ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

CHRIS KOSTER
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

January 25, 2012

The Honorable Robert Mayer
State Senator, District 25
State Capitol, Room 326
Jefferson City, MO 65101

Dear Senator Mayer,

I write to ask you to enact legislation repealing a long-standing flaw in the state's tobacco escrow statute. Failing to act may already have cost Missouri millions of dollars in tobacco payments.

As you know, Missouri and 45 other States signed a Master Settlement Agreement (MSA) in 1998 to resolve claims against several tobacco companies for the cost of treating the diseases caused by their products. Under the MSA, these tobacco companies agreed to educate the public on smoking-related health risks, to forgo all advertising to children, and to make annual payments to the states (including approximately $150 million to Missouri each year).

Tobacco companies that refuse to sign the MSA are not bound by its advertising restrictions. Nor has any state, including Missouri, released these non-signatory companies from their liability for the damage their products have caused the public health, including ongoing costs to our state's Medicaid fund. To ensure that funds are available to pay any claims Missouri and the other states may bring against these non-signatory companies in the future, the MSA included model escrow legislation. Each state, including Missouri, enacted an escrow statute requiring non-signatory companies to place a portion of their annual revenues in a qualified escrow account to pay future judgments. All tobacco manufacturers must either join the MSA or comply with this escrow law.

Unfortunately, a gap in the law's drafting led to unintended consequences, allowing non-signatory companies to game the system in Missouri. This flaw, called the Allocable Share Release, allows non-signatory tobacco manufacturers that concentrate

their sales in only a few states to recover nearly their entire deposit at the end of each year, defeating the very purpose of the law. The 45 other states that signed the MSA repealed this erroneous provision years ago. Missouri stands alone in its coddling of these non-signatory cigarette producers.

Since 2002, both Attorney General Nixon and I have consistently petitioned the General Assembly to correct this error. Because you have not done so, non-signatory tobacco manufacturers are alleged to have disproportionately concentrated their cigarette sales in Missouri and continue to harm our citizens without any enforceable obligation to pay for the damage they cause.

But beyond just the cost to the public health, the Missouri legislature's failure to repeal the Allocable Share Release provision of the escrow statute may also cost our state millions of dollars in annual MSA payments. The tobacco companies that make those payments have raised serious allegations that Missouri has not diligently enforced its escrow statute. In no small part, they complain that these non-signatory companies which concentrate their sales in Missouri are still able to recover nearly all of their escrow payments each year. In short, the failure to repeal the Allocable Share Release has allowed signatory companies to contest their previous payments to Missouri in an attempt to claw back millions of dollars from the General Assembly.

The Attorney General's office is currently litigating this issue. In April, Missouri enters arbitration hearings regarding the 2004 tobacco payments. If Missouri wins this arbitration, the status quo remains. If Missouri loses this arbitration, more than $100 million of state revenue could be lost from the 2004 MSA payment alone. If that happens, Missouri will surely be sued for the same payments in 2005, 2006, 2007, 2008, 2009, 2010, 2011 and 2012. The loss to our state from those years' payments could total more than $1 billion.

Simply put, the General Assembly's inaction over the last decade has placed our state in terrible and unnecessary peril. Unfortunately, it's already too late to eliminate that risk for fiscal years 2004 to 2012. Whatever damage is attributable to legislative inaction during those years has already occurred, and there is nothing that can be done to fix it now. The resolution of these years' enforcement efforts will be decided in the courts or in a negotiating room.

What I am asking is that you address this risk for fiscal years 2013 and beyond.

While the Attorney General's Office under then-Attorney General Nixon, as well as under the current administration, has aggressively enforced the escrow statute as it

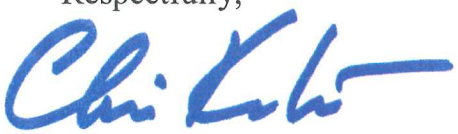
stands in our state, failure to repeal the Allocable Share Release – as every other state in the country has done – has left Missouri open to attack.

Consider how much more dire our economic challenges would be without the $1 billion in tobacco settlement payments that Missouri has received since 2004.

While bills to close the loophole in the escrow law have been introduced in prior years – last session, by Senator Mike Parson and Representative John Diehl – they have never been acted upon by the General Assembly. This session, Senator Kurt Schaefer has filed Senate Bill 629 in an attempt to address this issue.

For the third time, I respectfully ask the General Assembly to prioritize and pass this legislation.

