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Testimony of Leo J. Delicata, Esq., Legal Services for the Elderly, against LD 1693, An Act To Advance Health Equity, Improve the Well-being of All Maine People and Create a Health Trust before the Joint Standing Committee on Health and Human Services.

Senator Claxton, Representative Meyers and members of the Joint Standing Committee on Health and Human Services.

Legal Services for the Elderly is a non-profit legal services organization that was established in Maine following the passage of the Older American's Act in 1974. Since then, we have provided free legal assistance to our disadvantaged older adults when their basic human needs are at stake. Our clients are all aged sixty or older and most have very low incomes. Some are the most physically and financially compromised people in our communities.

The Fund for a Healthy Maine has helped pay the cost of prescription drugs and the cost of Medicare and Medicaid related medical care to older adults for over twenty years. We represent the individuals who receive this help.

As a preliminary matter we would like to say that while we are testifying again this bill we do not have the same position regarding Parts B,C,D,or E. We are in support of these initiatives and especially the creation of the Office of Health Equity within the Department of Health and Human Services in Part B. This idea would promote fairness in access to the essential health services affected by this bill. The remaining Parts are important public health prevention initiatives that will also improve the health of Maine people.

However, we have serious reservations about Part A and so we are testifying against its passage. We are convinced that this proposal is brought in good faith and with a genuine concern for improving the health of Maine people. Furthermore, the proponents are advocates with whom we have worked for years and whom we deeply respect. However, we disagree with the direction that this very serious deviation from long established public policy will take us.

As we read it, the bill ultimately proposes to end legislative control and management over most of the money now contained in the Fund for a Healthy Maine. It does so by changing who can decide to spend the money and what they can decide to buy. The basic idea is simple. While it has many sophisticated provisions it is built on three fundamental features.

First, the “Master Tobacco Settlement Agreement”(MSA) money in the current FHM will henceforth be held by a “trust” established by the Legislature. The remaining FHM money i.e., “Racino” generated funds would remain in the current FHM and would be available and subject to Legislative management. This trust will be managed by a Board consisting of individuals appointed by Legislative leaders and the Governor. The Board will prepare a distribution plan for the trust funds with notice and input by others, distribute the funds and exercise other duties as described in the proposed statute but not require approval from the Legislature or the Chief executive before it acts. This Committee is authorized to provide oversight to the Board, but no other direction is provided regarding the content of that oversight. The Board is also empowered to promulgate routine technical rules.

Second, the new “trust” is specifically prohibited from using any of its money, whether from the tobacco settlement or other sources, for “medical care.” As that term is defined in this bill, medical care means “...direct medical care, including but not limited to care provided under the MaineCare program and the prescription drug program established under section 254-D. "Medical care" does not include treatments provided under the Tobacco Prevention and Control Program established in section 272.”

Third, the FHM funds pertaining to MaineCare, Prescription Drugs Head Start and Childcare (purchased social services) would be allocated to the General Fund for FY23. The Trust retains all of the tobacco settlement funds thereafter for distributions described in the proposed legislation: tobacco prevention and control programs, attorney general’s office (presumably for legal services related to the Master Settlement Agreement), administration fund, internal stabilization account,

flexible account and health equity and health improvement account.

The result of accepting these features means that after FY23 all the Tobacco Settlement money would be managed by a trust and while these other programs (MaineCare, Prescription Drugs Head Start and Childcare) would be competing for general fund appropriations.

We have felt the frustration caused by Legislative decisions that reduced or eliminated FHM funding for the various populations and programs supported by the Fund. We are not unmindful that our public health infrastructure and programs for smoking prevention and cessation have been eroded or eliminated and the goal of preventing our youth from smoking has not been seen as a priority over a period of years.

It is not surprising that people who care deeply about the adverse health effects suffered by the public because of decisions that reduce health related funds would try to permanently insulate those funds. The fact that this is what this proposal attempts to do is understandable. The fact that it takes all the tobacco settlement money for prevention and equity purposes and prohibits its use for medical care and other existing Fund purposes is both unfair to people in other programs and financially unwise for the State.

