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**IN THE SUPREME COURT
STATE OF FLORIDA**

STATE OF FLORIDA, et al.,

Case No. 93,148 and 93,195

Appellants,

**District Court of Appeal - Fourth District
Nos. 98-1430, 98-1747,**

v.

**AMERICAN TOBACCO COMPANY,
et al.,**

Circuit Court Case No. CL 95-1466 AE

Appellees.

**ANSWER BRIEF OF GENTRY, HOGAN AND FONVIELLE
TO INITIAL BRIEF OF SETTLING DEFENDANTS**

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in Answer Brief of Gentry, Hogan and
Fonvielle to Initial Brief of Settling Defendants is 14 point Times New Roman.

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Statement of the Case and Facts

As far as it goes, Settling Defendants (sometimes referred to herein as “Tobacco”) have provided this Court with a reasonably accurate Statement of the Case and Facts. Although we do not agree with some of Tobacco’s characterizations of the issues which were presented to the trial judge, those matters will be addressed in the Argument. Because the course of events leading up to the appealed orders was extraordinarily lengthy, complicated, and convoluted, we would refer the Court to the comprehensive Statement of the Case and Facts contained in the Answer Brief of Gentry, Hogan and Fonvielle to the Brief of the State.

Summary of the Argument

With respect to the trial court's laborious consideration of the parties' suggestions for integrating the Texas Fee Payment Agreement into the Florida Settlement under the Most Favored Nation provision, which involved hours of hearings and multiple written submissions, the Settling Defendants only complain that the court should have added a provision, not in Texas, that would require the State's lawyers to give Tobacco a general release (as opposed to what they argue in their brief) and that it should not have included single sentences in two provisions which were necessary to conform the Texas provisions to the Florida situation. Settling Defendants asked, and the court accepted, continued jurisdiction to enter "further orders and directions as may be necessary and appropriate to implement or enforce" the Florida Settlement Agreement and they expressly authorized him to revise the Florida Settlement Agreement "so that the State of Florida will obtain treatment at least as relatively favorable" as any other state "after due consideration of relevant differences in population or other appropriate factors." (App. 56, S.A. 3, 13) To carry out these functions, the trial court necessarily had to resolve ambiguities and to make findings as to how to conform the Texas provisions to Florida. The court did not err in refusing to depart from the Texas Agreement by giving

Tobacco a general release and its determinations as to how to conform Texas to Florida are not prejudicial to Settling Defendants and are clearly supported by the record. Accordingly, the trial court's Order of April 16, 1998, should be affirmed in its entirety.

Argument

Defendants argue that the trial court should have (1) changed the Texas Attorneys' Fee Agreement so as to require the State's private counsel in Florida to give Tobacco a general release; (2) that the trial court erred in conforming the Texas provisions into the Florida Settlement by requiring the State to be reimbursed its advance payment from future attorneys' fees paid to private counsel through the panel process; and (3) that the trial court should not have added a sentence to paragraph (h) to the Most Favored Nation addendum to Article V of the Florida Settlement Agreement because that provision is not expressly set out in the Texas agreement. Otherwise, Settling Defendants acknowledge that the trial court's Order and the Most Favored Nation addendum are correct and properly entered.

1. The trial court properly refused to modify the terms of the Texas Settlement Agreement so as to require Florida's private counsel to give Tobacco a general release for claims they might have against Settling Defendants.

Settling Defendants argue the trial judge should have modified the provisions of the Texas Agreement to require a release of Tobacco by Florida lawyers, "Because the Texas private counsel had actually signed the Texas Settlement Agreement, they were bound by its terms, and could look only to the arbitration process to satisfy their claims for fees against Settling Defendants."

