SUBSTITUTE FOR

SENATE BILL NO. 472

A bill to amend 1999 PA 244, entitled

"An act to require tobacco product manufacturers to place funds in escrow for medical expenses incurred by the state due to tobacco related illnesses; to establish a formula for determining the amount of the escrow; to establish the conditions for release of funds from escrow; to prescribe powers and duties of the attorney general; and to provide for civil penalties for violation of this act,"

by amending sections 1 and 2 (MCL 445.2051 and 445.2052), section 2 as amended by 2003 PA 286.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. As used in this act:

(a) "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the master settlement agreement.

(b) "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns", "is owned", and "ownership" mean ownership of an equity interest, or the equivalent thereof, of 10% or more, and the term "person" means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(c) "Allocable share" means that term as defined in the master settlement agreement.

(d) "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (*i*) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (*ii*) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (*iii*) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (*i*) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette", 0.09 ounces of "roll-your-own" tobacco shall constitute 1 individual "cigarette".

(e) "Inflation adjustment" means that term as defined in the master settlement agreement.

(f) "Master settlement agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, and incorporated into a consent decree and final judgment entered into on December 7, 1998, in Kelley Ex Rel. Michigan v Philip Morris Incorporated, et al., Ingham ~~county~~ **COUNTY** circuit court, docket no. 96-84281CZ.

(g) "Original participating manufacturer" means that term as defined in the master settlement agreement.

(h) "Participating manufacturer" means that term as defined in the master settlement agreement.

(i) "Qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least $1,000,000,000.00 where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with section 2(2) of this act.

(j) "Released claims" means that term as defined in the master settlement agreement.

(k) "Releasing parties" means that term as defined in the master settlement agreement.

(*l*) "Tobacco product manufacturer" means an entity that after the date of enactment of this act directly (and not exclusively through any affiliate) meets 1 or more of the following:

(*i*) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer that will be responsible for the payments under the master settlement agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the master settlement agreement and that pays the taxes specified in subsection II(z) of the master settlement agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States).

(*ii*) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States.

(*iii*) Becomes a successor of an entity described in subparagraph (*i*) or (*ii*).

(m) The term "tobacco product manufacturer" as defined in subdivision (*l*) does not include an affiliate of a tobacco product manufacturer unless the affiliate itself falls within 1 or more of subdivision (*l*)(*i*) to (*iii*).

(n) "Units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the state on packs (or "roll-your-own" tobacco containers) bearing the excise tax stamp of the state. **UNITS SOLD SHALL ALSO INCLUDE THE NUMBER OF INDIVIDUAL CIGARETTES SOLD IN THE STATE BY THE APPLICABLE TOBACCO PRODUCT**

MANUFACTURER (WHETHER DIRECTLY OR THROUGH A DISTRIBUTOR, RETAILER, OR SIMILAR INTERMEDIARY OR INTERMEDIARIES) DURING THE YEAR IN QUESTION, AS TO WHICH THE STATE HAD POWER TO UNDER FEDERAL LAW, BUT DID NOT, IMPOSE OR COLLECT AN EXCISE TAX. The department of treasury ~~shall~~ **MAY** promulgate such ~~regulations~~ **RULES** as are necessary to ascertain the amount of ~~state excise tax paid on the cigarettes~~ **UNITS SOLD** of such tobacco product manufacturer for each year.

Sec. 2. (1) Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the date of enactment of this act shall do 1 of the following:

(a) Become a participating manufacturer and generally perform its financial obligations under the master settlement agreement.

(b) Place into a qualified escrow fund ~~by April 15 of the year following the year in question~~ the following amounts (as such amounts are adjusted for inflation):

(*i*) 1999: $.0094241 per unit sold after the date of enactment of this act.

(*ii*) 2000: $.0104712 per unit sold.

(*iii*) For each of 2001 and 2002: $.0136125 per unit sold.

(*iv*) For each of 2003 through 2006: $.0167539 per unit sold.

(*v*) For each of 2007 and each year thereafter: $.0188482 per unit sold.

(2) THE ESCROW FUND DEPOSITS REQUIRED BY THIS SECTION SHALL BE MADE IN QUARTERLY INSTALLMENTS FOLLOWING THE QUARTER IN WHICH SALES

TOOK PLACE. FOR PURPOSES OF THIS SECTION, THE CALENDAR YEAR SHALL BE DIVIDED INTO THE FOLLOWING QUARTERS: JANUARY 1 THROUGH MARCH 31; APRIL 1 THROUGH JUNE 30; JULY 1 THROUGH SEPTEMBER 30; AND OCTOBER 1 THROUGH DECEMBER 31. DEPOSITS FOR SALES FOR EACH QUARTER SHALL BE MADE ACCORDING TO THE FOLLOWING SCHEDULE:

(A) DEPOSITS FOR SALES OCCURRING IN THE FIRST QUARTER, JANUARY 1 THROUGH MARCH 31, ARE DUE APRIL 30 OF THE SAME YEAR. A CERTIFICATION OF THE FIRST QUARTER DEPOSIT SHALL BE FILED WITH THE DEPARTMENT OF TREASURY NO LATER THAN MAY 15 OF THE SAME YEAR.

(B) DEPOSITS FOR SALES OCCURRING IN THE SECOND QUARTER, APRIL 1 THROUGH JUNE 30, ARE DUE JULY 31 OF THE SAME YEAR. A CERTIFICATION OF THE SECOND QUARTER DEPOSIT MUST BE FILED WITH THE DEPARTMENT OF TREASURY NO LATER THAN AUGUST 15 OF THE SAME YEAR.

(C) DEPOSITS FOR SALES OCCURRING IN THE THIRD QUARTER, JULY 1 THROUGH SEPTEMBER 30, ARE DUE OCTOBER 31 OF THE SAME YEAR. A CERTIFICATION OF THE THIRD QUARTER DEPOSIT SHALL BE FILED WITH THE DEPARTMENT OF TREASURY NO LATER THAN NOVEMBER 15 OF THE SAME YEAR.

(D) DEPOSITS FOR SALES OCCURRING IN THE FOURTH QUARTER, OCTOBER 1 THROUGH DECEMBER 31, ARE DUE JANUARY 31 OF THE FOLLOWING YEAR. A CERTIFICATION OF THE FOURTH QUARTER DEPOSIT SHALL BE FILED WITH THE DEPARTMENT OF TREASURY NO LATER THAN FEBRUARY 15 OF THE YEAR FOLLOWING THE YEAR IN WHICH THE CIGARETTES WERE SOLD.

(3) FOR EACH OF THE QUARTERS, THE QUARTERLY DEPOSIT SHALL BE BASED UPON UNITS SOLD IN THAT QUARTER TOGETHER WITH THE INFLATION ADJUSTMENT PROVIDED BY THE DEPARTMENT OF TREASURY. AN ANNUAL RECONCILIATION DEPOSIT SHALL BE MADE ON OR BEFORE APRIL 15 OF THE YEAR FOLLOWING THE YEAR IN WHICH THE CIGARETTES WERE SOLD TO

ACCOUNT FOR THE ACTUAL ANNUAL INFLATION ADJUSTMENT. A STATEMENT OF THE RECONCILIATION DEPOSIT AND THE FINAL RECONCILED DEPOSIT FIGURES SHALL BE INCLUDED WITH THE ANNUAL CERTIFICATION, DUE ON OR BEFORE APRIL 30 OF THE YEAR FOLLOWING THE YEAR IN WHICH THE CIGARETTES WERE SOLD. ADDITIONALLY, THE ANNUAL CERTIFICATION REQUIRED UNDER SECTION 6D OF THE TOBACCO PRODUCT TAX ACT, 1993 PA 327, MCL 205.426D, SHALL INCLUDE THE FINAL RECONCILED DEPOSIT FIGURES.

(4) ~~(2)~~ A tobacco product manufacturer that places funds into escrow pursuant to subsection (1)(b) shall receive the interest or other appreciation on the funds as earned. The funds themselves shall be released from escrow only under 1 or more of the following circumstances:

(a) To pay a judgment or settlement on any released claim brought against the tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this subdivision in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under such judgment or settlement.

(b) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the master settlement agreement payments, as determined pursuant to section IX(*i*) of that agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer.

(c) To the extent not released from escrow under subdivision (a) or (b), funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(d) If a court of competent jurisdiction determines that subdivision (b) as amended by the amendatory act that added this subdivision is unconstitutional, subdivision (b) does not apply.

(5) ~~(3)~~ Each tobacco product manufacturer that elects to place funds into escrow pursuant to subsection (1)(b) shall ~~annually~~ **ON A QUARTERLY AND ANNUAL BASIS** certify to the department of treasury that it is in compliance with this section. The attorney general may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails ~~in any year~~ to place into escrow the funds required under this section shall be subject to all of the following that are applicable:

(a) Shall be required within 15 days to place sufficient funds into escrow to bring it into compliance with this section. The court, upon a finding of a violation of this subsection, may impose a civil penalty to be paid to the general fund of the state in an amount not to exceed 5% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100% of the original amount improperly withheld from escrow.

(b) In the case of a knowing violation, shall be required within 15 days to place sufficient funds into escrow to bring it into compliance with this section. The court, upon a finding of a knowing violation of this subsection, may impose a civil penalty to be paid to the general fund of this state in an amount not to exceed 15% of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300% of the original amount improperly withheld from escrow.

(c) In the case of a second knowing violation, shall be prohibited from selling cigarettes to consumers within the state (whether directly or through a distributor, retailer, or similar intermediary) for a period not to exceed 2 years.

