John M. Olson
jolson@olsoncichy.com

Joseph J. Cichy
jcichy@olsoncichy.com

David R. Bliss
dbliss@olsoncichy.com

OLSON CICHY BLISS
ATTORNEYS, P.C.

ORIGINAL

P.O. Box 817
115 North 4th Street
Bismarck, ND 58501
Phone: 701-223-4524
Fax: 701-223-0855

JoDee S. Wiedmeier, CLA
Certified Legal Assistant
jwiedmeier@olsoncichy.com

20030329

November 5, 2003

RECEIVED BY CLERK
SUPREME COURT NOV 6 2003

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOV 6 2003
STATE OF NORTH DAKOTA

Penny Miller, Clerk
North Dakota Supreme Court
State Capitol
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505

Re: Petition to Amend North Dakota Rule of Civil Procedure 62 and North Dakota Rule of Appellate Procedure 8

Dear Ms. Miller:

I am submitting this letter to request that the Court amend North Dakota Rule of Civil Procedure 62 ("N.D. R. Civ. Pro. 62") and North Dakota Rule of Appellate Procedure 8 ("N.D. R. App. Pro. 8") to establish a maximum appeal bond of $25 million. This submission is being made on behalf of my client, Philip Morris USA.

Proposed Amendments to N.D. R. Civ. Pro. 62 and N.D. R. App. Pro. 8

Please accept this letter as a petition to amend N.D. R. Civ. Pro. 62 to read as follows:

Rule 62. Stay of proceedings to enforce a judgment.

(a) Automatic Stay--Exceptions--Injunctions, receiverships, and accountings. Except as stated herein, no execution may issue upon a judgment nor may proceedings be taken for its enforcement until the expiration of ten days after notice of its entry if the opposing party appeared, and ten days after entry of a judgment by default. Unless otherwise ordered by the court, an interlocutory or final judgment in an action, or a judgment or order directing an accounting, may not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

.....

(d) Stay upon appeal. If an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a). The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court. The amount of the bond required collectively of all appellants may not exceed twenty-five million dollars regardless of the amount of the

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

.....

Please accept this letter as a petition to amend N.D. R. App. Pro. 8 to read as follows:

Rule 8. Stay or injunction pending appeal.
(a) Motion for stay.
(1) Initial motion in the district court. A party must ordinarily move first in the district court for the following relief:
(A) a stay of the judgment or order of a district court pending appeal.
(B) approval of a supersedeas bond.
(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.
(2) Motion in the supreme court: Conditions on relief. A motion for the relief mentioned in paragraph (a)(1) may be made to the supreme court or to one of its justices.
.....
(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court. The amount of the bond required collectively of all appellants may not exceed twenty-five million dollars regardless of the amount of the judgment. However, if an appellee proves by a preponderance of the evidence that an appellant whose bond has been limited is dissipating assets outside the ordinary course of business to avoid payment of a judgment, the court may require the appellant to execute a bond in an amount up to the amount of the judgment.
.....

The Problem - Ever Larger Verdicts Demand Ever Larger Appeal Bonds

One of the most frequently discussed trends in litigation over the past decade has been the skyrocketing size of damage awards. In 2002 alone, nationally there were 22 judgments over $100 million, including one for $28 billion, while in 1992 only 8 judgments exceeded $100 million. The total value of the 100 largest awards in 2002 was more than three times the size of the previous year's total. [1] 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.

---

[1] "Total Value of 2002's 100 Largest Awards More than Triples Previous Year's Total," National Law Journal, at C3 (Feb. 4, 2003); "1992's Largest Verdicts," National Law Journal, at S1 (Jan. 25, 1993).

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.[2]

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 N.D. R. Civ. Pro. 62(d) or N.D. R. App. Pro. 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.[3] While North Dakota courts have usually held that a bond equal to or lesser than the total judgment is adequate,[4] under the current rules, judges may theoretically set the bond at any amount they deem appropriate -- even if that amount exceeds the total 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 over100 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

---

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

3 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).

