

State of South Dakota

SEVENTY-FOURTH SESSION
LEGISLATIVE ASSEMBLY, 1999

400C0355

SENATE BILL NO. 28

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;
17 and

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

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

- 10 (1) It is the policy of the state that financial burdens imposed on the state by cigarette
11 smoking be borne by tobacco product manufacturers rather than by the State of South
12 Dakota to the extent that such manufacturers either determine to enter into a
13 settlement with the state or are found culpable by the courts; and
- 14 (2) It would be contrary to this policy of the State of South Dakota if tobacco product
15 manufacturers who determine not to enter into such a settlement could use a resulting
16 cost advantage to derive large, short-term profits in the years before liability may arise
17 without ensuring that the state will have an eventual source of recovery from them if
18 they are proven to have acted culpably. It is thus in the interest of the state to require
19 that such manufacturers establish a reserve fund to guarantee a source of
20 compensation and to prevent such manufacturers from deriving large, short-term
21 profits and then becoming judgment-proof before liability may arise.

22 Section 3. Terms used in this Act mean:

- 23 (1) "Adjusted for inflation," increased in accordance with the formula for inflation
24 adjustment set forth in the Master Settlement Agreement;
- 25 (2) "Affiliate," a person who directly or indirectly owns or controls, is owned or

1 controlled by, or is under common ownership or control with, another person. Solely
2 for purposes of this definition, the terms, owns, is owned, and ownership, mean
3 ownership of an equity interest, or the equivalent thereof, of ten percent or more, and
4 the term, person, means an individual, partnership, committee, association,
5 corporation, or any other organization or group of persons;

6 (3) "Allocable share," allocable share as that term is defined in the Master Settlement
7 Agreement;

8 (4) "Master Settlement Agreement," the settlement agreement, and related documents,
9 entered into on November 23, 1998, by the State of South Dakota and major United
10 States tobacco product manufacturers which is filed as part of the court record in
11 *State of South Dakota, et al. v. Philip Morris, Inc., et al.*, Civ. No. 98-65, Sixth
12 Judicial Circuit, Hughes County;

13 (5) "Qualified escrow fund," an escrow arrangement with a federally or state-chartered
14 financial institution having no affiliation with any tobacco product manufacturer and
15 having assets of at least one billion dollars where such arrangement requires that the
16 financial institution hold the escrowed funds' principal for the benefit of releasing
17 parties and prohibits the tobacco product manufacturer placing the funds into escrow
18 from using, accessing, or directing the use of the funds' principal except as consistent
19 with section 8 of this Act;

20 (6) "Released claims," released claims as that term is defined in the Master Settlement
21 Agreement;

22 (7) "Releasing parties," releasing parties as that term is defined in the Master Settlement
23 Agreement.

24 Section 4. For the purposes of this Act, the term, cigarette, means any product that contains
25 nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or

1 contains:

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

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

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

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

14 Section 5. For the purposes of this Act, the term, tobacco product manufacturer, means an
15 entity that directly, and not exclusively through any affiliate:

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

25 (2) Is the first purchaser anywhere for resale in the United States of cigarettes

1 manufactured anywhere that the manufacturer does not intend to be sold in the United
2 States; or

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

4 The term does not include an affiliate of a tobacco product manufacturer unless such affiliate
5 itself falls within any provision of this section.

6 Section 6. For the purposes of this Act, the term, units sold, means the number of individual
7 cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or
8 through a distributor, retailer, or similar intermediary or intermediaries, during the year in
9 question, as measured by excise taxes collected by the state on packs, or roll-your-own tobacco
10 containers, bearing the excise tax stamp or imprint of the state. The secretary of revenue shall
11 promulgate, pursuant to chapter 1-26, such rules as are necessary to ascertain the amount of
12 state excise tax paid on the cigarettes of such tobacco product manufacturer for each year.

13 Section 7. Any tobacco product manufacturer selling cigarettes to consumers within the
14 state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries,
15 shall do one of the following:

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

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

21 (a) For 1999: \$.0094241 per unit sold after the date of enactment of this Act;

22 (b) For 2000: \$.0104712 per unit sold;

23 (c) For each of 2001 and 2002: \$.0136125 per unit sold;

24 (d) For each of 2003 through 2006: \$.0167539 per unit sold;

25 (e) For each of 2007 and each year thereafter: \$.0188482 per unit sold.

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

5 (1) To pay a judgment or settlement on any released claim brought against such tobacco
6 product manufacturer by the state or any releasing party located or residing in the
7 state. Funds shall be released from escrow under this subdivision in the order in which
8 they were placed into escrow and only to the extent and at the time necessary to make
9 payments required under such judgment or settlement;

10 (2) To the extent that a tobacco product manufacturer establishes that the amount it was
11 required to place into escrow in a particular year was greater than the state's allocable
12 share of the total payments that such manufacturer would have been required to make
13 in that year under the Master Settlement Agreement, as determined pursuant to
14 section IX(i)(2) of the Master Settlement Agreement, and before any of the
15 adjustments or offsets described in section IX(i)(3) of the Master Settlement
16 Agreement other than the inflation adjustment, had it been a participating
17 manufacturer, the excess shall be released from escrow and revert back to such
18 tobacco product manufacturer; or

19 (3) To the extent not released from escrow under subdivision (1) or (2) of this section,
20 funds shall be released from escrow and revert back to such tobacco product
21 manufacturer twenty-five years after the date on which they were placed into escrow.

22 Section 9. Each tobacco product manufacturer that elects to place funds into escrow shall
23 annually certify its compliance with this section to the attorney general. The attorney general
24 may bring a civil action on behalf of the State of South Dakota against any tobacco product
25 manufacturer that fails to place into escrow the funds required. Any tobacco product

1 manufacturer that fails in any year to place into escrow the funds required by section 7 of this
2 Act shall:

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

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

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

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