

§37-600.21. Legislative findings and policies concerning tobacco manufacturer liability - Master Settlement Agreement.

A. The Oklahoma Legislature finds that cigarette smoking presents serious public health concerns to the State of Oklahoma and its citizens. The Oklahoma Legislature also finds that:

1. The Surgeon General has determined that smoking causes lung cancer, heart disease and other serious diseases;

2. There are hundreds of thousands of tobacco-related deaths in the United States each year; and

3. These diseases most often do not appear until many years after the person in question begins smoking.

B. The Oklahoma Legislature further finds that cigarette smoking also presents serious financial concerns for the State of Oklahoma; that, under certain health care programs, the state may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking; that those persons may have a legal entitlement to receive such medical assistance; and that, under these programs, the State of Oklahoma pays millions of dollars each year to provide medical assistance for those persons for health conditions associated with cigarette smoking.

C. The Oklahoma Legislature additionally finds that it is the policy of the State of Oklahoma that financial burdens imposed on the state by cigarette smoking should be borne by tobacco product manufacturers rather than by the State of Oklahoma to the extent that such manufacturers either determine to enter into a settlement with the state, or are found culpable by the courts; and that on November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement", with the state, which obligates these manufacturers, in return for a release of past, present and certain future claims against them as described therein, to pay substantial sums to the state (tied in part to their volume of sales); to fund a national foundation devoted to the interests of public health; and to make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

D. The Oklahoma Legislature therefore finally finds that it would be contrary to the policy of the State of Oklahoma if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably; and that it is thus in the interest of the State of Oklahoma to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise.

Added by Laws 1999, c. 357, § 1, eff. July 1, 1999.

§37-600.22. Definitions.

When used in this act:

1. "Adjusted for inflation" means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement;

2. "Affiliate" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms "owns", "is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, of ten percent (10%) or more, and the term "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons;

3. "Allocable share" means allocable share as that term is defined in the Master Settlement Agreement;

4. "Cigarette" means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains:

- a. any roll of tobacco wrapped in paper or in any substance not containing tobacco,
- b. tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette, or
- c. any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in subparagraph a of this paragraph.

The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette", nine one-hundredths (0.09) of an ounce of "roll-your-own" tobacco shall constitute one individual "cigarette";

5. "Master Settlement Agreement" means the settlement agreement and related documents entered into on November 23, 1998, by the State of Oklahoma and leading United States tobacco product manufacturers;

6. "Qualified escrow fund" means an escrow arrangement with a federally or state-chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least One Billion Dollars (\$1,000,000,000.00) where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing funds into

escrow from using, accessing or directing the use of the funds' principal except as consistent with Section 3 of this act;

7. "Released claims" means released claims as that term is defined in the Master Settlement Agreement;

8. "Releasing parties" means releasing parties as that term is defined in the Master Settlement Agreement;

9. "Tobacco product manufacturer" means an entity that after the effective date of this act directly, and not exclusively through any affiliate:

- a. manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer, as that term is defined in the Master Settlement Agreement, that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement, and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States),
- b. is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States, or
- c. becomes a successor of an entity described in subparagraph a or b.

The term "tobacco product manufacturer" shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within any of the provisions of subparagraphs a through c of this paragraph; and

10. "Units sold" means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or through a distributor, retailer or similar intermediary or intermediaries, during the year in question, as measured by excise taxes collected by the state on packs, or "roll-your-own" tobacco containers, bearing the excise tax stamp of the state. The Oklahoma Tax Commission shall promulgate such rules as are necessary to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year. Added by Laws 1999, c. 357, § 2, eff. July 1, 1999.

§37-600.23. Participating manufacturers - Escrow deposits.

A. Any tobacco product manufacturer selling cigarettes to consumers within the state, whether directly or through a distributor, retailer or similar intermediary or intermediaries, after July 1, 1999, shall do one of the following:

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

2. Place into a qualified escrow fund, by April 15 of the year following the year in question, the following amounts, as such amounts are adjusted for inflation:

- a. 1999: ninety-four thousand two hundred forty-one one-hundred-thousandths of one cent (\$.0094241) per unit sold after July 1, 1999,
- b. 2000: one hundred four thousand seven hundred twelve one-hundred-thousandths of one cent (\$.0104712) per unit sold,
- c. for each of 2001 and 2002: one hundred thirty-six thousand one hundred twenty-five one-hundred-thousandths of one cent (\$.0136125) per unit sold,
- d. for each of 2003 through 2006: one hundred sixty-seven thousand five hundred thirty-nine one-hundred-thousandths of one cent (\$.0167539) per unit sold, and
- e. for each of 2007 and each year thereafter: one hundred eighty-eight thousand four hundred eighty-two one-hundred-thousandths of one cent (\$.0188482) per unit sold.