4 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).

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."[5]

- 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. [6]

- 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. [7]

- The Loewen Group was forced to settle with plaintiffs after a Mississippi jury returned a verdict of $500 million against the company. The appeal bond that the company would have had to post in order to stay the execution of the judgment was $625 million, the approximate net worth of the company. To avoid filing for bankruptcy protection, the company settled with the plaintiffs for $175 million.[8]

- 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."[9]

The problems caused by exorbitant appeal bonds have been most vividly demonstrated by the ongoing case of Price v. Philip Morris in Madison County, Illinois. In March 2003, a judge awarded a class of smokers over $10.1 billion in damages from Philip Morris, and set the appeal bond at $12 billion -- an amount that the company could not possibly have posted.[10] If the company had been forced to post such a large bond, it most likely would not have been able to continue to make the billions of dollars in payments that it owes under the Master Settlement Agreement ("MSA") and other settlements with every state. Because of concern about this disastrous result, 37 state attorneys general (including North Dakota's) and The National Conference of State Legislatures petitioned the Price court to allow a lower bond to be posted so that MSA payments would not be jeopardized. The bond was eventually lowered to $6.8 billion, but even this reduced

---

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

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

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

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

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

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

amount would bankrupt most companies.

Newspapers across the country have called on courts and legislatures to enact sensible limits on appeal bonds. Commenting on the Price litigation, 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." [11] 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."[12] The paper recognized that high appeal bonds "render the right to an appeal nearly meaningless, thus violating the defendant's due process rights." And the *Chicago Sun-Times* acknowledged that "the antiquated appeal bond rule, devised long before such astronomical judgments were even imagined, must be reformed."[13]

The Solution - Sensible Appeal Bond Limits

Over the last three years, a number of states have recognized the potential consequences of exorbitant appeal bonds such as the one in Price, and have taken steps to deal with this problem. One of the most recent states to take action was South Dakota, whose Supreme Court changed its court rules in September 2003 to place a $25 million cap on appeal bonds. What follows is a discussion of the measures other states have taken to deal with the negative effects of appeal bonds.

Florida was the first state to enact limits on appeal bonds in 2000, when the Engle class action against the tobacco companies seemed likely to produce a multi-billion dollar punitive damages verdict. Although Florida legislators were not particularly sympathetic towards tobacco companies, they recognized that these corporations, like all defendants, are entitled to the right to appeal, and that the state would lose an important income stream from its tobacco settlement if the companies were forced to file for bankruptcy to secure an appeal. Thus, the legislature enacted a cap on the size of the appeal bond that would have to be posted with regard to the punitive damages aspect of any judgment. The cap limited appeal bonds to the lower of the punitive damages judgment plus twice the statutory rate of interest, ten percent of a defendant's net worth, or $100 million.[14]

The jury in Engle eventually awarded the plaintiffs $145 billion in punitive damages. Under Florida's previous appeal bond rules, the defendants would have had to post a $181 billion bond to appeal this judgment, which would have bankrupted any company or group of companies. But because the legislature had passed the appeal bond cap, the tobacco companies were able to post a much lower bond and appeal the verdict. In May 2003, a Florida appeals court set aside the entire verdict, holding that the certification of the class was improper. [15] But if the legislature had not acted to limit the appeal bond prior to the trial court's judgment in Engle, the previous bonding

---

11 "A Madison County Jackpot," Chicago Tribune, at 22 (April 2, 2003).

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

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

14 Fla. Stat. § 768.733 (2002).

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

requirement would have bankrupted an entire industry, thrown thousands of people out of work, and hurt all states by disrupting their tobacco settlement revenues.

Since Florida enacted its bonding legislation, twenty-two other states have followed suit, two by court rule and the rest through legislation, and in two other states (New Jersey and Wisconsin) legislation is awaiting the governor's signature. Five other states (Connecticut, Maine, Massachusetts, New Hampshire, and Vermont) automatically stay a judgment upon the filing of a notice of appeal, so over half of the states currently limit the appeal bond requirement. The approaches taken by the states have differed somewhat, as summarized below.

