

SB

48

ALASKA STATE LEGISLATURE

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Charlie Huggins Senator

SPONSOR STATEMENT SB 48

"An Act amending Rule 62, Alaska Rules of Civil Procedure, to limit the amount of the bond required to stay execution of a judgment in a civil litigation during an appeal or review; and amending Rules 204 and 205, Alaska Rules of Appellate Procedure, to limit the amount of the bond required to stay execution of a judgment in a civil litigation during an appeal."

Under current law in Alaska, a defendant is required to post a bond equal to the amount of the judgment plus appeal costs and interest – this is one of the highest appeal bond requirements in the nation.

SB48 proposes an appeal bond cap of the lesser of \$5 million dollars or ten percent of the defendant's net worth on the bond required for appeal. This bill ensures that the Right to appeal for all defendants' is protected.

Of the forty-five states that require a bond to secure an appeal, thirty-five with similar laws to Alaska have recognized that excessive appeal bond requirements jeopardize the integrity of the legal system and have adopted an appeal bond cap.

The risks posed by high appeal bonds are real. Numerous companies and individuals have been forced to either declare bankruptcy in order to stay execution of a judgment pending appeal, or settle with plaintiffs purely because they could not afford to pay the required bond, even when they have good arguments that the verdict against them was improper.

SB48 protects plaintiffs by allowing complete reinstatement of the full bond requirement if a preponderance of evidence shows that dissipation or diversion of assets is taking place. This limitation does not apply to awards resulting from the injury, loss, or destruction of natural resources caused by an environmental disaster. In addition, the limit will help guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect.

Contact: Karen Sawyer, Staff
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Version C
February 14, 2007

LEGAL SERVICES

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Juneau, Alaska 99801-1182
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MEMORANDUM

March 5, 2007

SUBJECT: Proving dissipation of assets outside the normal course of business; proof by a preponderance of the evidence; and defining net worth. (HB 103, (Work Order No. 25-LS0401A))

TO: Representative John Coghill
Attn: Karen Lidster

FROM: Dennis C. Bailey *DCB*
Legislative Counsel

You have asked three questions concerning the portions of HB 103 that provide that an appellee prove by a preponderance of the evidence that an appellant is intentionally dissipating assets outside the ordinary course of business to avoid payment of a judgment.

(1) What is required to prove by a "preponderance" of the evidence?

The Alaska pattern jury instructions provide a good definition for the preponderance of the evidence standard of proof:

. . . [T]he instructions that follow ask you to decide whether something is more likely true than not true. Something is more likely true than not true if you believe that the chance that it is true is even the slightest bit greater than the chance that it is not true. In more familiar language, something is more likely true than not true if you believe that there is a greater than 50 percent chance that it is true. Fifty-one percent probability is enough; no more is required for you to decide that something is more likely true than not true.

Proof by a preponderance of the evidence is the normal burden of proof in civil cases.

(2) Would it be possible to place the burden on the appellant by making it the appellant's burden to provide to the court information on any and all business transactions that the appellant makes during the appeal period?

It is possible to place the burden on the appellant to prove that that the appellant is not dissipating assets to avoid payment of a judgment. An argument supporting that proposition is that the financial records of the appellant are normally not available to the appellee so it would be unlikely that an appellee would be aware of any dissipation. On the other hand, requiring an appellant to make all business transactions available to the

Representative John Coghill

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court could be extremely burdensome, particularly for a large, or a small, business. Also, if such a provision were enacted, the courts would have to spend time and resources to establish a system to track the records, which could be extensive. Further, a court would probably be reluctant to make a determination on its own that assets are being dissipated. Normally, such a determination would only be made on motion after hearing the arguments of the parties. Other factors to consider are that many appeals may be pending simultaneously and appeals can continue for long periods, sometimes for years.

(3) How is net worth determined for a business or for an individual? Would it be advisable to include a definition of net worth in the bill?

In Title 21 of the Alaska Statutes, the net worth for an insurer "is calculated as its recorded assets less its liabilities." AS 21.90.900(34)(C), (I am not sure whether "recorded" has particular significance.) "Net worth" is used in several places in the Alaska Statutes without a definition. I located multiple definitions of "net worth," (without a particularly authoritative source) that defined "net worth" as total assets less total liabilities. My opinion is that a definition is not required, but an accountant may add additional guidance on this topic.

If I may be of further assistance, please advise.

DCB:ljw
07-108.ljw

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MEMORANDUM

January 5, 2007

SUBJECT: Appeal bonds; suggested alternate language.
(Work Order No. 25-LS0310\C)

TO: Senator Charlie Huggins
Attn: Karen Sawyer

FROM: Dennis C. Bailey *DCB*
Legislative Counsel

I have prepared the final draft for prefiling using the specific language you requested. However, some awkwardness and ambiguity are created by combining paragraphs (2) and (3) of the previous version because of the multiple references to "however," "unless," and "limitation." The change you requested also results in a definition appearing in the middle of the paragraph rather than at the end as required by the legislative drafting manual. Although the legislative drafting manual does not necessarily apply to court rules, placing definitions at the end is preferred. I moved the definition to the end of new subsection (2).

I recommend that during your review of the bill you consider using the following structure for the changes in sec. 2 of the enclosed bill if it retains the meaning you intend:

(2) 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. However, the amount of the bond that is required collectively of all appellants may not exceed the lesser of \$5,000,000 or 10 percent of all appellants' net worth regardless of the value of the judgment. This limitation does not apply

(A) to awards resulting from the injury, loss, or destruction of natural resources caused by an environmental disaster; in this subparagraph, "environmental disaster" means a real and substantial threat to the environment caused by the release of oil or other petroleum products or hazardous substances from a facility or carrier; or

Senator Charlie Huggins

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(B) if an appellee proves by a preponderance of the evidence that an appellant is intentionally dissipating assets outside the ordinary course of business to avoid payment of a judgment.

Also, please note that I corrected a typo on page 3, line 1, changing "applicant" to "appellant." In order to address the reference to "collectively," I revised "appellant" to read "all appellants."

It was brought to my attention that page 3, line 2 refers to a "defendant's" net worth, rather than "appellant's" net worth. I think "appellant's" was intended, and I made the change.

In a similar vein, page 3, line 2 refers to the net worth of a (single) "defendant" (now "appellant") as a measure of the bond amount required. Assuming there may be multiple appellants, I used "the net worth of all appellants," because the alternative seems illogical and to make it consistent with other similar references appearing elsewhere in the draft. I made a similar change to page 2, line 3, and page 4 line 1. Please review these changes closely to be sure they agree with your intent.

Secs. 1 - 3 each refers to a release of oil or other petroleum product or hazardous substances from a facility or carrier. The Alaska Statutes contain a range of definitions for the terms "facility" and "carrier," but the court rules do not define those terms. I think your intent may be retained by deleting the references to "facility" and "carrier." In addition, you should consider adding the term "unpermitted" before "release" in each of the sections. See, e.g., AS 43.55.165(e)(15) and AS 46.03.822(a). Finally, you might also consider adding "into the environment" following "release." See, e.g., AS 46.03.826(9). Let me know if you would like to make these changes.

