MAINE STATE LEGISLATURE

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LEGISLATIVE RECORD

OF THE

One Hundred And Seventeenth Legislature

OF THE

State Of Maine

VOLUME V

FIRST REGULAR SESSION

Senate
June 19, 1995 to June 30, 1995

FIRST CONFIRMATION SESSION
September 14, 1995

FIRST SPECIAL SESSION

House of Representatives
November 28, 1995 to November 30, 1995

Senate
November 28, 1995 to November 30, 1995

In Senate, June 19, 1995, Bill and Accompanying Papers **INDEFINITELY POSTPONED**, in **NON-CONCURRENCE**.

Comes from the House, that Body having **INSISTED**.

On motion by Senator **KIEFFER** of Aroostook, Tabled, pending **FURTHER CONSIDERATION**.

COMMITTEE REPORT

House

Divided Report

The Majority of the Committee on **HUMAN RESOURCES** on Bill "An Act Regarding Recovery from Members of the Tobacco Industry of Medicaid and Maine Health Program Health Care Costs for Tobacco-related Illness, Disease or Disability"

H.P. 331 L.D. 452

Reported that the same **Ought Not to Pass.**

Signed:

Senators:
PENDEXTER of Cumberland
BENOIT of Franklin

Representatives:
JOYNER of Hollis
MARVIN of Cape Elizabeth
WINGLASS of Auburn
LOVETT of Scarborough
JONES of Bar Harbor
JOHNSON of South Portland

The Minority of the same Committee on the same subject reported that the same **Ought to Pass as Amended by Committee Amendment "A" (H-417).**

Signed:

Senator:
PINGREE of Knox

Representatives:
FITZPATRICK of Durham
SHIAH of Bowdoinham
ETNIER of Harpswell
MITCHELL of Portland

Comes from the House with the Bill and Accompanying Papers **INDEFINITELY POSTPONED**.

Which Reports were **READ**.

Senator **PENDEXTER** of Cumberland moved that the Senate **ACCEPT** the Majority **OUGHT NOT TO PASS** Report.

THE PRESIDENT: The Chair recognizes the Senator from Somerset, Senator Mills.

Senator **MILLS**: Thank you, Mr. President, Men and Women of the Senate. I rise to ask that you vote against the pending motion. The bill before you arises from some work that started in other states. There was a movement in Florida, that people probably have read about, and in some other states to authorize the Department of Human Services and perhaps other agencies that expend money on tobacco related health costs, to recover those costs from the manufacturers of tobacco products. The bill in Florida became a matter of some controversy because it was, in some respects, retroactive. A recent court ruling has validated that law and has stated that the law is appropriate but that it should be applied prospectively. I think there was a ruling that came down about a week or so ago. Somewhat in anticipation of that, and in an effort to remove some of the more awkward objections to a preliminary draft of this bill that is before you, a number of us who are interested in the bill rewrote it in such a fashion that the Department of Human Services and other insuring agencies, and even individuals in this state who may have sustained out of pockets costs or losses, which they can prove are directly related to a tobacco induced illness, disease, or death, may recover, but only to the extent of their out of pockets costs for those damages that they may have suffered. It is not a case where people can recover anything for pain and suffering, or for a loss of consortium, or any of the other elements of damage that might accrue from being ill or sick through exposure to tobacco. It is strictly an economic loss statute. It is applied even-handedly. It does not take effect, except for injuries or diseases that might arise after the first of January 1996. It applies only to those manufacturers whose products are sold or distributed for consumption by Maine citizens after January 1, 1996. It authorizes, but does not compel, the Attorney General to recover these costs on behalf of the Department of Human Services. It enables the Department of Human Services, through its Department of Health, to continue, or to make use of existing statistics which they keep, detailing the costs that are attributable to tobacco related illnesses, and to make use of that statistical data base for establishing the level of cost to be recovered from the cigarette manufacturers. The liability of any single manufacturer of cigarettes, and there aren't very many of them, but the liability of each one is established on the basis of its relative market share for sale or consumption of cigarettes here in Maine. The Attorney General is authorized, if he wishes, to have the suit pursued through attorneys that are not members of the Attorney General's Department. It can be done privately if he so wishes at relatively little cost to the state, or he can bring the suit himself if he wishes, or if they arrive at settlement terms with the manufacturers, then no suit would be necessary or required.

The Bill is designed, I think it is unique in the United States. It is designed as kind of an even-handed way of holding the tobacco industry to account in the future for exactly those costs or expenses which may be directly attributable to the

consumption of their products within the state. It is a permissive bill. It simply authorizes the Department of Human Services, and the Attorney General, to take action if they so desire. It is not required, it is not mandated. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Franklin, Senator Benoit.

