MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
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ROLL NUMBER

DESCRIPTION

2273

2005 SENATE JUDICIARY

SB 2273

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2273

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 2, 2005

Tape Number	Side A	Side B	Meter #
1	X		0.0 - 2700
2	x		1048 - End
Committee Clerk Signature	Moira L Dalberg		

Minutes: Relating to bond requirements in litigation date, application & emergency.

Senator John (Jack) T. Traynor, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Sen. Nething, Dist 12, This bill relates to the amount of a bond after a judgment has been rendered to $25 Million. This bill was generated by judgments that had been rendered in tobacco use cases, in other states. These bonds were excessive. These funds are used in water funds, school districts and other areas. The money would be taken from this to pay these bonds. We need to have this in legislation and not only up to the courts.

John Olson - Keith A. Teel Partner, Covington & Burling, Washington, DC, representing Philip Morris USA and Altria Corp. Services, Ins. (meter 263)

Sen. Traynor stated that this is for a "bond" amount to appeal a lawsuit? Yes.

Senator Triplett asked if there were any cases pending in ND that this would affect? No

Keith Teel - Keith A. Teel Partner, Covington & Burling, Washington, DC, representing Philip Morris USA and Altria Corp. Services, Ins. (meter 263) Att. #1 and map Att. #2a and 2b

Sen. Traynor questioned if it was a cash bon? Typically it is but some are assureties to by an appeal bond. This goes into the big world bond companies-like Swiss Banks.

Senator Triplett discussed how bonds used to be because a person could "jump on their horse and leave town". Now the world is a small place. Is this due to "global" companies that can still do this? Sited a case of a wine company (meter 1447) who had never set foot on this country and ran in to a lawsuit. Generally what happens when a company gets hit with one of these, they have employees, distributors, shareholders, they can not just pack up in the night and leave. They need to deal with getting the verdict on appeal.

Senator Triplett stated that we like to look at the states around us. (meter 1550) Discussion on Montana's "Judicial Rule". Everything goes through the court. ND has a separation of powers.

David Straley - Greater ND Chamber of Commerce. (meter 1769) read his testimony Att. #3.

Eric Ozmensted - Pres. ND Farm Credit Bureau (meter 1863) on behalf of 27,500 member families. Agri Businesses have become the target of class action law suits based on newer expansive theories of product liability. These action can produce eye popping verdicts that present bonding problems for even the largest of Corporations. We hate to see a company go under only because they can not post the bond. Then no one gets paid.

Bill Butcher, State Director of Independent Business (meter 2062) NFIB I represent nearly 3,000 small business owner locally. We take our issues through a ballet process. We have had this issue and 93% of our people believe that there should be cap.

ND Petroleum Marketers Assoc. and the Retail Assoc. - gave testimony Att. #4

Testimony in Opposition of the Bill:

Paula J. Grosinger - Executive Dir. ND Trial Lawyers Assoc. Submitted Testimony - Att. #5

Senator John (Jack) T. Traynor, Chairman closed the Hearing

Senator John (Jack) T. Traynor, Chairman reopened the Hearing

Sen. Trenbeath made the motion to Do Pass and **Senator Syverson** seconded the motion. All were in favor, motion passes.

Carrier: **Sen. Traynor**

Senator John (Jack) T. Traynor, Chairman closed the Hearing

REPORT OF STANDING COMMITTEE

SB 2273: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2273 was placed on the Eleventh order on the calendar.

2005 HOUSE JUDICIARY

SB 2273

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2273

House Judiciary Committee

❑ Conference Committee

Hearing Date 3/8/05

Tape Number	Side A	Side B	Meter #
1	xx		2.2-42.8
2	xx		39.2-end
2		xx	0-5.9
Committee Clerk Signature	Dawn Penrose		

Minutes: 12 members present, 2 members absent (Reps. Charging & Onstad).

Chairman DeKrey: We will open the hearing on SB 2273.

Sen. Dave Nething: Sponsor, explained bill. It is not a personal interest, more of a theory interest. In the past, we have seen in other states, judgments that have been entered and appeals taken and at least in my opinion, an exorbitant bond is being set. That bond being set for high, that it interferes with the other cash obligations that the defendant may have in their regular course of business. I reflected that into our tobacco settlement money, that if the company that provides the funding for that would have such an obligation that it would impact the flow of our tobacco money, I would think that would really be a detriment to us. I know there are a lot of other reasons, than just that one and you're going to hear about that from the other folks here. When I was approached then with the idea of providing a $25 million dollar cap and after discussion and looking at the impact of that and how it would work, it seemed to me to be the kind of bill that would deserve sponsorship. So that's why I introduced it.

Chairman DeKrey: Thank you. Further testimony in support of SB 2273.

John Olson, Altria: I represent Altrea, which is an umbrella organization for Kraft Foods and Philip Morris, USA. We're encouraging you to support this bill for a number of reasons that will be explained more in detail by the man I'll introduce after a couple of comments. This is not a tobacco bill, this is not just something that protects tobacco companies. It's a bill that protects and gives due process to any company in this country that was on the end of a class action lawsuit. That's basically what we're talking about here; is to give due process to those companies having the right to appeal a large judgment. You will notice in the bill, it sets the amount of the appellate bond to $25 million dollars as a cap. We probably don't have hardly any judgments in ND at that amount of money, but the potential is there. Another person will be able to address your questions about that. The second feature of the bill, however, is that it protects the plaintiff. This is not a bill that would allow defendants to escape any kind of liability. The plaintiffs are protected and if there is an appeal and it is determined that the company is dissipating its assets or trying to avoid collection of a judgment, that might be upheld on appeal, then the protections are there to increase the amount of bond. Let me address one other thing, that is what Sen. Nething referred to, there was a case in Illinois several years ago, where there was a huge judgment, $12 billion dollars against Philip Morris on a particular case. The trial judge in that case set the amount of the bond at the amount of the judgment, $12 billion dollars. There is no way that Philip Morris could have appealed that, so what happened in that case, is that the Attorneys General, who represented the states that participated in the master settlement agreement all intervened to try and get that appeal bond reduced because of the potential impact on the master settlement agreement funds that were going to those states. You might be

interested in knowing that the amount of money that ND will receive in the next biennium, is projected at $42 million dollars as a result of those settlement agreements that are settled now. So that's why it's important in that respect, but obviously Altrea has other company interests that are looking down the road. There are other companies that you will look at and the research memos from news media to other companies involved in all kinds of different businesses, that this is important too. That's why you'll hear from representatives of our business community that support the bill.

Representative Bernstein: What is the definition of supersedeas.

John Olson: I believe that is a term that applies to the appellate process and the amount of cash bond that a potential defendant needs to post.

Chairman DeKrey: It's Latin, you shall desist a writ or bond, suspend a judgment creditor's power to levy execution pending appeal.

John Olson: That's exactly what we want.

Representative Kretschmar: To your knowledge, what is the current situation in ND, what the courts set as an appeal bond.

John Olson: I believe those bonds often times are set in the amount of the judgment, because they're smaller bonds and I think often times they are set at a minimal amount. I think it all depends on the kind of judgment, the amount of the judgment and the situation of the defendant. I don't think there's any really uniform process that exists on money judgment appeals.

Representative Koppelman: Could you walk us through how this process works and how these bonds are used, how they're posted, what the court does, what the parties to a case do, etc.

John Olson: I don't handle a lot of appeals where bonds are really involved in this latitude because these are money judgments. I've been involved in a lot of appeals where defendants appeal and post a bond for costs of the appeal. These bonds are posted to protect the plaintiff for recovery, future recovery of the judgment. So what would happen upon appeals, the defendant would get the judgment against it, a monetary judgment, and if it invoked its right to appeal, it needs to post a bond. The trial court sets that bond. I suppose that the bond could be reviewed by the Supreme Court on the appeal, but basically it is the trial court that sets that bond. There is no limit, there is no number of criteria that are looked at under the statute, or under the court rules, that would determine that. I suspect the court would look at the defendant, the amount of the judgment and make a decision accordingly. Of course, the plaintiff could weigh in on that, and make its arguments known to the court, too.

Representative Koppelman: If that amount is too high, theoretically we are pricing some people out of their access to the courts.

John Olson: That's exactly the point with this bill, to allow them due process to appeal. A lot of these major companies get these big judgments against them, and those appeals resolve in favor of the defendant. Those judgments are substantially reduced or even sometimes eliminated. But in order for them to get to the higher court, to get their day in court, they have to post that exorbitant bond. That's the Illinois example of what happened, and that's why everyone came to the aid of Philip Morris in that case, because everybody had such an interest in it. This applies to a lot of other companies as well.

Representative Klemin: Just to make it clear, would you agree that the purpose of the bond is to stay execution on the judgment, pending appeal.

John Olson: Yes.

Representative Klemin: So if the judgment creditor is not executing or levying on anything, there really isn't even any reason for the bond to start with. The party, who is appealing, can go to the district court anytime, if there is an execution that's been issued to request bond.

John Olson: The party that's appealing can.

Representative Klemin: So if there's no execution you don't need the bond. It's not routinely required to post.

John Olson: That's correct. That would be where my most familiarity is with cases that do not have money judgments. You're just posting a bond to pay the costs.

Representative Klemin: I'm not sure you even have to do that anymore. I think they changed that rule. But that's a different type of bond, $250 bond.

John Olson: Yes.

Representative Klemin: If nobody is executing on the judgment, there's no need for the bond and if somebody does execute on the judgment, at that point, whenever that may occur, that's when the party that is appealing would apply for a stay of execution and would have to post this bond.

John Olson: I assume you're technically correct. But if there is no stay of execution, then a bond is required in order to effect that appeal.

Representative Klemin: A supersedeas bond is required on appeal if there's no stay of execution.

John Olson: I'll let Mr. Teel speak to that, but I think that's the entire issue. In order to effectuate your right to appeal, you are required to post a bond. I believe you are required to do that even in ND.

Representative Klemin: Only to stay an execution.

John Olson: Whether to stay an execution or for whatever reason, it is still a bond.

Representative Klemin: And the other thing, just for the information of the committee, the rule does say, Rule 62, which is the rules of civil procedure, the bond has to be of such sum as the court shall desire, with at least two sureties.