If I may be of further assistance, please advise.

DCB:med
07-001.med

Enclosure

Sec. 43.55.165. Lease expenditures.

(e) For purposes of this section, lease expenditures do not include

(15) the portion of costs incurred for dismantlement, removal, surrender, or abandonment of a facility, pipeline, well pad, platform, or other structure, or for the restoration of a lease, field, unit, area, body of water, or right-of-way in conjunction with dismantlement, removal, surrender, or abandonment, that is attributable to production of oil or gas occurring before April 1, 2006; the portion is calculated as a ratio of the amount of oil and gas production, in barrels of oil equivalent, associated with the facility, pipeline, well pad, platform, other structure, lease, field, unit, area, body of water, or right-of-way occurring before April 1, 2006, to the total amount of oil and gas production, in barrels of oil equivalent, associated with that facility, pipeline, well pad, platform, other structure, lease, field, unit, area, body of water, or right-of-way through the end of the calendar month before commencement of the dismantlement, removal, surrender, or abandonment; a cost is not excluded under this paragraph if the dismantlement, removal, surrender, or abandonment for which the cost is incurred is undertaken for the purpose of replacing, renovating, or improving the facility, pipeline, well pad, platform, or other structure; for the purposes of this paragraph, "barrel of oil equivalent" means

(A) in the case of oil, one barrel;

(B) in the case of gas, 6,000 cubic feet;

Sec. 46.03.822. Strict liability for the release of hazardous substances.

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the exception set out in (i) of this section, the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

(2) the owner and the operator of a vessel or facility, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(3) any person who at the time of disposal of any hazardous substance owned or operated any facility or vessel at which the hazardous substances were disposed of, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(4) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by the person, other than domestic sewage, or by any other party or entity, at any facility or vessel owned or operated by another party or entity and containing hazardous substances, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(5) any person who accepts or accepted any hazardous substances, other than refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance.

Sec. 46.03.826. Definition: for AS 46.03.822 - 46.03.828.

In AS 46.03.822 - 46.03.828

(9) "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance, but excluding

(A) any release that results in exposure to persons solely within a workplace, with respect to a claim that those persons may assert against the persons' employer; and

(B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, or vessel;

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) Automatic Stay -- Exceptions. Except as to judgments entered on default or by consent or on confession, and except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after the date shown in the clerk's certificate of distribution on the judgment. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal or proceedings for review.

(b) Stay on Motion for New Trial or for Judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) Injunction Pending Appeal or Review. When an appeal is taken or review sought from an interlocutory or final judgment or order or decision granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal or the proceedings for review upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) Stay Upon Appeal or Proceedings for Review. When an appeal is taken or review sought the appellant or petitioner by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of filing the petition for review, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) Stay In Favor of the State or Agency Thereof. When an appeal is taken or review sought by the state or an officer or agency thereof, and the operation or enforcement of the judgment, order or decision is stayed, no bond, obligation or other security shall be required from the appellant or the petitioner, as the case may be.

(f) Power of Supreme Court Not Limited. The provisions in this rule do not limit any power of the supreme court or of a justice thereof to stay proceedings during the pendency of an appeal or proceedings for review, or to suspend, modify, restore or grant an injunction during the pendency of an appeal or proceedings for review, or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(g) Stay of Judgment Upon Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(Adopted by SCO 5 October 9, 1959; amended by SCO 30 effective February 1, 1961; by SCO 44 effective February 26, 1962; by SCO 258 effective November 15, 1976; and by SCO 554 effective April 4, 1983)

Note: Chapter 42 § 2 SLA 1999 enacts AS 09.19.200 which governs the remedies available in civil litigation involving conditions in correctional facilities. According to § 3 of the act, the enactment of AS 09.19.200 has the effect of amending Civil Rules 59(f), 60(b), 62, and 65 by altering the remedies available and the procedure to be used in litigation involving correctional facilities.

Rule 204. Appeal: Time—Notice—Bonds.

(a) When Taken - Appeals and Cross-Appeals.

(1) *Appeals.* The notice of appeal shall be filed within 30 days from the date shown in the clerk's certificate of distribution on the judgment appealed from, unless a shorter time for filing a notice of appeal applies as provided by Rules 216-220.

(2) *Subsequent Appeals.* If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the filing of any timely notice of appeal by any other party, or within 30 days from the date shown in the clerk's certificate of distribution on the judgment, whichever period expires last.

(3) *Motions That Terminate Time for Filing Appeals in Civil Cases.* In a civil case, the running of the time for filing an appeal is terminated by a timely motion filed in superior court pursuant to those rules of civil procedure enumerated in this section. The full time for an appeal by any party begins to run again on the date of notice, as defined in Civil Rule 58.1 (c), of any of the following orders made on timely motion:

[a] Granting or denying a motion for judgment under Civil Rule 50(b);

[b] Granting or denying a motion to amend or make additional findings of fact under Civil Rule 52 (b) whether or not an alteration of the judgment would be required if the motion is granted;

[c] Granting or denying a motion to alter or amend a judgment under Civil Rule 59;

[d] Denying a new trial under Civil Rule 59; or

[e] Granting or denying a motion for reconsideration under Civil Rule 77(k) on the date of notice as defined by Civil Rule 58.1(c) or on the date of denial of the motion pursuant to Civil Rule 77(k)(4), whichever is earlier; or

[f] Granting or denying a petition for rehearing under Appellate Rule 506 in an appeal from an administrative agency.

(4) *Motions That Terminate Time for Filing Appeals in Criminal Cases.* In a criminal case, if a timely motion for a new trial or in arrest of judgment, or a timely motion for reconsideration has been filed in the superior court, or if a motion for reduction, correction, or suspension of sentence under Criminal Rule 35 has been made within the 30-day period following the date shown in the clerk's certificate of distribution on the judgment, an appeal from a judgment may be filed within 30 days after the date of notice of the order deciding the motion. Date of notice is defined in Criminal Rule 32.3(c).

(5) Effect of Taxing of Costs and Prejudgment Interest and Awarding of Attorney's Fees.

[a] The running of the time for filing an appeal is not terminated by proceedings related to the taxing of costs pursuant to Civil Rule 79 or while awaiting calculation of prejudgment interest or proceedings related to the award of attorney's fees. However, the statement of points on appeal filed pursuant to Appellate Rule 204(e) and the designation of transcript filed pursuant to Appellate Rule 210(b)(1) may be amended by motion by an appellant or cross appellant to include the award or denial of costs and attorney's fees or prejudgment interest and pertinent portions of the electronic record. These subjects will thereafter be considered part of the appeal if covered in the brief of appellant or cross-appellant. If no appeal or cross-appeal is pending, the allowance of costs and attorney's fees or the award of prejudgment interest shall be considered a final judgment subject to separate appeal limited to the subject of costs, attorney's fees or prejudgment interest.

[b] Notwithstanding Rule 203, the pendency of an appeal shall not divest the trial court of jurisdiction to consider the matters of costs and attorney's fees pursuant to Civil Rules 79 and 82.

(6) *Premature Appeals.* If a notice of appeal is filed after the announcement of a decision but before the date shown in the clerk's certificate of distribution on the judgment, the notice of appeal shall be treated as filed on the date shown in the clerk's certificate of distribution on the judgment.

(j) *Appeal - How Taken.* A party may appeal from a final order or judgment by filing a notice of appeal with the clerk of the appellate courts. The notice of appeal must identify the party taking the appeal, the final order or judgment appealed from, and the court to which the appeal is taken. The party must file the original and one copy of the notice of appeal accompanied by the original and one copy of the documents listed below:

[1] a completed docketing statement in the form prescribed by these rules, which includes a list of the parties to the appeal;

[2] a copy of the final order or judgment from which the appeal is taken;

[3] a statement of points on appeal as required by Rule 204(e);

[4] unless the party is represented by court-appointed counsel, the party is the state or an agency thereof, or the party is a prisoner found by the court to be eligible to pay less than full fees under AS 09.19.010,

(A) the filing fee required by Administrative Rule 9(a);

(B) a motion for waiver of filing fee pursuant to Administrative Rule 9(f)(1); or

(C) a motion to appeal at public expense pursuant to Rule 209;

[5] unless the party is represented by court-appointed counsel, the party is the state, municipality, or officer or agency thereof, or the party is an employee appealing denial of compensation by the Alaska Workers' Compensation Board or denial of benefits under AS 23.20 (Employment Security Act),

[a] the cost bond or deposit required by Rule 204(c)(1);

[b] a copy of a superior court order approving the party's supersedeas bond or other security in lieu of bond or a copy of the party's motion to the superior court for approval of a supersedeas bond or other security;

[c] a motion for waiver of cost bond; or

[d] a motion to appeal at public expense pursuant to Rule 209;

[6] a designation of transcript if the party intends to have portions of the electronic record transcribed pursuant to Rule 210(b); and

[7] proof of service of the notice of appeal and all required accompanying documents, except the filing fee, on all other parties to the appeal.

A party may move for an extension of time to file the statement of points on appeal and the designation of transcript. The clerk of the appellate courts shall refuse to accept for filing any notice of appeal not conforming to this paragraph and accompanied by the items specified in [1]-[7] or a motion to extend the time for filing item [3] or [6].

(c) *Bond on Appeal.*

(1) Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal in a civil case. The bond shall be in the sum of seven hundred fifty dollars (\$750.00), unless the superior court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is

required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or such costs as the supreme court may award if the judgment is modified. If a bond on appeal in the sum of seven hundred fifty dollars (\$750.00) is given, no approval thereof is necessary. After a bond on appeal is filed, an appellee may by motion raise objection to the form or amount of the bond or to the sufficiency of the surety which shall be determined by the superior court. In lieu of filing such cost bond, the appellant may deposit in the office of the clerk of the court from which the appeal is taken a sum of money reasonably sufficient to cover such costs, the amount thereof to be fixed by the superior court.

(2) Notwithstanding subparagraph (1), a bond for costs on appeal shall not be required in an appeal from a decision of the trial court in any criminal case or any civil case where an indigent party is entitled to court-appointed counsel, and a bond shall not be required from an employee appealing from a denial of compensation by the Alaska Workers' Compensation Board or from a denial of a claim for benefits under AS 23.20 (Employment Security Act).

(d) **Supersedeas Bond.** Whenever in a civil case an appellant entitled thereto desires a stay on appeal, the appellant may present to the superior court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full, together with costs and interest, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs and interest as the supreme court may adjudge and award. 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. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the court or the state troopers or when the proceeds of such property of a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the cost of the action, costs on 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. A municipality or an officer or agent thereof desiring a stay on appeal is exempted from the requirement of posting supersedeas bond imposed by this subsection.

(e) **Statement of Points.** At the time of filing the notice of appeal, the appellant shall serve and file a concise statement of the points on which appellant intends to rely in the appeal. The appellate court will consider only points included in the statement, and points that the court can address effectively without reviewing untranscribed portions of the electronic record. On motion in the appellate court, and for cause, the statement of points may be supplemented.

(f) **Judgment Against Surety.** By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits to the jurisdiction of the superior court and irrevocably appoints the clerk of that court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the superior court prescribed may be served on the clerk of the superior court who shall forthwith mail copies to the surety if the surety's address is known.

(g) **Parties to the Appeal.** All parties to the trial court proceeding when the final order or judgment was entered are parties to the appeal. A party who files a notice of appeal, whether separately or jointly, is an appellant under these rules. All other parties are deemed to be appellees, regardless of their status in the trial court. An appellee may elect at any time not to participate in the appeal by filing and serving a notice of non-participation. The filing of a notice of non-participation shall not affect whether the party is bound by the decision on appeal.

(h) **Service of Documents.** Papers filed or served in the appeal must be served on all parties, except appellees who have elected not to participate in the action.

(i) Joint or Consolidated Appeals. If two or more parties are entitled to appeal from a judgment or order of a court and their interests are such as to make joinder practical, they may file a joint notice of appeal. Appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party.

SCO 439 effective November 15, 1980; amended by SCO 461 effective June 1, 1981; by SCO 510 effective August 30, 1982; by SCO 513 effective October 1, 1982; by SCO 554 effective April 4, 1983; by SCO 573 effective February 1, 1984; by SCO 574 effective February 1, 1984; by SCO 575 effective February 1, 1984; by SCO 726 effective December 15, 1986; SCO 794 effective March 15, 1987; by SCO 830 effective August 1, 1987; by SCO 847 effective January 15, 1988; by SCO 987 effective January 15, 1990; by SCO 995 effective January 15, 1990; by SCO 1019 effective July 15, 1990; by SCO 1069 effective July 15, 1991; by SCO 1153 effective July 15, 1994; by SCO 1155 effective July 15, 1994; by SCO 1162 effective July 15, 1994; by SCO 1238, effective July 15, 1996; by SCO 1248 effective July 15, 1996; by SCO 1272 effective July 15, 1997; by SCO 1279 effective July 31, 1997; by SCO 1284 effective January 15, 1998; and by SCO 1470 effective October 15, 2002)

Note: AS 10.06.633, as enacted by ch. 166, § 1, SLA 1988, amended Appellate Rule 204 by requiring that certain documents must be filed in the notice of appeal from an involuntary dissolution of a corporation. AS 10.06.863, as enacted by ch. 166, § 1, SLA 1988, amended Appellate Rule 204 by requiring that certain documents must be filed in the notice of appeal from a revocation of a certificate of authority of a foreign corporation to transact business in Alaska. AS 10.06.915, as enacted by ch. 166, § 1, SLA 1988, amended Appellate Rule 204 by requiring that certain documents must be filed in the notice of appeal from the failure to approve articles of incorporation and certain other administrative actions.

Docketing Statements. The court system has prepared docketing statement forms, which are available from the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, (907) 264-0612. Parties may prepare their own docketing statements instead of using the court system forms. However, such statements must include all of the information which appears on the court system forms and must follow the same numbering system. Parties should contact the Clerk of the Appellate Courts for further instructions on preparing their own docketing statements.