Senator **BENOIT**: Thank you, Mr. President. May it please the Senate. I guess I could say this is my favorite piece of legislation at this session. There is just so much to talk about. It proves an old adage, first of all, politics makes for strange bedfellows, and this is exhibit A. In this particular bill, the state government is in bed with insurance entities, if you can believe it. I fear for the offspring of that union. That's who can bring a suit, the state and an insurance entity. Picture the insurance companies, with their premiums, insuring people, getting the benefit, and then on top of that, turning around and suing the tobacco company for damages. Don't you just love it? How self-serving could you get? So, as we go down through this, I would ask you to consider whether that should happen at all, and take a look at the situation further and determine, if you don't feel that this is the best example of a lawyer's bill. For example, the Attorney General is in bed with private counsel in this situation, and look at how the law fees are apportioned, up to 50% of the original judgement can go for counsel fees. If you want to see a rush to court, there's a basis right there, the amount of counsel fees involved. The thing that bothers me about this is that it is government at its worst. You and I, when we go to court and bring an action in court, negligence or what have you, have to stand defenses coming at us, defenses that have existed in this state since its beginning practically. Comparative negligence, contributory fault, assumption of the risk, in this bill the tobacco companies do not have those defenses available. Government at its worst. Government ought to go to court on a fair basis, like you and I, not better off. There is a dome overhead, and you know the feeling of government, that big agency there, big enough to stand on their own two feet, but in this bill they win because the longstanding defenses available to you and I, we have to discert them or defend against them, are taken away from the people sued by our government. In a way, to me, this all boils down to fairness. If our government goes to court, it ought to go to court on the same basis you and I do, on a basis of fairness. I like the way it is written here that the Commissioner of the Department of Human Services is going to act like a judge and determine the fairness of some evidence before the court. It says here that the studies and scientific samplings and statistical surveys, determined by the Commissioner to be reliable, will be taken into the case. I thought that was the judges job, to determine what would be coming into a case. That bothers me.

Here's one that I have never seen before in a piece of potential litigation. I call this one the rush to judgement. Can you believe this language? "The tobacco manufacturer in entitled to rebut the presumptions," and there are three of them in here, set up against the defendant. You can rebut those if "determination of liability and damages is concluded in a timely manner, without unduly delaying the case." I thought the court was in charge of how long it took to try a case. If it takes too long, the tobacco company cannot rebut these presumptions, just by a passage of time. It reminds me when I was on the court and I would hear a speeding case. After it was over, say it took twenty minutes, some lawyer would say, "Gee, Judge, you should have heard that case in ten minutes." I would look back and say, "Gee, how did I know, when the case started, how long it was going to take?" You don't time people when they come to court, that's not the way to run a court, and yet here it is in this particular situation. I don't like the idea of bringing a case to court on the basis of statistical analysis. I'm going to close by referring to Judge Gignoux, a Judge that I love. I tried a lot of cases before Judge Gignoux in my sixteen years in the AG's office here. He sat on the District Court in Portland and was well thought of. His name came up once as a possible appointment to the United States Supreme Court. The man was a scholar of the law, I loved him for that. He heard these so-called asbestos cases and the issues came up whether statistical analysis could be part of the presentation. He said no. Here's what he said specifically, "The issues in the case will be," and the three things he mentioned here go counter to this bill, he said, "A. the defendants liability on theories of negligence and/or strict liability. B. approximate causation of plaintiffs damages, approximate cause." That's important, it has been in the law for years and years and years. Appoximate cause has got to be shown. "C. plaintiffs, or plaintiffs decedants, contributory negligence." That's out in this bill, it's not available. Contributory negligence and assumption of the risk, he said, were in those cases. So, I said I was going to conclude with that, but I have got to mention something about Florida. Florida had enacted a bill like this, and they are trying to get out of it now. The good Senator from Somerset can correct me on this, because I do not want to misstate the present status of that litigation in Florida. Florida enacted a similar provision, it has gone into court. It's pretty expensive stuff too. I think we take advantage of what is going on down there. They have constitutional problems with the situation. The hearing on constitutional questions was held the sixteenth of this month. At the conclusion of the hearing the trial judge ruled the statute was constitutional only if applied prospectively, plus it had to be applied across the board, not just against tobacco companies. Don't single out one industry, be fair. The business of being prospective, you will notice in the bill that you can bring a suit after a particular date this year. If you can bring a suit next year you can go back three years. Going back three years is retrospectively. I would ask you, seriously, to look at this bill, because when the first version came out it was so bad that the second version had to be given some life. This bill is not worthy of passage for many reasons. Please give that serious consideration. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Knox, Senator Pingree.