Besides Florida, four other states enacted limits on the size of appeal bonds in 2000. These states were Kentucky ($100 million limit), and Georgia, North Carolina and Virginia ($25 million limits). [16] In each of these states, the limit applied only to the bond for the punitive damages portion of a judgment. These states were concerned that if the Florida legislature did not limit appeal bonds there, the Engle plaintiffs might seek to seize tobacco company assets in other states. Thus, these states limited the size of bonds for judgments entered by courts within their states, and further provided that if a plaintiff with an out-of-state judgment came to one of the states to collect on that judgment, the defendant could stop the plaintiff until the appeal was completed by posting the bond required in that state. These states were worried that the tobacco settlement proceeds might be threatened before an appeal could ever be completed, and they were also worried about the jobs that could be lost in their states if the tobacco companies were put out of business before they could appeal.

In 2001, Louisiana, Nevada, Oklahoma, and West Virginia passed legislation that limited the size of the appeal bond that signatories of the tobacco Master Settlement Agreement would have to post to appeal a damages verdict of any kind, be it compensatory or punitive damages.[17] Again, a primary motivating factor for these states was their financial interest in ensuring that settlement proceeds under the state tobacco settlement were not threatened because of the inability of the tobacco companies to appeal a judgment. The Oklahoma appeal bond cap was $25 million; the caps in Nevada and Louisiana were $50 million; and West Virginia's cap was $100 million for punitive damages and $100 million for compensatory damages.

In 2002, three states enacted legislation limiting the size of appeal bonds. Ohio adopted a $50 million limit, [18] while Indiana and Michigan [19] each adopted a $25 million limit. Significantly, these bond limitations were not tied in any way to tobacco companies or the Master Settlement Agreement, but are truly comprehensive in scope. In each state, the limits that were adopted apply to damages of all kinds, including the costs a defendant might incur to pay for equitable relief, and to all types of defendants.

---

[16] See Ga. Code Ann. § 5-6-46 (2002); Ky. Rev. Stat. Ann. § 205.1(Michie 2002); N.C. Gen. Stat. § 1-289 (2002); Va. Code Ann. § 8.01-676.1 J. (2002).

[17] See La. Rev. Stat. Ann. § 98.6 (West 2002); Nev. Rev. Stat. § 20.035.1 (2002); Okla. Stat. Ann. tit. 12 § 990.4 B.5 (2002); and W. Va. Code § 4-11A-4 (2002).

[18] See Ohio Rev. Code Ann. § 2505.09 (2002).

[19] See Ind. Code § 34-49-5-3 (2002); Mich. Comp. Laws. Ann. § 600.2607(1) (2002).

Thus far in 2003, the legislatures in Arkansas, California, Colorado, Idaho, Kansas, Missouri, New Jersey, Oregon, Tennessee, Texas, and Wisconsin have each adopted appeal bond caps.[20] As in Indiana, Michigan and Ohio, the legislation passed in Arkansas, Colorado, Tennessee, Texas, and Wisconsin applies to all parties. In California, Kansas, New Jersey, Oregon, and Missouri, however, the caps apply only to appellants who are signatories, affiliates, or successors of signatories to the MSA, and Idaho's cap applies only to the punitive damages portion of a judgment. Arkansas, Colorado, Kansas, and Texas legislators agreed to cap their appeal bonds at $25 million, while Missouri and New Jersey capped their bonds at $50 million; Tennessee's cap stands at $75 million; Wisconsin's cap is $100 million; in California, the cap is the lesser of 100% of the judgment or $150 million; and Oregon's cap is $150 million. Idaho placed a $1 million cap on the punitive damages portion of a judgment. In addition, Florida and North Carolina adopted legislation to expand their appeal bond limits, making them applicable to all money judgments under any legal theory (rather than the punitives-only caps enacted in 2000).