Note to SCO 1238: Ch. 79 § 1 SLA 1995 amends AS 09 by adding a new chapter related to prisoner litigation against the state. AS 09.19.010 prohibits the court from accepting any filing in an action governed by AS 09.19 until the filing fee required by AS 09.19.010 has been paid.

Section 17 of chapter 79 amends Appellate Rule 204(b)(4) to include the language "or the party is a prisoner whom the court finds is eligible to pay less than full fees under AS 09.19.010." Section 1 of this order is adopted for the sole reason that the legislature has mandated the amendment.

Note: In 1997 the legislature enacted AS 18.16.030(j), which specifies the procedure for appeal of an order denying a petition to bypass parental consent to an abortion. According to ch. 14, § 8 SLA 1997, AS 18.16.030(j) has the effect of amending Appellate Rules 204, 210, 212, and 213 by establishing specific time limits applicable to certain appeals and by instructing the supreme court to modify or dispense with formal requirements applicable to certain briefs. Instead of amending individual rules to implement AS 18.16.030, the supreme court has adopted a separate rule on judicial bypass appeals. See Appellate Rule 220.

Note: Ch. 77 SLA 2002 (HB 157), Section 2, adds new Chapter 26 to Title 6 of the Alaska Statutes, concerning providers of fiduciary services. According to Section 9 of the Act, AS 06.26.760(b)(2) has the effect of amending Appellate Rule 204 by postponing the deadlines for the filing of appeals to the supreme court and the court of appeals by a trust company when the Department of Community and Economic Development has taken possession of a trust company.

Rule 205. Stays Pending Appeal In Civil Cases.

In a civil case, the supreme court or a justice thereof may stay the enforcement or effect of the judgment appealed from or the proceedings in the trial court upon such terms as to bond or other matters as may be proper. A motion for a stay will normally not be considered by the supreme court unless application has previously been made to the trial court and has been denied, or has been granted on conditions other than those requested.

(SCO 439 effective November 15, 1980)

Alaska

Under current law in Alaska, a defendant is required to post a bond equal to the amount of the judgment plus appeal costs and interest. This is one of the highest appeal bond requirements in the nation. If a defendant cannot afford to post a bond in the amount required by Alaska law, the company may be forced to file for bankruptcy--which carries with it an automatic stay of a debtor's obligations to pay its creditors--in order to stop the plaintiff from taking its assets during the appeal

SB 48, Alaska's proposed appeal bond reform legislation, places a cap of the lesser of \$5 million dollars or ten percent of the defendant's net worth on the bond required for appeal to ensure that all defendants' right to appeal is protected. It is also important to note that plaintiffs are protected under the proposed reform. This legislation calls for the complete reinstatement of the full bond requirement if a preponderance of evidence shows that dissipation or diversion is taking place. In addition, the limit will help guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect.

Placing a reasonable cap on the amount required to secure an appeal is simply sound public policy. Alaska should enact SB 48 and become the 36th state to reform antiquated appeal bond laws.

For more information, please contact Kristin Armshaw, ALEC's Civil Justice Task Force Director, at 202-742-8532.

Alaska Appeal Bond Reform

The Issue:

Prior to the adoption of the American Legislative Exchange Council's (ALEC) Appeal Bond Waiver Act in 35 states across the country, all but five states required a supersedeas or appeal bond to be posted in order to secure an appeal. When these rules were created, million-and billion-dollar judgments were unheard of. Today, large judgments are becoming increasingly more common. In the states that have not reformed appeal bond statutes, the amount required to secure an appeal can be more than a defendant's net worth. Forced settlements and increased bankruptcy filings are the consequences of obsolete appeal bond statutes.

Examples of forced bankruptcies caused by excessive appeal bonds are too common. Ordered to pay a \$9.2 million libel and defamation judgment, Alton Telegraph Printing Co., an Illinois newspaper, would have had to post a bond equal to the judgment plus interest and costs. This amount far exceeded the company's net worth and Alton was forced to file for bankruptcy protection. In another case, a California-based company, Plumberex, was forced to file bankruptcy after it was handed \$2,139,109.00 judgment.

As the size of judgments have increased in major corporate civil litigation, so too has the size of judgments in litigation against individual defendants. Alabama resident, Richard V. Ford, filed for bankruptcy because he was unable to post a supersedeas bond on a \$164,802 judgment. In Hawaii, a \$753,117 judgment in a breach of contract case forced Lillian Corey into bankruptcy because she was unable to post the supersedeas bond. The right to appeal is fundamental. When the amount of money required to obtain a bond is so high that it is impossible for a defendant to pay, his basic rights are violated.

The Legislative Response:

Since 2000, 35 states have recognized the unfairness of such antiquated appeal bond statutes and enacted legislation to create a fair mechanism for securing the right to appeal. In 2006 alone, Alabama, Florida, Hawaii, and Washington State adopted legislation to reform their appeal bond rules.

To date the following states have enacted appeal bond reform: Alabama, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin. In addition, Connecticut, Maine, Massachusetts, New Hampshire and Vermont do not require a bond.

AMERICAN LEGISLATIVE EXCHANGE COUNCIL

ALEC

Alaska Should Limit the Size of Appeal Bonds

- Under current law in Alaska, a defendant is required to post a bond equal to the amount of the judgment plus appeal costs and interest—this is one of the highest appeal bond requirements in the nation.
- The proposed appeal bond cap places a cap of the lesser of \$5 million dollars or ten percent of the defendant's net worth on the bond required for appeal to ensure that all defendants' right to appeal is protected.
- Of the forty-five states that require a bond to secure an appeal, **thirty-five** with similar laws to Alaska have recognized that excessive appeal bond requirements jeopardize the integrity of the legal system and have adopted an appeal bond cap.
- In 2006 alone, Alabama, Florida, Hawaii, and Washington State adopted legislation to reform their antiquated appeal bond rules.
- Bond requirements were implemented at a time when multi-million and –billion dollar verdicts were unthinkable. In 2005 alone, nationally there were 16 jury verdicts over \$100 million, while in 1992 only 8 verdicts exceeded \$100 million.
- The risks posed by high appeal bonds are real. Numerous companies and individuals have been forced to either declare bankruptcy in order stay execution of a judgment pending appeal, or settle with plaintiffs purely because they could not afford to pay the required bond, even when they have good arguments that the verdict against them was improper.
- Plaintiffs are protected under the proposed reform. This legislation calls for the complete reinstatement of the full bond requirement if a preponderance of evidence shows that dissipation or diversion is taking place. In addition, the limit will help guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect.

American Legislative Exchange Council

ALEC

ALEC's Appeal Bond Waiver Act: Safeguarding the Right to Appeal

One of the greatest successes of the American Legislative Exchange Council's (ALEC) Disorder in the Court Project has been the adoption of its Appeal Bond Waiver Act by thirty-five states (five additional states do not require a bond to secure an appeal) in the seven years since the model reform was developed. Many different explanations have been offered for its broad appeal, but the primary reason is that at its core, this is simply commonsense legislation. In America, we are secured several fundamental rights by our legal system: the right to a trial by a jury of ones' peers, the belief that a defendant is innocent until proven guilty, and that the right to appeal a verdict is fundamental. The latter is the basis of the Appeal Bond Waiver Act.