(Def. Br. p. 12) However, what Settling Defendants really submitted to the trial court went far beyond requiring “the arbitration process to satisfy their claims for fees against Settling Defendants.” In truth, Tobacco sought and argued for a general release of all claims Florida counsel might have against Settling Defendants. See Tobacco’s final submission to the court, App. 22, Ex.A, wherein at “(a) *Exclusive Obligation of Settling Defendants as to Fees,*” Settling Defendant added the following language to the provisions of the Texas Agreement:

and any Private Counsel seeking an award of fees pursuant to this Addendum shall release Settling Defendants **from any and all claims** [emphasis added]

Tobacco’s acknowledged purpose for adding this clause was to require Montgomery to give up his suit against Settling Defendants for interference with contract, not to limit the lawyers’ right to fees as bargained for by the State and awarded pursuant to the Addendum. Indeed, the Most Favored Nation Addendum to Article V of Florida Settlement Agreement (Ex. 1 to the trial court’s order of April 16, 1998) expressly provides in paragraph (a), as was done in Texas, that

The provisions for payment of fees set forth herein constitute the entire obligation of Settling Defendants with respect to attorneys’ fees in connection with this action and the exclusive means by which Private

Counsel may seek payment of fees by the Settling Defendants in connection with this action.

(App. 56, S.A. 2)

Obviously, the trial court gave Settling Defendants exactly what they argue in their brief they were entitled to. However, the court refused to expand the terms of the Texas Agreement to cut off any private counsel's right to assert claims against Tobacco other than those relating to its obligation to pay fees under the Florida Settlement Agreement. The trial court's order does what Tobacco argues in its brief it wanted, and provides that the provisions of the Addendum are the exclusive and entire obligation of Settling Defendants to pay private counsel's fees. However, Texas did not, and certainly the Florida adoption of Texas should not, eliminate any other claims which some lawyer thinks he may have against the tobacco industry. Tobacco thus argues for apples in its brief — which it got — as opposed to the oranges it sought below.

2. The trial court did not err in conforming the Texas Attorneys' Fee Agreement into the Florida Settlement by requiring reimbursement to the State of its \$50 million advance.

First, other than being punitive, one wonders why Settling Defendants care that the first \$50 million they are obligated to pay Florida's counsel under the Settlement Agreement should go to the State to reimburse it for its advance payment of fees. The lawyers did not object to this procedure, inasmuch as they

are not entitled to a double recovery by collecting fees from both the State and Settling Defendants. They recognize the State is entitled to a set-off or “credit” for any fees paid to them by Settling Defendants. Furthermore, this provision in no way increases Settling Defendants’ obligation to pay fees -- they are only obligated to pay the amount awarded by the panel as provided in the fee payment Addendum. Furthermore, it is clear from a comparison of the Texas provision (Def. Br. p. 14) with the Florida provision (Def. Br. p. 15) that the timing and circumstances for advance payments in Texas are necessarily different than existed in Florida (Texas settled its case some seven months before the appealed order was entered) and that the judge’s order is a fair and reasonable adaptation to the Florida situation.

Indeed, the Texas provision (f) expressly provides that the advance payments are “to be credited to the Settling Defendants and the State of Texas, in the amounts of the respective advances, against subsequent payments of attorneys’ fees.” In short, Texas envisioned that both the State and Settling Defendants would receive credit for their advances from subsequent payments. Particularly in light of the State’s stated concerns about advancing any monies without getting approval of the legislature, the trial court properly clarified the “payback” provisions of the Texas agreement to make it clear that the State

would be reimbursed the first \$50 million from subsequent payments of attorneys' fees by Settling Defendants and that Settling Defendants would receive a credit for the second \$50 million.

Clearly, given the contentious nature of this litigation and the penchant for parties to construe any ambiguity in a manner to frustrate or prejudice the rights of other affected parties, the trial court did not err and certainly did not prejudice Settling Defendants by conforming subparagraph (f) of the Texas agreement to the Florida situation.

3. Although the sentence specifying Tobacco's agreement to pay the State of Florida additional monies in the event of passage of a federal program does not appear in the Texas Settlement Agreement, the trial court properly included the sentence to reflect the Florida situation.

Tobacco acknowledges that in the aftermath of the Florida settlement "Settling Defendants separately entered into an agreement with the State of Texas that, in most respects, closely tracked their settlement with the State of Florida." (Def. Br. p. 4) However, what was added in Texas -- no doubt because of the highly-charged litigation that ensued in Florida because of the lack of such a provision — was the comprehensive "Cost, Expenses, and Fees Attachment to the Texas Settlement Agreement" As expressly provided in the Most Favored Nation provision, such an agreement in a subsequent settling state

is to be adopted into the Florida Settlement Agreement “after due consideration of relevant differences in population or other appropriate factors.” (App. 56, S. A 13, emphasis added) The Florida Settlement Agreement provides,

in the event of the enactment of the Proposed Resolution or other substantially equivalent federal program, the parties hereto contemplate that the State of Florida and any other similar state which has made an exceptional contribution to secure the resolution of these matters may apply to the panel of independent arbitrators for reasonable compensation for its efforts in securing the proposed resolution, subject to an appropriate separate annual cap on all such payments.

