

AN ACT RELATING TO RECOVERY OF TOBACCO-RELATED MEDICAID EXPENDITURES

It is hereby enacted by the General Assembly of the State of Vermont:

Sec. 1. LEGISLATIVE FINDINGS AND INTENT

(a) The general assembly finds that:

(1) Regular tobacco use leads to disease and death. There are more than 400,000 tobacco-related deaths each year in the United States, including more than 800 in Vermont. Nationally, tobacco use causes more deaths than AIDS, homicides, suicides, automobile accidents, fires and drug and alcohol use combined.

~~(2) Tobacco may be unique among consumer products sold in Vermont because when used as the manufacturer intends, it will cause disease and death.~~

(2) Tobacco use in Vermont is responsible for the largest sustained health care problem in the history of the state. Through the Medicaid program, which provides medical assistance to indigent persons, Vermont has paid millions of dollars each year to treat these persons for tobacco-related health conditions.

(3) Under the Medicaid program, the state has a legal obligation to provide medical assistance to eligible persons for tobacco-related health conditions, and those persons have a legal entitlement to receive the medical assistance.

(4) Unlike other consumer products such as firearms, alcohol, and dairy products, when used as the manufacturer intends, tobacco will cause disease and death.

(b) The general assembly intends that:

(1) Medicaid shall be the payer of last resort for medically necessary goods and services furnished to Medicaid recipients. Subject to such exemptions as the general assembly may deem appropriate, all other sources of payment for those medical services shall be primary to Medicaid.

(2) The state shall not bear the burden of payment for treatment of tobacco-related health conditions to the extent that the resources of a culpable tobacco manufacturer are available.

(3) Statutory creation of an additional cause of action for recovery of Medicaid expenditures for treatment of tobacco-related health conditions from tobacco manufacturers does not preempt, extinguish or limit existing common law and statutory rights of recovery. Existing laws and rights are expressly preserved.

~~(4) This act is intended to regulate practice in court within the meaning of 1 V.S.A. § 213.~~

~~(5) This act is remedial in nature and shall be liberally construed to permit full recovery~~

by the state.

(4) This act is remedial in nature and shall be liberally construed.

Sec. 2. 33 V.S.A. § 1904 is amended to read:

§ 1904. DEFINITIONS

When used in this subchapter, unless otherwise indicated:

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(10) "Tobacco" means all products listed in 7 V.S.A. § 1001(4).

(11) "Tobacco manufacturer" means any person engaged in the process of designing, fabricating, assembling, producing, constructing or otherwise preparing a product containing tobacco, including packaging or labeling of these products, with the intended purpose of selling the product for gain or profit. "Tobacco manufacturer" does not include persons whose activity is limited to growing natural leaf tobacco or to selling tobacco products at wholesale or retail to customers. "Tobacco manufacturer" also does not include any person who manufacture or produces firearms, dairy products, products containing alcohol or other nontobacco products, unless such person also manufactures or produces tobacco products.

Sec. 3. 33 V.S.A. § 1911 is added to read:

§ 1911. TOBACCO MANUFACTURERS; LIABILITY FOR MEDICAID EXPENDITURES

(a) After the state has paid medical assistance benefits to eligible persons for tobacco-related health conditions under this chapter, the state may recover from tobacco manufacturers the amount paid or likely to be paid for medical assistance to such persons, plus punitive damages, costs, reasonable attorney's fees and other appropriate relief.

(b) The cause of action created in this section shall be a direct cause of action and not a subrogated cause of action. Affirmative defenses relating to subrogated causes of action shall not apply to this direct cause of action.

(c) In order to recover under subsection (a) of this section, the state shall prove:

(1) that the tobacco manufacturers were either negligent or produced a defective product unreasonably dangerous to the user or consumer who received or will receive medical assistance;

(2) that the tobacco product caused the health conditions for which the state seeks reimbursement; and

(3) the amount of compensatory damages and the appropriateness of any other relief sought.

(d) The right of the state to bring a cause of action against a tobacco manufacturer under this section shall be independent of and not construed to affect any rights or causes of action by an individual Medicaid benefits recipient to recover damages or other relief as a result of a tobacco-related health condition. In the event that recovery of Medicaid expenditures has been achieved and the individual recipient thereafter recovers damages from a tobacco manufacturer, then the tobacco manufacturer shall be entitled to a setoff for the amount of any such Medicaid recovery which represents the expenditure on behalf of the individual recipient.

(e) Existing common law and statutory actions available to recover Medicaid expenditures from a tobacco manufacturer, including direct action, are expressly preserved. An action brought pursuant to this section may be brought in addition to any existing common law or statutory action, or both, and shall not preempt, limit or extinguish those actions.

(f) In any action brought pursuant to this section:

~~(1) All defenses available to a defendant under common law and statutory law may be asserted by a defendant except that the following affirmative defenses shall not be available:~~

~~(A) assignment;~~

~~(B) lien;~~

~~(C) subrogation;~~

~~(D) assumption of the risk by the recipient;~~

~~(E) comparative negligence by the recipient;~~

~~(F) factors, occurrences or conditions caused by the recipient;~~

~~(G) waiver by the recipient; or~~

~~(H) any other matter constituting an avoidance or affirmative defense to a claim for recovery by the recipient.~~

(1) Joint and several liability applies to any judgment in favor of the state, except as provided in subdivision (3) of this subsection.

(2) The state may proceed under the market share theory for allocation of damages between or among tobacco manufacturers, provided that the tobacco products involved are substantially interchangeable among brands, and substantially similar factual and legal issues are involved in seeking recovery against each individual tobacco manufacturer. In the event the state elects to proceed under the market share theory, joint and several liability shall not apply.

(3) Sums paid to all recipients may be recovered in a single action.

(4) If the number of recipients is sufficiently large so that it is impracticable to identify, the court may require the state to release information on individual recipients including individual Medicaid and medical records which are in the possession, custody or control of the state, to the extent necessary for the defendant to establish its defenses, subject to such orders as are necessary to maintain the privacy of the recipients and to prevent Medicaid fraud.

(5) Evidence of statistical analysis ~~shall~~ may be admissible to prove or rebut the elements of subdivisions (b)(2) and (b)(3) of this section.

(g) Before the state enters into a contract with an attorney to represent the state in an action brought pursuant to this section, the contract shall be reviewed and approved by the joint fiscal committee. The joint fiscal committee shall approve the contract if it determines that the contract is reasonable under the circumstances.

Sec. 4. APPLICABILITY

This act shall enable the state to recover state Medicaid benefits for tobacco-related health conditions paid or to be paid after the effective date of this act. This act shall not apply to any Medicaid benefits for tobacco-related conditions paid by the state prior to the effective date of this act.

Sec. 5. EFFECTIVE DATE

This act shall take effect on passage.