The History of ALEC's Commitment to Bonding Fairness

The Appeal Bond Waiver Act stands as one of the cornerstone bills that comprise ALEC's Disorder in the Court legislative package. When the Project was developed in the spring of 1999, the mission was to provide state legislators with legislative remedies to combat the growing trend of regulation through litigation. This model legislation was developed and adopted by ALEC's Civil Justice Task Force out of concern that the American court system had become exposed to manipulation by private attorneys seeking to avoid the legislative process in an attempt to regulate industry and reap large financial awards in the form of attorneys' fees. In the aftermath of the tobacco Master Settlement Agreement, industry-wide litigation was of primary concern. However, the task force had the foresight to recognize that tobacco was not unique and that *any* industry or business could be a target of this new lucrative litigation machine.

The first two pieces of legislation developed by ALEC's Civil Justice Task Force to create the foundation for the Project were the Private Attorney Retention Sunshine Act and the Appeal Bond Waiver Act. The former aimed to prevent backroom government contracts with private attorneys and the latter safeguarded the fundamental right to appeal for all defendants. These bills were the first to be adopted by the task force because they were the two most basic and commonsense solutions to the most glaringly egregious abuses occurring in the legal system at that time.

Prior to the adoption of the Appeal Bond Waiver Act across the country, most states required a supersedeas ("appeal") bond to be posted in order to secure a right to appeal. When these rules were created, million-and billion-dollar judgments were unheard of. Today, these judgments are becoming increasingly more common and often defendants are unduly forced into settlement in an effort to avoid bankruptcy. Or, if a defendant cannot afford to post a bond in the amount required by law, the company may be forced to file for bankruptcy and thereby obtain an automatic stay of its obligations to pay its creditors. Either scenario amounts to overly-negative consequences of what is simply an outdated law.

The Current Landscape

Alaska is one of the few remaining states to allow antiquated appeal bond statutes to remain law, thereby placing an undue impediment to a defendant's right to appeal. Under current Alaska law, a defendant must post an appeal bond equal to the amount of the judgment plus appeal costs and interest.

Placing a reasonable cap on the amount required to secure an appeal is simply sound public policy. Opponents have argued that this is simply a protection for big business. The response to that is simple. First, this legislation protects all businesses that face a judgment so high that it could force them into bankruptcy just to secure an appeal. Second, the right to appeal should be a fundamental right for all defendants – large or small. In America, defendants' rights should not be affected by its size or profits. A company's rights should not diminish as it grows. If Bill Gates is personally sued, should he be guaranteed fewer rights because he is wealthy?

Another argument is that bankruptcy-causing verdicts have not been common in certain states. Nonetheless, any state could potentially be the next to host the next large judgment. For businesses, the lack of an appeal bond cap equates to a greater risk and less predictability in a state's civil justice system.

Alaska's Proposed Appeal Bond Waiver Act

Based on the ALEC model, Alaska's proposed appeal bond reform safeguards a defendant's right to appeal by limiting the amount of the bond required while still providing assurance that the defendant's funds would be available to satisfy the judgment after appeal. To this end, the legislation would establish a cap of the lesser of \$5 million or 10 percent of a defendant's net worth (the cap does not apply to awards resulting from injury, loss, or destruction of natural resources caused by an environmental disaster) to secure an appeal. If a defendant attempts to dissipate assets in an attempt to avoid paying a judgment, the bond requirement can be increased to an amount equal to the full amount of the judgment.

Conclusion

Realizing the unfairness of draconian supersedeas bond rules, Washington most recently became the 35th state of the 45 that required a bond to secure an appeal to enact a cap. With this proposed legislation, the Alaska legislature now has the opportunity to safeguard the right to appeal for all defendants and prevent the use of litigation to regulate industry and unnecessarily force settlement or bankruptcy.

February 08, 2007

Senator Charlie Huggins
State Capitol, Room 119
Juneau, AK 99801-1182

Senator Huggins,

The Alaska State Chamber of Commerce supports a reduction in tort related lawsuits. Too often, suits are filed not based upon merit or negligence of a company, but based on whether that company has deep pockets. The Alaska State Chamber supports SB 48, which limits the size of appeal bonds as both sides work through the court process.

As you know, current Alaska law requires a defendant to post a bond equal to the amount of the judgment plus legal appeal costs and interest. Under this arrangement, Alaska has one of the highest appeal bond requirements in the nation. SB 48 places a cap on appeal bonds equating it to the lesser of \$5 million dollars or ten percent of the defendant's net worth. This lower bond requirement ensures that Alaska businesses can continue to operate without putting the entire company's net worth into a court ordered bond.

There are forty-five states requiring cash bonds to secure an appeal. In the last few years, thirty-five of those states have adopted an appeal bond caps similar to what is proposed in SB 48. Last year alone, the states of Alabama, Florida, Hawaii and Washington adopted legislation to reform excessive and antiquated appeal bond requirements. In addition, the limit will help guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect damages. Without a cap, bankruptcy often becomes the only option for a company or business facing the heavy requirement of a net worth appeal bond.

Tort Reform has long been a priority of the Alaska State Chamber of Commerce, while this legislation falls short of complete tort reform, the State Chamber feels SB 48 is the right step in creating a better appeal process for keeping businesses whole while ensuring wronged defendants access to a solvent company.

We appreciate your thoughtful consideration of this legislation and encourage its adoption.

Yours in economic prosperity,



Wayne A. Stevens
President/CEO

**Alaska State Chamber of Commerce
2007 Position
Amend the Tort Laws and Regulations**

The Alaska State Chamber of Commerce supports amending tort laws and regulations to reduce the number of wasteful lawsuits and exorbitant settlements and awards that cause insurance rates to climb and businesses to become less competitive in Alaska.

Alaska Trucking Association, Inc.

3443 Minnesota Drive · Anchorage, Alaska 99503 · Phone (907) 276-1149 · Fax (907) 274-1946
www.aktrucks.org

February 12, 2007

State Senator Charlie Huggins
State Capitol, Room 119
Juneau, Alaska 99801

Dear Senator Huggins,

An important idea, Senate Bill 48/House Bill 103, has been introduced. We voice our strong support for this legislation, so, the right of a fair trial is preserved and potential abuse of our state judicial system is mitigated.

This proposed legislation is a practical, thoughtful approach toward guaranteeing a fair hearing for both plaintiffs and defendants; by capping the amount necessary for an appeal to \$5 million or 10% of a business' net worth, a defendant is able to participate in an appeal without causing a financial crisis.

Likewise, the plaintiff's right to secure payment, if a judgment is in their favor, is protected by the requirement of a full bond by the defendant if evidence suggests that the defendant attempts to divert assets (potentially needed to pay the plaintiff) unnecessarily.

SB 48 and HB 103 are an excellent means of both reducing frivolous lawsuits and protecting the rights of plaintiffs.

With Best Regards,



Aves D. Thompson
Executive Director

cc: ATA Board of Directors



If you got it, a truck brought it...



