

State of South Dakota

SEVENTY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 1999

400C0355

SENATE JUDICIARY COMMITTEE ENGROSSED NO. **SB28** - 1/21/99

Introduced by: The Committee on Judiciary at the request of the Attorney General

1 FOR AN ACT ENTITLED, An Act to establish escrow funds to pay claims brought against
2 tobacco product manufacturers.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. The Legislature finds the following:

5 (1) Cigarette smoking presents serious public health concerns to the State of South
6 Dakota and to the citizens of the state. The surgeon general of the United States has
7 determined that smoking causes lung cancer, heart disease, and other serious diseases,
8 and that there are hundreds of thousands of tobacco-related deaths in the United
9 States each year. These diseases most often do not appear until many years after the
10 person in question begins smoking;

11 (2) Cigarette smoking also presents serious financial concerns for the state. Under certain
12 health care programs, the state may have a legal obligation to provide medical
13 assistance to eligible persons for health conditions associated with cigarette smoking,
14 and those persons may have a legal entitlement to receive such medical assistance;

15 (3) Under these programs, the state pays millions of dollars each year to provide medical
16 assistance for these persons for health conditions associated with cigarette smoking;

1 and

2 (4) On November 23, 1998, major United States tobacco product manufacturers entered
3 into a settlement agreement, entitled, Master Settlement Agreement, with the state.
4 The Master Settlement Agreement obligates these manufacturers, in return for a
5 release of past, present, and certain future claims against them as described therein,
6 to pay substantial sums to the state, tied in part to their volume of sales; to fund a
7 national foundation devoted to the interests of public health; and to make substantial
8 changes in their advertising and marketing practices and corporate culture, with the
9 intention of reducing underage smoking.

10 Section 2. In enacting this Act, it is the intention of the Legislature that:

11 (1) It is the policy of the state that financial burdens imposed on the state by cigarette
12 smoking be borne by tobacco product manufacturers rather than by the State of South
13 Dakota to the extent that such manufacturers either determine to enter into a
14 settlement with the state or are found culpable by the courts; and

15 (2) It would be contrary to this policy of the State of South Dakota if tobacco product
16 manufacturers who determine not to enter into such a settlement could use a resulting
17 cost advantage to derive large, short-term profits in the years before liability may arise
18 without ensuring that the state will have an eventual source of recovery from them if
19 they are proven to have acted culpably. It is thus in the interest of the state to require
20 that such manufacturers establish a reserve fund to guarantee a source of
21 compensation and to prevent such manufacturers from deriving large, short-term
22 profits and then becoming judgment-proof before liability may arise.

23 Section 3. Terms used in this Act mean:

24 (1) "Adjusted for inflation," increased in accordance with the formula for inflation
25 adjustment set forth in the Master Settlement Agreement;

- 1 (2) "Affiliate," a person who directly or indirectly owns or controls, is owned or
2 controlled by, or is under common ownership or control with, another person. Solely
3 for purposes of this definition, the terms, owns, is owned, and ownership, mean
4 ownership of an equity interest, or the equivalent thereof, of ten percent or more, and
5 the term, person, means an individual, partnership, committee, association,
6 corporation, or any other organization or group of persons;
- 7 (3) "Allocable share," allocable share as that term is defined in the Master Settlement
8 Agreement;
- 9 (4) "Master Settlement Agreement," the settlement agreement, and related documents,
10 entered into on November 23, 1998, by the State of South Dakota and major United
11 States tobacco product manufacturers which is filed as part of the court record in
12 *State of South Dakota, et al. v. Philip Morris, Inc., et al.*, Civ. No. 98-65, Sixth
13 Judicial Circuit, Hughes County;
- 14 (5) "Qualified escrow fund," an escrow arrangement with a federally or state-chartered
15 financial institution having no affiliation with any tobacco product manufacturer and
16 having assets of at least one billion dollars where such arrangement requires that the
17 financial institution hold the escrowed funds' principal for the benefit of releasing
18 parties and prohibits the tobacco product manufacturer placing the funds into escrow
19 from using, accessing, or directing the use of the funds' principal except as consistent
20 with section 8 of this Act;
- 21 (6) "Released claims," released claims as that term is defined in the Master Settlement
22 Agreement;
- 23 (7) "Releasing parties," releasing parties as that term is defined in the Master Settlement
24 Agreement.

25 Section 4. For the purposes of this Act, the term, cigarette, means any product that contains

1 nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or
2 contains:

3 (1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco;

4 (2) Tobacco, in any form, that is functional in the product, which, because of its
5 appearance, the type of tobacco used in the filler, or its packaging and labeling, is
6 likely to be offered to, or purchased by, consumers as a cigarette;

7 (3) Any roll of tobacco wrapped in any substance containing tobacco which, because of
8 its appearance, the type of tobacco used in the filler, or its packaging and labeling, is
9 likely to be offered to, or purchased by, consumers as a cigarette described in
10 subdivision (1) of this definition.

11 The term, cigarette, includes, roll-your-own, meaning any tobacco which, because of its
12 appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or
13 purchased by, consumers as tobacco for making cigarettes. For purposes of this definition,
14 0.09 ounces of roll-your-own tobacco constitutes one individual cigarette.

