

By Senator Dyer

14-1098-98

1 A bill to be entitled
2 An act relating to Medicaid third-party
3 liability; amending s. 409.910, F.S.;
4 clarifying legislative intent as to certain
5 amendments enacted by ch. 94-251, Laws of
6 Florida; providing definitions; providing for
7 judicial review of certain fees; recognizing
8 the remedial intent of ch. 94-251, Laws of
9 Florida; providing an effective date.

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11 WHEREAS, Florida's business, health care, and insurance
12 communities have to pay for the increased costs of health care
13 and lost employee productivity resulting from sickness and
14 death caused by cigarette smoking, at a cost to the Florida
15 economy of billions of dollars in direct and indirect costs
16 each year (a majority of which are for indirect costs for
17 excessive sick leave, disability, and forfeited future
18 earnings for those persons who die prematurely, and a
19 significant portion of which are for direct health care costs
20 for hospitalization, physician fees, nursing home care,
21 medications, and other charges) and at a cost of the lives of
22 approximately 28,000 Floridians annually, 77 deaths each day
23 (Dr. Joyner Simms, Ph.D., Journal of the Florida Medical
24 Association, Vol. 81, No. 12, December 1994; Journal of the
25 Florida Medical Association, Vol. 83, No. 2; Proposed Rules
26 HHS, FDA, 21 CFR Parts 801, 803, 804, and 897, filed on
27 Friday, August 11, 1995, including all medical, scientific,
28 and legal justification for such rules as submitted by the
29 Federal Drug Administration and supporters of such proposed
30 rules as pertaining to cigarettes), and

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1 WHEREAS, thousands of Medicaid patients are treated for
2 sickness and death from cigarette-smoking-related illnesses,
3 and

4 WHEREAS, hundreds of millions of dollars are spent each
5 year in treating Medicaid patients who are sick and dying from
6 cigarette-smoking-related illnesses, and

7 WHEREAS, cigarettes are addictive and known to destroy
8 health and cause death when used as directed, and

9 WHEREAS, the state has an obligation to use
10 taxpayer-provided resources efficiently and expediently and to
11 recover state and federal Medicaid funds from all potentially
12 liable third parties, and

13 WHEREAS, the Florida Legislature found it compelling to
14 seek reimbursement for state tax dollars on behalf of Medicaid
15 recipients when third parties are liable, and for this reason
16 enacted the Medicaid Third-Party Liability Act of 1990, which
17 amended the 1978 and 1982 laws, and

18 WHEREAS, a disproportionate amount of the state's
19 limited Medicaid resources are expended on cigarette-related
20 injury and disease, and

21 WHEREAS, the increase in costs to treat Medicaid
22 recipients for cigarette-smoking-related illnesses and
23 diseases has significantly burdened the state, and

24 WHEREAS, the escalating costs to treat Medicaid
25 recipients for cigarette-smoking-related illnesses and
26 diseases ultimately impairs the state's ability to use tax
27 dollars to support other public services, and

28 WHEREAS, the magnitude of this compelling financial
29 problem demands immediate action, and

30 WHEREAS, cigarettes, regardless of the manufacturer,
31 are substantially similar in that they contain nicotine and

1 other harmful ingredients, are sold for use as an inhalant
2 into the consumer's lungs, cause the systemic discharge of
3 toxic and harmful chemicals and by-products into the
4 consumer's body, and, when used as intended by the
5 manufacturer, have no significant nutritional or health
6 benefit to outweigh their deleterious effects, and

7 WHEREAS, the abrogation of the products liability
8 statute of repose contained in the 1994 amendments to the 1990
9 comprehensive Medicaid Third-Party Liability Act was
10 unnecessary surplusage inasmuch as the Supreme Court of
11 Florida has held that the products liability statute of repose
12 was never intended by the Legislature to apply to products
13 such as cigarettes which cause latent diseases and, if so
14 intended, would be an unconstitutional violation of the access
15 to courts guarantee of Article I, Section 21 of the State
16 Constitution, and

17 WHEREAS, in 1994, the Florida Legislature enacted
18 chapter 94-251, Laws of Florida, which amended the
19 comprehensive 1990 Medicaid Third-Party Liability Act to
20 streamline the remedies for recovering Medicaid expenditures
21 made in instances of disease among thousands of Florida
22 Medicaid recipients which was caused by defective products,
23 and

24 WHEREAS, cigarette manufacturers have contended that
25 the remedial 1994 amendments to the 1990 comprehensive
26 Medicaid Third-Party Liability Act contained in chapter
27 94-251, Laws of Florida, could potentially be used to recover
28 Medicaid expenditures from manufacturers of other legal
29 products that, unlike cigarettes, are useful but that, like
30 cigarettes, pose inherent risks when used as directed, and

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1 WHEREAS, it is the intent of the Legislature that the
2 state use the remedial 1994 amendments, as amended by this
3 act, only against cigarette manufacturers and their public
4 relations affiliates to recover Medicaid expenditures caused
5 by the use of cigarettes, NOW, THEREFORE,

