

Amendment No. ____ (for drafter's use only)

	<u>Senate</u>	CHAMBER ACTION	<u>House</u>
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ORIGINAL STAMP BELOW

11 Representative Cosgrove offered the following:

13 **Amendment (with title amendment)**

14 On page 1,
15 remove from the bill: everthing after the enacting clause
16
17 and insert in lieu thereof:

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

21 409.910 Responsibility for payments on behalf of
22 Medicaid-eligible persons when other parties are liable.--

23 (1)(a) It is the intent of the Legislature that
24 Medicaid be the payor of last resort for medically necessary
25 goods and services furnished to Medicaid recipients. All other
26 sources of payment for medical care are primary to medical
27 assistance provided by Medicaid. If benefits of a liable third
28 party are available, it is the intent of the Legislature that
29 Medicaid be repaid in full and prior to any other person,
30 program, or entity. Medicaid is to be repaid in full from, and
31 to the extent of, any third-party benefits, regardless of

Amendment No. ____ (for drafter's use only)

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

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

- 27 1. "Cigar" means any roll for smoking which is not
28 intended for direct inhalation into the respiratory system of
29 the person smoking such tobacco product.
30 2. "Cigarette" means any roll for smoking, except one
31 in which the tobacco is fully naturally fermented, without

Amendment No. ____ (for drafter's use only)

1 regard to the kind of tobacco or other substances used in the
2 inner roll or the nature or composition of the material in
3 which the roll is wrapped, which is made wholly or in part of
4 tobacco irrespective of size or shape and whether the tobacco
5 is flavored, adulterated, or mixed with any other ingredient,
6 but the term does not include tobacco products.

7 3. "Cigarette manufacturer" means any person or
8 corporation that manufactures, sells, or wholesales
9 cigarettes. The term does not include growers of natural leaf
10 tobacco or independent retailers.

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

14 5. "Tobacco products" means loose tobacco suitable for
15 smoking, snuff, snuff flour, cavendish, plug and twist
16 tobacco, fine cuts and other chewing tobaccos, shorts, refuse
17 scraps, clippings, cuttings, and sweepings of tobacco, and
18 other kinds and forms of tobacco prepared in such manner as to
19 be suitable for chewing. The term includes cigars but does not
20 include cigarettes.

21 (9) ~~If in the event that~~ medical assistance has been
22 provided by Medicaid to more than one recipient for treatment
23 of disease or injury caused by the use of cigarettes, and the
24 agency elects to seek recovery from liable third parties due
25 to actions by the third parties or circumstances which involve
26 common issues of fact or law, the agency may bring an action
27 to recover sums paid to all such recipients in one proceeding.
28 In any action brought under this subsection, the admissibility
29 of evidence is governed by the Florida Evidence Code ~~shall be~~
30 ~~liberally construed regarding the issues of causation and of~~
31 ~~aggregate damages.~~ The issue of causation or aggregate ~~and~~

Amendment No. ____ (for drafter's use only)

1 damages in any such action may be proven by use of aggregate
2 statistical analysis as long as such analysis takes into
3 account pre-existing conditions and other contributing causes
4 of disease or injury not directly related to cigarettes.

5 (a) In any action under this subsection to recover
6 costs of treatment of disease or injury caused by the use of
7 cigarettes wherein the number of recipients for which medical
8 assistance has been provided by Medicaid is so large as to
9 cause it to be impracticable to join or identify each claim,
10 the agency shall not be required to so identify the individual
11 recipients for which payment has been made, but rather can
12 proceed to seek recovery based upon payments made on behalf of
13 an entire class of recipients. Notwithstanding the foregoing
14 sentence, a court shall permit a cigarette manufacturer to
15 conduct reasonable sample discovery, in light of the claims or
16 defenses asserted, concerning recipients whose injuries are
17 claimed to result from the use of cigarettes.

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

Amendment No. ____ (for drafter's use only)

1 responsible manufacturers.

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

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

23 (15) The department is authorized to enter into
24 agreements to enforce or collect medical support and other
25 third-party benefits.

26 (b) If an agreement to enforce or collect third-party
27 benefits is entered into by the department with any person
28 other than those described in paragraph (a), including any
29 attorney retained by the department who is not an employee or
30 agent of any person named in paragraph (a), then the
31 department may pay such person a percentage of the amount

Amendment No. ____ (for drafter's use only)

1 actually collected and reimbursed to the department as a
2 result of the efforts of the person, to the extent of medical
3 assistance paid by Medicaid. In no case shall the percentage
4 exceed a maximum established by the department, which shall
5 not exceed the lesser of a percentage determined to be
6 commercially reasonable or 30 percent of the amount actually
7 collected and reimbursed to the department as a result of the
8 efforts of the person under contract. However, in any action
9 under this subsection to recover costs of treatment of disease
10 or injury caused by the use of cigarettes, the court pursuant
11 to Rule 4-1.5, Rules Regulating The Florida Bar, shall provide
12 a thorough and rigorous review of the appropriateness of the
13 amount of attorney's fees for state-retained counsel. The
14 court shall also consider existing case law and
15 reasonableness, fairness, and equity to the taxpayers and
16 shall ensure that any fee award is not excessive and does not
17 constitute a windfall to state-retained counsel. After such
18 thorough and rigorous review, if the court determines that the
19 attorney's fees are in compliance with Rule 4-1.5, Rules
20 Regulating The Florida Bar, and that the fees are reasonable,
21 fair, and equitable to taxpayers and are not excessive or
22 unjust, the court shall authorize attorney's fees for
23 state-retained counsel. In any such contract concerning
24 cigarette litigation, the Attorney General shall be the
25 managing attorney.

26 (19) In cases of suspected criminal violations or
27 fraudulent activity, on the part of any person including a
28 liable third party, the department may bring ~~is authorized to~~
29 ~~take~~ any civil action permitted at law or equity to recover
30 the greatest possible amount, including without limitation,
31 treble damages under s. 772.104 ~~s. 772.73~~. In any action in

Amendment No. ____ (for drafter's use only)

1 which the recipient has no right to intervene, or does not
2 exercise his or her right to intervene, any amounts recovered
3 under this subsection shall be the property of the agency, and
4 the recipient shall have no right or interest in such
5 recovery.

6 Section 2. The 1994 amendments, enacted by chapter
7 94-251, Laws of Florida, effectuate the purpose of the 1990
8 Medicaid Third-Party Liability Act, are remedial in nature,
9 and shall be retroactively applied to payments made by the
10 state beginning October 3, 1990, in accordance with the
11 effective date of the 1990 Medicaid Third-Party Liability Act,
12 as set forth in chapter 90-295, Laws of Florida.

13 Section 3. This act shall take effect upon becoming a
14 law.

15
16
17 ===== T I T L E A M E N D M E N T =====

18 And the title is amended as follows:

19 On page 1, lines 2 through 9
20 remove from the title of the bill: all of said lines

21
22 and insert in lieu thereof:

23 An act relating to Medicaid third-party
24 liability; amending s. 409.910, F.S.;
25 clarifying legislative intent as to certain
26 amendments enacted by ch. 94-251, Laws of
27 Florida; providing definitions; providing for
28 judicial review of certain fees; recognizing
29 the remedial intent of ch. 94-251, Laws of
30 Florida; providing an effective date.

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