

By Representative Geller

1 A bill to be entitled
2 An act relating to the Medicaid Third-Party
3 Liability Act; 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 responsibility for payment of damages;
8 correcting cross references; recognizing
9 remedial intent of ch. 94-251, Laws of Florida;
10 providing an effective date.

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

31

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 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 intended by the
9 manufacturer, and
10 WHEREAS, cigarettes have caused and are causing disease
11 among so many Florida Medicaid patients annually that it would
12 be impossible for the State of Florida to obtain recovery for
13 its taxpayers of Medicaid expenditures to treat
14 cigarette-caused diseases in circumstances allowing for
15 traditional affirmative defenses and requiring individualized
16 claims that would involve innumerable complexities including a
17 multiplicity of individualized minitrials within the main
18 trial, all of which would result in an intolerable delay of a
19 decade or more for the recovery of Medicaid expenditures made
20 in any one year for cigarette-caused diseases, and
21 WHEREAS, the State of Florida has an obligation to use
22 taxpayer-provided resources in an efficient and expedient
23 manner and to recover state and federal Medicaid funds from
24 all potentially liable third parties, and
25 WHEREAS, the Florida Legislature found it compelling to
26 seek reimbursement of state tax dollars on behalf of Medicaid
27 recipients when third parties are liable, and thereby enacted
28 the Medicaid Third-Party Liability Act of 1990, amended from
29 the 1978 and 1982 laws, and
30
31

1 WHEREAS, a disproportionate amount of the state's
2 limited Medicaid resources are expended on cigarette-related
3 injury and disease, and

4 WHEREAS, the increase in costs to treat Medicaid
5 recipients for cigarette-smoking-related illnesses and
6 diseases has placed a significant burden on the State of
7 Florida, and

8 WHEREAS, the escalating costs to treat Medicaid
9 recipients for cigarette-smoking-related illnesses and
10 diseases ultimately affects the state's efficient use of tax
11 dollars to support other public services, and

12 WHEREAS, the magnitude of this compelling financial
13 problem demands immediate action, and

14 WHEREAS, cigarettes, regardless of the manufacturer,
15 are substantially similar in that they contain nicotine and
16 other harmful ingredients; are sold for use as an inhalant
17 into the consumer's lungs; cause the systemic discharge of
18 toxic and harmful chemicals and byproducts into the consumer's
19 body; and, have no significant nutritional or health benefit
20 to outweigh their deleterious effects, and

21 WHEREAS, the abrogation of the products liability
22 statute of repose contained in the 1994 amendments to the 1990
23 comprehensive Medicaid Third-Party Liability Act was
24 unnecessary surplusage inasmuch as the Supreme Court of
25 Florida has held that the products liability statute of repose
26 was never intended by the Legislature to apply to products
27 such as cigarettes which cause latent diseases and, if so
28 intended, would be an unconstitutional violation of the access
29 to courts guarantee of Section 21, Article I of the State
30 Constitution, and

31

1 WHEREAS, in 1994, the Florida Legislature passed
2 chapter 94-251, Laws of Florida, which amended the
3 comprehensive 1990 Medicaid Third-Party Liability Act to
4 streamline the remedies for recovering Medicaid expenditures
5 made in instances of disease among thousands of Florida
6 Medicaid recipients caused by defective products, and

7 WHEREAS, cigarette manufacturers have contended that
8 the remedial 1994 amendments to the 1990 comprehensive
9 Medicaid Third-Party Liability Act contained in chapter
10 94-251, Laws of Florida, could potentially be used to recover
11 Medicaid expenditures from manufacturers of other legal
12 products that, unlike cigarettes, are useful but that, like
13 cigarettes, pose inherent risks when used as intended by the
14 manufacturer, and

15 WHEREAS, it is the intent of the Florida Legislature
16 that the State of Florida use the remedial 1994 amendments, as
17 amended herein, only against cigarette manufacturers and their
18 public relations affiliates to recover Medicaid expenditures
19 caused by the use of cigarettes, NOW, THEREFORE,