6
7 Be It Enacted by the Legislature of the State of Florida:

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9 Section 1. Subsections (1), (9), and (19), paragraph
10 (h) of subsection (12), and paragraph (b) of subsection (15)
11 of section 409.910, Florida Statutes, are amended to read:

12 409.910 Responsibility for payments on behalf of
13 Medicaid-eligible persons when other parties are liable.--

14 (1)(a) It is the intent of the Legislature that
15 Medicaid be the payor of last resort for medically necessary
16 goods and services furnished to Medicaid recipients. All other
17 sources of payment for medical care are primary to medical
18 assistance provided by Medicaid. If benefits of a liable third
19 party are available, it is the intent of the Legislature that
20 Medicaid be repaid in full and prior to any other person,
21 program, or entity. Medicaid is to be repaid in full from, and
22 to the extent of, any third-party benefits, regardless of
23 whether a recipient is made whole or other creditors paid.
24 Principles of common law and equity as to assignment, lien,
25 and subrogation, ~~comparative negligence, assumption of risk,~~
26 ~~and all other affirmative defenses normally available to a~~
27 ~~liable third party,~~ are to be abrogated to the extent
28 necessary to ensure full recovery by Medicaid from third-party
29 resources; such principles shall apply to a recipient's right
30 to recovery against any third party, but shall not act to
31 reduce the recovery of the agency pursuant to this section.

1 Comparative negligence and assumption of the risk defenses
2 normally available to a liable third party against a Medicaid
3 recipient do not apply in any action by the agency to recover
4 the costs of the treatment of disease or injury caused by the
5 use of cigarettes. Recovery against a cigarette manufacturer
6 is permitted only when the department proves each element of
7 an existing common law or statutory cause of action, and
8 nothing in this section is intended to alter or limit the
9 elements that must be proven by the department in order to
10 prevail on any such cause of action.~~The concept of joint and~~
11 ~~several liability applies to any recovery on the part of the~~
12 ~~agency.~~It is intended that if the resources of a liable third
13 party become available at any time, the public treasury should
14 not bear the burden of medical assistance to the extent of
15 such resources. ~~Common-law theories of recovery shall be~~
16 ~~liberally construed to accomplish this intent.~~

17 (b) As used in this section, the term:

18 1. "Cigar" means any roll for smoking which is not
19 intended for direct inhalation into the respiratory system of
20 the person smoking such tobacco product.

21 2. "Cigarette" means any roll for smoking, except one
22 in which the tobacco is fully naturally fermented, without
23 regard to the kind of tobacco or other substances used in the
24 inner roll or the nature or composition of the material in
25 which the roll is wrapped, which is made wholly or in part of
26 tobacco irrespective of size or shape and whether the tobacco
27 is flavored, adulterated, or mixed with any other ingredient,
28 but the term does not include tobacco products.

29 3. "Cigarette manufacturer" means any person or
30 corporation that manufactures, sells, or wholesales
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1 cigarettes. The term does not include growers of natural leaf
2 tobacco or independent retailers.

3 4. "Independent retailers" means any person or
4 corporation engaged in the business of selling cigarettes or
5 any other product to ultimate consumers.

6 5. "Tobacco products" means loose tobacco suitable for
7 smoking, snuff, snuff flour, cavendish, plug and twist
8 tobacco, fine cuts and other chewing tobaccos, shorts, refuse
9 scraps, clippings, cuttings, and sweepings of tobacco, and
10 other kinds and forms of tobacco prepared in such manner as to
11 be suitable for chewing. The term includes cigars but does not
12 include cigarettes.

13 (9) If ~~in the event that~~ medical assistance has been
14 provided by Medicaid to more than one recipient for treatment
15 of disease or injury caused by the use of cigarettes and the
16 agency elects to seek recovery from liable third parties due
17 to actions by the third parties or circumstances which involve
18 common issues of fact or law, the agency may bring an action
19 to recover sums paid to all such recipients in one proceeding.
20 In any action brought under this subsection, the admissibility
21 of evidence is governed by the Florida Evidence Code ~~shall be~~
22 ~~liberally construed regarding the issues of causation and of~~
23 ~~aggregate damages.~~ The issue of causation or aggregate and
24 damages in any such action may be proven by use of aggregate
25 statistical analysis as long as such analysis takes into
26 account pre-existing conditions and other contributing causes
27 of disease or injury not directly related to cigarettes.

28 (a) In any action under this subsection to recover
29 costs of treatment of disease or injury caused by the use of
30 cigarettes wherein the number of recipients for which medical
31 assistance has been provided by Medicaid is so large as to

1 cause it to be impracticable to join or identify each claim,
2 the agency shall not be required to so identify the individual
3 recipients for which payment has been made, but rather can
4 proceed to seek recovery based upon payments made on behalf of
5 an entire class of recipients. Notwithstanding the foregoing
6 sentence, a court shall permit a cigarette manufacturer to
7 conduct reasonable sample discovery, in light of the claims or
8 defenses asserted, concerning recipients whose injuries are
9 claimed to result from the use of cigarettes.