(6) ~~(4)~~ For purposes of subsection ~~(3),~~ **(5),** each failure to make **A QUARTERLY OR** an annual deposit required under subsection (1)(b) shall constitute a separate violation.

(7) ~~(5)~~ If, following a court determination described in subsection ~~(2)(d),~~ **(4)(D),** a court of competent jurisdiction determines that subsection ~~(2)~~ **(4)** without subsection ~~(2)(b)~~ **(4)(B)** is unconstitutional, then this subsection applies. A tobacco product manufacturer that places funds into escrow pursuant to subsection (1)(b) shall receive the interest or other appreciation on the funds as earned. The funds themselves shall be released from escrow only under 1 or more of the following circumstances:

(a) To pay a judgment or settlement on any released claim brought against the tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this subdivision in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under such judgment or settlement.

(b) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the state's allocable share of the total payments that such manufacturer would have been required to make in that year under the master settlement agreement (as determined pursuant to section IX(*i*)(2) of the master settlement agreement, and before any of the adjustments or offsets described in section IX(*i*)(3) of the master settlement agreement other than the inflation adjustment) had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer.

(c) To the extent not released from escrow under subdivision (a) or (b), funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(8) NOTWITHSTANDING SUBSECTION (4), A TOBACCO PRODUCT MANUFACTURER THAT ELECTS TO PLACE FUNDS INTO ESCROW PURSUANT TO SUBSECTION (1)(B) MAY MAKE AN IRREVOCABLE ASSIGNMENT OF ITS INTEREST IN THE FUNDS TO THE BENEFIT OF THE STATE. SUCH ASSIGNMENT SHALL BE PERMANENT AND APPLY TO ALL FUNDS IN THE SUBJECT ESCROW ACCOUNT OR THAT MAY SUBSEQUENTLY COME INTO THE ACCOUNT, INCLUDING THOSE DEPOSITED INTO THE ESCROW ACCOUNT PRIOR TO THE ASSIGNMENT BEING EXECUTED, THOSE DEPOSITED INTO THE ESCROW ACCOUNT AFTER THE ASSIGNMENT IS EXECUTED, AND INTEREST OR OTHER APPRECIATION ON THE FUNDS. THE TOBACCO PRODUCT MANUFACTURER, THE MICHIGAN DEPARTMENT OF TREASURY, AND THE FINANCIAL INSTITUTION WHERE THE ESCROW ACCOUNT IS

MAINTAINED MAY MAKE SUCH AMENDMENTS TO THE QUALIFIED ESCROW ACCOUNT AGREEMENT AS MAY BE NECESSARY TO EFFECTUATE AN ASSIGNMENT OF RIGHTS EXECUTED PURSUANT TO THIS SUBSECTION OR A WITHDRAWAL OF FUNDS FROM THE ESCROW ACCOUNT PURSUANT TO SUBSECTION (4). AN ASSIGNMENT OF RIGHTS EXECUTED PURSUANT TO THIS SECTION SHALL BE IN WRITING, SIGNED BY A DULY AUTHORIZED REPRESENTATIVE OF THE TOBACCO PRODUCTS MANUFACTURER MAKING THE ASSIGNMENT, AND SHALL BECOME EFFECTIVE UPON DELIVERY OF THE ASSIGNMENT TO THE MICHIGAN DEPARTMENT OF TREASURY AND THE FINANCIAL INSTITUTION WHERE THE ESCROW ACCOUNT IS MAINTAINED.

(9) NOTWITHSTANDING SUBSECTION (4), ANY ESCROW FUNDS ASSIGNED TO THE STATE PURSUANT TO SUBSECTION (1)(A) SHALL BE WITHDRAWN BY THE STATE UPON THE REQUEST BY THE TREASURER AND APPROVAL OF THE ATTORNEY GENERAL. ANY FUNDS WITHDRAWN PURSUANT TO THIS SUBSECTION SHALL BE DEPOSITED INTO THE GENERAL FUND AND SHALL BE CALCULATED ON A DOLLAR-FOR-DOLLAR BASIS AS A CREDIT AGAINST ANY JUDGMENT OR SETTLEMENT DESCRIBED IN SUBSECTION (4) WHICH MAY BE OBTAINED AGAINST THE TOBACCO PRODUCT MANUFACTURER WHO HAS ASSIGNED THE FUNDS IN THE SUBJECT ESCROW ACCOUNT. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO RELIEVE A TOBACCO PRODUCT MANUFACTURER FROM ANY PAST, CURRENT, OR FUTURE OBLIGATIONS THE MANUFACTURER MAY HAVE PURSUANT TO THIS ACT.

(10) ~~(6)~~ If this act or any portion of the amendatory act that added this subsection is held by a court of competent jurisdiction to be unconstitutional, the remaining portions of this act shall continue in full force and effect.