

# MAINE STATE LEGISLATURE

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# 118th MAINE LEGISLATURE

## FIRST REGULAR SESSION-1997

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Legislative Document

No. 398

S.P. 119

In Senate, January 23, 1997

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**An Act to Recover Economic Loss Attributable to Tobacco Use.**

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Reference to the Committee on Judiciary suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator MILLS of Somerset.  
Cosponsored by Representative TOWNSEND of Portland.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 14 MRSA c. 751 is enacted to read:

CHAPTER 751

RECOVERY OF ECONOMIC LOSS ATTRIBUTABLE TO TOBACCO USE

§8351. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Economic loss. "Economic loss" is defined as follows.

A. "Economic loss" to the State means health care and disability costs paid by or through the State, including, but not limited to, benefits under the Medicaid program administered by the Department of Human Services pursuant to the United States Social Security Act, Title XIX, or benefits under the State Employee Health Program for active or retired state employees and their dependents.

B. "Economic loss" to an insurer means health care and disability benefits paid by the insurer to or on behalf of an individual.

C. "Economic loss" to a health care provider means the reasonable value of uncompensated health care services and products provided to an individual.

D. "Economic loss" to an individual means health care expense, loss of income or earning capacity caused by disability, the cost or value of replacement services, pecuniary loss arising from death and the costs of burial. "Economic loss" does not include subjective or nonmonetary losses, or damages for pain, suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation or humiliation.

2. Insurer. "Insurer" means any entity that pays health or disability benefits on behalf of residents of this State, including insurers authorized to do business under the Maine Insurance Code, self-insured employers of Maine citizens and other groups or entities that may provide such benefits.

3. Tobacco or tobacco products. "Tobacco" or "tobacco products" includes cigarettes, cigars, cheroots, pipe tobacco, chewing tobacco, snuff and any other form of tobacco prepared for smoking, chewing, inhaling or other human use.

2           4. Tobacco manufacturer. "Tobacco manufacturer" means any  
3           entity that manufactures, packages, labels or prepares tobacco or  
4           tobacco products for human use.

6           **§8352. Liability**

8           A tobacco manufacturer whose products are distributed,  
9           marketed or sold to consumers in this State after December 31,  
10           1997, is strictly liable for the economic loss and related costs  
11           arising from personal injury, death or disease that is reasonably  
12           attributable to human exposure to its tobacco products and may  
13           not assert against any such claim the defenses of comparative  
14           negligence, contributory fault or assumption of the risk. All  
15           economic loss sustained after December 31, 1997 is recoverable  
16           regardless of when the exposure may have occurred. Economic loss  
17           may not be diminished by any theory or assertion that a victim's  
18           early death from tobacco exposure may have reduced the victim's  
19           consumption of future medical services.

20           **§8353. Recovery by State, insurer or health care provider**

22           If the State, an insurer or a health care provider incurs  
23           after December 31, 1997, any economic loss reasonably  
24           attributable to human exposure to tobacco or tobacco smoke, then  
25           such entity may recover its loss from any tobacco manufacturer  
26           liable under this chapter or liable under other applicable law.  
27           A recovery by an entity under this section is independent of any  
28           recovery to which an individual may be entitled. The State may  
29           proceed by action of the Commissioner of Human Services  
30           represented either by the Attorney General or by private  
31           attorneys pursuant to section 8358.

32           **§8354. Recovery by individuals**

34           If, after December 31, 1997, an individual sustains an  
35           injury, death or disease that is reasonably attributable to that  
36           person's exposure to tobacco or tobacco smoke, then that person  
37           may recover from any tobacco manufacturer liable under this  
38           chapter or other applicable law that person's economic loss that  
39           arises from exposure to the manufacturer's products regardless of  
40           when the exposure may have occurred. Economic loss recoverable  
41           by an individual includes future losses that are reasonably  
42           foreseeable at the time when recovery is made. If a portion of  
43           the loss has been paid by an entity that asserts its own claim  
44           for economic loss under section 8353, the court shall grant  
45           relief as necessary to avoid duplication of recovery; otherwise,  
46           the collateral source doctrine applies.