Representative Zaiser: From your point of view, what you might know, what's been the largest supersedeas bond in the state of ND, how does that relate to the $25 million dollar number.

John Olson: I don't know. I haven't done a lot of research on what bonds have been imposed by trial courts for appeals, those monetary judgments.

Representative Zaiser: Then do you think that this would be clearly high enough to address all of the issues that might arise.

John Olson: I think that's a good question. What you'll hear from Mr. Teel, is what has happened nationally, and what states have done with this issue. Certainly, this $25 million dollars is going to encompass any known judgments or any potential judgments that we know of right now in ND; but the point is that class action lawsuits, sometimes involve form shopping. People go to those states where they think they can get the best bang for the buck, so to speak and if class action plaintiffs think that they can come to ND, and get this kind of remedy in place, that

may make ND something that we need to look at and address for the protection of companies and giving them due process on appeal.

Representative Kretschmar: To your knowledge, are these types of bonds available for purchase through a bonding company, or do you have to put up the cash.

John Olson: That also is a good question, I'll let Mr. Teel address that. There is just so much bonding availability in the world. He's got the figures on that and so some of these bonds, that have been set like in Illinois, exceed the bonding capacity, I believe, that's available to these bonding companies.

Chairman DeKrey: Thank you. Further testimony in support.

Keith Teel, Altria: Support (see written testimony). Appeal bonds have been around for a long time. Where the word supersedeas came from, I don't know, but I wish it wasn't there, because everybody I know stumbles over it. It's more commonly referred to as an appeal bond today. An appeal bond is an amount of money that generally you are required to post when you lose a judgment and you want to take that judgment up on appeal. In every state, obviously on most judgments, there's a right to appeal them. But in order to appeal them, and protect your assets while you appeal, you usually have to post an appeal bond. It's usually specified in statute or court order and it typically it is, in almost all states, the amount of the judgment. That is sometimes specified in the Rule or in statute, in other states, and this is one of them, it's left to the discretion of the courts. ND decisions were reported about appeal bonds, but those that are suggested the discretion, it is exercised and that this is sort of a general principle that I think most courts adhere to, which is that the appeal bond shouldn't be used to either bankrupt the defendant or to prevent you from being able to appeal. So you do see situations where, I know of one case

in the state, where there was about a $70,000 judgment and the bond that was required was $40,000, for example. ND, as of right now, has a discretionary system; but ND has never seen, and we certainly have not been able to find this decision if it exists, is what I would call one of these mega-judgments; hundreds of million or billions of dollars. That is what caused my client to become concerned about this. Appeal bonds are an old device, they've been around for a long time. Think of Abraham Lincoln practicing law and wins a judgment and the defendant could literally get on his horse and ride out of town. That's how old these things are, they've been around for a long time. They've been around before the advent of two very important developments in the law, one of those are class action suits. Class actions didn't exist when these things came about. Also the expansion of punitive damages. Punitive damages have existed in the country, since really the founding of the republic. But when you go back and look at some of the very old decisions on awarding punitive damages, in the 1790's, you will find that a defendant had $2 of punitive damages assessed against him. I suppose $2 was a lot of money then, so maybe it's more than a slap on the wrist, but you certainly didn't have what you see now, which are these class actions with punitive damages piled on top, resulting in mega-judgments. As an example, Philip Morris, after the signing of the tobacco settlement agreement, all of the companies that signed the agreement had a judgment done in Florida against them in a class action of $145 billion dollars and it was all punitive damages. The judge did kind of a strange thing when he put the case together, how it was going to be tried. A $145 billion dollars was the verdict, the bonding requirement in FL up to that time, was 125% of the judgment, so the appeal bond that was required was $181 billion dollars. You cannot go out and purchase that. You can't go out and purchase $5 billion dollars. Exxon found that out in dealing with the Exxon

Valdez situation in Alaska. The way you have to do it, if you're getting judgments of that magnitude, is that you have to come up with the cash and put it in a bank. There are amazing things that happen with that. There was an article just two or three days ago, down in Illinois, which is where Philip Morris had a case, called the Price case, that Mr. Olson referred to. There was a $10.1 billion dollar judgment. Ultimately Philip Morris was directed to post the bond of $7 billion dollars, which has been sitting in an interest bearing account, and the interest goes to the county. The reason that there was an article in the paper, was because the county just paid off some bonds on its courthouse. There's lots of people interested in the money in these things, but there are strange things that go on. We became worried about this issue, and about the potential impact it would have both on the ability to appeal and the ability to meet obligations under the state master settlement agreement, when we were dealing in 2000, with that case in Florida. The problem is that there are really two ways to get a stay of litigation. One is to post an appeal bond under state law, and that is the preferred way. The other way is to declare bankruptcy, because then you can take advantage of the stay in bankruptcy that is available under federal bankruptcy laws. That is obviously a lousy choice to have to make. The Florida legislature thought that was a lousy choice to even dance around with. That case was in trial for about a year, there were reports coming out that it was going to be one of these mega-judgments. The FL legislature took a look at about three weeks before the verdict came in, the FL legislature was the first state to deal with this issue. It adopted a $100 million dollar maximum appeal bond. Now it applied only to the punitive damages portion of the judgment in that case, because that was all that was at trial at that point, the punitive damages in that case. The verdict comes down, and instead of having to post $181 billion dollars, or instead of having to declare bankruptcy, the companies

posted a $100 million dollars. If they had had to declare bankruptcy, the FL legislature had opinions from NY bankruptcy counsel that said there's a very good chance the payments under the state tobacco settlement agreement would disappear at least while the company was in bankruptcy. Obviously they didn't think that was a good idea and the FL legislature limited the bond. Since then and this is attached to the testimony that I passed out, it's also the map that you have in front of you. Since then, 32 states in total, including Florida, have now acted in this area. The bonds that they have adopted have ranged from, in Idaho did $1 million, but otherwise they have all been from $25 million to $150 million dollars. There has been discussion in some states, of shouldn't it be a lower number, this would help the small businessman who gets a $50,000 judgment. The answer is, of course, that these numbers should be there for the truly catastrophic situation. Having said that, I should also tell you, on the last page of my testimony, there are six jurisdictions in this country that don't even require an appeal bond. So the notion that there's nothing sacrosanct about posting an appeal bond is really undercut by those six jurisdictions. There they made a judgment that what matters more is the right of people, who are involved in the judicial process, to get to an appeal and they just eliminated the appeal bond entirely in those states. You put it together, there are now 38 jurisdictions in this country, that have in one way or another limited the appeals bonds. About 21 of the states, of the 32 states that have passed something, have had a bill like this before you today, that applies to all defendants in all kinds of cases. The other 11 states have passed legislation that was only limited to signatories to the tobacco master settlement agreement. In those states, it was a judgment that they really wanted to make sure that nothing imperiled those funds. Obviously, for the people I represent, at least on the Philip Morris, USA side, that works. But we think this is a principle

that makes sense more broadly. There are other companies that do get hit with these kinds of judgments. Last year, Exxon had a judgment in the state of Alabama, for $11.8 billion dollars. So companies of all kinds can get these judgments. The states have allowed limited bonds, they haven't been called on very much. Every state that has passed these things, has been careful not to change substantive law. What I mean by that, is this bill does not in this state, or in any other state where these have passed, reduce the likelihood that a plaintiff can win a judgment, they don't let the defendant off the hook for the judgment; all they do it let a defendant post whatever that maximum bond is and get to the appeal. If you lose at the appeal, all bets are off, but as Mr. Olson said, the pattern particularly in class actions, and punitive damages, is one where you do see a lot of reversals. That case I mentioned against the tobacco companies in FL in the year 2000, $145 billion dollars in 2003 gets to the first level court of appeals and is reversed in totum, from $145 billion dollars down to zero and the class is ordered decertified. If the legislature there had not allowed a lower bond, a bankruptcy would have ensued, every state including FL and ND would have lost their MSA payments, all for a judgment that was later reversed. That, in a way, is sort of the poster child for the need to do this. The other states that have not yet done this, those that show up on your map, I should tell you right now, I counted up a couple of days ago, in 10 of those states, efforts are now under way to do something along these lines. I think what you see here is a pattern that, obviously a great majority of jurisdictions in this country, have in one way or another, limited the appeal bond and we hope that the committee will see fit to put ND also in that group. In answer to the question of how much you can buy in an appeal bond, the world bond market is estimated to be between $5-10 billion dollars, but when you start getting to those kinds of numbers, you start having to go out to people like Swiss insurance

companies. Any one company, the estimate is, the maximum bond you could buy, if you could afford to buy it, is about $1-2 billion dollars, but it depends a little bit on what you do, and how risky your litigation portfolio is. I can tell you for the tobacco company that I represent, nobody's eagerly running out there saying please let us loan you money to post appeals bond. The companies I represent, have actually had to go ahead and come up with the dollars and put it in a bank account. I did talk to Exxon's counsel, down in Alabama, this is the $11.8 billion dollar case, and he told me that they did purchase part of the bond. They couldn't buy it all and they had to put corporate assets up for the rest of it. The part they purchased, the premium was about $130 million dollars. Those are recoverable costs in litigation in Alabama. As you might imagine, there is no plaintiff in the world, if the defendant posts that, pays the money, buys that bond and appeals, and wins on appeal. There's no plaintiff in the world who's going to be able to reimburse you $130 million dollars for the costs of that bond. So Exxon was looking at being a loser either way. This is a complicated subject, in terms of how when you get into these big judgments, how you do it, how you actually make it work. We'd like to just have a world where there's a bond that companies can deal with, that they could purchase it if they needed to. That's what these 38 states have done.

Representative Koppelman: Which state had a $1 million dollar bond.

Keith Teel: Idaho, Wyoming is now in the middle of a rules process. Wyoming is underway. I just heard that the next meeting of their rules committee is on the 17th of March. So they are in the middle of looking at this.

Representative Koppelman: That would be through judicial rules.

Keith Teel: Yes. Some states it's clear that the Supreme Court has to do it, a couple of states require that. Some states, it's quite clear that either the Supreme Court through the rules process, or the legislature could do it. Actually there are very few states where only the legislature can do it. This is a state where probably both could do it.

Representative Koppelman: I assume that people in Idaho looked at this...