Senator **PINGREE**: Thank you, Mr. President, Men and Women of the Senate. I want to take a break from

discussing some of the legal issues to tell you why I oppose the pending motion and support this bill. The fact is 2,258 people in Maine die every year from illnesses related to smoking. I think that this bill is about taking responsibility. I've got a feeling that today we are going to spend a lot of time discussing personal responsibility. I think we are asking this industry to take responsibility for the cost of illnesses generated by their product. When I was in business I had to worry about the products that I sold to the public. If a little kid was going to put a plastic bag over their head. If I was selling a loaf of bread, if there was something in it that wasn't okay. I think we are asking them to take responsibility for the cost that we have to pay. It costs the people of the State of Maine $273 million a year to pay for the illnesses related to smoking. Across the country, 43% of those costs are either borne by the federal or the state government. We are asking to be allowed to sue for the medical costs that we pay. The thing that I think is different about this industry, and you will hear people talk about how this will be spread to everything before you know it, it will be pick-up trucks if you don't drive responsibly and it will be all kinds of things, the difference about tobacco is that it's the only substance, when used as intended, is intended to be addictive and it is marketed to our children. We listened to hours of testimony in our Committee, we have talked about this a lot. We saw copies of the patents received by the tobacco industry that show tobacco is manipulated to make it more addictive, as if it wasn't addictive enough already. We also saw the catalogs, and you have some of them on your desks. Tell me that this isn't marketed to our children. Our children, they know, if they capture them at thirteen, fourteen or fifteen, you will be a smoker for life because it is addictive. It is being marketed to people that it is illegal to sell to right now. You can say what about beer, what about alcohol, if you have a beer, if you have a couple of beers, it doesn't mean you become addicted. We know that tobacco is addictive when used as directed. People say you can blame Twinkies. Eating a Twinkie isn't addictive, eating a box of Twinkies maybe isn't so good for your health, but it is not manipulated and it is not marketed to be addictive. We talk all the time about government costing too much. I agree, it costs too much. One of the reasons I think it costs too much is we pay the bills that should be other people's responsibility. We pay the Medicaid costs that I believe should be the responsibility of the tobacco industry. This is an industry that spends $600 million a year making sure that we don't pass laws like this. I'm offended by being manipulated myself in that way. I think that we should vote down the pending motion and allow our Attorney General the opportunity to sue and recover these costs so that we don't have to pay them. This is an issue about our pocketbooks, this is an issue about the health of our children.

THE PRESIDENT: The Chair recognizes the Senator from Somerset, Senator Mills.

Senator **MILLS**: Thank you, Mr. President, Men and Women of the Senate. It was thirty-one years ago that the Surgeon General passed judgement on this industry and stated that cigarettes cause cancer and a number of other human ailments, heart disease and the like. The industry itself has been on notice of the harm that it has been doing for the last thirty-one years at least, and probably for fifty-one or sixty-one years. The reason, and the only reason I think, that the bill in Florida is under some challenge at the moment is that the industry, Ligott and Myers, and others, have hired fifty lobbyists, according to the Wall Street Journal, to attack the bill on all fronts, to soften up the support for the bill. Here in our own Legislature, I know of at least six, and they are all good friends of mine, but they are highly paid lobbyists who have been assigned to work this bill, and others that are presently before you, on similar subjects. I need to correct several misconceptions that I think were conveyed to you earlier. Number one, to the extent that counsel fees are recoverable under this statute, they are only recoverable if you prove what you did to earn them, and they are limited to a fraction of the overall recovery. So, it is not something where you just get 50% of the whole recovery, not at all. Private counsel can't bring suit for the state unless the Attorney General decides to hire private counsel. He might want to do it himself, he has that option. There is only one affirmative defense that is taken away, really, by this statute, and that is the defense that somehow it is the smoker's fault or the smoker is guilty of contributory fault or having assumed the risk of smoking. We take that defense away, but we also take away the smoker's right to recover for other collateral damages, like pain and suffering and that sort of thing. In a sense, the statute is a lot like a workers' compensation statute. You get a certain set of limited economic damages and no more, and you get a defense taken away that the industry should no longer be able to use after thirty-one years of being on notice of the harm that the product is up to. I don't think that this is a matter for ridicule. I think when you have got 2200 people dying every year in the State of Maine because of this product it's not funny, and it's not something to be joking about on the floor of the Senate. When you have $300 million a year being spent by the people of Maine because of what this product has been doing for the last few decades to people, I don't think it's a laughing matter or a matter for ridicule. I take it seriously. There was a lot of serious effort that went into this bill to generate a careful, well thought out, finely crafted bill that would send the bill to the industry and say, "Pay it please, just pay it please. If you choose not to pay it, or if you choose not to come to terms with us, then, and only then, will some action possibly be brought against you by the State or by individuals." It is the judge who is in control of this litigation if there should be any. The judge has control over it from start to finish. It is across the board. It affects the entire tobacco industry. It is entirely prospective. It is only for the future. There is nobody that can bring a claim today. It only affects those people who are injured, who become diseased or disabled in the future, next year or later. I leave you with this, it isn't as if this isn't an industry that can't afford to pay the bill that we are sending them in this legislation.