B. A tobacco product manufacturer that places funds into escrow pursuant to paragraph 2 of subsection A of this section shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

1. To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this paragraph:

- a. in the order in which they were placed into escrow, and
- b. only to the extent and at the time necessary to make payments required under such judgment or settlement;

2. To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in this state in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to Section IX(i) of that Agreement, including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer, unless otherwise provided for by subsection C or D of this section; or

3. To the extent not released from escrow under paragraph 1 or 2 of this subsection, funds shall be released from escrow and

revert back to such tobacco product manufacturer twenty-five (25) years after the date on which they were placed into escrow.

C. If this act, or any portion of the amendment to paragraph 2 of subsection B of this section made by this act, is held by a court of competent jurisdiction to be unconstitutional, then paragraph 2 of subsection B of this section shall have no force and effect.

D. If in accordance with the provisions of subsection C of this section, paragraph 2 of subsection B of this section shall have no force and effect because a court of competent jurisdiction found such provisions unconstitutional, and if, thereafter, a court of competent jurisdiction finds that subsection B of this section without the provisions of paragraph 2 of subsection B of this section is unconstitutional, then paragraph 2 of subsection B of this section shall be replaced by the provisions of paragraph 1 of this subsection.

1. To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the allocable share for the state of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement (as determined pursuant to Section IX(i)(2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in Section IX(i)(3) of that Agreement other than the Inflation Adjustment) had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer.

2. Neither any holding of unconstitutionality nor the rendering of paragraph 2 of subsection B of this section to have no force and effect shall affect, impair or invalidate any other provision of this section, or the application of this section to any other person or circumstance, and the remaining portions of this section shall at all times continue in full force and effect.

E. Each tobacco product manufacturer that elects to place funds into escrow pursuant to paragraph 2 of subsection A of this section shall annually certify to the Attorney General that it is in compliance with paragraph 2 of subsection A of this section. The Attorney General may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

1. Be required within fifteen (15) days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a violation of paragraph 2 of subsection A or this subsection of this section, may impose a civil penalty to be paid to the General Fund of the state in an amount not to exceed five percent (5%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed one hundred percent (100%) of the original amount improperly

withheld from escrow;

2. In the case of a knowing violation, be required within fifteen (15) days to place such funds into escrow as shall bring it into compliance with this section. The court, upon a finding of a knowing violation of paragraph 2 of subsection A or this subsection of this section, may impose a civil penalty to be paid to the General Fund of the state in an amount not to exceed fifteen percent (15%) of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed three hundred percent (300%) of the original amount improperly withheld from escrow; and

3. In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state, whether directly or through a distributor, retailer or similar intermediary, for a period not to exceed two (2) years.

Each failure to make an annual deposit required under this section shall constitute a separate violation.

Added by Laws 1999, c. 357, § 3, eff. July 1, 1999. Amended by Laws 2003, c. 401, § 1.

NOTE: Section 2 of Laws 2003, c. 401 provides:

"The amendments to Section 600.23 of Title 37 of the Oklahoma Statutes made by Enrolled House Bill No. 1359 of the 1st Regular Session of the 49th Oklahoma Legislature shall become effective on January 1 of the year after:

"1. Twenty-five states have enacted similar amendments to their laws on early release of funds from escrow accounts established in compliance with the statutes of other states that are similar to the escrow requirements of Sections 600.21 through 600.23 of Title 37 of the Oklahoma Statutes; and

"2. The Attorney General certifies such fact to the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and the Secretary of State."

The Oklahoma Attorney General, on October 15, 2004, certified that more than twenty-five states have enacted similar amendments to their laws on early release of funds from escrow accounts established in compliance with the statutes of those states that are similar to the escrow requirements of Section 600.21 through 600.23 of Title 37 of the Oklahoma Statutes.