Respectfully,



CHRIS KOSTER
Attorney General

Enclosure

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THE KANSAS CITY STAR

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Tuesday, Feb 9, 2010

Posted on Sun, Feb. 07, 2010

Missouri's the lone laggard in enforcing tobacco terms

By CHRIS KOSTER

It's hard to imagine, but it has been 11 years since Missouri joined the landmark settlements with the major tobacco companies.

These agreements with each state brought an end to health care reimbursement litigation against the big cigarette companies.

They changed forever the way cigarettes can be marketed and sold in our state — for example, by banning cigarette billboards and advertising on city buses. And they have provided Missouri more than $1.5 billion in settlement payments — payments that have become increasingly important as health care costs continue to skyrocket.

But today these settlement payments are under considerable threat, and it could not come at a worse time for our state's budget.

Despite this threat, Missouri has still not enacted simple legislation that protects our future payments, legislation that has been passed by 49 other states. This legislation would give law enforcement personnel important tools to protect the state from tobacco companies, many of which are based outside the United States. They have flooded our cities and towns with illegal cigarettes.

As the state's chief law enforcement officer, I respectfully ask the General Assembly to protect Missouri against these foreign cigarette manufacturers. The problem we are facing isn't difficult to understand. Some companies signed the tobacco settlement agreements and others didn't. To deal with those that didn't, we passed a law in 1999 that required those "non-signatories" to pay money into an escrow account — money that can be returned to them after a period of time.

The escrow law serves two purposes. First, it assures that we have assets we can go after if we ever pursue litigation against the non-signatory companies, especially if they are foreign. Yet these assets are available only if we can locate and serve such companies when they fail to comply with Missouri law.

Second, the escrow law protects the states' settlement payments by preventing the same foreign non-signatory manufacturers from charging artificially low prices. By ignoring this law, such companies boost their own sales at the expense of law-abiding manufacturers and erode our state's settlement revenue.

Other states have enacted legislation that provides strong tools to enforce the 1999 escrow law. If enacted here, these requirements would place the burden on foreign manufacturers to comply with Missouri laws before selling their products in our state, instead of placing the burden on the state to waste valuable resources to run down manufacturers in other countries for illegal sales here.

The proposed enforcement legislation makes clear that escrow payments are required on all cigarettes sold into the state, not just a portion. It requires manufacturers to file certifications with the state, stating the amounts they sell here. It requires the Department of Revenue to publish lists of non-compliant manufacturers and their brands. And it prohibits wholesalers from carrying brands that appear on this non-compliant list.

These proposals are not difficult or complex requirements, yet Missouri stands alone in not enacting them. While the tobacco settlement agreements changed things for the better, there's still work to be done in Missouri. We need to toughen our laws and send a message that tobacco companies can take their illegal cigarettes elsewhere.

Chris Koster is Missouri's attorney general. He lives in Jefferson City.

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CHRIS KOSTER
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

February 18, 2009

[redacted]
Missouri State Senate
Senate Post Office
Jefferson City, MO 65101

Dear [redacted]:

In 1998, Missouri entered into the tobacco Master Settlement Agreement (MSA) with 45 other states. As part of the agreement, the MSA required passage of a statute mandating tobacco manufacturers NOT participating in the settlement make annualized payments into a state escrow account ("escrow statute"). In order to avoid a potentially dramatic adjustment to Missouri's tobacco payments, the escrow statute must then be "diligently enforced." Missouri enacted its escrow statute in 1999.

In the succeeding years, 45 of 46 states have enacted two additional statutes to aid in the enforcement of their escrow statutes. Although bills were introduced here in four of the last six years, Missouri remains the only state that participated in the MSA that has failed to enact the additional enforcement legislation.

The tobacco companies have contested whether the states, including Missouri, have diligently enforced their escrow statutes for calendar year 2003. Missouri currently faces a national arbitration on this issue, expected to begin in the coming months. We anticipate similar challenges for each year subsequent to 2003.

A finding that Missouri failed to diligently enforce its escrow statute could result in the potential loss of the state's annual payments of approximately $140 million for 2003 and beyond.

The model legislation contains common sense provisions to aid enforcement of the escrow statute, such as requiring the non-participating manufacturers to list registered agents for service of process and to identify their brands for easier tracking of state sales. It would also authorize a website listing brands approved for sale in Missouri, which will provide merchants with protection against unknowing sales of contraband cigarettes.