THE PRESIDENT: The Chair recognizes the Senator from Cumberland, Senator Pendexter.

Senator **PENDEXTER**: Thank you, Mr. President, Men and Women of the Senate. You all know where I stand on smoking issues. It certainly is one of my hot buttons. I'm not usually on the side of the tobacco industry, but I have to say to you, this bill distresses me. Yes, we will talk about personal responsibility later on, and we will talk about it now, because for thirty-one years adults know that when cigarettes are used as intended they kill. If they so choose to make that adult decision in this world of difficult choices, I cannot justify then turning around and suing an industry for a decision that they made. We all know the health risks of smoking tobacco. My father died of lung cancer. He smoked two or three packs a day for most of his life. He knew that that would probably kill him, and it did. We all make those decisions and I cannot justify the existence of this bill. If we want to pass public policy that makes sense, then we need to legislate from a perspective that encourages people not to smoke. Those are the types of legislative initiatives that I support, and will continue to support. I cannot support anything like this. When the vote is taken, I request the yeas and nays.

On motion by Senator **PENDEXTER** of Cumberland, supported by a Division of one-fifth of the members present and voting, a Roll Call was ordered.

THE PRESIDENT: The Chair recognizes the Senator from Franklin, Senator Benoit.

Senator **BENOIT**: Thank you, Mr. President. I will be brief. May it please the Senate. Let's assume that smoking is wrong. So is this bill. But two wrongs do not make it right. A moment ago I heard a mention of fifty lobbyists being hired. So what? Hire 5,000 lobbyists if you want to. That begs the question, it doesn't make the bill good or bad. People have a right to hire lobbyists if they want to, it's a very legitimate thing to do. All I'm saying here today is if you allow somebody to be sued, please have the courage to put it on fair grounds. This bill is not fair. Thank you.

THE PRESIDENT: The Chair recognizes the Senator from Oxford, Senator Ferguson.

Senator **FERGUSON**: Thank you, Mr. President, Ladies and Gentlemen of the Senate. I have listened to the debate and it has been very good, but I believe that we, as individuals, have to assume a little responsibility for our own health and our own body. To my knowledge, no one is being forced to smoke in this country. Therefore, I am going to be voting against this bill. Thank you.

THE PRESIDENT: The pending question before the Senate is the motion by Senator **PENDEXTER** of Cumberland that the Senate **ACCEPT** the Majority **OUGHT NOT TO PASS** Report.

A vote of Yes will be in favor of **ACCEPTANCE**.

A vote of No will be opposed.

Is the Senate ready for the question?

The Doorkeepers will secure the Chamber.

The Secretary will call the Roll.

ROLL CALL

YEAS: Senators: ABROMSON, AMERO, BEGLEY, BENOIT, BERUBE, CAREY, CARPENTER, CASSIDY, FERGUSON, HALL, HANLEY, HARRIMAN, HATHAWAY, KIEFFER, LORD, MICHAUD, PENDEXTER, SMALL, STEVENS, and the PRESIDENT, Senator BUTLAND

NAYS: Senators: BUSTIN, CIANCHETTE, CLEVELAND, ESTY, FAIRCLOTH, GOLDTHWAIT, LAWRENCE, LONGLEY, McCORMICK, MILLS, O'DEA, PARADIS, PINGREE, RAND, RUHLIN

20 Senators having voted in the affirmative and 15 Senators having voted in the negative, the motion by Senator **PENDEXTER** of Cumberland to **ACCEPT** the Majority **OUGHT NOT TO PASS** Report, **PREVAILED**.

ENACTOR

The Committee on **Engrossed Bills** reported as truly and strictly engrossed the following:

Emergency Resolve

Resolve, Urging Efforts to Enhance Opportunities for Businesses that Use Recycled Materials as Raw Materials

H.P. 805 L.D. 1122
(S "A" S-344 to C "A" H-550)

This being an Emergency Measure and having received the affirmative vote of 27 Members of the Senate, with 1 Senator having voted in the negative, and 27 being more than two-thirds of the entire elected Membership of the Senate, was **FINALLY PASSED** and having been signed by the President, was presented by the Secretary to the Governor for his approval.

Out of order and under suspension of the Rules, the Senate considered the following:

SECOND READERS

The Committee on **Bills in the Second Reading** reported the following: