult smokers, total cigarette sales would not decrease. Instead, sales volume would shift from MSA signatories to those manufacturers who have refused to join the MSA and are able to market their products at a substantial discount. This would impact MSA payments, because the settlement payments are tied to the sales volume of participating manufacturers. As a result, there would be no public health benefit if MSA signatories decreased their marketing revenues, but the states would suffer from the lower MSA payments.

6. Argument: Bond caps are unnecessary because the tobacco companies and their parent organizations are extremely wealthy and can afford to post appeal bonds, no matter how high they are set.

No matter how large a company is, raising money to post an exorbitant appeal bond is not as easy as the health groups make it out to be, and in some cases, it may be impossible to raise these funds.

- Any reliance by the health groups' on the financial figures of the tobacco companies' parent organizations to demonstrate the companies' financial solvency and bond-posting ability are basically irrelevant. The financial conditions of the parent companies of corporate defendants have nothing to do with this issue as a matter of law and by specific agreement in the MSA. As was recognized during the MSA payment crisis precipitated by the Price case in Illinois, parent companies of MSA signatories have no obligation whatsoever either to post bonds for, or make MSA payments on behalf of, their subsidiaries.

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[5] See id.

[6] Federal Trade Commission, Cigarette Report for 2001 (issued 2003), *available at* http://www.ftc.gov/os/2003/06/2001cigreport.pdf.

- Furthermore, the fact that a company may be profitable does not mean it has the cash resources to post an exorbitant appeal bond. In one class action against the MSA signatories, a Florida jury returned a verdict in 2000 of $145 billion. Although the Florida legislature acted just before the verdict to set a maximum appeal bond of $100 million, had it not done so, the defendants would have been required under previously existing Florida law to post a bond of 125 percent of the judgment, or $181 billion. No company on earth could do that. In fact, the entire world bonding market -- which is estimated to have total bonding capacity of approximately $10 billion -- would not be large enough to support such a bond.

- While it is true that Philip Morris USA was able to post a $6.8 billion bond in the Price case in Illinois, the court accepted as the bulk of the bond a $6.8 billion note, rather than $6.8 billion in cash. To be clear, this is the only $6.8 billion note that Philip Morris USA has, and it has now been pledged and cannot be used for that purpose again. Nothing like it is available for another judgment in another state. To the contrary, precisely because the bond in that one case was so outrageously high -- and some MSA signatories clearly would not have been able to post such a bond even one time -- that bond caps are so essential now.

7. Argument: In many states, appeal bond caps are not necessary because judges have the discretion to set the bond in an amount lower than the amount of the judgment.

This is simply incorrect.

- A purely discretionary approach does not prevent a court from setting the bond in an amount that would potentially bankrupt a defendant: although a court has discretion to set a lower bond if the defendant demonstrates that it cannot afford to post a bond in the full amount of the judgment, nothing in the current rules require the court to do so. A clear example of the problems with a discretionary approach is the Price case, in which the judge used his discretion under the Illinois court rules to first set a clearly bankrupting bond ($12 billion) and then, only after a brief was filed on behalf of 37 Attorneys General around the country, a $6.8 billion bond. Discretion permits judges who do not adequately appreciate the facts, or simply do not care, to bankrupt defendants before they can appeal; the only way to prevent these abuses of discretion is to have a defined cap.

- A discretionary approach also leaves uncertainty for litigants and adds to the burdens a court will face. A discretionary approach may require protracted post-trial proceedings to determine the appropriate bond. Such proceedings waste judicial resources. And the uncertainty of a purely discretionary approach destabilizes the investment community, and can result in significant losses, at least in the short term, for retirement and other funds that invest in the stocks of the large publicly-traded companies that usually are defendants in the largest cases.

- Twelve out of the 27 states that have adopted appeal bond caps give courts discretion in setting the amount of the bond cap. These states have recognized that a purely discretionary approach does not adequately protect defendants from the negative consequences of exorbitant appeal bonds. In these states, such discretion continues to exist after the passage of bond cap legislation unless a judgment reaches the level of the appeal bond limit, which would occur only very rarely.