One of the reasons offered to justify this “separation” is that the tobacco settlement agreement is clear that “first and foremost” payments should advance policies to reduce youth smoking and promote public health. It is true that these goals were mentioned in the recitals introducing the agreement but so was the goal for which every lawsuit alleging personal injury is filed, i.e., to “secure monetary payments to the Settling States” . In addition, the goal of promoting public health is not defined in the agreement but we believe that managing the treatment of illness in a population is not excluded by that term. We do not agree that the agreement assigned priorities anywhere in its text nor does the agreement require any Settling State to spend the money for any particular purpose. In fact, the Legislature rejected the idea that any special priority should be assigned to a program in the current Fund for a Healthy Maine by including language in the Fund that requires a reduction of allocations by the proportion that a program’s fund balance bears to the entire fund allocations should budgeted allocation shortfalls make reductions necessary.

Because the idea that it would be appropriate to prohibit the use of MSA funds for

medical care was so disturbing, we further explored the intent of the Master Settlement Agreement. We believe we found something interesting and helpful. Included as Exhibit T in the MSA is a model act intended for enactment by Settling States. We believe that it graphically suggests why the lawsuit was initiated and what the Settling States anticipated they would do with the money they recovered beyond what is set out in the MSA recitals. That model agreement compels non-settling tobacco manufacturers to create a reserve account so that funds would be available to pay verdicts against them in case they went out of business before future cases could be decided.

Maine adopted this model agreement as the Tobacco Manufacturers Act in 1999 PUBLIC LAW, C. 401, PART U Sec. U-1. We have set out the findings and purposes found in the Public Law at length because they are unusually instructive. This Act was also adopted in the same Budget bill as Part U and the original Fund for a Healthy Maine Act followed as Part V.

Here are the findings and purposes:

22 MRSA c. 263, sub-c. III is enacted to read:

SUBCHAPTER III TOBACCO MANUFACTURERS ACT §1580-G.

The Findings and purposes are as follows:

Cigarette smoking presents serious public health concerns to the State and to the citizens of the State. The Surgeon General has determined that smoking causes lung cancer, heart disease and other serious diseases, and that there are hundreds of thousands of tobacco-related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking.

Cigarette smoking also presents serious financial concerns for the State. 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, and those persons may have a legal entitlement to receive such medical assistance.

Under these programs, the State pays millions of dollars each year to provide medical assistance for these persons for health conditions associated with cigarette smoking.

It is the policy of the State that financial burdens imposed on the State by cigarette

smoking be borne by tobacco product manufacturers rather than by the State to the extent that such manufacturers either determine to enter into a settlement with the State or are found culpable by the courts.

On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the State. The Master Settlement Agreement 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 interest of public health; and to make substantial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

It would be contrary to the policy of the State 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. It is thus in the interest of the State 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.”

These findings and purposes are instructive for three reasons. First, this language was written by the Settling States and included in the master settlement agreement. So, the language is a statement of the reason that they would bring similar tobacco litigation against similar Non-Settling tobacco manufacturers. It is fair to infer that this is also the reason they brought the lawsuit settled with the Master Settlement Agreement. Second, it makes clear that the Settling States anticipated they would have an obligation to pay the medical expenses of individuals with diseases caused by tobacco products and they wanted those manufacturers who caused the diseases to remain financially responsible. Again, the inference is that the same reasoning applies to the settled lawsuit. Third, they support the proposition that the choices made to include programs providing medical care in the existing Fund for a Healthy Maine are consistent with the language of the Master Settlement Agreement.

Approximately 38,000 older or disabled adults receive help with the premium, deductible, co-payments and co-insurance out of pocket Medicare and prescription drug costs through the Medicare Saving Program (MSP) and the Drugs for the Elderly and Disabled Program (DEL). The Department of Health and Human

Services accounts within the FHM help pay for most of these costs. The Tobacco Settlement and Racino dollars in the FHM are used to leverage Federal Medicaid “Match” dollars thus “...maximizing to the extent possible federal funds” as required by the FHM language. The Federal match percentage is approximately 70.24 %. That means for every 100 dollars the MaineCare program spends Federal funds pay \$70.24 of the bill and the FHM dollars pay the remaining \$29.76. Transitioning these programs to the General Fund means the \$29.76 will be paid with Maine tax revenues. That is why this proposal is financially unwise for the State.

The last comment we will make involves the firm belief that it is not possible to permanently insulate public funds from future Legislative action. The delegation of Legislative power to an entity removed from Legislative control except for the power to terminate that entity is clearly a policy decision that will be given careful consideration and will not be easily made. But even if this proposal succeeds there is absolutely no guarantee that a future chief executive and a future Legislature will have different priorities and make decisions that will cause exactly the reductions and eliminations that have produced a perceived need for this legislation.

Thank you for letting us share our thoughts with you.