2/12/07

Attention: State Representative John Coghil/ State Senator Charlie Huggins

On behalf of the Alaska Restaurant & Beverage Association, I am conveying strong support for HB 103/SB 48. Bond Requirement On Appeal.

Thirty-five states have enacted similar laws which allow a defendant to appeal a judgment without fronting exorbitant costs for the appeal hearing.

Currently in Alaska, appealing a judgment is a major risk: an individual or company is, in effect, found guilty before trial by being forced to post a bond equal to the amount of the previous judgment in addition to appeal fees. This is a subversion of basic due process. Many may be forced to file for bankruptcy simply because the cost of continuing to prove innocence is too costly. Should the fundamental right to a trial cost one their entire savings and assets?

We believe that "innocent until proven guilty" is a Right that must be upheld, and is so, by keeping bond requirements at a reasonable rate. HB 103/SB48 brings common-sense to the table by capping the amount a defendant is required to post for a bond so both parties can continue, fairly, through the judicial process.

We sincerely ask for your vote of support.

Respectfully,

A handwritten signature in cursive script, appearing to read "Rogina".

Karen R. Rogina
President & CEO

Cc: Alaska Legislature

LESSMEIER & WINTERS

LAWYERS - LLC

**VINTAGE BUSINESS PARK
3000 VINTAGE BOULEVARD
SUITE 100
JUNEAU, ALASKA 99801**

**MICHAEL L. LESSMEIER
GREGORY W. LESSMEIER
SHELDON E. WINTERS**

**TELEPHONE: (907) 796-4999
FACSIMILE: (907) 796-4998
E-MAIL: lw@gdl.net**

VIA HAND DELIVERY

February 2, 2007

The Honorable Charlie Huggins
Alaska State Senate
State Capitol, Room 119
Juneau, Alaska 99801-1182

Re: Senate Bill 48

Dear Senator Huggins:

State Farm supports Senate Bill 48, setting a reasonable cap on appeal bonds. Uncapped appeal bonds make it financially difficult or impossible for parties to appeal decisions, impinging on their due process rights. At least thirty-three states have adopted caps on appeal bond requirements and we are appreciative of your efforts in seeing that Alaska does so as well. If we can provide you any information or assistance, please let me know.

Sincerely,



Sheldon E. Winters
Lobbyist for State Farm Insurance Companies

SEW/caf
Huggins SB48.wpd

2/13/07

**State Capitol, Room 119
Juneau, AK 99801-1182**

**To: The Honorable Senator Huggins
The Honorable Representative Coghill
cc: Alaska Legislature**

Dear Senator Huggins and Representative Coghill,

I am writing today to express strong support for House Bill 103 & Senate Bill 48.

This proposed legislation caps the amount a defendant is required to post for an appeal bond so both parties can continue, fairly, through the judicial process.

Under current Alaska law, a defendant must post an appeal bond equaling the disputed damage claim in addition to court fees. That makes appeals, for many, impossible. Companies may have to file for bankruptcy just to participate in a trial; basic due process is at risk because the cost of continuing to prove innocence is too great.

An individual is still "innocent until proven guilty," and that charges are only valid after a careful process of adjudication takes place. I ask that the Right to a trial be preserved by keeping bond requirements at a reasonable level so appeals can be heard.

Thank you for your time.

Best Regards,



**Kerry Gronewold
General contractor
PO Box 70268
Fairbanks, AK 99707**

State Capitol, Room 214
Juneau, AK 99801-1182

2/12/07

Senator Huggins ✓
Representative Coghill
Alaska State Legislature

Dear Senator Huggins & Representative Coghill:

My family and I would like to thank you both for sponsoring SB 48 & HB 103, and encourage the legislature to expedite its passage into law.

There is a serious problem with Alaska's law when homegrown businesses and entrepreneurs are in danger of petty lawsuits blowing out of proportion. That is the current situation: someone (a defendant) who desires the opportunity to appeal a ruling is required to post a bond in the full sum of the judgment with extra legal fees tacked on.

This appears to be a "cart before the horse" scenario where a defendant is literally served an additional judgment before an actual trial occurs.

As an Alaskan business owner I take pride in running an efficient, legal, fair, and safe operation. I never want to find myself in the position of defending a business practice by an opportunistic plaintiff seeking a quick award that may be unwarranted (as has happened all over the nation). Everybody deserves a full and fair trial.

Both these bills can help prevent many of the frivolous lawsuits that clog-up our courts and hurt our economy.

Thank you, again.

Sincerely,


Jamie Luncesford

General Manager, Squared Away Carpentry



Alaska

March 12, 2007

**The Honorable Charlie Huggins
Alaska State Senate
State Capitol Building
Juneau, Alaska 99811-1182**

RE: Senate Bill 48

Dear Senator Huggins,

On behalf of the Alaska Chapter of the National Federation of Independent Business, I wish to express our support for Senate Bill 48. The Alaska Chapter of the National Federation of Independent Business has 2,500 members, making it the largest small-business advocacy group in the state.

Upon completion of an action in the trial courts, Alaska requires a defendant to post an appeal bond in order to stay an adverse judgment while they appeal. Alaska Courts have the authority to require the amount of the bond equal to or in excess of the size of the judgment. However, given the size of damage awards, 35 states have reconsidered their appeal bond cap requirements and have passed legislation that limits the amount of the appeal bond that the defendant must post to stay a judgment on appeal.

The appeal bond cap, given the escalation of damages, will ensure a defendant's due process right to an appeal while also protecting the financial interests of both the plaintiff and defendant throughout the course of the appeal. The legislation capping the amount of the appeal bond does not change the substantive law that guides the ultimate resolution of any litigation. Courts retain the authority to increase the bond requirement if it is shown that a defendant is dissipating his or her assets to avoid judgment.

The risks posed by high appeal bonds are real. Numerous companies and individuals have been forced to either declare bankruptcy in order to stay execution of a judgment pending appeal, or settle with plaintiffs purely because they could not afford to pay the required bond, even when they have good arguments that the verdict against them was improper. I have enclosed examples of appeal bond-related bankruptcies, including 3 Alaskan examples.

Senator Charlie Huggins
March 12, 2007
Page 2 of 2

Senate Bill 48 is based on model legislation developed by the American Legislative Exchange Council. It is a fair response to the adverse affects of the ever-growing litigious nature of our society as it assures the right of appeal and protects the interest of a plaintiff.

Sincerely yours,

A handwritten signature in black ink that reads "DENNY". The signature is stylized with a large, sweeping initial "D" and the name "DENNY" written in a cursive-like font.

Dennis L. DeWitt
Alaska State Director
National Federation of Independent Business

Enclosure

cc: Senator Hollis French, Chair, Judiciary Committee



Alaska

Examples of Appeal Bond-Related Bankruptcies

To date, 35 states have recognized the possibility that a large appeal bond could force a defendant into bankruptcy. 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.

The following are some examples of situations in which defendants could not post appeal bonds and were forced into bankruptcy:

- The Valdez Fisheries Development Association (“VFDA”), a non-profit corporation operating a fish hatchery in Valdez, was faced with a \$2.1 million judgment from a failed real estate transaction. It sought to stay the judgment pending appeal, but the court denied the stay, despite Alaska’s provision allowing the state court to set the appeal bond at a lower level. VFDA was therefore forced into bankruptcy. The creditor argued that the bankruptcy filing was in bad faith, but the bankruptcy court disagreed, stating “VFDA has pursued every possible option in lieu of bankruptcy. It has attempted to obtain a waiver of the bond requirements and limitations on execution in state court on many occasions without success.”¹
- Nome Commercial Co. and two individuals declared bankruptcy after two judgments totaling \$1.546 million against them. The bankruptcy court noted that there was “uncontradicted evidence that the [debtors lacked] the ability to post a supersedeas bond,”² which would have forced “the demise of their businesses” while the cases were pending appeal before the Alaska Supreme Court.
- Askinuk Corp., a Native village corporation whose shareholders were several hundred Native Alaskans and their descendants, declared bankruptcy when it could not obtain a bond on a \$231,000 judgment. Due to the size of the judgment and corporation’s lack of liquidity, the court wrote that “Askinuk was in no position to rely on Rule 204(d),”³ which grants courts the discretion to reduce a required appeal bond.
- The Alton Telegraph Printing Co., an Illinois newspaper that had been in business for over 100 years, was ordered to pay a \$9.2 million libel and defamation judgment. Under Illinois law, Alton would have had to post a bond equal to the judgment plus interest and costs, which far exceeded the company’s entire net worth. In order to avoid the forced

¹ In re Valdez Fisheries Development Ass’n, 5 A.B.R. 406 (Bankr. D. Alaska 1998).

² In re Nome Commercial Co., 4 A.B.R. 358 (Bankr. D. Alaska 1996).

³ In re Askinuk Corp., 3 A.B.R. 251 (Bankr. D. Alaska 1993).

NFIB

Examples of Appeal Bond-Related Bankruptcies

Page 2 of 3

sale and liquidation of its businesses to satisfy the judgment during the appeal, Alton had to file for bankruptcy protection. The court recognized that declaring bankruptcy was necessary just so the company could "preserve its status as an ongoing concern and protect its employees and its creditors while the claims against it are being litigated."⁴

- In Kansas, a jury returned a \$2.6 million verdict against Midland Fumigant, Inc., and an individual defendant, Donald Fox. Although Midland posted an appeal bond and obtained a stay, Mr. Fox could not afford to post the required bond, and the plaintiff began efforts to collect on its judgment. Mr. Fox then was forced to file for bankruptcy so he could stay the execution of the judgment during his appeal.⁵
- After a Texas jury returned an \$11.12 billion verdict against Texaco for tortious interference of a contract, the court required the defendant to post an appeal bond in excess of the full amount of the verdict in order to stay execution of the judgment during the appeal. Because the world's total surety bond capacity was less than \$1.5 billion at the time, Texaco could not post the bond, and the company filed for bankruptcy to prevent Pennzoil from perfecting judgment liens on its property.⁶
- In Alabama, Richard V. Ford was forced into bankruptcy when he could not post the supersedeas bond on a \$164,802 judgment.⁷
- In Hawaii, a \$753,117 judgment in a breach of contract case forced Lillian Corey into bankruptcy because she could not post a supersedeas bond.⁸
- In Texas, William and Ruby McLaury were forced into bankruptcy when they could not post the supersedeas bond on a \$512,243 judgment.⁹
- In California, a company unable to post a bond on a \$2 million judgment was forced into bankruptcy. The court in that case noted that "[w]hile the timing of the filing is a factor to be considered in determining bad faith, the evidence supports a finding that Plumberex, faced with a \$2,139,109 judgment and the real threat of being driven out of

⁴ In re Alton Telegraph Printing Co., 14 B.R. 238 (Bankr. S.D. Ill. 1981).

⁵ In re Fox, 232 B.R. 229 (Bankr. D. Kan. 1997).

⁶ Kirk v. Texaco, 82 B.R. 678 (S.D.N.Y. 1988); Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 4-5 (1987).

⁷ In re Ford, 74 B.R. 934 (Bankr. S.D. Ala. 1987).

⁸ In re Corey, 46 B.R. 31 (Bankr. D. Haw. 1984).

⁹ In re McLaury, 25 B.R. 30 (Bankr. N.D. Tex. 1982).

business, filed bankruptcy as a last resort. It is undisputed that Plumberex sought chapter 11 protection because it was unable to either pay Truebro's judgment or obtain a *supersedeas* bond."¹⁰

In addition, even when companies are not forced into bankruptcy, they can be forced by large appeal bond requirements to enter into highly unfavorable settlements to avoid bankruptcy. For example, the Loewen Group was forced to settle with plaintiffs after a Mississippi jury returned a verdict of \$500 million against the company. The appeal bond that the company would have had to post in order to stay the execution of the judgment was \$625 million, the approximate net worth of the company. To avoid filing for bankruptcy protection, the company settled with the plaintiffs for \$175 million.¹¹

Finally, there appear to be limits on the size of bonds that can be purchased. In Alaska, Exxon was initially required to post a \$5 billion appeal bond to stay the enforcement of the judgment in the Exxon Valdez case, but the entire world bond market was too small to back a bond of that magnitude. The court eventually decided that an alternative bonding arrangement would be sufficient, because it recognized that such a large bond "is not available to anyone, not even a company with the creditworthiness of Exxon."¹²

¹⁰ In re Plumberex Specialty Products, Inc., 311 B.R. 551 (Bankr. C.D. Cal. 2004).

¹¹ Funeral Chain Settles, Avoiding a Big Bill. N.Y. Times, Jan. 30, 1996, at D5.

¹² Exxon Need Not Post a \$5 Billion Bond. National Law Journal, Aug. 26, 1996, at B1.

LAW OFFICES

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March 16, 2007

The Honorable Charlie Huggins
Alaska State Legislature
State Capitol, Room 119
Juneau, AK 99801-1182

RE: SB 48 (An Act gutting the "Bond on Appeal" requirements of Alaska R. Civ. P. 62 and Appellate Rules 204 and 205)

Dear Senator Huggins:

I am very anxious to know at whose suggestion the legislation was introduced. Please indulge me while I hit some of the public policy "high points" implicated by the proposed legislation. In all due respect, I hope that you will consider withdrawing the bill.

A solution in search of a problem: we have a fair system that works.

No one needs to worry about the appellate bonding requirement until they have lost at trial. The system mandated by our Constitution and broadly thought to be the fairest system in human experience has defined the person needing the bond to be the loser. However, our system allows this responsible party to go a step further and appeal any mistake they perceive damaged them at trial. But the *quid pro quo* for using an expensive judicial system beyond the trial stage, is nothing more than insuring that the appealing party's responsibility will be promptly paid if and when their loss is affirmed on appeal. It is a fair system that discourages frivolous appeals and demands responsibility for those deemed responsible at the end of the appellate process. In addition to every day citizens, I am sure the State of Alaska itself and all of your major business constituents want to keep it that way. See the next to the last heading, below.

The fourth paragraph of the sponsor statement suggests that high appeal bonds pose real risks and argues that "[n]umerous companies and individuals have been forced either to declare bankruptcy in order to stay execution of a judgment pending appeal or settle with plaintiffs purely because they could not afford to pay the required bond." No authority for this generality is offered, and I seriously doubt its accuracy. Indeed, it would be useful to the legislative and public debate over this bill to give specific examples of defendants in Alaska who were forced to declare bankruptcy or enter unreasonable settlements. I suspect that these examples would turn out to be poster children for opposition to, not support of, this legislation.

As you probably know, more than 97% of all civil cases settle prior to trial. Alaska's experience in this regard tracks the national experience very closely. It is true that many of the three percent of the remaining cases that actually go through trial represent legitimate, heartfelt, and well-substantiated legal and factual disputes. But, it is equally true that much of that three percent are made up of cases that exploit the publicly funded judicial system for the purpose of putting off personal responsibility for wrong doing. Defendants in many of these cases cling to meritless defenses, and refuse to engage in reasonable settlement discussions. Your bill simply rewards those in this latter category. It undermines the responsibility of defendants in legitimate cases and keeps deserving parties from funds that a jury of their peers has determined they are entitled to.

Reinstatement of the full bond requirement: an empty remedy.

After gutting the current bonding requirements, Section 1 of the bill offers an illusory olive branch:

However, if an appellee proves by a preponderance of the evidence that an appellant whose bond has been limited is dissipating assets outside of the ordinary course of business to avoid payment of a judgment, the court may require the appellant to post the bond in an amount up to the full amount of the judgment.

Having fought a meritorious claim for years, the winner must somehow figure out whether the loser is (a) dissipating assets, (b) outside the ordinary course of business (whatever that means). The winner, having prevailed at the trial court level, is apparently expected to do this even though discovery into such areas traditionally ends with the trial court litigation and, even at that level, rarely allows inquiry into the defendant's assets. And, then, if the winner at trial is lucky enough to actually get information about asset dissipation, they get to initiate a brand new lawsuit taking years itself (with a probable resolution date after the appeal in question), so they can prove, once again by a preponderance, that they have been done wrong, not only in the underlying case, but as the loser's appeal advances. And if they somehow win, "the court may" or may not help them.

It is a mockery of reality to suggest that this provision of the bill does anything for anyone.

Why the "environmental disaster" exception?

The provision of the bill exempting environmental disasters as being, apparently, a category of activity so heinous as to require a full bond, begs the question of what other kinds of conduct is equally bad, or worse. What if a foreign oil company costs the State of Alaska hundreds of millions of dollars by turning a blind eye to its responsibility to monitor corrosion in its oil pipelines? What if a hospital cannot open until months or years after the projected date, or cannot deliver the services it was designed to deliver, because of shoddy construction? What if plaintiff's damages resulted from the illegal sale of alcohol to minors by a notorious bar? What if a family was mauled by some drunk driver being

defended by a major insurance company (or not)? What if a meth lab explodes in a neighborhood you represent damaging those in its immediate vicinity? What if some careless air taxi operator takes off without fuel and crashes into a school playground? Why in the world, having been determined to be responsible by a jury, should defendants behind any of these examples be allowed to dissipate their assets, hide their assets, or spend their assets while they appeal? It is simply wrong.

The State of Alaska, your responsible business constituents, and ordinary Alaskans are not likely to support this bill.

The State of Alaska, predictably, locks horns with the titans of industry. These are not usually small claims cases. The State of Alaska builds docks, ships, airports, etc., and it rarely does it with its own labor. When some careless contractor has done the state wrong, I am sure the state would like to know that it will be paid what it is owed at the end of the appellate process, instead of being left to go on some goose chase for assets that have been dissipated during the appeal.

Big businesses in Alaska engage in litigation with each other all the time. They, too, expect that the end of the litigation process will result in their just claims being paid, not the beginning of an often futile search for assets that have somehow managed to disappear during the long appellate process.

And, then, there is the more standard Alaskan. If someone has sunk their last nickel into a family home that blows down in the first windstorm, they, too, want justice at the end of the process. Bonding at the beginning of the appellate process for the full amount of the judgment is the only way any of these interests will be fairly served. It is the only way to keep the appellate process from being used as a shield to personal responsibility by wrongdoers. However this might be done "outside", Alaska should not dumb down its justice system to match the inadequacies expressed in the schemes adopted by other states.

In closing.

I have only met you a couple of times, and I hope that you do not take offense at my frank description of the impact of this proposed legislation. I have always been a big fan of candor and I did not want to "sugar coat it." I would be than pleased to speak to you in detail about this bill and why it is a bad idea for Alaska. I, again, respectfully request that you consider withdrawing the legislation.

Yours very truly,

LAW OFFICES
MICHAEL J. SCHNEIDER, P.C.


Michael J. Schneider

cc: Senate Judiciary Committee

LAW OFFICES
MICHAEL J. SCHNEIDER, P.C.
880 "N" STREET, SUITE 202
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TELEPHONE (907) 277-9306
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FACSIMILE COVER SHEET

TO:	The Honorable Hollis French Alaska State Legislature/Senate Judiciary Committee
FAX:	(907) 485-8595

DATE: March 16, 2007

FROM: Michael J. Schneider

RE: SB 48

COMMENTS: Please see attached letter of this date.

TOTAL NO. OF PAGES (INCLUDING COVER SHEET): 4

March 15, 2007

Senator Hollis French, Chair
Senate Judiciary Committee
State Capitol
Juneau, AK 99801-1182

Dear Senator French:

Flint Hills Resources Alaska, LLC, supports a reduction in tort related lawsuits, especially those that are frivolous and without merit. Along with the Alaska State Chamber of Commerce and others in Alaska, we support SB 48, which limits the size of appeal bonds as parties to litigation work through the court process.

Current Alaska law requires a defendant to post a bond equal to the amount of the judgment plus legal appeal costs and interest. With this arrangement, Alaska has one of the highest appeal bond requirements in the nation. SB 48 places a cap on appeal bonds equal to the lesser of \$5 million dollars or ten percent of the defendant's net worth. The lower bond requirement will allow Alaska businesses to continue operation without putting the entire company's net worth into a court ordered bond.

Of the forty-five states requiring cash bonds to secure an appeal, thirty-five of those states have adopted appeal bond caps similar to those proposed in SB 48 in the last few years. Last year Alabama, Florida, Hawaii and Washington adopted legislation to reform excessive and antiquated appeal bond requirements. An advantage of such legislation is that it will help guarantee plaintiffs who obtain judgments will have solvent defendants from whom to collect damages. Without a cap, bankruptcy often becomes the only option for a company or business facing the excessive requirement of a net worth appeal bond.

Flint Hills Resources Alaska strongly feels that SB 48 is an important step in creating a better appeal process for keeping businesses whole while ensuring wronged defendants access to a solvent company. We appreciate your thoughtful consideration of SB 48 and we strongly encourage its adoption.

Sincerely,

Jeffrey J. Cook

Jeffrey J. Cook, Director External Affairs
Flint Hills Resources Alaska, LLC
