

SENATE BILL NO. 722

November 03, 2021, Introduced by Senator RUNESTAD and referred to the Committee on Finance.

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), as amended by 2016 PA 42.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. As used in this act:

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

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

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

14 (d) "Cigarette" means any product that contains nicotine, is
15 intended to be burned or heated under ordinary conditions of use,
16 and consists of or contains (i) any roll of tobacco wrapped in paper
17 or in any substance not containing tobacco; or (ii) tobacco, in any
18 form, that is functional in the product, which, because of its
19 appearance, the type of tobacco used in the filler, or its
20 packaging and labeling, is likely to be offered to, or purchased
21 by, consumers as a cigarette; or (iii) any roll of tobacco wrapped in
22 any substance containing tobacco which, because of its appearance,
23 the type of tobacco used in the filler, or its packaging and
24 labeling, is likely to be offered to, or purchased by, consumers as
25 a cigarette described in clause (i) of this definition. The term
26 "cigarette" includes "roll-your-own" (i.e., any tobacco which,
27 because of its appearance, type, packaging, or labeling is suitable
28 for use and likely to be offered to, or purchased by, consumers as
29 tobacco for making cigarettes). For purposes of this definition of

1 "cigarette", 0.09 ounces of "roll-your-own" tobacco shall
2 constitute 1 individual "cigarette".

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

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

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

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

15 (i) "Qualified escrow fund" means an escrow arrangement with a
16 federally or state chartered financial institution having no
17 affiliation with any tobacco product manufacturer and having assets
18 of at least \$1,000,000,000.00 where such arrangement requires that
19 such financial institution hold the escrowed funds' principal for
20 the benefit of releasing parties and prohibits the tobacco product
21 manufacturer placing the funds into escrow from using, accessing,
22 or directing the use of the funds' principal except as consistent
23 with ~~section 2(2) of this act.~~ **2(4)**.

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

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

28 (l) "Tobacco product manufacturer" means an entity that after
29 ~~the date of enactment of this act~~ **December 28, 1999** directly (and

1 not exclusively through any affiliate) meets 1 or more of the
2 following:

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

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

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

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

23 (n) "Units sold" means the number of individual cigarettes
24 sold in the state by the applicable tobacco product manufacturer
25 (whether directly or through a distributor, retailer, or similar
26 intermediary or intermediaries) during the year in question, as
27 measured by excise taxes collected by the state on packs (or "roll-
28 your-own" tobacco containers) bearing the excise tax stamp of the
29 state. Units sold shall also include the number of individual

1 cigarettes sold in the state by the applicable tobacco product
 2 manufacturer (whether directly or through a distributor, retailer,
 3 or similar intermediary or intermediaries) during the year in
 4 question, as to which the state had power to under federal law, but
 5 did not, impose or collect an excise tax. The department of
 6 treasury may promulgate such rules as are necessary to ascertain
 7 the amount of units sold of such tobacco product manufacturer for
 8 each year.

9 Sec. 2. (1) Any tobacco product manufacturer selling
 10 cigarettes to consumers within the state (whether directly or
 11 through a distributor, retailer, or similar intermediary or
 12 intermediaries) after ~~the date of enactment of this act~~ **December**
 13 **28, 1999** shall do 1 of the following:

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

16 (b) Place into a qualified escrow fund the following amounts
 17 (as such amounts are adjusted for inflation):

18 (i) 1999: \$.0094241 per unit sold after ~~the date of enactment~~
 19 ~~of this act.~~ **December 28, 1999.**

20 (ii) 2000: \$.0104712 per unit sold.

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

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

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

25 (2) The escrow fund deposits required by this section shall be
 26 made in quarterly installments following the quarter in which sales
 27 took place. For purposes of this section, the calendar year shall
 28 be divided into the following quarters: January 1 through March 31;
 29 April 1 through June 30; July 1 through September 30; and October 1

1 through December 31. Deposits for sales for each quarter shall be
2 made according to the following schedule:

3 (a) Deposits for sales occurring in the first quarter, January
4 1 through March 31, are due April 30 of the same year. A
5 certification of the first quarter deposit shall be filed with the
6 department of treasury no later than May 15 of the same year.

7 (b) Deposits for sales occurring in the second quarter, April
8 1 through June 30, are due July 31 of the same year. A
9 certification of the second quarter deposit must be filed with the
10 department of treasury no later than August 15 of the same year.

11 (c) Deposits for sales occurring in the third quarter, July 1
12 through September 30, are due October 31 of the same year. A
13 certification of the third quarter deposit shall be filed with the
14 department of treasury no later than November 15 of the same year.

15 (d) Deposits for sales occurring in the fourth quarter,
16 October 1 through December 31, are due January 31 of the following
17 year. A certification of the fourth quarter deposit shall be filed
18 with the department of treasury no later than February 15 of the
19 year following the year in which the cigarettes were sold.