15 Section 5. For the purposes of this Act, the term, tobacco product manufacturer, means an
16 entity that, on or after July 1, 1999, directly, and not exclusively through any affiliate:

17 (1) Manufactures cigarettes anywhere which the manufacturer intends to be sold in the
18 United States, including cigarettes intended to be sold in the United States through
19 an importer, except where such importer is an original participating manufacturer, as
20 that term is defined in the Master Settlement Agreement, that will be responsible for
21 the payments under the Master Settlement Agreement with respect to such cigarettes
22 as a result of the provisions of subsections II(mm) of the Master Settlement
23 Agreement and that pays the taxes specified in subsection II(z) of the Master
24 Settlement Agreement, and provided that the manufacturer of such cigarettes does not
25 market or advertise such cigarettes in the United States;

1 (2) Is the first purchaser anywhere for resale in the United States of cigarettes
2 manufactured anywhere that the manufacturer does not intend to be sold in the United
3 States; or

4 (3) Becomes a successor of an entity described in subdivision (1) or (2).

5 The term does not include an affiliate of a tobacco product manufacturer unless such affiliate
6 itself falls within subdivision (1), (2), or (3).

7 Section 6. For the purposes of this Act, the term, units sold, means the number of individual
8 cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or
9 through a distributor, retailer, or similar intermediary or intermediaries, during the year in
10 question, as measured by excise taxes collected by the state on packs bearing the excise tax
11 stamp or imprint of the state, or on roll-your-own tobacco. The secretary of revenue shall
12 promulgate, pursuant to chapter 1-26, such rules as are necessary to obtain information from any
13 licensee, licensed under the authority of the Department of Revenue, to ascertain the amount of
14 state excise tax paid on the cigarettes of such tobacco product manufacturer for each year. The
15 Department of Revenue may provide information obtained pursuant to this section as is
16 necessary for a tobacco product manufacturer to compute its escrow payment under section 7
17 of this Act.

18 Section 7. Any tobacco product manufacturer selling cigarettes to consumers within the
19 state, on or after July 1, 1999, whether directly or through a distributor, retailer, or similar
20 intermediary or intermediaries, shall do one of the following:

21 (1) Become a participating manufacturer, as that term is defined in section II(jj) of the
22 Master Settlement Agreement, and generally perform its financial obligations under
23 the Master Settlement Agreement; or

24 (2) Place into a qualified escrow fund by April fifteenth of the year following the year in
25 question the following amounts, as such amounts are adjusted for inflation:

- 1 (a) For 1999: \$.0094241 per unit sold after the date of enactment of this Act;
- 2 (b) For 2000: \$.0104712 per unit sold;
- 3 (c) For each of 2001 and 2002: \$.0136125 per unit sold;
- 4 (d) For each of 2003 through 2006: \$.0167539 per unit sold;
- 5 (e) For each of 2007 and each year thereafter: \$.0188482 per unit sold.

6 Section 8. A tobacco product manufacturer that places funds into escrow pursuant to
7 subdivision (2) of section 7 of this Act shall receive the interest or other appreciation on such
8 funds as earned. Such funds themselves shall be released from escrow only under the following
9 circumstances:

- 10 (1) To pay a judgment or settlement on any released claim brought against such tobacco
11 product manufacturer by the state or any releasing party located or residing in the
12 state. Funds shall be released from escrow under this subdivision in the order in which
13 they were placed into escrow and only to the extent and at the time necessary to make
14 payments required under such judgment or settlement;
- 15 (2) To the extent that a tobacco product manufacturer establishes that the amount it was
16 required to place into escrow in a particular year was greater than the state's allocable
17 share of the total payments that such manufacturer would have been required to make
18 in that year under the Master Settlement Agreement, as determined pursuant to
19 section IX(i)(2) of the Master Settlement Agreement, and before any of the
20 adjustments or offsets described in section IX(i)(3) of the Master Settlement
21 Agreement other than the inflation adjustment, had it been a participating
22 manufacturer, the excess shall be released from escrow and revert back to such
23 tobacco product manufacturer; or
- 24 (3) To the extent not released from escrow under subdivision (1) or (2) of this section,
25 funds shall be released from escrow and revert back to such tobacco product

1 manufacturer twenty-five years after the date on which they were placed into escrow.

2 Section 9. Each tobacco product manufacturer that elects to place funds into escrow shall
3 annually certify its compliance with section 7 of this Act to the attorney general. The attorney
4 general may bring a civil action on behalf of the State of South Dakota against any tobacco
5 product manufacturer that fails to place into escrow the funds required. Any tobacco product
6 manufacturer that fails in any year to place into escrow the funds required by section 7 of this
7 Act shall:

8 (1) Within fifteen days place such funds into escrow as shall bring it into compliance with
9 section 7 of this Act. The court, upon a finding of a violation of section 7 of this Act,
10 may impose a civil penalty to be paid to the state general fund in an amount not to
11 exceed five percent of the amount improperly withheld from escrow per day of the
12 violation and in a total amount not to exceed one hundred percent of the original
13 amount improperly withheld from escrow;

14 (2) In the case of a knowing violation, within fifteen days place such funds into escrow
15 as shall bring it into compliance with section 7 of this Act. The court, upon a finding
16 of a knowing violation of section 7 of this Act, may impose a civil penalty to be paid
17 to the state general fund in an amount not to exceed fifteen percent of the amount
18 improperly withheld from escrow per day of the violation and in a total amount not
19 to exceed three hundred percent of the original amount improperly withheld from
20 escrow; and

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

24 Section 10. Each failure to make an annual deposit required under section 7 of this Act
25 constitutes a separate violation.

1 **BILL HISTORY**

2 1/12/99 First read in Senate and referred to Judiciary. S.J. 20

3 1/20/99 Scheduled for Committee hearing on this date.

4 1/20/99 Judiciary Do Pass Amended, Passed, AYES 7, NAYS 0. S.J. 125