

# MAINE STATE LEGISLATURE

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# 119th MAINE LEGISLATURE

## FIRST REGULAR SESSION-1999

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Legislative Document

No. 1720

S.P. 596

In Senate, March 9, 1999

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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.

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

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

4   CHAPTER 751

6   RECOVERY OF ECONOMIC LOSS ATTRIBUTABLE  
8   TO TOBACCO USE

10           §8351. Definitions

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

16                   1. Commissioner. "Commissioner" means the Commissioner of  
18                   Human Services.

20                   2. Economic loss. "Economic loss" is defined as follows.

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

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

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

48                   D. "Economic loss" to an individual means health care  
                  expenses, loss of income or earning capacity caused by  
                  disability, the cost or value of replacement services or  
                  pecuniary loss arising from death and the costs of burial.  
                  "Economic loss" to an individual 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.

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

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

8           5. Tobacco manufacturer. "Tobacco manufacturer" means any  
          entity that manufactures, packages, labels or prepares tobacco or  
10           tobacco products for human use.

12           **§8352. Liability**

14           A tobacco manufacturer whose products are distributed,  
          marketed or sold to consumers in this State after December 31,  
16           1999 is strictly liable for the economic loss and related costs  
          arising from personal injury, death or disease that is reasonably  
18           attributable to human exposure to its tobacco products and may  
          not assert against such claims the defenses of comparative  
20           negligence, contributory fault or assumption of the risk. All  
          such economic loss sustained after December 31, 1999 is  
22           recoverable regardless of when the exposure occurred. Economic  
          loss may not be diminished by any theory or assertion that a  
24           victim's early death from tobacco exposure may have reduced the  
          victim's consumption of future medical services.

26           **§8353. Recovery by the State, an insurer or health care provider**

28           If the State, an insurer or a health care provider incurs  
          after December 31, 1999 any economic loss reasonably attributable  
30           to human exposure to tobacco or tobacco smoke, then that entity  
          may recover its loss from any tobacco manufacturer liable under  
32           this chapter or liable under other applicable law. A recovery by  
          an entity under this section is independent of any recovery to  
34           which an individual may be entitled. The State may proceed by  
          action of the commissioner represented either by the Attorney  
36           General or by private attorneys pursuant to section 8358.

38           **§8354. Recovery by individuals**

40           If, after December 31, 1999, an individual sustains an  
          injury, death or disease that is reasonably attributable to that  
42           person's exposure to tobacco or tobacco smoke, then that person  
          may recover from any tobacco manufacturer liable under this  
44           chapter or other applicable law that person's economic loss that  
          arises from exposure to the manufacturer's products regardless of  
46           when the exposure may have occurred. Economic loss recoverable  
          by an individual includes future losses that are reasonably  
48           foreseeable at the time when recovery is made. If a portion of  
          the loss has been paid by an entity that asserts its own claim  
50           for economic loss under section 8353, the court shall grant

2 relief as necessary to avoid duplication of recovery. Otherwise,  
3 the collateral source doctrine applies.

4 **§8355. Recovery of related costs**

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

14 **§8356. Presumptions and apportionment**

16 In determining a tobacco manufacturer's proportionate share  
17 of liability to the State or other entity under sections 8352 and  
18 8353, the court shall apply evidentiary presumptions in the  
19 following manner.

20 1. Losses aggregated. Economic losses may be aggregated  
21 and proven on a year-to-year basis.

24 2. Share of liability. It is presumed that a tobacco  
25 manufacturer's proportionate share of liability for economic loss  
26 in any given year is equal to its percentage share of the total  
27 dollar volume of retail tobacco sales in this State for the  
28 3-year period immediately preceding the year in which the  
29 economic loss is sustained.

30 3. Proof of economic loss. Proof of economic loss  
31 attributable to tobacco use may be based on reliable assessments  
32 and expert appraisals for classes of persons affected rather than  
33 on proof of causation and damages for each person individually.

36 4. Assessment of economic loss. An assessment of economic  
37 loss may be based on reliable epidemiological studies, scientific  
38 samplings, statistical surveys and other data for categories or  
39 classes of persons reasonably comparable to those for whom such  
40 loss has been paid, rather than proof supplied on a  
41 person-by-person basis.

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

52 6. Effect of presumptions. A tobacco manufacturer may

2 rebut the presumptions defined or developed under this section  
3 and may be heard on adjustments to be made in the proposed  
4 application of such presumptions. The court shall apply those  
5 presumptions that aid in providing reasonable assessments of the  
6 economic losses claimed and may not reject a presumption merely  
7 because an alternative method exists that may yield greater  
8 certainty, reliability or precision. Proceedings for determining  
9 liability and damages under this chapter may not be unduly  
10 delayed for purposes of seeking further refinement of data  
11 gathering and analysis so long as the methods proposed or  
12 available yield a reasonable and equitable result.

14 **§8357. Compromise authority**

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

22 **§8358. Private sector assistance**

23 The commissioner and the Attorney General may contract with  
24 private consultants and private attorneys to provide expert  
25 assistance and legal representation for an action brought under  
26 this chapter.

28 **§8359. Distribution**

29 Funds recovered for the State under this chapter first must  
30 be used to pay the associated fees, legal costs and expenses  
31 incurred by the Department of Human Services or the Attorney  
32 General, including expenses payable under section 8357. The  
33 remainder must be remitted to the General Fund. All State  
34 recoveries must be accounted for as directed by the State Budget  
35 Officer.

38 **§8360. Other remedies**

39 Remedies in this chapter are cumulative to those that exist  
40 or that arise from common law or from state or federal laws; and  
41 nothing contained in this chapter may be construed to foreclose a  
42 remedy otherwise available for recovery of tobacco-related  
43 losses. Amounts recovered as the result of litigation concluded  
44 prior to the effective date of this chapter must be duly credited  
45 against the losses to which such recoveries pertain.

2

## SUMMARY

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

10

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

16

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

22

24 Remedies contained in the bill are expressly cumulative and  
not intended to foreclose remedies that may exist or arise from  
interpretations of common law or state or federal laws. Amounts  
that may be recovered in prior tobacco settlements are credited  
26 against any losses to which those recoveries pertain.