20
21 Be It Enacted by the Legislature of the State of Florida:

22
23 Section 1. Subsections (1) and (9), paragraph (h) of
24 subsection (12), and subsection (19) of section 409.910,
25 Florida Statutes, 1996 Supplement, are amended to read:

26 409.910 Responsibility for payments on behalf of
27 Medicaid-eligible persons when other parties are liable.--

28 (1)(a) It is the intent of the Legislature that
29 Medicaid be the payor of last resort for medically necessary
30 goods and services furnished to Medicaid recipients. All other
31 sources of payment for medical care are primary to medical

1 assistance provided by Medicaid. If benefits of a liable third
2 party are available, it is the intent of the Legislature that
3 Medicaid be repaid in full and prior to any other person,
4 program, or entity. Medicaid is to be repaid in full from, and
5 to the extent of, any third-party benefits, regardless of
6 whether a recipient is made whole or other creditors paid.
7 Principles of common law and equity as to assignment, lien,
8 and subrogation, comparative negligence, assumption of risk,
9 and all other affirmative defenses normally available to a
10 liable third party, are to be abrogated to the extent
11 necessary to ensure full recovery by Medicaid from third-party
12 resources; such principles shall apply to a recipient's right
13 to recovery against any third party, but shall not act to
14 reduce the recovery of the agency pursuant to this section.
15 Comparative negligence, assumption of the risk, and all other
16 affirmative defenses normally available to a liable third
17 party shall not apply in any action by the agency to recover
18 the costs of the treatment of disease or injury caused by the
19 use of cigarettes. Recovery is permitted only when the
20 department proves each element of an existing common law or
21 statutory cause of action, and nothing in this section is
22 intended to alter or limit the elements that must be proved by
23 the department in order to prevail in any such cause of
24 action. ~~The concept of joint and several liability applies to~~
25 ~~any recovery on the part of the agency.~~ It is intended that if
26 the resources of a liable third party become available at any
27 time, the public treasury should not bear the burden of
28 medical assistance to the extent of such resources. ~~Common-law~~
29 ~~theories of recovery shall be liberally construed to~~
30 ~~accomplish this intent.~~

31 (b) As used in this section:

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

4 2. "Cigarette" means any roll for smoking, except one
5 of which the tobacco is fully naturally fermented, without
6 regard to the kind of tobacco or other substances used in the
7 inner roll or the nature or composition of the material in
8 which the roll is wrapped, which is made wholly or in part of
9 tobacco irrespective of size or shape and whether such tobacco
10 is flavored, adulterated, or mixed with any other ingredient,
11 but the term cigarette does not include tobacco products.

12 3. "Cigarette manufacturer" means any person or
13 corporation who manufactures, sells, or wholesales cigarettes.
14 The term cigarette manufacturer does not include growers of
15 natural leaf tobacco and independent retailers.

16 4. "Disease or injury caused by the use of cigarettes"
17 means disease or injury caused by the use of cigarettes for
18 which cigarette manufacturers and their coconspirators are
19 responsible. Independent growers of natural leaf tobacco and
20 independent retailers are specifically declared not to be
21 coconspirators of cigarette manufacturers for the purpose of
22 this definition.

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

26 6. "Tobacco products" means loose tobacco suitable for
27 smoking, snuff, snuff flour, cavendish, plug and twist
28 tobacco, fine cuts and other chewing tobaccos, shorts, refuse
29 scraps, clippings, cuttings, and sweepings of tobacco, and
30 other kinds and forms of tobacco prepared in such manner as to
31

1 be suitable for chewing. Tobacco products includes cigars but
2 does not include cigarettes.

3 (9) In the event that medical assistance has been
4 provided by Medicaid to more than one recipient for treatment
5 of disease or injury caused by the use of cigarettes, and the
6 agency elects to seek recovery from liable third parties due
7 to actions by the third parties or circumstances that ~~which~~
8 involve common issues of fact or law, the agency may bring an
9 action to recover sums paid to all such recipients in one
10 proceeding. In any action brought under this subsection, the
11 admissibility of evidence is governed by the Florida Evidence
12 Code shall be liberally construed regarding the issues of
13 causation and of aggregate damages. The issue of causation or
14 aggregate ~~and~~ damages in any such action may be proven by use
15 of aggregate statistical analysis as long as such analysis
16 takes into account causes of disease or injury not directly
17 related to cigarettes.