20 (3) For each of the quarters, the quarterly deposit shall be
21 based upon units sold in that quarter together with the inflation
22 adjustment provided by the department of treasury. An annual
23 reconciliation deposit shall be made on or before April 15 of the
24 year following the year in which the cigarettes were sold to
25 account for the actual annual inflation adjustment. A statement of
26 the reconciliation deposit and the final reconciled deposit figures
27 shall be included with the annual certification, due on or before
28 April 30 of the year following the year in which the cigarettes
29 were sold. Additionally, the annual certification required under

1 section ~~6d-6c~~ of the tobacco product tax act, 1993 PA 327, MCL
2 ~~205.426d~~, **205.426c**, shall include the final reconciled deposit
3 figures.

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

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

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

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

29 (d) If a court of competent jurisdiction determines that

1 subdivision (b) as amended by ~~the amendatory act that added this~~
2 ~~subdivision~~ **2003 PA 286** is unconstitutional, subdivision (b) does
3 not apply.

4 (5) Each tobacco product manufacturer that elects to place
5 funds into escrow pursuant to subsection (1)(b) shall on a
6 quarterly and annual basis certify to the department of treasury
7 that it is in compliance with this section. The attorney general
8 may bring a civil action on behalf of the state against any tobacco
9 product manufacturer that fails to place into escrow the funds
10 required under this section. Any tobacco product manufacturer that
11 fails to place into escrow the funds required under this section
12 shall be subject to all of the following that are applicable:

13 (a) Shall be required within 15 days to place sufficient funds
14 into escrow to bring it into compliance with this section. The
15 court, upon a finding of a violation of this subsection, may impose
16 a civil penalty to be paid to the general fund of the state in an
17 amount not to exceed 5% of the amount improperly withheld from
18 escrow per day of the violation and in a total amount not to exceed
19 100% of the original amount improperly withheld from escrow.

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

28 (c) In the case of a second knowing violation, shall be
29 prohibited from selling cigarettes to consumers within the state

1 (whether directly or through a distributor, retailer, or similar
2 intermediary) for a period not to exceed 2 years.

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

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

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

21 (b) To the extent that a tobacco product manufacturer
22 establishes that the amount it was required to place into escrow in
23 a particular year was greater than the state's allocable share of
24 the total payments that such manufacturer would have been required
25 to make in that year under the master settlement agreement (as
26 determined pursuant to section IX(i)(2) of the master settlement
27 agreement, and before any of the adjustments or offsets described
28 in section IX(i)(3) of the master settlement agreement other than
29 the inflation adjustment) had it been a participating manufacturer,

1 the excess shall be released from escrow and revert back to such
2 tobacco product manufacturer.

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

7 (8) Notwithstanding subsection (4), a tobacco product
8 manufacturer that elects to place funds into escrow pursuant to
9 subsection (1)(b) may make an irrevocable assignment of its
10 interest in the funds to the benefit of the state. Such assignment
11 shall be permanent and apply to all funds in the subject escrow
12 account or that may subsequently come into the account, including
13 those deposited into the escrow account prior to the assignment
14 being executed, those deposited into the escrow account after the
15 assignment is executed, and interest or other appreciation on the
16 funds. The tobacco product manufacturer, the Michigan department of
17 treasury, and the financial institution where the escrow account is
18 maintained may make such amendments to the qualified escrow account
19 agreement as may be necessary to effectuate an assignment of rights
20 executed pursuant to this subsection or a withdrawal of funds from
21 the escrow account pursuant to subsection (4). An assignment of
22 rights executed pursuant to this section shall be in writing,
23 signed by a duly authorized representative of the tobacco products
24 manufacturer making the assignment, and shall become effective upon
25 delivery of the assignment to the Michigan department of treasury
26 and the financial institution where the escrow account is
27 maintained.

28 (9) Notwithstanding subsection (4), any escrow funds assigned
29 to the state pursuant to subsection (1)(a) shall be withdrawn by

1 the state upon the request by the treasurer and approval of the
2 attorney general. Any funds withdrawn pursuant to this subsection
3 shall be deposited into the general fund and shall be calculated on
4 a dollar-for-dollar basis as a credit against any judgment or
5 settlement described in subsection (4) which may be obtained
6 against the tobacco product manufacturer who has assigned the funds
7 in the subject escrow account. Nothing in this section shall be
8 construed to relieve a tobacco product manufacturer from any past,
9 current, or future obligations the manufacturer may have pursuant
10 to this act.

11 (10) If this act or any portion of ~~the amendatory act that~~
12 ~~added this subsection~~ **2003 PA 286** is held by a court of competent
13 jurisdiction to be unconstitutional, the remaining portions of this
14 act shall continue in full force and effect.