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ON BEHALF OF THE AMERICAN TORT REFORM ASSOCIATION AND
NATIONAL FEDERATION OF INDEPENDENT BUSINESS (NFIB)
IN SUPPORT OF S.B. 199, AMENDING SUPERSEDEAS BOND REQUIREMENTS

In the past two decades, states have come to realize that outdated supersedeas (appeal) bond requirements may act as a barrier to prevent a defendant from being able to exercise its right to appeal. The rapid rise of class actions and mass torts, and the emergence of state and local government-sponsored lawsuits, have created the possibility of astronomically large judgments in civil cases. Often, the cases are based on novel and expansive theories of liability, and may be highly speculative. Bonding statutes can stand as an unfair roadblock to appeals of crushing verdicts. There is no way for a defendant to stay the judgment and pursue an appeal if the defendant is financially unable to bond the judgment or cannot find someone willing to issue the bond. A company could face bankruptcy in that situation.

To make matters worse, the cases that cry out for appellate review are the ones that defendants may not be able to appeal – cases that may be based on an untested legal theory, involve prejudicial or inflammatory evidence, or result in an excessive punitive damages award.

The only way for a defendant to avoid such a fate is to settle at a premium, even if the defendant believes the plaintiff's case is flimsy or meritless. Bonding statutes should not be a tool to facilitate legal extortion.

Most states have updated their appeal bond laws to address these modern litigation issues. Kansas has two appeal bond laws. KSA § 50-6a05 limits appeal bonds to $25 million for signatories to the state attorney general tobacco litigation Master Settlement Agreement and their successors. Kansas also enacted KSA § 60-2103 applicable to all other civil defendants. That statute provides that a trial court *may* reduce the amount of the bond in judgments exceeding $1 million to $1 million *plus* 25% of any amount in excess of $1 million. The cap does not apply if the court finds the judgement defendant is purposefully dissipating its assets or diverting assets to avoid the payment on the judgement or if the judge finds the defendant is *likely* to disburse assets needed to satisfy the judgment.

S.B. 199 will harmonize Kansas law and bring it into conformity with the approach in most other states in several key ways.

First, the general bond cap would be set at $25 million, like the bond cap that applies to tobacco companies in Kansas and the approach taken in most other states. Virtually all other states with bond caps use a "hard" cap, such as $25 million. Kansas is an outlier in having an appeal bond limit for most civil cases that is based on a percentage of the judgment in cases exceeding $1 million. That approach does not give defendants the certainty they need before trial as to the availability of an appeal following a potentially excessive verdict. Thus, undue pressure to settle speculative but potentially high value cases remains.

Second, general civil defendants will have certainty as to the $25 million cap, again like the bond cap that applies to tobacco companies in Kansas and the approach taken in most other states. Kansas is also an outlier in allowing a trial court discretion as to whether to limit an appeal bond to something less than the full amount of the judgment. This is another reason why

defendants cannot be certain before trial that an appeal will be available, again leading to pressure to settle cases at a premium and for reasons not related to the merits of the case.

Third, general civil defendants will have certainty as to the availability of the cap unless they purposefully dissipate assets to avoid paying the judgment – also like the bond cap that applies to tobacco companies in Kansas and the approach taken in most other states. Kansas is an outlier in allowing a judge to waive the general bond cap if the court finds the defendant is *likely* to engage in mischief. This standard is too subjective and gives trial courts too much power to remove the certainty that defendants need to protect the right to an appeal.

Finally, S.B. 199 establishes a $1 million appeal bond limit for small business defendants. This provision acknowledges that capping appeal bonds at $25 million may not protect the right to appeal for many small businesses because they lack that level of financial wherewithal.

The reforms in S.B. 199 are fair and workable. We know that from the experience in Kansas under the appeal bond law that applies to tobacco companies and from the experience of some thirty other states over the past twenty years. ATRA and NFIB urge passage of S.B. 199.