18 (a) In any action under this subsection wherein the
19 number of recipients for which medical assistance has been
20 provided by Medicaid is so large as to cause it to be
21 impracticable to join or identify each claim, the agency shall
22 not be required to so identify the individual recipients for
23 which payment has been made, but rather can proceed to seek
24 recovery based upon payments made on behalf of an entire class
25 of recipients.

26 (b) In any action brought pursuant to this subsection
27 to recover costs of treatment of disease or injury caused by
28 the use of cigarettes wherein a third party is liable due to
29 its manufacture, sale, or distribution of a product, the
30 agency shall be allowed to proceed under a market share
31 theory, provided that the products involved are substantially

1 interchangeable among brands, and that substantially similar
2 factual or legal issues would be involved in seeking recovery
3 against each liable third party individually. Each
4 manufacturer found liable under this subsection is responsible
5 for paying only that portion of the damages which is
6 commensurate with its share of the market; however, if any
7 share of the market is not recoverable or collectible, such
8 portion must be allocated pro rata to each of the financially
9 responsible manufacturers.

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

16 (h) Except as otherwise provided in this section,
17 actions to enforce the rights of the department under this
18 section shall be commenced within 5 years after the date a
19 cause of action accrues, with the period running from the
20 later of the date of discovery by the department of a case
21 filed by a recipient or his legal representative, or of
22 discovery of any judgment, award, or settlement contemplated
23 in this section, or of the provision of medical assistance to
24 a recipient. Each item of expense provided by the agency shall
25 be considered to constitute a separate cause of action for
26 purposes of this subsection. ~~The defense of statute of repose~~
27 ~~shall not apply to any action brought under this section by~~
28 ~~the agency.~~ Nothing in this paragraph affects or prevents a
29 proceeding to enforce a lien during the existence of the lien
30 as set forth in subparagraph (6)(d)9. ~~(6)(c)9.~~

31

1 (19) In cases of suspected criminal violations or
2 fraudulent activity, on the part of any person including a
3 liable third party, the department is authorized to take any
4 civil action permitted at law or equity to recover the
5 greatest possible amount, including without limitation, treble
6 damages under s. 772.104 ~~s. 772.73~~. In any action in which the
7 recipient has no right to intervene, or does not exercise his
8 right to intervene, any amounts recovered under this
9 subsection shall be the property of the agency, and the
10 recipient shall have no right or interest in such recovery.

11 Section 2. The 1994 amendments, enacted by chapter
12 94-251, Laws of Florida, effectuate the purpose of the 1990
13 Medicaid Third-Party Liability Act, are remedial in nature,
14 and shall be retroactively applied to payments made by the
15 state beginning October 3, 1990, in accordance with the
16 effective date of the 1990 Medicaid Third-Party Liability Act,
17 as set forth in chapter 90-295, Laws of Florida.

18 Section 3. This act shall take effect January 1, 1999.

19 *****
20 *****

21 HOUSE SUMMARY

22 Revises the provisions of the Medicaid Third-Party
23 Liability Act to:

24 1. Revise legislative intent to provide that
25 comparative negligence, assumption of the risk, and all
26 other affirmative defenses normally available to a liable
27 third party shall not apply in any action by the agency
28 to recover the costs of the treatment of disease or
29 injury caused by the use of cigarettes.

30 2. Provide definitions.

31 3. Provide that each manufacturer found liable
under the act is responsible for paying only that portion
of the damages which is commensurate with its share of
the market, provided that if any share of the market is
not recoverable or collectible, such portion must be
allocated pro rata to each of the financially responsible
manufacturers.

4. Provide legislative intent with respect to the
remedial intent of chapter 94-251, Laws of Florida.