Besides the twenty-three state legislatures that have passed appeal bond legislation, the Supreme Courts of two states changed court rules that, like N.D. R. Civ. Pro. 62 and N.D. R. App. Pro. 8, govern appeal bonds. In 2001 the Mississippi Supreme Court amended its court rules to limit the bond that a defendant in any case would have to post to stay a punitive damages judgment while it appeals. [21] The amount of the limit imposed by the court was the lower of $100 million, 125 percent of the punitive damages award, or 10 percent of the defendant's net worth. And in September 2003, the South Dakota Supreme Court amended its court rules to limit the bond for any money judgment to $25 million. [22] Both of these court rules apply to all civil actions, not just those involving MSA signatories.

North Dakota Should Amend N.D. R. Civ. Pro. 62 and N.D. R. App. Pro. 8

As the foregoing discussion shows, many states have recognized in the last three years that uncapped appeal bonds could effectively deny a defendant's right to appeal. The North Dakota Supreme Court should do as the Supreme Courts of Mississippi and South Dakota have done to ensure that that never happens here, by adopting a sensible outer limit on appeal bonds.

The proposed amendments to N.D. R. Civ. Pro. 62 and N.D. R. App. Pro. 8 would establish a $25 million limit on the size of appeal bonds. These limits would apply to all defendants in any type of action, and they would cover both punitive and compensatory damages. The amendments preserve a court's discretion to determine how large of a bond is necessary to protect the plaintiff should the defendant's appeal be unsuccessful, within this generous $25 million limit. The amendments also provide that, if a defendant is dissipating its assets outside the ordinary course of business for the purpose of evading the full payment of a judgment, the court may order a bond up

---

[20] See Ark. Code § 16-55-214 (2003); Colo. Rev. Stat. § 13-16-125 (2003); Idaho Code § 13-202 (2003); Mo. Rev. Stat. § 512.085 (2003); Tenn. Code Ann. § 27-1-124 (2003); Tex. Civ. Prac. & Rem. Code Ann. § 52.006 (2003); the California, Kansas, and Oregon statutes have not yet been codified, and the Wisconsin and New Jersey appeal bond bills are still awaiting signature by their respective governors.

[21] See Miss. R. of App. Pro. 8.

[22] See S.D. Sup. Ct. R. 14-26A-26.

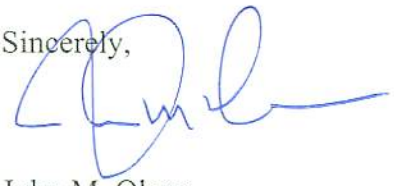
to the full amount of the judgment. This provision is found in almost all of the appeal bond limitation laws adopted over the last three years in other states.

Importantly, the proposed amendments do not change any substantive law. Nothing in the amendments change the right of the plaintiffs to recover fully the damages to which they are entitled. An appeal bond that is set lower than the total damages award does not have any effect on the judgment itself.[23] If the verdict is upheld on appeal, the defendants are required to pay the full amount of the judgment, not merely the amount of the appeal bond. The proposed amendment merely ensures that defendants can fully exercise their right to an appeal without going into bankruptcy or being forced to settle with the plaintiffs.

In summary, the proposed amendments are a sensible change to North Dakota's court rules. Plaintiffs would be protected by the large but limited bond that is required, and by the provision allowing a judge to require a higher bond if a defendant is improperly dissipating its assets. A defendant's right to appeal is also fully protected, by mandating a large but not impossibly high appeal bond. The limit also ensures that corporate defendants stay solvent throughout the appeals process, thus protecting the jobs of North Dakota residents and the vitality of the state's economy.

For these reasons, I urge the Court to adopt the proposed amendments. Thank you for your consideration of this matter.

Sincerely,



John M. Olson

---

[23] See Berg, 530 N.W.2d at 343 ("to hold that the amount of a bond would provide a maximum cap for a judgment would be ludicrous...a supersedeas bond does not create a judgment cap").