The public health community deserves the respect it has earned over the years for its work on genuine public health initiatives. They and their stakeholders have a genuine interest in working together with all those -- including MSA signatories -- who support spending as much of the settlement money as possible on tobacco control initiatives. But no one -- neither the health groups, nor the State, nor the companies who joined the settlement -- should object to the idea that the settlement payments should continue until a potentially bankrupting verdict can be heard on appeal. The fact is that appeal bond caps are a fiscal and a fairness, rather than a health, issue.

American Heart Association®

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Appeal Bonds Bill

The American Heart Association is concerned about proposed SB 307/HB 468, legislation that would limit the amount of appeal bonds to $100 million in any civil lawsuit that involves a tobacco company, or any affiliate of a tobacco company, that participated in the 1998 Master Settlement Agreement, regardless of the amount of the legal judgment or the subject matter of the lawsuit. This legislation fails to protect the public health of all Alaskans, and it is not needed to protect the MSA payments that Alaska receives each year.

This bill is not needed. It is the American Heart Association's position that the safeguard built into Alaska Appellate Rule 204(d) already adequately protects all defendants, including any "signatory, a successor of a signatory, or an affiliate of a signatory to the Master Settlement Agreement". The rule says that "when the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, and interest, *unless the superior court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond*."

The superior court may set the bond for the amount of judgment, or the court may, "after notice and hearing and for good cause shown," fix a "different amount" or order "security other than the bond." Appellate Rule 204(d). There is, therefore, inherent flexibility in the existing cou rules to allow for smaller bonds in cases where the defendant shows good cause (like the threa of bankruptcy or the inability to make MSA payments). This flexibility is further evidenced by the fact that, as far as the Heart Association has been able to ascertain, there has never been an instance where an Alaska business went bankrupt in attempting to meet an appeal bond. The American Heart Association continues to believe that there is simply no need for proposed HB 468.

Appeal bond limits help only the big tobacco companies. Appeal bond limits are special interest, special protection bills to benefit the tobacco companies – and the tobacco companies certainly do not deserve special treatment or special protections.

The only reason the Alaska Legislature is being asked to consider this proposed legislation is because tobacco companies are trying to avoid being brought to justice for years of misinformation and deceit about so-called "light" cigarettes that killed and harmed millions of people. Because the judicial systems in other states have forced the tobacco companies to pay for the harm they have caused, the tobacco companies are now trying to legislate options away from judges, juries and the injured parties who file lawsuits in many states throughout the country, including Alaska.

Appeal bond limits hurt deserving plaintiffs who have won lawsuits. Appeal bond limits reduce the security and protections that are currently in place to protect worthy plaintiffs who win lawsuits. Appeal bond provisions require losing defendants to post bonds prior to appealing lawsuits that they have lost – and the winning plaintiffs have recourse to those posted bond

amounts if the defendants lose on appeal and, for whatever reason, are no longer able to pay the damages they owe to the plaintiffs.

Through this mechanism, appeal bond requirements are meant to ensure that losing defendants do not use repeated frivolous appeals to avoid paying the damages owed to winning plaintiffs. They are also meant to ensure that losing defendants do not waste their assets or hide them during the appeal process, and appeal bonds protect plaintiffs against the possibility that the defendants lose their ability to pay during the appeal process. Low appeal bond limits fail to provide any of these protections in lawsuits where plaintiffs have been awarded damages that significantly exceed the amount of the appeal bond maximum.

The judicial system and existing laws already have sufficient protections in place to stop appeal bond requirements from bankrupting defendants. Tobacco companies who lose big lawsuits and have large damages judgments against them have numerous protections available:
1) They can file a motion with the court seeking to have the appeal bond amount reduced.
2) If the lower court refuses, they can file an appeal to a higher court to have the bond reduced.
3) They can work out a deal with the winning plaintiffs to post a smaller bond amount.