Keith Teel: Actually there is a group called the American Legislative Exchange Council, which is a national legislature group of state legislators. They came up with bills. In 1999 or 2000, their civil justice committee adopted a model bond bill and it had a $1 million dollar limit. If you compare what they passed to that model bill, it is verbatim.

Representative Koppelman: You alluded earlier to the potential of this not really being much protection for smaller companies. I noticed in the matrix that in OK, it says separate legislature was passed, in 2004 they gave the court discretion to lower the bond if judgment debtor can show that it is likely to suffer substantial economic harm if required to post bond in an amount required by the statute. Is that a provision that you sought in any of these, or did states elect to say, we want to protect the huge companies out there, but we also want to protect the majority of the businesses that we have in our state.

Keith Teel: We have not sought it. We've been worried about is the ability to make these payments under the state settlement agreement. We'd rather not go back to war with all the states. There have been several states that have been looking at this, have decided to handle it a couple of ways. You might notice a couple of states have, TX for example, what they passed legislatively last year was something that said the bond is the lesser of 25% of the judgment or 50% of the net worth. Now I actually think that 50% of net worth for a small business is a pretty

high number. I think one or two other states, have something similar in what they've done. They've done a 20-30% bond. That's a direct response to the desire to make it cover smaller businesses. We weren't sure, when you look at the few reported cases, that you find in ND, if you wanted to go that way, what would be the right way. We didn't find any decisions where smaller businesses had been obviously bankrupted by the size of a bond. But I've got to tell you, if you're a small business and you get a $70,000 judgment and it's lowered to $40,000, that might be pretty hard. That is a judgment that obviously the legislature could make.

Representative Koppelman: So your group would not object to that kind of amendment, for example.

Keith Teel: No. It's easy enough to draft, because we've seen it in other states. I could give you that language if that is something you want.

Representative Kretschmar: Are you familiar with the new federal law that affects the class actions in ND.

Keith Teel: It depends. It should have some effect, frankly everywhere. That bill took years to get through Congress and I think as legislators, all of you would appreciate it if you read it, you can read and find the obvious points of compromise, where they did this. Basically, what the bill does is take class actions, where more than $5 million dollars is in controversy and there are more than 100 members of the class and move those to federal court. That's the general rule. But, if you have a defendant that is a resident of the state, and the class is filed in the state, that's generally going to stay in state court. If you have a defendant that is a resident from somewhere else, but enough members of the class are residents of the state, then it will stay in state court. No one's really quite sure, I've heard a lot of discussion, I think the net effect is you're going to

see fewer class actions in state court, but you will not see the elimination of class actions in state court.

Representative Klemin: This bill carries three other sections; relating to emergency clause. This legislation without the emergency clause would become effective August 1st if it passes, which is about 4.5 months away. Are you aware of any case pending in ND where we would be likely to see the cap exceeded by August 1.

Keith Teel: I'm not sure that it would be the cap exceeded by August 1, it would probably be any case filed that could lead to a judgment that might exceed the cap. The short answer is, no I'm not aware of it. However, I will say that virtually all the bills that have passed, have had this kind of language and I think they've had it because the general rule in this country, is that things that affect procedure apply immediately to cases pending; whereas if you were to come up with a completely new substantive law, it applies only to prospectively. This says effectively what is the general rule, that it applies to pending cases. I'm not aware of any cases in ND right now that this would necessarily would affect.

Representative Klemin: We have sections 2, 3 and 4 up here now, I don't think it would make a lot of difference.

Keith Teel: I think that's right. The only reason I can tell you that I'm hesitating, is that I have seen what happened in Illinois when you try to deal with this problem with an appeal bond in a large case after it's already been entered. I don't really see that happening here, because I don't see that case in ND, but I can't tell you that I know every case filed in ND. I was talking to a lawyer in WY, about this upcoming meeting there, and she said to me, do you realize we've got some cases here that the damages being sought are about $600 million dollars dealing with

oil and gas leases. I had never heard of them. I don't know what's out there already on file in ND that might be affected. What I worry a little bit about, is that the general rule is procedural changes apply to pending cases and this is what that says and you take it out, I guess I wonder if there's any chance a court might apply a different rule, might not be willing to apply these procedural changes to pending cases, because they're going to assume that's what the legislature meant in taking this out.

Representative Klemin: I'm not sure that it would read all that much into it.

Keith Teel: Maybe not.

Representative Klemin: Maybe we could put on the record here that we're taking it out because it's not needed, so if anybody wants the know the intent, all they have to do is look at our tapes here.

Representative Zaiser: Wouldn't you say that any bond that would even approach $25 million dollars would involve a very egregious case or not.

Keith Teel: I suppose I have to say, yes, but it's kind of in the eyes of the beholder. I'm sure in the plaintiff's view, yes. In a statewide class action, like in the FL situation, the class there was estimated to be a million people and it was a punitive damages only issue that they were fighting about. You don't have to get very much per person to get to a big number, probably most people of that class action, didn't even know the case was going on until the verdict came out, because they didn't know they were in the class. I'm struggling a little bit because I understand your question, I think there clearly are some people who would say, if it's that big it's got to be something, yet given the size of companies, given the size of class actions in this day and age, given what you see verdicts doing, I'm not so sure you can necessarily agree,

then I would have to go on and say that in the largest case I'm away of, the FL class action of $145 billion dollars, it got to the first appellate review and it was completely reversed.

Representative Zaiser: On the matrix, I sort of zeroed in one state, Michigan's description, where they attached a COLA to the amount.

Keith Teel: Yes, I think they are the only state that did that.

Representative Zaiser: Would that be significant, or would that be 5% or 10% on $25 million a year would be very incremental.

Keith Teel: It's actually quite incremental. It's a COLA every 5th year. It's one of the first states that did this. I wondered at the time if we were going to see it, and we never saw it again. But it kicked in after 5 years, and I don't think it was an every year adjustment after that. So it would be pretty incremental. I don't know that there's anything wrong with it, I mean I'm not here to argue against it. I can tell you, other states thought about it and just decided that the numbers they were setting were so high that they didn't see the need to put in a cost of living adjustment.

Representative Zaiser: They wouldn't accumulate that COLA, in other words, it wouldn't say be 3% a year, therefore after 5 years, it would be at 15%.

Keith Teel: Yes.

Chairman DeKrey: Thank you. Further testimony in support of SB 2273.

David Straley, Coalition of 18 Chambers of Commerce in ND: Support (see written testimony).

Chairman DeKrey: Thank you. Further testimony in support.

Bill Butcher, National Federation of Independent Business: Support, NFIB has approximately 3,000 small business owners who are members in ND, and it's a national organization as well, with approximately 600,000 members nationally. The question of tort reform to reduce litigation to cap damages, to cap appeal bonds, has come up several times in ND on ballots for our members, and nationally, and while our requirement normally is to take a position on an issue, we have to have at least 60% of our members agree to either support or oppose it. In this case, every time this question has been raised with our members, we have had a vote of over 90%. This is a very firm and strong position that NFIB holds. We've heard testimony that $25 million dollars is not even in our wavelength as far as small business owners. However, we support this bill just to be consistent with our position to reduce litigation and appeal caps and damage awards. I was particularly interested in the conversation between Representative Koppelman and Mr. Teel about Oklahoma. At any rate, the provision for smaller companies that would be an expansion of this bill, and I would certainly encourage any further conversation along those lines.

Chairman DeKrey: Thank you. Further testimony in support, testimony in opposition, we will close the hearing.

(Reopened later in the same session)

Chairman DeKrey: What are the committee's wishes in regard to SB 2273.

Representative Koppelman: Explained his amendment. As you recall, when we heard the bill this morning, there was some discussion about what other states are doing, and as we look at what they've done, some states. The bill as we have it before us, would basically protect typically large companies that would be in jeopardy for very large judgments and that's the intent

of the bill. But I think if we adopt something like this in ND, it's a good idea to protect all business, whether it's large or small. The amendment would do, as some other states have done, it would be on page 1, line 11, after "exceed" insert "the lesser of one hundred percent of the judgment amount, twenty percent of the appellant's net worth, or". It still does everything that the proponents of the bill want, but it also puts some language in to protect the small business owner.

Representative Klemin: I am going to resist this motion. I don't think that it's anything that anybody asked for. I don't think it had very much of a hearing on this issue. I think it could work against the party, the judgment creditor, to a considerable extent in some cases; because of what is meant by net worth. It is certainly subject to some different interpretations, 20% of an appellant's net worth, I can conceivably see that one might be arguing that because of certain other debts and things that there are, there are companies around that actually have a negative net worth. The amount of supersedeas bond is set in any case in the amount that the court directs, that's the way the rule reads, under Rule 62 right now. A supersedeas bond is to be only when there is a stay of execution requested. For example, if there is no execution, there's nothing to stay and you don't need a supersedeas bond to start with. ND does not require an appeal bond in all cases. Maybe it is required in some other states. There is only a supersedeas bond required if you seek to get a stay of execution, while an appeal is pending. Quite frequently, in my experience, this is not all that much used to start with, because the parties aren't going to be out executing on it until after the Supreme Court has decided the case on appeal anyway; because what happens then if the case is reversed and you have to give the money back that you executed on. So supersedeas bonds are not used all that much, but then there's another downside I can see,

and that's from the appellant standpoint. Now the appellant is going to have to come in and indicate that what his assets and liabilities are, which may have never been an issue at all before in this particular lawsuit, because it was based on something else, and now all of a sudden, we're going to have to try and determine what the appellant's net worth is, then the next problem I see with this, is that right now the way that the rule reads, it's in the amount that the court shall direct for the supersedeas bond. This would say that the court no longer has any discretion, it's either going to be 100% or it's going to be 20% of the net worth, or $25 million dollars as a cap. The court will have no discretion to set it at whatever is reasonable under the circumstances because we've said it's going to be 100%. The appellant may not want to come in and give all that information on his net worth, because we're not into the area yet where we're trying to find out what his assets are, so we can actually collect on the judgment. So, I think this is, #1 it's not needed, #2, I think it's creating problems that we don't currently have. So I'm going to resist the motion.

Representative Maragos: If there is an appeal, does that automatically stay the execution, or can the appellant pay it and then still appeal.

Representative Klemin: No, the way it works is, that under the Rules of Civil Procedure, Rule 62, there is an automatic stay of an execution for 10 days. The first 10 days.

Representative Maragos: Is that the time in which you file an appeal.

Representative Klemin: You have 60 days to file an appeal. There are, in that particular rule, a number of different stays that are possible, depending on what kind of property is involved. If it is personal property that you're trying to recover, for example, or if it's real estate that you're trying to levy on, but the one we're talking about is the general provision that applies for general

executions that are not related to specific types of property that were involved in that lawsuit. The Supreme Court has held that if you pay the judgment, you basically waive your right to appeal, so nobody pays the judgment. What they do is they either, there is no bond posted because it's not being executed on. You only need a bond if there's going to be an execution. If there is an execution, under the rules on execution, the sheriff has to serve that execution, and then the party that is being levied upon, has 10 days in which to claim exemptions. That also gives him time to apply for a stay of execution based on a supersedeas bond, if necessary. I think this is going to create a problem where we don't have one right now, because right now they don't require 100% of the judgment amount to be posted as a supersedeas bond. This would require it, unless we went to the 20% of the net worth, which the appellants in most cases, are not going to tell you.

Chairman DeKrey: This is actually going to work against the defendant.

Representative Klemin: Well, it will.

Chairman DeKrey: Because he's not only going to have to lay his finances out on the table...

Representative Klemin: It's going to make it a lot easier to collect that judgment at some point in time, because now we know what he's got.

Representative Koppelman: I think Representative Klemin raises some good points, I don't agree with many of them, but I do agree with one, that is the question of lesser of language. It wasn't my intent to necessarily do that, that's just the way it got drafted. I would think that if we eliminate the word lesser of, then it would read, "may not exceed 100% of the judgment amount, 20% of the appellant's net worth, or $25 million dollars regardless of the amount of judgment". I understand what Representative Klemin is saying with respect to the idea that if you say "the

lesser of" you're kind of dictating to the court that it has to be one of those three. I think the intent of the amendment is to say you can't go beyond that. So if we remove the words, "the lesser of". The intent again is to say, are we just going to protect big business here, or are we going to protect small business, which is what most of ND is. I think, I respect what Representative Klemin is saying about not tipping your hand or showing your net worth, but I think that if the language were revised that way, it would sort of be, I assume if you're a defendant, and you want to make sure that this bond amount is low enough for you to afford, then it would be a judgment call whether you want to go to court and put your cards on the table, so to speak, here's what my net worth is, your Honor, or if you didn't want to do that, if you've got 100% of the judgment, that's fine, you just ask the court to do that.

Representative Klemin: First of all, I think we have to not, I mean if the focus here is to protect business, what about the rights of the judgment creditor who's gone through a trial, probably a jury trial, or a bench trial to get the judgment. We're at the end of the lawsuit, the judgment has been entered. The party, who may be appealing, has been found liable and that party may not be a business, it might be an individual, could be an individual who's involved in a motor vehicle accident who's got liability insurance and it's actually the insurance company that is appealing, they would never have needed a supersedeas bond before in most cases, because we know that if the insurance company is defending, the insurance company is going to appeal, the insurance company is going to be good for it if it loses. There is no reason to execute on the judgment against the defendant because you're going to get it from the insurance company, so to require the defendant now to be telling what his net worth is, when really is has nothing to do with that, because he's got insurance. It doesn't really apply, to require the bond now would be

100% of the judgment really isn't necessary. I still think we're creating problems where we don't need to.

Representative Zaiser: I agree with many of Representative Klemin's comments. I can't go quite as deep into the list as he is, because I'm not an attorney. I think that one of the key issues here is that we're taking some of the discretion away from the courts, and also I agree with the basic assessment that what was asked for was really putting a cap on those egregious cases where they're asking for $25 million dollars. I think he indicated, I thought, that that's what they're trying to do, to prevent court shopping, so they wouldn't go around to states. I think when we went to $25 million, we'd be right in line with nearly all the states in the country, and there's only a few exceptions that went lower than that. I also agree with Representative Klemin in terms of, we've had a lot of immunity issues in here. I think we need to look at the plaintiff's side of the picture a little bit as well. I think if somebody is found guilty, then how much protection do we give somebody. Maybe, should we protect them from having a big financial burden, for instance, maybe I was victimized to the point where I'm bankrupt because of the action. What's my protection.

Representative Delmore: I call the question.

Chairman DeKrey: We don't have anything to call, because we only have a motion, we don't have a second yet.

Representative Koppelman: I didn't move the amendment.

Chairman DeKrey: He hasn't moved it yet.

Representative Meyer: We don't have a motion or anything.

Representative Delmore: We do, we just don't have a second.

Chairman DeKrey: He hasn't moved it yet. We're just talking about it.

Representative Klemin: We've got a bill here now that's going to govern a situation that's rarely, if ever, going to occur. This amendment is going to change it into one that's going to occur in every case. So I think it really changes the whole scope of the bill here, I don't think it had a hearing on that issue.

Representative Koppelman: You say that this isn't used very often, appeal bonds, supersedeas bonds are not used in most cases, how could this affect every case.

Representative Klemin: It's going to affect every case where there's an appeal where you might want to look at this.

Representative Koppelman: Are these bonds required now in ND courts.

Representative Klemin: To stay an execution.

Representative Koppelman: So they are used very infrequently.

Representative Klemin: Only to stay an execution, they're not an appeal bond that's required if there's no execution. It would apply in every case where there is a stay of execution sought.

Representative Koppelman: I appreciate everything that Representative Koppelman has said, and appreciate his legal knowledge and wisdom, but I think it comes down to, do we protect all business in ND or just certain ones. I think this would do that, as far as the question of did this have a hearing, many of the amendments we add in this committee and other committees I've served on, including many that Representative Klemin astutely recommends, amendments to improve a bill, because we are the policy makers, we want to make sure that the impact on the public is what we want it to be. I don't that's unusual. I would the amendment, plus I want to delete the word "lesser of".

Chairman DeKrey: Is there a second. Is there a second. Seeing none, the motion dies for lack of a second. We now have the bill before us.

Representative Delmore: I move a Do Pass.

Representative Zaiser: Seconded.

Chairman DeKrey: Any further discussion on the bill.

Representative Klemin: I guess I have a question about sections 2, 3 and 4 of this bill. First of all, section 4 as I understand it, is that in case of an emergency measure becomes effective upon being filed with the Secretary of State. So to that extent, section 2 says that. That's what an emergency measure is. Section 2 it becomes effective upon filing with the Secretary of State, which is what happens if the emergency clause carries under section 4. So you don't need section 2. Then in regard to section 3, application of act, the act applies to all action pending or filed on or after its effective date, that already is what happens, so you don't need section 3. Then in section 4, this is applying to cases of over $25 million dollar judgments, of which we have no cases pending that we know of that are going to result in a judgment by August 1. I'm not so sure why we even need an emergency clause. We don't need sections 2 and 3.

Representative Koppelman: Wouldn't LC catch that kind of redundancy, I mean they draft it.

Representative Kretschmar: It's my understanding that if you want an act to become effective immediately, it's got to be a 2/3 vote in each house. That's the same as an emergency clause.

Chairman DeKrey: So that's why they put the effective date and application date in there.

Representative Klemin: Well, that's the same as the emergency clause. Isn't that what you said Representative Kretschmar.

Representative Kretschmar: Yes.

Representative Klemin: So you don't need section 2.

Representative Zaiser: I agree, but let's just pass it.

Chairman DeKrey: We have a motion on the floor and it's been seconded.

Representative Koppelman: I call the question.

Chairman DeKrey: Clerk will call a Do Pass motion on SB 2273 as amended.

11 YES 0 NO 3 ABSENT DO PASS CARRIER: Rep. Kingsbury

58297.0101
Title.

Prepared by the Legislative Council staff for
Representative Koppelman
March 8, 2005

PROPOSED AMENDMENTS TO SENATE BILL NO. 2273

Page 1, line 11, after "exceed" insert "the lesser of one hundred percent of the judgment amount, twenty percent of the appellant's net worth, or"

Renumber accordingly

Date: 3/8/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2273

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By Rep. Delmore Seconded By Rep. Zaiser

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	A		Representative Meyer	✓	
Representative Bernstein	✓		Representative Onstad	A	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging	A				
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 11 No 0

Absent 3

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2273: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (11 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). SB 2273 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

SB 2273

AH #1

COVINGTON & BURLING

To: **Senator John T. Traynor, Chairman**
Senate Judiciary Committee

From: **Keith A. Teel, Partner, Covington & Burling, Washington, D.C., representing Philip Morris USA by its service company Altria Corporate Services, Inc.**

Date: **Wednesday, February 2, 2005**

Subject: **Support of S.B. 2273, relating to supersedeas bonds**

First, I'd like to thank you for the opportunity to speak with your committee today in support of Senate Bill 2273, which provides a $25 million limitation on bond requirements during appeal in civil litigation. My name is Keith A. Teel, and I am here today representing Philip Morris USA by its service company Altria Corporate Services, Inc.

An undeniable trend in litigation over the past decade has been the skyrocketing size of damage awards. In 2003 alone, nationally there were 21 jury verdicts over $100 million, while in 1992 only 8 verdicts exceeded $100 million.[1] The total value of the 100 largest jury verdicts in 2003 was $19.6 billion.[2] Defendants who are subject to these large damage awards invariably seek to appeal them, and they are often successful in getting the judgments reduced or overturned on appeal, particularly where a significant portion of the award is made up of punitive damages. But most states, including North Dakota, require the defendant to post a bond in order to stay the execution of a judgment during the course of appeal. The purpose of the bond is to "maintain the status quo and protect the judgment holder if the appeal is unsuccessful," while at the same time protecting the defendant from having the plaintiff seize its assets while it appeals.[3]

In most states, the bond that defendants must post to obtain a stay during an appeal equals or exceeds the amount of the judgment. Neither North Dakota Rule of Civil Procedure 62(d) or Rule of Appellate Procedure 8 specifies the amount of a bond that a defendant must post in North Dakota, so courts have discretion to determine how large of a bond is necessary to give the plaintiff sufficient security in the judgment.[4] While North Dakota courts

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[1] See VerdictSearch, Top 100 of 2003 (last visited Feb. 18, 2004), at http://www.verdictsearch.com/jv3_news/top100/; "1992's Largest Verdicts," National Law Journal, at S1 (Jan. 25, 1993).

[2] David Hechler, "When a Zebra is Not a Horse: A Picture of a Zebra Was a Jury Prop in a Contract Case Worth $11.9 Billion," National Law Journal, at 1 (Feb. 9, 2004).

[3] Berg v. Berg, 530 N.W. 2d 341, 343 (N.D. 1995).

[4] See In re Estate of Johnson, 214 N.W. 2d 109, 111 (N.D. 1973) (reviewing trial court's setting of the bond amount for abuse of discretion, and finding that the bond was "reasonable under the circumstances and fairly related to potential damages that might be suffered" by the plaintiff).

have usually held that a bond equal to or lesser than the total judgment is adequate,[5] under the current rules, judges may theoretically set the bond at any amount they deem appropriate -- even if that amount exceeds the total judgment.

If a defendant cannot afford to post a bond in the amount set by the court, 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. In the context of the tobacco companies, a bankruptcy stay could disrupt the billions of dollars in payments the companies owe to North Dakota and the other states under the tobacco master settlement agreement ("MSA"). This problem has been most vividly demonstrated by the 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 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. The appellate court ultimately rejected and reversed the verdict in its entirety.[6]

To date, 32 states have recognized the potential consequences of exorbitant appeal bonds and have passed legislation or amended court rules to limit the size of the required bond in cases involving large judgments. In addition, it should be noted that 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. 2273 would impose a $25 million limit on the appeal bond that defendants must post to stay the execution of a judgment in North Dakota. This bond limit would not change 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 -- nor does it affect the rights of plaintiffs to recover fully the damages to which they are entitled if the judgment is upheld on appeal. This limit is essential to guaranteeing that all defendants are treated fairly and are able to exercise fully their right to appeal, without being forced to declare bankruptcy or to settle the case before the completion of appellate review.

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[5] See Berg, 530 N.W.2d at 341 (district court required a $6,000 bond to stay execution of a $9852 judgment); Dakota Northwestern Bank Nat'l Ass'n. v. Schollmeyer, 311 N.W. 2d 164, 165 (N.D. 1981) (district court required a $13,000 bond to stay execution of a $20,828.81 judgment); Stetson v. Investors Oil, 176 N.W. 2d 643, 644 (N.D. 1970) (district court required $40,000 bond to stay execution of a $68,521.94 judgment).

[6] Liggett Group v. Engle, 2003 Fla. App. LEXIS 7500 (Fla. Dist. Ct. App. 2003).

S.B. 2273 is also essential to protect the rights of plaintiffs: by ensuring that defendants are not bankrupted by huge appeal bond requirements, the limit would help to guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect. 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. 2273 thus would not injure plaintiffs in any way, but would merely guarantee that all defendants, no matter how large the judgment against them, can exercise their right to appeal.

For the foregoing reasons, we urge the committee to pass S.B. 2273. Thank you.

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	5/17/2004	All litigants	$25,000,000	Expands current law to apply to all forms of judgments in civil litigation
Hawaii	SB 2840	7/2/2004	MSA signatories, successors, and affiliates	$150 million	Applies to all forms of judgments in civil litigation under any legal theory
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
Iowa	HF 2581	9/7/2004	All litigants	$100,000,000	Applies to appeals from money judgments

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
[redacted]	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
Minnesota	HF 1425	5/13/2004	All litigants	$150 million	Applies to all forms of judgments in civil litigation under any legal theory
[redacted]	Rule 8	4/26/2001	All litigants	The lesser of the following: 1. 125% of the judgment 2. 10% of the net worth of the defendant 3. $100,000,000	Applies to the punitive damages portion of a judgment
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 SB 1275 HB 2661	4/10/2001 5/28/2004 5/28/2004	As passed in 2001, covered Master Settlement Agreement signatories only; broadened in 2004 to include successors and affiliates as well Separate legislation was passed in 2004 that applies to all litigants	$25,000,000 Separate legislation was passed in 2004 that gives the court discretion to lower the bond if judgment debtor can show that it is likely to suffer substantial economic harm if required to post bond in the amount required by statute (which is double the amount of the judgment)	As passed in 2001, applied to all forms of judgments in civil litigation involving MSA signatories Separate legislation was passed in 2004 that applies to all forms of judgments in civil litigation
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

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
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	4/26/2004	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
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	Sup. Ct. Order 2005-03-22 (amending URCP 62 governing appeal bonds)	1/24/2005	All litigants	$25,000,000 -- compensatory damages $0 -- punitive damages	Applies in class actions and actions involving multiple plaintiffs where damages are not proved for each plaintiff individually Applies in all actions and eliminates bond requirement for punitive damages
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

State	Bill Number	Date Approved	To Whom Limits Apply	Amount of Appeal Bond Limit	Scope of Appeal Bond Limit
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

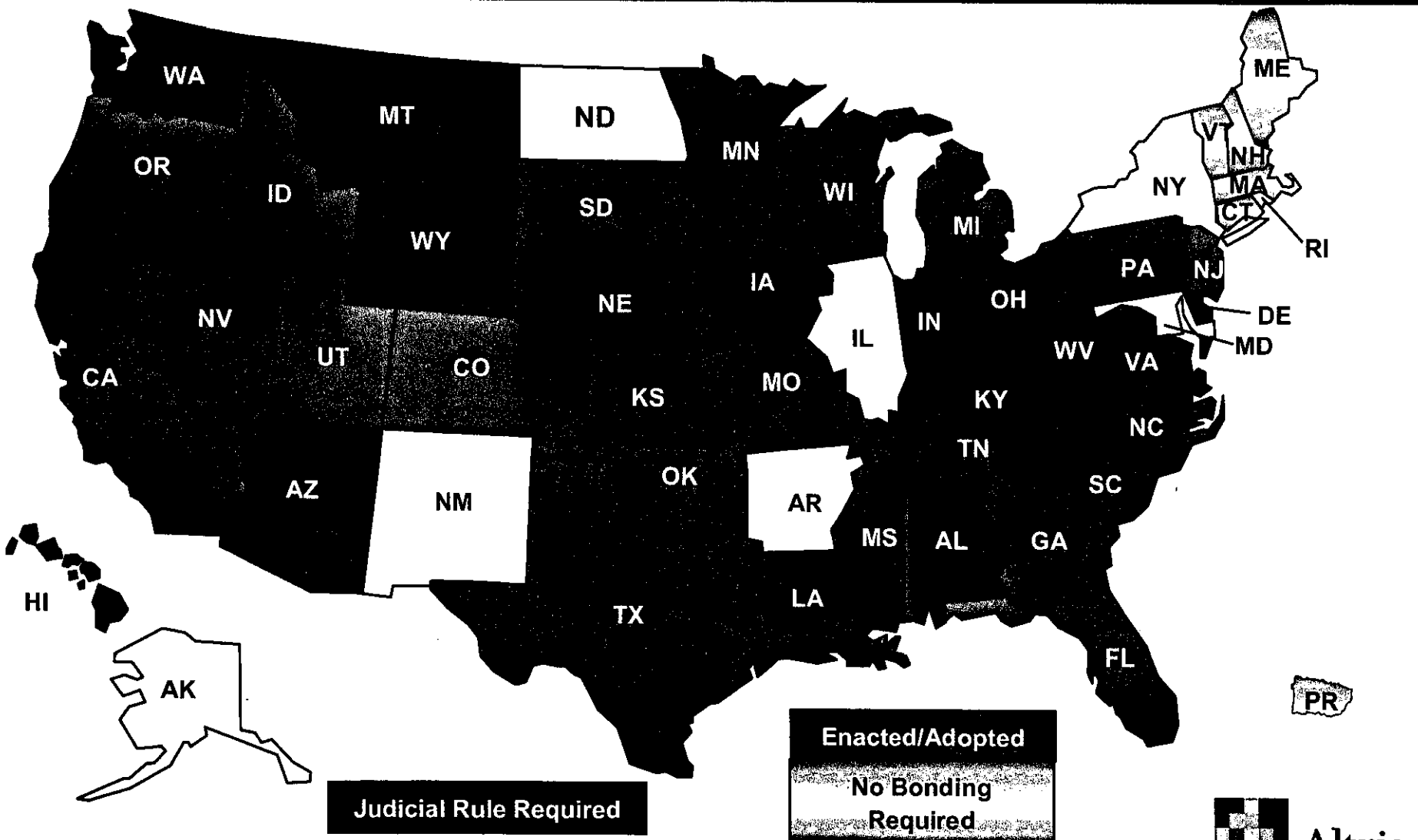
JURISDICTIONS THAT DO NOT REQUIRE BONDS

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.

Appeal Bond Cap Laws and Rules

9 states enacted in 2004 (4 were amendments)

36 jurisdictions have bonding coverage– 77.71% of US & PR population



Altria

2b

January 26, 2005

North Dakota Should Join Other States in Limiting the Size of Appeal Bonds and Protecting Defendants' Right to Appeal

An undeniable trend in litigation over the past decade has been the skyrocketing size of damage awards. In 2003 alone, nationally there were 21 jury verdicts over $100 million, while in 1992 only 8 verdicts exceeded $100 million.[1] The total value of the 100 largest jury verdicts in 2003 was $19.6 billion.[2] While few huge verdicts have been handed down in North Dakota thus far, the nationwide trend of escalating judgments indicates that damage awards in our state are also likely to increase.

Defendants who are subject to these large damage awards invariably seek to appeal them, and they are often successful in getting the judgments reduced or overturned on appeal, particularly where a significant portion of the award is made up of punitive damages. But most states, including North Dakota, require the defendant to post a bond in order to stay the execution of a judgment during the course of appeals. The purpose of the bond is to "maintain the status quo and protect the judgment holder if the appeal is unsuccessful," while at the same time protecting the defendant from having the plaintiff seize its assets while it appeals.[3]

In most states, the bond that defendants must post to obtain a stay during an appeal equals or exceeds the amount of the judgment. Neither North Dakota Rule of Civil Procedure 62(d) or Rule of Appellate Procedure 8 specifies the amount of a bond that a defendant must post in North Dakota, so courts have discretion to determine how large of a bond is necessary to give the plaintiff sufficient security in the judgment.[4] While North Dakota courts have usually held that a bond equal to or lesser than the total judgment is adequate,[5] under the current rules, judges may theoretically set the bond at any amount they deem appropriate -- even if that amount exceeds the total judgment.

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1 See VerdictSearch, Top 100 of 2003 (last visited Feb. 18, 2004), at http://www.verdictsearch.com/jv3_news/top100/; "1992's Largest Verdicts," National Law Journal, at S1 (Jan. 25, 1993).

2 David Hechler, "When a Zebra is Not a Horse: A Picture of a Zebra Was a Jury Prop in a Contract Case Worth $11.9 Billion," National Law Journal, at 1 (Feb. 9, 2004).

3 Berg v. Berg, 530 N.W. 2d 341, 343 (N.D. 1995).

4 See In re Estate of Johnson, 214 N.W. 2d 109, 111 (N.D. 1973) (reviewing trial court's setting of the bond amount for abuse of discretion, and finding that the bond was "reasonable under the circumstances and fairly related to potential damages that might be suffered" by the plaintiff).

5 See Berg, 530 N.W.2d at 341 (district court required a $6,000 bond to stay execution of a $9852 judgment); Dakota Northwestern Bank Nat'l Ass'n. v. Schollmeyer, 311 N.W. 2d 164, 165 (N.D. 1981) (district court required a $13,000 bond to stay execution of a $20,828.81 judgment); Stetson v. Investors Oil, 176 N.W. 2d 643, 644 (N.D. 1970) (district court required $40,000 bond to stay execution of a $68,521.94 judgment).

The bond requirement originated in the early years of our country, at a time when most litigation involved individuals, not well-established companies, and when multi-million or -billion dollar verdicts were unthinkable. Now, however, defendants subject to such huge damage awards may simply be unable to post a bond to protect their assets while they appeal. In order to stop a plaintiff from seizing their assets during an appeal, these companies may have no alternative other than to seek bankruptcy protection, which carries with it an automatic stay of the debtor's obligations to pay its creditors.

The risks posed by high appeal bonds are not merely hypothetical. Numerous companies and individuals have been forced to either declare bankruptcy in order to stay execution of a judgment pending appeal, or to settle with the plaintiffs, because they could not afford to post the required appeal bond, even when they have good arguments that the verdict against them was improper. Some noteworthy examples of this disturbing trend are listed below:

- 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 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."[6]

- 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.[7]

- 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.[8]

- 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

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

7 In Re Fox, 232 B.R. 229 (Bankr. Kans. 1997).

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

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.[9]

- 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."[10]

The problems caused by exorbitant appeal bonds have been most vividly demonstrated by the Engle case in Florida, in which a class of smokers was awarded $145 billion in punitive damages. When the Engle trial started, Florida law required a defendant to post a bond equal to 125 percent of the verdict. This would have resulted in a bond in the Engle case of $181 billion. Since no company or industry could post such a bond, the only way for the defendants to obtain a stay would have been for them to declare bankruptcy. This in turn would have caused the interruption and possible termination of all payments that the tobacco companies owe under the Master Settlement Agreement ("MSA") and other settlements to North Dakota and every other state. However, just before the verdict, the Florida legislature enacted an appeal bond cap of $100 million. This allowed the companies to post a bond, and also permitted the MSA payments to continue during the appeal. In May 2003 the intermediate appellate court reversed and rejected the verdict in its entirety,[11] and the case is now on appeal to the Florida Supreme Court.

Newspapers across the country have called on courts and legislatures to enact sensible appeal bond reforms. After an Illinois judge initially required Philip Morris to post a $12 billion bond to stay the execution of a $10.1 billion judgment in the case of Price v. Philip Morris,[12] the Chicago Tribune said, "the Illinois Supreme Court should substantially reduce the bond and revisit its own rules for appeal...so Philip Morris can have its day in appellate court."[13] The New York Times commented that the $12 billion bond in Price "is the kind of ruling that erodes the credibility of our legal system."[14] The paper recognized that high appeal bonds "render the right to an appeal nearly meaningless, thus violating the defendant's due process rights." And

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9 "Funeral Chain Settles, Avoiding a Big Bill," N.Y. Times, at D5 (Jan. 30, 1996).

10 "Exxon Need Not Post a $5 Billion Bond," Nat'l L. J., at B1 (Aug. 26, 1996).

11 Liggett Group v. Engle, 2003 Fla. App. LEXIS 7500 (Fla. Dist. Ct. App. 2003).

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

13 "A Madison County Jackpot," Chicago Tribune, at 22 (Apr. 2, 2003).

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

the Chicago Sun-Times acknowledged that "the antiquated appeal bond rule, devised long before such astronomical judgments were even imagined, must be reformed."[15]

The Solution - Sensible Appeal Bond Limits

Over the last four years, numerous states have recognized that the solution to the potential consequences of exorbitant supersedeas bonds is to adopt absolute limits on the size of appeal bonds. To date, 31 states have passed legislation or amended court rules to limit the size of the required bond in cases involving large judgments.[16] In addition, five other states (Connecticut, Maine, Massachusetts, New Hampshire and Vermont) do not require defendants to post a bond at all during an appeal, so over two-thirds of the states currently have limits on appeal bonds.

The majority of states (19 out of 31) that have established bond limitations have passed legislation or adopted court rules that apply broadly to all litigants. This approach ensures that all defendants are treated fairly and are given the right to pursue a just and orderly appeal. The actions taken by the other 12 states demonstrate that this issue is not just one of fairness for all litigants, but also a matter of protecting state revenue. These states have passed bond limits that apply only to signatories or successors and affiliates of signatories of the Master Settlement Agreement ("MSA") and other settlements between the tobacco companies and every state. As discussed above, if these companies were forced to declare bankruptcy in order to stay a judgment during an appeal, it could potentially disrupt the billions of dollars in payments that the companies owe to North Dakota and every other state. The MSA-specific bond limits thus recognize the importance of keeping these companies solvent while they appeal a large adverse judgment, in order to protect the much-needed flow of tobacco settlement revenue into state coffers.

North Dakota Should Adopt a Sensible Appeal Bond Limit

The North Dakota legislature should adopt the proposed legislation establishing a $25 million limit on the bond that defendants must post to stay the execution of a judgment pending appeal. This limit is essential to guaranteeing that all defendants are treated fairly and are able to exercise fully their right to appeal, without being forced to declare bankruptcy or to settle the case before the completion of appellate review. It is also essential to protect the rights of plaintiffs: by ensuring that defendants are not bankrupted by huge appeal bond requirements, the limit would help to guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect.

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15 "Appeal Bond Rule Could Send State Finances Up in Smoke," Chicago Sun-Times, at 31 (March 27, 2003).

16 See, e.g., "States Cap Appeal Bonds," American Bar Association, Litigation News, Vol. 29, No. 5 (July 2004). See also Vanessa O'Connell, "New Laws Help Tobacco Makers with Big Judgments," Wall Street Journal, July 19, 2004, at A1; David Hechler, "Appeal Bond Caps: the Quiet Tort Reform," National Law Journal, Feb. 16, 2004, at A1.

Importantly, the proposed amendments would not in any way limit damages for plaintiffs who are injured. In fact, the proposed bond limit would not affect the rights of any plaintiffs to be fully compensated for their injuries, no matter how large their damages are. If a jury delivers a large verdict in favor of a plaintiff, and that verdict is upheld on appeal, the defendant is still required to pay the plaintiff the full amount of the judgment. Plaintiffs are also protected by the provision in the proposed amendments allowing a court to impose a higher bond if the defendant is intentionally dissipating its assets to avoid paying a judgment. A similar provision is found in almost all of the states that have adopted bond limits thus far.

Moreover, the proposed appeal bond legislation would not conflict with the court-enacted procedural rules already in place in North Dakota. A legislatively-adopted appeal bond limit would simply further define the current procedural rules by giving them a monetary limit. It is within the legislature's powers to pass this type of supplemental procedural rule.[17] Together, the proposed appeal bond limit works with other procedural rules to ensure both that plaintiffs are fully compensated and that defendants are fully protected.

For the foregoing reasons, the legislature should adopt the proposed amendment to chapter 28 of the North Dakota Century Code.

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[17] See City of Fargo v. Ruether, 490 N.W. 2d 481, 483 (N.D. 1992); see also State v. Hanson, 558 N.W.2d 611, 613 (N.D. 1996) ("We have recognized that there is an interplay between statutory procedures and rules promulgated by this court.").

AH #3

Testimony of David Straley
Greater North Dakota Chamber of Commerce
Presented to the Senate Judiciary Committee
February 2, 2005

Mr. Chairman and members of the Senate Judiciary Committee, my name is David Straley. I am here today representing the Greater North Dakota Chamber of Commerce to urge you to **support** SB 2273.

We believe North Dakota should adopt a sensible appeal bond limit. To my understanding North Dakota has not seen the large jury verdicts as other states have, but the potential certainly exists. Businesses, which are among the defendants who are subject to such large verdicts, typically appeal, and are often successful in either reversing the judgment or getting the judgment amount reduced.

This cap will not reduce the amount of the judgment, but will only be capped so that companies will not have to either sell off assets or be put into bankruptcy pending the appeals process. This is a sensible approach, and if the verdict stands on appeal, then the business can then do necessary things to pay the judgment. Plus, there is a provision to prevent companies from dissipating assets which protects the judgment holder.

Thank you, Chairman Traynor and members of the Senate Judiciary Committee, for this opportunity to discuss the business community's position on SB 2273. We urge a **DO PASS** for Senate Bill 2273. Thank you and I would be happy to answer any questions at this time.

2000 Schafer Street PO Box 2639 Bismarck, ND 58502 Toll-free: 800-382-1405 Local: 701-222-0929 Fax: 701-222-1611
Web site: www.ndchamber.com E-mail: ndchamber@ndchamber.com

AH #4

ND Petroleum Marketers Association
ND Retail Association

February 2, 2005

To the Honorable Members of the Senate Judiciary Committee

Please give your favorable consideration for the enactment of **SB 2273**. Everyone deserves their day in court and that is why we endorse passage of limits on bonding that will ensure every defendant indeed has the opportunity to exhaust all of the options available to them to seek justice through the courts of law.

A limit is necessary in part because no one anticipated the recent phenomenon of jury awards that can amount hundreds of millions of dollars. The North Dakota Legislature should adopt SB 2273 and establish a $25 million limit on the bond that defendants must post to stay the execution of a judgment pending appeal. The limit is essential to guarantee fair treatment of all defendants and their respective right to appeal – without being force to declare bankruptcy to settle the case before completion of appellate review.

It is my understanding legislation (or court adopted rules) similar to SB 2273 have been addressed in some fashion by the majority of other states and we hope the ND Legislature will, too, enact this good public policy.

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#5

Senate Judiciary Hearing
Testimony presented by Paula J. Grosinger
Executive Director, North Dakota Trial Lawyers Association
Lobbyist #114

Senate Bill 2273
2 February 2005
701-202-1293

The most likely cases that would result in a judgment in excess of $25 million are cases where large numbers of individuals are caused physical or financial injury.

For instance, if the NDPERS plan were defrauded by ACME Investment, and a court found employees' losses were $200 million and awarded damages in that amount, the appeal bond would be capped at $25 million.

If a company polluted the Fargo city water supply with toxins resulting in deaths and illness, and a jury found liability of $500 million, the appeal bond could not exceed $25 million.

One could liken a cap on appeal bonds to the imposition of a mandatory minimum bond. Both scenarios are arbitrary and defeat the underlying criteria for setting an appeal bond.

The purpose of an appeal bond is to protect the judgment holder against any loss the holder may sustain as the result of an unsuccessful appeal, and to maintain the status quo while the appeal is pending. When there is a cap on the appeal bond, the judgment holder is left unprotected for any excess verdict. In addition, in cases where huge injury has been done, an appeal bond cap makes it easier for a defendant to delay payment to the injured.

Only about half of large jury verdicts are paid in full in this country now. Injured individuals in complex cases like medical malpractice, are forced to wait an average of three to five years before receiving the money they have been awarded because of appeals *(Daily Health Policy Report,* Kaiser Family Foundation, November 30, 2004). This is often money individuals need to live and to meet their medical expenses

The most likely defendants in very large verdict cases are corporations. SB 2273 amounts to providing special treatment to corporate defendants because they have the potential to harm a larger number of North Dakotans. Another way to look at it is that certain special interests would be able to post an appeal bond for a small fraction of the damages assessed by a jury simply because the special interest, individual or group has caused greater harm to a larger number of people.

Paula Grosinger

From: "Mike J. Williams" <mwilliams@maringlaw.com>
To: "Paula Grosinger" <grosingr@ndtla.com>; "Bliss David" <dbliss@olsoncichy.com>; "Heigaard McGurran Rebecca" <rmcgurran@camrudlaw.com>; "Wolf Albert" <aawolf@wheelerwolf.com>
Sent: Thursday, October 21, 2004 11:28 AM
Subject: RE: to the point

I have a call in to see how a letter might be received. I will also check to see what we might put in the letter that might be helpful. I will e-mail all once I have a response.

Mike

From: Paula Grosinger [mailto:grosingr@ndtla.com]
Sent: Thursday, October 21, 2004 11:49 AM
To: Bliss David; Heigaard McGurran Rebecca; Mike J. Williams; Wolf Albert
Subject: to the point

Rebecca and NDTLA folks,
Here's the text for the letter on Appeal Bonds letter. Tweak as you wish. I copied to Mike, Al and Dave Bliss, too.

Your Honors:

The North Dakota Trial Lawyers Association Board of Directors wishes to address the issue of a proposed cap on appeal bonds which was recently argued by legal representatives for the Phillip Morris Company.

At our recent executive committee conference call on October 20th, we agreed that imposition of an appeal bonds cap defeats the underlying criteria for setting an appeal bond. If one likened this to imposing a mandatory minimum bond, the arbitrary nature of a cap becomes even more clear. Imposition of an appeal bond cap has the effect of prejudging the merits of all appellate cases.

We are concerned that questions will be raised about the appropriateness of the Court ruling on something that more appropriately would be a statutory function.

Thank you for your consideration.

(Continued)

Oklahoma aimed at improving knowledge of nutrition and physical fitness among preschoolers. That age may sound too young, but in fact, young children can learn to identify foods as either "go" foods or "slow" foods, according to the program sponsor, the American Heart Association. Go foods are good for the body because they give you the energy you need to have fun. Slow foods like sweets and high-fat foods taste good and are good to eat every once in a while. Taught this way, children readily identify differences among foods.
Congress should promote such nutrition education nationally through school-based health centers as Sen. Lieberman has proposed.
For more information:
"Too much fat. Our position: Health chief Tommy Thompson needs to exert leadership,"
The Orlando News Sentinel, editorial, November 29, 2004:
http://www.orlandosentinel.com/news/opinion/orl-edped291112904nov29,1,1192316.story
"Healthy Habits for Kids Pushed in Oklahoma,"
Associated Press, November 29, 2004:
http://www.grandforks.com/mld/grandforks/10295560.htm
"Preventing Chronic Disease in Childhood,"
PPI Health Policy Wire, December 11, 2003:
http://www.ppionline.org/ppi_ci.cfm?contentid=252259&knlgAreaID=111&subsecid=900033

4.) Mega Malpractice Awards Not Worth the Wait
The big jury verdicts on medical malpractice lawsuits that often make headlines are paid in full just over half the time, according to a *Wall Street Journal* article. Earlier this year, for example, a New York state jury awarded $112 million to the parents of their brain-damaged daughter. Instead of the $112 million, they settled for $6 million in order to avoid lengthy appeals by the defendants.
The large amounts have at least one clear effect: they give patients a strong incentive to settle cases that might otherwise be open for years due to appeals by defendants. A study by Neil Vidmar, a Duke University law professor, and his colleagues of New York malpractice awards found that larger awards settled for a small percentage, typically 5 percent to 10 percent. It is not surprising that an injured patient would be eager to settle after a court judgment because on average, injured patients wait three to five years to receive damages.
A better way to provide streamlined justice would be through administrative Health Courts based in part on the worker's compensation system. Injured workers simply file a claim, which is a payable once the worker's compensation administrator determines that the injury is job-related. Health courts would be just as fast for straightforward cases like an injury from a hospital-acquired infection. Cases that are more complex would take more time because a health court would need to determine if the injury could have been avoided. But it would take much less time than today's medical justice system because health courts would be less adversarial with expert witnesses hired by the health court judge instead of the plaintiffs.
As the debate over malpractice reform heats up again next year in Congress and state legislatures, health courts offer fundamental reform as an alternative to tweaking or capping today's broken system of medical justice.
For more information: "Some Big Medical Malpractice Verdicts Significantly Reduced Through Settlements,"
Daily Health Policy Report, Kaiser Family Foundation, November 30, 2004:
http://www.kaisernetwork.org/

daily_reports/rep_index.cfm?DR_ID=26970
"Fact Check: The Impact of Malpractice on Health Costs,"
PPI Health Policy Wire, October 14, 2004:L
http://www.ppionline.org/ppi_ci.cfm?knlgAreaID=111
&subsecID=900033&contentID=252963

Page 11A

Legal myths: Hardly the whole truth

The stories are humdingers: People are injured, often while doing foolish things, yet they win huge payouts in court. The tales would be harmless, except that they're the backdrop for a very real push for tort reform.

By Jonathan Turley

Have you heard about the guy who injured himself while using his lawn mower as a hedge clipper, and then won $500,000 in a lawsuit against the lawn mower company? How about the woman who threw a soft drink at her boyfriend, slipped on the wet floor, and then won $100,000 in a lawsuit against the restaurant? These are only two of the common examples of lawsuit abuses that are fueling the call for "litigation reform." They are also completely untrue — part of a growing collection of legal mythologies that are appearing widely in the national media.

Image is everything in tort reform, such as President Bush's visit earlier this month to a "judicial hellhole" in Illinois where tort cases supposedly flourish. He has made tort reform a priority of his second term and is expected to repeat these calls in his State of the Union address Wednesday. It is all part of a well-funded campaign to limit damages against companies and physicians across the country.

Horror stories offered by industry groups play to a weakness in the media for "you-are-not-going-to-believe-this" stories. Of course, it is not surprising that the stories are unbelievable — because many never occurred.

Take the ubiquitous hedge-clipper man story. It has appeared in print, on TV programs, in law school classrooms and in political speeches for decades. Former vice president Dan Quayle used it in his call for reform (though he reportedly referred to the man cutting his hair with a lawn mower). In reality, the story originated in an ad campaign by the insurance firm Crum & Forester, which later admitted that it knew of no such case. Yet, proving that facts should never stand in the way of a good story, it remains perhaps the most cited example of abuse — the best $500,000 that the insurance industry never paid.

Even true stories often prove not to be examples of bad law, but bad lawyering. Take the list of the "wackiest consumer warnings," released this month by the Michigan Lawsuit Abuse Watch to show the need for reform. Included are such things as a warning on a toilet brush that reads, "Do Not Use for Personal Hygiene" or a sign on a scooter that reads, "This product moves when used." These are not fabrications, but none of these warnings make any more legal sense than they do practical sense. No company has to warn consumers not to use a toilet brush on their teeth or hair.

Legal legends can be irresistible, even for the most respected newspapers, magazines and networks.

*U.S. News & World Report*owner Mort Zuckerman used the story of the soft drink lady in Pennsylvania in an article denouncing lawsuit abuse. He is not alone. The tale of Amber Carlson and her soda has appeared in countless television and print sources. Zuckerman also cited the case of a woman who knocked her teeth out while sneaking through a nightclub's restroom window to avoid paying a $3.50 cover charge — and then won $12,000 from a jury. It is also false.

Both stories have been attributed to the Stella Awards, an annual listing of loony lawsuits. But the Stella Web site points out that they both are complete fabrications. Yet they continue to appear in print and on the Internet.

Other examples of fabricated "true cases of lawsuit abuse":

•Kathleen Robertson of Austin received $780,000 from a jury after she tripped over her own son in a furniture store.

•Carl Truman, a 19-year-old in Los Angeles, was awarded more than $74,000 when his hand was run over by a neighbor. The neighbor did not see Truman, who was in the process of stealing his hubcaps.

•Terrence Dickson of Bristol, Pa., was given a $500,000 award after he was inadvertently trapped in the garage of a house that he was burglarizing.