I urge you to enact the model legislation this session in order to provide maximum protection to the state's future tobacco settlement payments.

Respectfully,

Chris Koster

CHRIS KOSTER
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
65102

JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

January 24, 2007

[redacted]
State Senator, [redacted]
State Capitol, Room [redacted]
Jefferson City, MO 65101

Dear [redacted]

I write to again urge your support for tobacco legislation necessary to help protect potentially hundreds of millions of dollars to be paid to the State of Missouri under the Master Settlement Agreement ("MSA"). This proposal, which is outlined below, closes certain loopholes in House Bill 814 (1999), which required all cigarette manufacturers that are not signatories to the MSA ("non-participating manufacturers" or "NPMs") to establish escrow accounts to ensure their financial integrity for future judgments owed to the State ("NPM Statute"). See §196.1000 et seq., RSMo.

Missouri has been a national leader in enforcing its NPM Statute. We were the first state to file a lawsuit against an NPM, and have since assessed more than $50 million in escrow payments and more than $10 million in penalties. There is a strong incentive, however, for NPMs to seek to circumvent the escrow obligations imposed by the NPM Statute, and these companies have developed numerous schemes to do so. That is why Missouri joined a bipartisan working group representing 37 state Attorneys General and Revenue offices to develop proposed legislation, designed to provide a set of additional tools to aid in the enforcement of the NPM Statute, and in the prosecution of those who violate it.

This legislative proposal contains the following important provisions:

- NPMs may not sell cigarettes in Missouri until they have set up a lawful escrow account for Missouri, made themselves amenable to suit for violations of the NPM Statute in Missouri, disclosed all brand families for which they are responsible, and become compliant with all State obligations.

- The creation of a website directory of cigarettes that are approved for sale in the State. It would provide the market (including retailers) with an efficient and definitive means of determining what cigarettes may be sold legally in the State.

- Each NPM must maintain in its escrow the same amount per cigarette sold, whether it is a regional or national company. This plugs a loophole in the original bill and provides a more level playing field.

To date, Missouri is the only settling state in the nation that has failed to pass any aspect of this proposed legislation. Accordingly, because Missouri lacks the enforcement tools available to other states, it is more likely that Missouri will be forced to defend against an attempt by the settling tobacco companies to reduce Missouri's tobacco payments under the MSA.

The stakes are extremely high. The settling tobacco companies are claiming a $1.1 billion offset against their April 2006 payment to the settling states. This offset will be assessed against any state that has failed to diligently enforce its NPM Statute, potentially zeroing out such state's annual payments for years to come. We are currently involved in litigation over this matter, and expect a similar dispute concerning our April 2007 payment. Accordingly, I respectfully request that you lend your support to this important proposal this year.

Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General

ATTORNEY GENERAL OF MISSOURI

JEFFERSON CITY
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JEREMIAH W. (JAY) NIXON
ATTORNEY GENERAL

P.O. Box 899
(573) 751-3321

February 16, 2006

[redacted]
State Representative, [redacted]t
State Capitol, Room [redacted]
Jefferson City, MO 65101

Dear [redacted]

I write to again urge your support for certain tobacco legislation necessary to help protect potentially hundreds of millions of dollars to be paid to the State of Missouri under the Master Settlement Agreement ("MSA"). This proposal, which is outlined below, closes certain loopholes in House Bill 814 (1999), which required all cigarette manufacturers that are not signatories to the MSA ("non-participating manufacturers" or "NPMs") to establish escrow accounts to ensure their financial integrity for future judgments ("NPM Statute"). See §196.1000 et seq., RSMo.

Missouri has been a national leader in enforcing its NPM statute. We were the first state to file a lawsuit against an NPM, and have since assessed nearly $17 million in escrows and more than $11 million in penalties. There is a strong incentive, however, for NPMs to seek to circumvent the escrow obligations imposed by the NPM statute, and these companies have developed numerous schemes to do so. That is why Missouri joined a bipartisan working group representing 37 state Attorneys General and Revenue offices to develop proposed legislation, designed to provide a set of additional tools to aid in the enforcement of the NPM statute, and in the prosecution of those who violate it.

This legislative proposal contains the following important provisions:

- Non-participating manufacturers may not sell cigarettes in Missouri until they have set up a lawful escrow account for Missouri, made themselves amenable to suit for violations of the statute in Missouri, disclosed all brand families for which they are responsible, and become compliant with all State obligations.

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Sincerely,

JEREMIAH W. (JAY) NIXON
Attorney General