47           **§8355. Recovery of related costs**

2        An entity or individual entitled to recover under this  
4        chapter may also recover from liable manufacturers the costs and  
6        expenses that are reasonably necessary for effectuating the  
8        recovery of economic loss. These related costs include the fees  
      and expenses for investigation, for gathering of data, for  
      performance of scientific studies, for legal representation, for  
      expert witnesses and for court costs and proceedings.

10        **§8356. Presumptions and apportionment**

12        In determining a tobacco manufacturer's proportionate share  
14        of liability to the State or other entity under sections 8352 and  
16        8353, the court shall apply evidentiary presumptions in the  
      following manner.

18        1. **Aggregated losses.** Economic losses may be aggregated  
      and proven on a year-to-year basis.

20        2. **Proportionate share.** It is presumed that a tobacco  
22        manufacturer's proportionate share of liability for economic loss  
24        in any given year is equal to its percentage share of the total  
      dollar volume of retail tobacco sales in this State for the  
      3-year period immediately preceding the year in which the  
      economic loss is sustained.

26        3. **Class appraisal and assessment.** Proof of economic loss  
28        attributable to tobacco use may be based on reliable assessments  
30        and expert appraisals for classes of persons affected rather than  
      on proof of causation and damages for each person individually.

32        4. **Studies, samplings and surveys.** An assessment of  
34        economic loss, including causation and damages, may be based on  
36        reliable epidemiological studies, scientific samplings or  
38        statistical surveys and other data for categories or classes of  
      persons reasonably comparable to those for whom such loss has  
      been paid, rather than proof supplied on a person-by-person basis.

40        5. **Rules.** The commissioner may adopt rules specifying  
42        methods by which data may be collected and assessments may be  
44        made to determine the extent of each manufacturer's liability and  
46        may propose to the court other evidentiary presumptions  
      appropriate to determining liability and damages in any action  
      under this chapter. Rules adopted under this section are routine  
      technical rules pursuant to Title 5, chapter 375, subchapter II-A.

48        6. **Rebuttal of presumptions.** A tobacco manufacturer may  
50        rebut the presumptions defined or developed under this section  
      and may be heard on adjustments to be made in the proposed  
      application of such presumptions. The court shall apply those

2 presumptions that aid in providing reasonable assessments of the  
3 economic losses claimed and may not reject a presumption merely  
4 because an alternative method exists that may yield greater  
5 certainty, reliability or precision. Proceedings for determining  
6 liability and damages under this chapter may not be unduly  
7 delayed for purposes of seeking further refinement of data  
8 gathering and analysis so long as the methods proposed or  
9 available yield a reasonable and equitable result.

10 **§8357. Compromise authority**

12 The Attorney General, with advice and consent of the  
13 Commissioner of Human Services, may compromise or waive any  
14 portion of the State's recovery authorized by this chapter to the  
15 extent that it lies in the best interests of the State to do so  
16 and may establish a plan for periodic payments by any tobacco  
17 manufacturer in discharge of its liability as it accrues.

18 **§8358. Private sector assistance**

20 The Commissioner of Human Services and the Attorney General  
21 may contract with private consultants and private attorneys to  
22 provide expert assistance and legal representation for an action  
23 brought under this chapter.

24 **§8359. Distribution**

26 Funds recovered for the State under this chapter must first  
27 be used to pay the associated fees, legal costs and expenses  
28 incurred by the Department of Human Services or the Attorney  
29 General, including expenses payable under section 8358. The  
30 remainder must be remitted to the General Fund. All state  
31 recoveries must be accounted for as directed by the State Budget  
32 Officer.

34  
35  
36 **SUMMARY**

37  
38 The bill creates a uniform prospective remedy for recovery  
39 of economic loss caused by tobacco exposure. Related costs and  
40 legal fees are also recoverable. The liabilities created by the  
41 law apply only to manufacturers and not to other members of the  
42 tobacco industry.

43  
44 Manufacturers are prospectively held to a strict liability  
45 standard and are deprived of the contributory negligence defense;  
46 but victims may not recover noneconomic damages. This is  
47 parallel to the trade-off created by workers' compensation laws.  
48 The bill is, in essence, a "tobacco compensation" statute.

2           Group losses asserted by the State, insurers or health care  
3 providers are provable on the basis of market share liability  
4 with the aid of certain presumptions that the manufacturers are  
5 permitted to rebut or adjust.

6           The bill is derived in part from legislation in Florida and  
7 Massachusetts but it is more fully developed than those laws.

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