10 (b) In any action brought pursuant to this subsection
11 to recover costs of treatment of disease or injury caused by
12 the use of cigarettes wherein a third party is liable due to
13 its manufacture, sale, or distribution of a product, the
14 agency shall be allowed to proceed under a market share
15 theory, provided that the products involved are substantially
16 interchangeable among brands, and that substantially similar
17 factual or legal issues would be involved in seeking recovery
18 against each liable third party individually. Each
19 manufacturer found liable under this subsection is responsible
20 for paying only that portion of the damages that is
21 commensurate with its share of the market; however, if any
22 share of the market is not recoverable or collectible, such
23 portion must be allocated pro rata to each of the financially
24 responsible manufacturers.

25 (12) The department may, as a matter of right, in
26 order to enforce its rights under this section, institute,
27 intervene in, or join any legal or administrative proceeding
28 in its own name in one or more of the following capacities:
29 individually, as subrogee of the recipient, as assignee of the
30 recipient, or as lienholder of the collateral.

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1 (h) Except as otherwise provided in this section,
2 actions to enforce the rights of the department under this
3 section shall be commenced within 5 years after the date a
4 cause of action accrues, with the period running from the
5 later of the date of discovery by the department of a case
6 filed by a recipient or his or her legal representative, or of
7 discovery of any judgment, award, or settlement contemplated
8 in this section, or of the provision of medical assistance to
9 a recipient. Each item of expense provided by the agency shall
10 be considered to constitute a separate cause of action for
11 purposes of this subsection. ~~The defense of statute of repose~~
12 ~~shall not apply to any action brought under this section by~~
13 ~~the agency.~~ Nothing in this paragraph affects or prevents a
14 proceeding to enforce a lien during the existence of the lien
15 as set forth in subparagraph (6)(d)9~~(6)(c)9~~.

16 (15) The department is authorized to enter into
17 agreements to enforce or collect medical support and other
18 third-party benefits.

19 (b) If an agreement to enforce or collect third-party
20 benefits is entered into by the department with any person
21 other than those described in paragraph (a), including any
22 attorney retained by the department who is not an employee or
23 agent of any person named in paragraph (a), then the
24 department may pay such person a percentage of the amount
25 actually collected and reimbursed to the department as a
26 result of the efforts of the person, to the extent of medical
27 assistance paid by Medicaid. In no case shall the percentage
28 exceed a maximum established by the department, which shall
29 not exceed the lesser of a percentage determined to be
30 commercially reasonable or 30 percent of the amount actually
31 collected and reimbursed to the department as a result of the

1 efforts of the person under contract. However, in any action
2 under this subsection to recover costs of treatment of disease
3 or injury caused by the use of cigarettes, the court pursuant
4 to Rule 4-1.5, Rules Regulating The Florida Bar, shall provide
5 a thorough and rigorous review of the appropriateness of the
6 amount of attorney's fees for state-retained counsel. The
7 court shall also consider existing case law and
8 reasonableness, fairness, and equity to the taxpayers and
9 shall ensure that any fee award is not excessive and does not
10 constitute a windfall to state-retained counsel. After such
11 thorough and rigorous review, if the court determines that the
12 attorney's fees are in compliance with Rule 4-1.5, Rules
13 Regulating The Florida Bar, and that the fees are reasonable,
14 fair, and equitable to taxpayers and are not excessive or
15 unjust, the court shall authorize attorney's fees for
16 state-retained counsel. In any such contract concerning
17 cigarette litigation, the Attorney General shall be the
18 managing attorney.

19 (19) In cases of suspected criminal violations or
20 fraudulent activity, on the part of any person including a
21 liable third party, the department may bring ~~is authorized to~~
22 ~~take~~ any civil action permitted at law or equity to recover
23 the greatest possible amount, including without limitation,
24 treble damages under s. 772.104 ~~s. 772.73~~. In any action in
25 which the recipient has no right to intervene, or does not
26 exercise his or her right to intervene, any amounts recovered
27 under this subsection shall be the property of the agency, and
28 the recipient shall have no right or interest in such
29 recovery.

30 Section 2. The 1994 amendments, enacted by chapter
31 94-251, Laws of Florida, effectuate the purpose of the 1990

1 Medicaid Third-Party Liability Act, are remedial in nature,
2 and shall be retroactively applied to payments made by the
3 state beginning October 3, 1990, in accordance with the
4 effective date of the 1990 Medicaid Third-Party Liability Act,
5 as set forth in chapter 90-295, Laws of Florida.

6 Section 3. This act shall take effect upon becoming a
7 law.

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SENATE SUMMARY

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