In April 2003, for example, Phillip Morris used existing avenues of appeal to get a court in Illinois to reduce an appeal bond in a large class action lawsuit from $12 billion to $ 6 billion. In fact, courts have already ruled that appeal bond requirements that force a losing defendant that wants to appeal into bankruptcy violate the constitutional right to due process. Other rulings on punitive damages indicate that forcing losing defendants into bankruptcy may also not be permissible.

Tobacco companies have access to enormous financial resources that can be used to satisfy even the largest appeal bond requirements. The tobacco companies (and their parent companies) have enormous assets, revenue streams, and profits – and have a vast capacity to borrow money or to raise needed revenue through price increases. In 2002, Altria (Philip Morris' parent company) had total assets of $87.5 billion, net revenues of $80.4 billion, and US tobacco revenues of $18.9 billion.

Tobacco companies can easily raise even very large appeal bond amounts by reducing their current non-essential spending. The tobacco companies (and their parent companies) currently spend enormous amounts of money on expenditures that are not necessary to protect their market share. Most notably, the companies could save a lot of money by reducing or eliminating their shareholder dividends and stock buybacks. The big tobacco companies spend $25 million *every year* on marketing their deadly products in Alaska alone.

Tobacco companies' risk of being financially overwhelmed by multiple appeal bond requirements and lawsuit losses is very low. For example, tobacco companies are promoting this legislation in Alaska despite the fact that there is no indication that there will be a significant tobacco-related lawsuit in Alaska, and despite the fact that Alaska judges and juries have proven to be moderate in their damage awards.

There are other options that would protect payments while also protecting Alaska citizens. The above facts show that no appeal bond limits should be instituted at all. But if some appeal bond limit is destined to pass in Alaska, these arguments support a much higher appeal bond limit than those currently being pushed by Philip Morris and other tobacco companies. To date, they have proposed appeal bond limits of $25 million (and this was amount was raised in previous committees to $100 million), but in order to protect legitimately harmed Alaskans who have prevailed in superior court, there is absolutely no justification for any appeal bond limit that is not in the billions of dollars.

Another alternative would be to set appeal bond limits to be no greater than the total value of a losing defendant's assets or no greater than a losing defendant's total revenues in the prior fiscal year. An even better alternative (if some appeal bond limit must be passed) would be to set guidelines for the courts. For example, a proposed bill could read: "Appeal bond limits shall not be set in an amount that would force a losing defendant into bankruptcy or otherwise cause severe financial strains that jeopardize the losing defendant's ability to stay in business or meet its preexisting financial obligations."

April 19, 2004

superoneratio (s[y]oo-pər-on-ə-**ray**-shee-oh). [Law Latin] *Hist.* 1. The act or practice of surcharging a common. 2. The placement of more cattle on a common than is allowed; overstocking.

superoneratione pasturae. See DE SUPERONERATIONE PASTURAE.

superplusagium (s[y]oo-pər-plə-**say**-jee-əm), *n.* [Law Latin] *Hist.* A surplus; a remainder.

super praerogativa regis (s[y]oo-pər pri-rog-ə-tī-və **ree**-jis), *n.* [Law Latin] *Hist.* A writ against the king's tenant's widow for marrying without royal permission.

superpriority. *Bankruptcy.* The special priority status granted by the court to a creditor for extending credit to a debtor or trustee that cannot obtain unsecured credit from a willing lender. • This priority may be either an administrative claim outranking other administrative claims or, if certain statutory requirements are met, a security interest in property. 11 USCA § 364(c)(1).

