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IN THE SUPREME COURT OF FLORIDA
CASE NO. 93,148 & 93,195
4TH DCA CASE NO. 98-1669

AMERICAN TOBACCO CO., et al.,

Appellants,

v.

STATE OF FLORIDA, et al.,

Appellees. /

X Appellant & Appellee

On Petition For Discretionary Review of Appeal
Certified as Requiring Immediate Resolution

ANSWER BRIEF OF APPELLEES STATE OF FLORIDA, LAWTON M. CHILES, JR., DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION, THE AGENCY FOR HEALTH CARE ADMINISTRATION, AND THE DEPARTMENT OF LEGAL AFFAIRS

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STATEMENT CERTIFYING FONT USED

Pursuant to the Court's Administrative Order dated July 13, 1998, In Re: Briefs Filed In The Supreme Court of Florida, we certify that the size and style of type used in this brief are: Times New Roman, 14 point proportionally spaced font.

INTRODUCTION

This answer brief of the State of Florida, Lawton M. Chiles, Jr., Department of Business & Professional Regulation, the Agency for Health Care Administration and the Department of Legal Affairs (collectively, the "State" or "State Plaintiffs") responds to the initial brief filed by Appellants Philip Morris, Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and the United States Tobacco Company (herein referred to as the "Settling Defendants") in this Court's Case No. 93,148, Fourth District Court of Appeal Case No. 98-1669. (The Settling Defendants' initial brief is referred to herein as "Settling Defendants' Br. at __").

The State Plaintiffs are Appellants in the Fourth District Court of Appeal's Case Nos. 98-1430 and 98-1738, and are Appellees in the Fourth District's Case No. 98-1669, all of which have been consolidated into this Court's Case No. 93,148, involving the appeal of the trial court's "Order Implementing Most Favored Nation Provision of Florida Settlement Agreement" (the "MFN Order," App. 1).[1] On July 24, 1998, the State filed its initial brief with this Court as an Appellant in Consolidated Case Nos. 93,148 and 93,195 ("State's Initial Brief").

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[1]Capitalized terms not otherwise defined herein shall have the same meanings set forth in the State's Initial Brief. "Supp. App." refers to the Supplemental Appendix filed by the State with its Initial Brief. "App." refers to the Appendix filed in Fourth District Court of Appeal Case No. 98-1430.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts in the State's Initial Brief is herein adopted, insofar as it relates to the MFN Order, as the State's response and supplement to the Settling Defendants' statement of the case and facts. (State's Initial Br. at pgs. 4-17).

SUMMARY OF THE ARGUMENT

The State agrees with the Settling Defendants that the trial court had no authority to enter the MFN Order, which materially amended the parties' August 25, 1997 Settlement Agreement over the objections of all the settling parties, and to the State's detriment. However, the State disagrees with the Settling Defendants' contention that the MFN Order can be cured by this Court judicially rewriting it to the satisfaction of the Settling Defendants only. The Settling Defendants' proposal, like that of certain PTA lawyers in the trial court, eviscerates the fact that the "most favored nation" provision of the Settlement Agreement ("MFN provision") is intended to be implemented at the request of, and for the exclusive benefit of, the State Plaintiffs. Non-plaintiff third parties, whether the State's private lawyers or the Settling Defendants, may not invoke the MFN provision to the detriment and contrary to the will of the State Plaintiffs if the MFN provision's intended salutary purpose is to be accomplished. For the reasons discussed in the State's Initial Brief and herein,

the MFN Order should be reversed.

ARGUMENT

I. The MFN Order Must Be Reversed, Not Judicially Amended.

The Settling Defendants correctly argue that the trial court had no authority to enter the MFN Order and effectively rewrite the Settlement Agreement over the objections of all the settling parties. (Settling Defendants' Initial Br. at pgs. 11-17). See M&C Assocs. v. DOT, 682 So.2d 640 (Fla. 2d DCA 1996); Dorson v. Dorson, 393 So.2d 632 (Fla. 4th DCA 1981); see also legal authorities cited by the State in its Initial Brief at pgs. 44-49. The State thus adopts and incorporates its Initial Brief insofar as it relates to the MFN Order as its response to the Settling Defendants' legal arguments. (State's Initial Br. at pgs. 21-49).

The State, however, takes issue with the very limited, one-sided relief sought by the Settling Defendants. The Settling Defendants request that this Court "cure" only their problems with the MFN Order -- by judicially rewriting the MFN Order to delete or modify only those provisions of the MFN Order that they did not like. (Settling Defendants' Initial Br. at pgs. 11-18). Therein lies the State's opposition to the Settling Defendants' legal arguments and analysis. In essence, the Settling Defendants ask this Court to do what they assert the trial court should not have done -- that is, to do a judicial rewrite of the parties' Settlement Agreement over

the objections of the parties, for their own benefit only and to the detriment of the State. In making such a request of this Court, the Settling Defendants have overlooked all the other objectionable portions of the MFN Order, and indeed, have ignored the fundamental premise of the MFN provision in the parties' Settlement Agreement (Section IV), which was intended to permit the State to incorporate any terms of other state tobacco settlement agreements deemed by the State of Florida to be more favorable to the State. (App. 56, Section IV). Moreover, the Settling Defendants' requested remedy (a judicial rewrite by this Court of the parties' Settlement Agreement to the Settling Defendants' satisfaction) is inconsistent with their own legal arguments that the trial court could not rewrite the parties' Settlement Agreement. (Settling Defendants' Initial Br. at pg. 18).