(App. 56, S.A. 14)

As the Texas Fee Payment Agreement did in curing the vague and ambiguous obligation to pay attorneys’ fees that was provided in the Florida Settlement Agreement, it also defined the annual cap for the special fund from which the State could receive additional monies and provided other details. However, regardless of the amount of money Tobacco may or may not have agreed Texas should receive from such fund, in consideration of the efforts that had been made and were being made by Governor Chiles and Attorney General Butterworth, Settling Defendants agreed with the State of Florida that it would not oppose application by the State for payment of an additional \$250 million in recognition of its “exceptional contribution.” Indeed, after the Florida

settlement, and as required by federal securities laws, Settling Defendants reported they had agreed that “Settling Defendants will not oppose application of \$250 million by the State of Florida.”

This obviously was a very “appropriate factor” as contemplated by the Most Favored Nation provision of the Florida Settlement Agreement to be considered in revising the Florida Settlement Agreement. The inclusion of such language simply reflected the agreement Tobacco had made with the State of Florida and which it acknowledged in its 8K filings; it did not constitute a modification of the Florida Settlement Agreement; its inclusion is not prejudicial to Settling Defendants inasmuch as it simply reflects their agreement; and it was well within the trial court’s authority given the trial court by Settling Defendants under the Most Favored Nation provision and within its jurisdiction to enter “orders and directions as may be necessary and appropriate to implement or enforce” the Settlement Agreement. (App. 56, S.A. 3) Candidly, it seems rather silly to suggest that the court erred in conforming this provision to the Florida situation because the relevant provisions of the Texas Agreement, quite naturally, do not include a sentence about Florida.

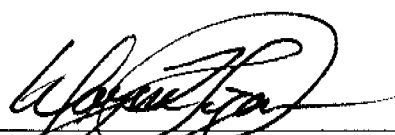
Summary

The Settling Defendants are truly straining at gnats in complaining about the two “additions” the trial court made to the Texas provisions to bring them into conformity with the Florida situation and avoid further ambiguity and potential litigation. As to their desire for a “general release,” they did not get one in Texas and they are not entitled to one in Florida. Although admittedly repetitive, our comments in our Brief in response to the State’s appeal are equally applicable to Defendants’ arguments. The court judiciously considered the issues, expending several hours of hearing and reviewing a plethora of submissions, and entered an order which faithfully and properly incorporates the Texas provisions into the Florida Settlement. The court’s determinations are presumed to be correct and should not be disturbed unless there is no basis to support them. See, *Malt v. Deese*, 399 So. 2d 41, 46 (Fla. 4th DCA 1981), “Resolution of the ambiguity is a question of fact and we are bound by the findings of the trial court as long as they are supported by the record.” See also, *Goldfarb v. Robertson*, 82 So. 2d 504 (Fla. 1955); *Vance v. Florida Reduction Corporation*, 263 So. 2d 585 (Fla. 1st DCA 1972). Clearly, the records supports the trial judge’s findings as to how to correlate the Texas provisions into the Florida settlement and should be affirmed.

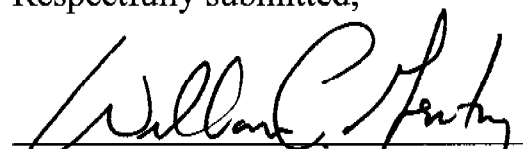
Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should reject Tobacco's invitation to fly-speck the trial court's laborious and judicious efforts and that the Order Implementing Most Favored Nation Provision of the Florida Settlement should be affirmed in its entirety.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing ANSWER BRIEF OF GENTRY, HOGAN AND FONVIELLE TO INITIAL BRIEF OF SETTLING DEFENDANTS and Appendix have been furnished by U. S. Mail, this 20th day of August, 1998, to the following:

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