supersede, *vb.* 1. To annul, make void, or repeal by taking the place of <the 1996 statute supersedes the 1989 act>. 2. To invoke or make applicable the right of supersedeas against (an award of damages) <what is the amount of the bond necessary to supersede the judgment against her?>. — **supersession** (for sense 1), *n.*

supersedeas (soo-pər-**seed**-ee-əs), *n.* [Latin "you shall desist"] A writ or bond that suspends a judgment creditor's power to levy execution, usu. pending appeal. — Also termed *writ of supersedeas*. Pl. **supersedeases** (soo-pər-**see**-dee-əs-iz).

supersedeas bond. See BOND (2).

superseding cause. See CAUSE (1).

super statuto (s[y]oo-pər stə-t[y]oo-toh), *n.* [Law Latin] *Hist.* A writ against tenants-in-chief who transferred their land without the king's permission in violation of the Statute of Westminster II, chs. 12 & 13.

super statuto de articulis cleri (s[y]oo-pər stə-t[y]oo-toh dee ahr-tik-yə-lis **kleer**-ī), *n.* [Law Latin] *Hist.* A writ against a sheriff who unlawfully distrains goods.

COVINGTON & BURLING

To: **Senator Ralph Seekins, Chair**
Senate Judiciary Committee

From: **Keith A. Teel, Partner, Covington & Burling, Washington, D.C., representing Philip Morris USA, Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation and R.J. Reynolds Tobacco Company**

Date: **Friday, February 20, 2004**

Subject: **Support of S.B. 307, relating to supersedeas bonds**

First, I'd like to thank you, Chairman Seekins, for the opportunity to speak with your committee today in support of Senate Bill 307, which provides a $25 million limitation on bond requirements during appeal in litigation involving signatories to the tobacco master settlement agreement or their successors or affiliates. My name is Keith A. Teel, and I am here today representing Philip Morris USA, Lorillard Tobacco Company, Brown & Williamson Tobacco Corporation and R.J. Reynolds Tobacco Company, who are the four original participating manufacturers of the Tobacco Master Settlement Agreement ("MSA").

The MSA is very important to Alaska and to the 45 other states who are parties to the settlement. It delivers millions of dollars in revenues to the state annually, and it will continue to do so for years to come. Yet the continued receipt of these funds is threatened by the huge judgments that have been awarded against the tobacco companies that are funding the settlement. Defendants facing such large judgments almost always have a right to appeal them, and in many cases their appeals are successful in obtaining a reduced judgment or in overturning the judgment entirely. But in order to stay the execution of a judgment on appeal, a defendant must post a supersedeas (or appeal) bond which, in the diminishing number of states which do not have limits on appeal bonds, usually equals the amount of the judgment. In Alaska, the bond required is ordinarily the amount of the judgment remaining unsatisfied, plus appeal costs and interest.[1] But Alaska courts are permitted to set the bond in a different amount for good cause shown -- meaning that judges may set the bond at an amount that exceeds the total judgment.[2]

If a company cannot afford to post a bond in the amount set by the court, the company may be forced to file for bankruptcy in order to stop the plaintiff from taking its assets during the appeal. Such a stay could disrupt payments by the company, including payments to Hawaii and the other states under the MSA. This problem has been most vividly demonstrated by the ongoing Engle case in Florida, in which a class of smokers was awarded $145 billion in punitive damages. Had there not been an appeal bond cap in place at that time, the defendant

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1 Alaska R. App. P. 204(d).

2 Id.

tobacco companies would clearly have gone bankrupt, resulting in the termination of all MSA settlement payments nationwide, and precluding the ability to pursue a fair and orderly appeal. However, because Florida had previously enacted bond cap legislation, the settlement payments continued during the appeal, and the appellate court ultimately rejected and reversed the verdict in its entirety.

To date, 26 states have recognized the possibility that an enormous appeal bond may cause signatory companies to be unable to meet their obligations to the states under the MSA, and these states have passed legislation or amended court rules to limit the size of the required bond in cases involving large judgments. In addition, five other states do not require a defendant to post a bond at all during an appeal. Some states have passed legislation that applies broadly to all litigants, while other states have passed more limited legislation that applies only to MSA signatories, successors, and affiliates. The bond limits range from $1 million to $150 million. Nearly all of the statutes include a provision that allows for a higher bond amount up to the full value of the judgment if the court determines that the appellant is dissipating assets to avoid paying a judgment.

S.B. 307 would impose a $25 million limit on the appeal bond that MSA signatories, successors, and affiliates must post to stay the execution of a judgment in Alaska. This bond limit would not change the any other aspect of the law -- meaning it does not change the rules by which the trial is conducted, or affect who ultimately wins or loses the lawsuit -- or affect the rights of plaintiffs to recover fully the damages to which they are entitled if the judgment is upheld on appeal. Plaintiffs are also protected by the provision in the bill allowing the court to require a bond amount up to the value of the judgment if the appellant is dissipating its assets to avoid paying a judgment. S.B. 307 thus would not injure plaintiffs in any way, and it would protect the state by ensuring that it will continue to receive its MSA payments while the tobacco companies fully appeal an adverse judgment.

For the foregoing reasons, we urge the committee to pass S.B. 307. Thank you.

MSA Signed NOVEMBER 1998

Annual Payments to Each State

Year	1998	1999	2000	2001	2002	2003	2004 to 2007	2008 to 2017	2018 to 2025	Total
Amount	$2,400,000,000.00	$0.00	$6,411,750,000.00	$6,923,660,000.00	$8,313,294,800.00	$8,391,971,144.00	$7,004,000,000.00	$7,143,000,000.00	$8,003,999,997.00	$195,918,675,920.00
Alabama	$38,787,139.87	$0.00	$103,622,268.35	$111,895,403.67	$134,353,720.06	$135,625,232.71	$113,193,803.17	$115,440,225.02	$129,355,111.40	$3,166,302,118.81
Alaska	$8,194,049.54	$0.00	$21,890,915.46	$23,638,672.09	$28,383,145.58	$28,651,761.36	$23,912,967.90	$24,387,539.93	$27,327,155.19	$668,903,056.50
Arizona	$35,373,226.92	$0.00	$94,501,786.55	$102,046,748.46	$122,528,359.76	$123,687,958.17	$103,230,867.24	$105,279,566.63	$117,969,711.74	$2,887,614,909.02
Arkansas	$19,873,586.24	$0.00	$53,093,527.74	$57,332,480.87	$68,839,575.47	$69,491,067.60	$57,997,749.17	$59,148,761.04	$66,278,410.08	$1,622,336,125.69
California	$306,334,930.78	$0.00	$818,392,913.50	$883,732,877.84	$1,061,105,244.62	$1,071,147,458.11	$893,987,439.65	$911,729,337.72	$1,021,626,993.76	$25,006,972,510.74
Colorado	$32,900,674.16	$0.00	$87,896,207.30	$94,913,784.01	$113,963,751.40	$115,042,295.05	$96,015,134.08	$97,920,631.45	$109,723,748.27	$2,685,773,548.89
Connecticut	$44,556,896.25	$0.00	$119,036,533.13	$128,540,333.44	$154,339,422.45	$155,800,078.15	$130,031,875.55	$132,612,462.45	$148,597,248.93	$3,637,303,381.55
Delaware	$9,491,268.84	$0.00	$25,356,517.92	$27,380,966.02	$32,876,548.30	$33,187,689.27	$27,698,686.24	$28,248,388.89	$31,653,381.58	$774,798,676.89
D.C.	$14,570,838.84	$0.00	$38,926,906.65	$42,034,805.86	$50,471,532.83	$50,949,191.30	$42,522,564.69	$43,366,459.11	$48,593,747.53	$1,189,458,105.56
Florida	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Georgia	$58,906,980.41	$0.00	$157,373,679.86	$169,938,293.33	$204,046,289.14	$205,977,366.58	$171,910,204.50	$175,321,900.45	$196,454,779.60	$4,808,740,668.60
Hawaii	$14,444,759.81	$0.00	$38,590,078.62	$41,671,085.70	$50,034,811.08	$50,508,336.45	$42,154,624.04	$42,991,216.38	$48,173,273.94	$1,179,165,923.07
Idaho	$8,718,317.14	$0.00	$23,291,529.13	$25,151,109.85	$30,199,141.89	$30,484,944.11	$25,442,955.52	$25,947,891.39	$29,075,587.65	$711,700,479.23
Illinois	$111,701,933.67	$0.00	$298,418,697.16	$322,244,254.19	$386,921,293.46	$390,583,085.03	$325,983,476.42	$332,452,880.08	$372,525,948.64	$9,118,539,559.10
Indiana	$48,955,278.39	$0.00	$130,787,085.94	$141,229,042.84	$169,574,858.88	$171,179,701.52	$142,867,820.78	$145,703,147.32	$163,265,853.39	$3,996,355,551.01
Iowa	$20,872,006.95	$0.00	$55,760,871.07	$60,212,783.18	$72,297,977.85	$72,982,200.02	$60,911,473.61	$62,120,310.68	$69,608,143.15	$1,703,839,985.56
Kansas	$20,008,109.65	$0.00	$53,452,915.44	$57,720,561.87	$69,305,547.47	$69,961,449.52	$58,390,333.34	$59,549,136.35	$66,727,045.67	$1,633,317,646.19
Kentucky	$42,267,806.11	$0.00	$112,921,085.75	$121,936,632.68	$146,410,305.30	$147,795,920.49	$123,351,547.49	$125,799,557.93	$140,963,133.32	$3,450,438,586.10
Louisiana	$54,128,474.21	$0.00	$144,607,601.88	$156,152,979.89	$187,494,151.32	$189,268,580.68	$157,964,930.57	$161,099,871.36	$180,518,461.42	$4,418,657,915.22
Maine	$18,464,411.55	$0.00	$49,328,829.47	$53,267,211.52	$63,958,373.54	$64,563,670.37	$53,885,307.70	$54,954,704.87	$61,578,812.49	$1,507,301,275.81
Maryland	$54,250,967.50	$0.00	$144,934,850.37	$156,506,355.69	$187,918,452.52	$189,696,897.43	$158,322,406.83	$161,464,442.03	$180,926,976.56	$4,428,657,383.58
Mass.	$96,935,496.43	$0.00	$258,969,237.19	$279,645,174.68	$335,772,232.68	$338,949,953.70	$282,890,090.42	$288,504,271.26	$323,279,880.48	$7,913,114,212.77
Michigan	$104,446,741.41	$0.00	$279,035,997.59	$301,314,052.34	$361,790,230.09	$365,214,183.32	$304,810,407.01	$310,859,614.11	$348,329,882.46	$8,526,278,033.60
Minnesota	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Mississippi	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Missouri	$54,590,425.53	$0.00	$145,841,733.70	$157,485,644.00	$189,094,291.94	$190,883,864.90	$159,313,058.50	$162,474,753.97	$182,059,069.06	$4,456,368,286.30
Montana	$10,194,218.72	$0.00	$27,234,492.45	$29,408,876.82	$35,311,477.28	$35,645,662.22	$29,750,128.30	$30,340,543.46	$33,997,719.42	$832,182,430.63
Nebraska	$14,279,599.86	$0.00	$38,148,843.51	$41,194,622.66	$49,462,718.04	$49,930,829.17	$41,672,632.27	$42,499,659.09	$47,622,465.53	$1,165,683,457.48
Nevada	$14,638,443.42	$0.00	$39,107,516.49	$42,229,835.47	$50,705,706.47	$51,185,581.14	$42,719,857.37	$43,567,667.21	$48,819,208.77	$1,194,976,854.76
New Hampshire	$15,982,416.92	$0.00	$42,698,025.70	$46,107,008.63	$55,361,059.77	$55,884,992.33	$46,642,020.04	$47,567,668.35	$53,301,360.40	$1,304,689,150.27
New Jersey	$92,807,910.83	$0.00	$247,942,134.27	$267,737,674.95	$321,474,801.04	$324,517,212.33	$270,844,419.77	$276,219,544.60	$309,514,382.50	$7,576,167,918.47
New Mexico	$14,313,352.87	$0.00	$38,239,016.77	$41,291,995.30	$49,579,634.15	$50,048,851.76	$41,771,134.78	$42,600,116.47	$47,735,031.79	$1,168,438,809.05
New York	$306,288,745.07	$0.00	$818,269,525.50	$883,599,638.62	$1,060,945,263.21	$1,070,985,962.65	$893,852,654.37	$911,591,877.52	$1,021,472,964.43	$25,003,202,243.12
North Carolina	$55,974,840.09	$0.00	$149,540,283.73	$161,479,483.90	$193,889,727.95	$195,724,684.52	$163,353,241.67	$166,595,117.83	$186,676,091.64	$4,569,381,898.24
North Dakota	$8,784,330.94	$0.00	$23,467,889.12	$25,341,550.30	$30,427,805.29	$30,715,771.56	$25,635,605.78	$26,144,364.95	$29,295,743.66	$717,089,369.09
Ohio	$120,900,234.58	$0.00	$322,992,532.93	$348,780,049.22	$418,783,038.09	$422,746,366.61	$352,827,184.57	$359,829,323.15	$403,202,282.16	$9,869,422,448.51
Oklahoma	$24,867,287.65	$0.00	$66,434,513.15	$71,738,602.00	$86,137,122.12	$86,952,316.82	$72,571,034.45	$74,011,264.86	$82,932,404.27	$2,029,985,862.29
Oregon	$27,543,797.82	$0.00	$73,584,977.37	$79,459,954.68	$95,408,213.01	$96,311,148.56	$80,381,983.32	$81,977,228.27	$91,858,565.71	$2,248,476,833.11
Penn.	$137,924,610.41	$0.00	$368,474,217.00	$397,892,961.71	$477,753,311.05	$482,274,729.42	$402,509,988.05	$410,498,121.73	$459,978,575.54	$11,259,169,603.46
Rhode Island	$17,253,727.23	$0.00	$46,094,410.65	$49,774,558.78	$59,764,717.02	$60,330,325.43	$50,352,127.30	$51,351,405.67	$57,541,180.29	$1,408,469,747.28
South Carolina	$28,232,446.25	$0.00	$75,424,744.69	$81,446,607.84	$97,793,603.59	$98,719,114.28	$82,391,688.98	$84,026,818.16	$94,155,208.21	$2,304,693,119.82
South Dakota	$8,374,699.41	$0.00	$22,373,532.90	$24,159,821.39	$29,008,893.79	$29,283,431.59	$24,440,164.46	$24,925,199.13	$27,929,622.54	$683,650,008.54
Tennessee	$58,581,467.29	$0.00	$156,504,051.21	$168,999,234.09	$202,918,753.08	$204,839,159.61	$170,960,248.71	$174,353,092.02	$195,369,193.34	$4,782,168,127.09
Texas	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
Utah	$10,677,285.47	$0.00	$28,525,035.47	$30,802,455.97	$36,984,759.08	$37,334,779.83	$31,159,878.10	$31,778,270.89	$35,608,747.04	$871,616,513.42
Vermont	$9,868,441.49	$0.00	$26,364,158.22	$28,469,055.67	$34,183,026.39	$34,506,531.76	$28,799,401.75	$29,370,948.99	$32,911,252.36	$805,588,329.25
Virginia	$49,073,882.70	$0.00	$131,103,944.75	$141,571,199.45	$169,985,689.11	$171,594,419.81	$143,213,947.68	$146,056,143.38	$163,661,398.74	$4,006,037,550.26
Washington	$49,278,196.65	$0.00	$131,649,782.25	$142,160,616.27	$170,693,406.67	$172,308,835.15	$143,810,203.90	$146,664,232.79	$164,342,785.78	$4,022,716,266.79
West Virginia	$21,275,048.98	$0.00	$56,837,623.03	$61,375,502.33	$73,694,064.18	$74,391,498.79	$62,087,684.60	$63,319,864.52	$70,952,288.31	$1,736,741,427.33
Wisconsin	$49,728,936.59	$0.00	$132,853,962.15	$143,460,937.12	$172,254,712.48	$173,884,917.03	$145,125,613.28	$148,005,747.52	$165,846,003.46	$4,059,511,421.32

Wyoming $5,960,276.82	$0.00	$15,923,252.04	$17,194,554.25	$20,645,640.96	$20,841,029.62	$17,394,074.52	$17,739,273.88	$19,877,523.19	$486,553,976.10
Amercian Samo a$365,208.62	$0.00	$975,677.65	$1,053,575.12	$1,265,036.21	$1,277,008.41	$1,065,800.48	$1,086,952.15	$1,217,970.74	$29,812,995.31
N. Marianas $202,503.22	$0.00	$541,000.00	$584,193.09	$701,445.39	$708,083.81	$590,971.89	$602,700.20	$675,348.22	$16,530,900.80
Guam $526,489.51	$0.00	$1,406,549.63	$1,518,847.65	$1,823,692.71	$1,840,951.99	$1,536,471.89	$1,566,964.41	$1,755,842.52	$42,978,803.27
US Virgin Island $416,623.09	$0.00	$1,113,034.64	$1,201,898.61	$1,443,129.42	$1,456,787.08	$1,215,845.06	$1,239,974.49	$1,389,438.02	$34,010,102.11
Puerto Rico $26,910,657.33	$0.00	$71,893,502.96	$77,633,434.04	$93,215,094.84	$94,097,274.89	$78,534,268.30	$80,092,843.87	$89,747,042.15	$2,196,791,813.07
$2,400,000,000.00	$0.00	$6,411,750,000.00	$6,923,660,000.00	$8,313,294,800.00	$8,391,971,144.00	$7,004,000,000.00	$7,143,000,000.00	$8,003,999,997.00	$195,918,675,920.00

SENATE FINANCE COMMITTEE

S I G N - I N

SB 307-APPEAL BONDS: TOBACCO SETTLEMENT PARTIES

NAME: KEITH TEEL Subject/Bill No: _____

Co./Dept./Title: Covington & Burling Phone: 202-662-5501

Address: WASHINGTON, D.C. ~~20004~~ Zip: 20004

Do you wish to testify? ✓ Yes ___ No ✓ Respond To Questions

NAME: Brian Hoyt Subject/Bill No: SB 307

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? ___ Yes ___ No ___ Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? ___ Yes ___ No ___ Respond To Questions

NAME: _____ Subject/Bill No: _____

Co./Dept./Title: _____ Phone: _____

Address: _____ Zip: _____

Do you wish to testify? ___ Yes ___ No ___ Respond To Questions

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 2/9/04

FURTHER: Finance

Date of 5-Day Notice: 2/12/04
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 3/1/04

Judiciary Committee considered SENATE BILL NO. 307

SB 307 APPEAL BONDS: TOBACCO SETTLEMENT PARTIES

"An Act relating to the amount of the bond required to stay execution of a judgment in civil litigation involving a signatory, a successor of a signatory, or an affiliate of a signatory to the tobacco product Master Settlement Agreement during an appeal; amending Rules 204 and 205, Alaska Rules of Appellate Procedure; and providing for an effective date."

and recommends:

[✓] be replaced with _____ **CS** SB 307 (JUD)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

Senate Bill:
[✓] Same Title
[ ] New Title

House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
CRT	2/17			✓	1

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
Therriault			X	
Ogan			X	
Ellis		X		
Seekins CHAIR:	✓			