•A Mr. Grazinski won more than $1,750,000 and a new Winnebago after he put his new motor home on cruise control at 70 mph and then went into the back to fix himself some coffee — only to crash on the highway.

These are the legal versions of the urban legends about alligators living in the New York City sewers. Everyone knows that alligators brought back by kids as pets from Florida have been flushed down the toilets, only to thrive below the streets of New York City.

Legal legends fit the stereotype of litigation so well that their falsity becomes secondary. Of course, law is not alone in such fabrications. Consider my favorite story about Pia Zadora's dismal performance as the lead in *The Diary of Anne Frank*. Zadora was so bad that, during the scene where Nazis break into the house screaming, "Where is Anne Frank?" audience members screamed, "She's in the attic!" It is a brilliant story, but I was crushed to learn recently that it is also completely untrue: Zadora has never played Anne Frank, and there is no such scene in the play.

I loved the Zadora story for the same reason people such as Zuckerman loved the fabricated lawsuit stories: They capture a critical idea with an element of humor or absurdity. There is, however, a great difference between using urban legends to dish on some actress and using them to make massive changes in the law. So, as we begin this latest debate over tort reform, one small piece of advice: If you hear about a case that is almost too good to be true, it probably isn't.

Jonathan Turley is the Shapiro Professor of Public Interest Law at George Washington University and has testified before Congress on tort reform. He is also a member of USA TODAY's board of contributors.

North Dakota Petroleum Council

A Division of the American Petroleum Institute
and the
North Dakota Oil and Gas Association

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February 28, 2005

Representative Duane DeKrey, Chairman
House Judiciary Committee
600 E. Boulevard Avenue
Bismarck, North Dakota 58505

Re: SB 2273

Dear Chairman DeKrey and Committee Members,

I am writing in support of SB 2273 which places sensible limits upon bond requirements for those litigants who wish to appeal a judgment. The bill sets a maximum appeal bond in North Dakota of $25,000,000. Even though we have seen few jury awards of that size in North Dakota, I believe the state should take the pro-active step of placing a cap on appeal bonds. As you know, the appeal bond is designed to maintain the status quo during an appeal. This allows both litigants a fair opportunity to settle their differences and preserves the status quo while the case is being reviewed in the appellate process. However, if the appeal bond is set so high that a litigant cannot afford to post the bond, it places the litigants in an unequal position, and impedes the appellant's access to the court.

The North Dakota Petroleum Council represents over 100 members engaged in exploration, production, pipeline, oil field service, gas processing, and refining activities across western North Dakota, some of which involve multi-million dollar facilities and activities. We hope never to be exposed to multi-million dollar verdicts, but if such an event were to occur, I believe our members should have the right to have the case reviewed on appeal, and not be prevented from appealing because of an inability to post a large bond.

SB 2273 preserves North Dakota citizens fair access to the Courts, and to have their cases reviewed on appeal. I urge a DO PASS on SB 2273.

Sincerely,

Ron Ness
President

ND Petroleum Marketers Association
ND Retail Association

March 7, 2005

To the Honorable Members of the House Judiciary Committee

Please give your favorable consideration for the enactment of **SB 2273**. Everyone deserves their day in court and that is why we endorse passage of limits on bonding that will ensure every defendant indeed has the opportunity to exhaust all of the options available to them to seek justice through the courts of law.

A limit is necessary in part because no one anticipated the recent phenomenon of jury awards that can amount hundreds of millions of dollars. The North Dakota Legislature should adopt SB 2273 and establish a $25 million limit on the bond that defendants must post to stay the execution of a judgment pending appeal. The limit is essential to guarantee fair treatment of all defendants and their respective right to appeal – without being force to declare bankruptcy to settle the case before completion of appellate review.

It is my understanding legislation (or court adopted rules) similar to SB 2273 have been addressed in some fashion by the majority of other states and we hope the ND Legislature will, too, enact this good public policy.

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Testimony of David Straley
Greater North Dakota Chamber of Commerce
Presented to the House Judiciary Committee
March 8, 2005

SB 2273

Mr. Chairman and members of the House Judiciary Committee, my name is David Straley. I am here today representing a coalition 18 chambers of commerce that speak for over 7,400 member businesses in North Dakota. I am here today to urge you to **support** Senate Bill 2273.

We believe North Dakota should join the majority of states that have a bond cap. North Dakota should adopt a sensible appeal bond limit. To my understanding, we have never had a jury award for as much as this cap, but someday, I'm sure we will.

This cap will not reduce the amount of the judgment, but will only be capped so that companies will not have to either sell off assets or be put into bankruptcy pending the appeals process. This is a sensible approach, and if the verdict stands on appeal, then the company can liquidate assets to pay the judgment. Plus, there is a provision to prevent companies from dissipating assets.

Thank you, Chairman DeKrey and members of the House Judiciary Committee, for this opportunity to discuss the business community's position on SB 2273. We urge a **DO PASS** for Senate Bill 2273. Thank you and I would be happy to answer any questions at this time.

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The following chambers are members of a coalition that support our policy statements:

Beulah

Bismarck-Mandan

Bottineau

Cando

Crosby

Devils Lake

Dickinson

Fargo

Grand Forks

Greater North Dakota Chamber of Commerce

Hettinger

Jamestown

Langdon

Minot

Wahpeton

Watford City

West Fargo

Williston

Total Businesses Represented = 7429

COVINGTON & BURLING

To: **Rep. Duane DeKrey, Chairman**
House Judiciary Committee

From: **Keith A. Teel, Partner, Covington & Burling, Washington, D.C., representing Philip Morris USA by its service company Altria Corporate Services, Inc.**

Date: **Tuesday, March 8, 2005**

Subject: **Support of S.B. 2273, relating to supersedeas bonds**

First, I'd like to thank you for the opportunity to speak with your committee today in support of Senate Bill 2273, which provides a $25 million limitation on bond requirements during appeal in civil litigation. My name is Keith A. Teel, and I am here today representing Philip Morris USA by its service company Altria Corporate Services, Inc.

An undeniable trend in litigation over the past decade has been the skyrocketing size of damage awards. In 2003 alone, nationally there were 21 jury verdicts over $100 million, while in 1992 only 8 verdicts exceeded $100 million.[1] The total value of the 100 largest jury verdicts in 2003 was $19.6 billion.[2] Defendants who are subject to these large damage awards invariably seek to appeal them, and they are often successful in getting the judgments reduced or overturned on appeal, particularly where a significant portion of the award is made up of punitive damages. But most states, including North Dakota, require the defendant to post a bond in order to stay the execution of a judgment during the course of appeal. The purpose of the bond is to "maintain the status quo and protect the judgment holder if the appeal is unsuccessful," while at the same time protecting the defendant from having the plaintiff seize its assets while it appeals.[3]

In most states, the bond that defendants must post to obtain a stay during an appeal equals or exceeds the amount of the judgment. Neither North Dakota Rule of Civil Procedure 62(d) or Rule of Appellate Procedure 8 specifies the amount of a bond that a defendant must post in North Dakota, so courts have discretion to determine how large of a bond is necessary to give the plaintiff sufficient security in the judgment.[4] While North Dakota courts

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1 See VerdictSearch, Top 100 of 2003 (last visited Feb. 18, 2004), at http://www.verdictsearch.com/jv3_news/top100/; "1992's Largest Verdicts," National Law Journal, at S1 (Jan. 25, 1993).

2 David Hechler, "When a Zebra is Not a Horse: A Picture of a Zebra Was a Jury Prop in a Contract Case Worth $11.9 Billion," National Law Journal, at 1 (Feb. 9, 2004).

3 Berg v. Berg, 530 N.W. 2d 341, 343 (N.D. 1995).

4 See In re Estate of Johnson, 214 N.W. 2d 109, 111 (N.D. 1973) (reviewing trial court's setting of the bond amount for abuse of discretion, and finding that the bond was "reasonable under the circumstances and fairly related to potential damages that might be suffered" by the plaintiff).

have usually held that a bond equal to or lesser than the total judgment is adequate,[5] under the current rules, judges may theoretically set the bond at any amount they deem appropriate -- even if that amount exceeds the total judgment.

If a defendant cannot afford to post a bond in the amount set by the court, 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. In the context of the tobacco companies, a bankruptcy stay could disrupt the billions of dollars in payments the companies owe to North Dakota and the other states under the tobacco master settlement agreement ("MSA"). This problem has been most vividly demonstrated by the 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 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. The appellate court ultimately rejected and reversed the verdict in its entirety.[6]

To date, 32 states have recognized the potential consequences of exorbitant appeal bonds and have passed legislation or amended court rules to limit the size of the required bond in cases involving large judgments. In addition, it should be noted that 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. 2273 would impose a $25 million limit on the appeal bond that defendants must post to stay the execution of a judgment in North Dakota. This bond limit would not change 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 -- nor does it affect the rights of plaintiffs to recover fully the damages to which they are entitled if the judgment is upheld on appeal. This limit is essential to guaranteeing that all defendants are treated fairly and are able to exercise fully their right to appeal, without being forced to declare bankruptcy or to settle the case before the completion of appellate review.

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[5] See Berg, 530 N.W.2d at 341 (district court required a $6,000 bond to stay execution of a $9852 judgment); Dakota Northwestern Bank Nat'l Ass'n. v. Schollmeyer, 311 N.W. 2d 164, 165 (N.D. 1981) (district court required a $13,000 bond to stay execution of a $20,828.81 judgment); Stetson v. Investors Oil, 176 N.W. 2d 643, 644 (N.D. 1970) (district court required $40,000 bond to stay execution of a $68,521.94 judgment).

[6] Liggett Group v. Engle, 2003 Fla. App. LEXIS 7500 (Fla. Dist. Ct. App. 2003).

S.B. 2273 is also essential to protect the rights of plaintiffs: by ensuring that defendants are not bankrupted by huge appeal bond requirements, the limit would help to guarantee that plaintiffs who obtain judgments will have solvent defendants from whom they can collect. 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. 2273 thus would not injure plaintiffs in any way, but would merely guarantee that all defendants, no matter how large the judgment against them, can exercise their right to appeal.

For the foregoing reasons, the committee should pass S.B. 2273. Thank you.