The Settling Defendants assert they would be satisfied with three judicially imposed amendments to the MFN Order. (Settling Defendants' Br. at pg. 18). However, by seeking revision/deletion of only these three provisions of the MFN Order, the Settling Defendants overlook all the other flaws and objectionable provisions in the MFN Order, such as:

-The lack of standing of the PTA lawyers to invoke the MFN provision of the State's Settlement Agreement for their own benefit and to the detriment of the State.

-The impropriety of a determination by any one other than the State of Florida as to what provisions of the Texas settlement agreement were "more favorable" to the State than those in the August 25, 1997 Settlement Agreement.

-The "judicial findings" regarding the PTA lawyers' alleged "contract" rights that have no basis in the record below and were written into the MFN Order by PTA lawyers, to the prejudice and detriment of the State.

-The over-reaching "judicial determinations" regarding the "rights" of certain private counsel other than the PTA lawyers to seek an arbitration award from the arbitration panel.

-The requirement for an immediate $50 million fee advance from the State to the PTA lawyers, even though there was no appropriation permitting the expenditure of State funds for such a purpose, and even though the MFN Order as drafted by the PTA lawyers omitted all of the consideration for such an advance of fees provided by Texas counsel to the State of Texas.

-The requirement that all further settlement payments be paid into escrow under the supervision of the trial court, although under no interpretation of the Settlement Agreement, the Texas settlement, or the Medicaid Provider Contract between the State of Florida and the PTA are all of the settlement funds due the State from the Settling Defendants required to be paid into such a perpetual escrow.

(See, State's Initial Brief, pgs. 21 -32).

The Settling Defendants' brief ignores all these flaws, and simply asks that the MFN Order be rewritten by this Court to modify three specific provisions of the MFN Order so the Order will be more favorable to them, even if then less favorable to the State:

1. The Settling Defendants ask this Court to "rewrite" the MFN Order to require the State to pay $50 million in attorneys' fees to the PTA, without any reimbursement by the Settling Defendants, even though the parties' Settlement Agreement made the Settling Defendants responsible for payment of all such attorneys' fees. (Settling Defendants' Initial Br. at pgs. 13-17). Obviously, the provision requested by the Settling Defendants is not "more favorable" to the State of Florida, and in fact is directly contrary to a fundamental requirement of the State's settlement -- that the Settling Defendants pay the State's attorneys' fees. No such material modification of the State's settlement can be imposed upon the State without its consent, and here, the State did not consent.

2. The Settling Defendants further request that this Court rewrite the MFN Order to require a release of all claims against them by the PTA lawyers, as a condition precedent to the PTA lawyers receiving any portion of the arbitrated fee award. (Settling Defendants' Initial Br. at pgs. 12-13). However, the Settlement

Agreement between the parties required no such releases from the PTA lawyers as a condition to these lawyers receiving their arbitrated fee. Nor did the Texas settlement agreement (upon which the MFN Order is predicated) require any such release (a fact conceded by Settling Defendants in their Initial Brief at pgs. 12-13). Certainly requiring such a release (especially without a concomitant release of the State) would be a material amendment to the parties' Settlement Agreement, and would not be in the best interests of the State.

3. The Settling Defendants further ask this Court to strike the MFN Order insofar as it requires the Settling Defendants not to oppose an application by the State of Florida for an additional $250 million award in the event of a national settlement, in recognition of the State's exceptional contribution in promoting such a settlement. (Settling Defendants' Initial Br. at pgs. 16-17). The Settling Defendants incorrectly assert that this provision has no comparable counterpart in the Texas settlement agreement. (App. 40, Exh. 3, Exh. 1, pg. 7, Section h). In fact, this additional award in recognition of the State's leadership is expressly contemplated by the Florida Settlement Agreement itself. (App. 56). Moreover, the specific amount of the unopposed application ($250 million) had been previously acknowledged and agreed to by the Settling Defendants, as shown by their own SEC filings. (App. 1, Exh. 1, pgs. 7-8).

By arguing for amendments to the Settlement Agreement solely more favorable to them, the Settling Defendants have missed the fundamental purpose of the MFN provision in the parties' Settlement Agreement, which was to permit the State to invoke those provisions from subsequent settlements deemed by the State to be more favorable to the State of Florida than the terms of its own settlement. (App. 56, Section IV). The MFN provision of the Settlement Agreement runs only in favor of the State, and is not reciprocal. (App. 56, Section IV).

The Settling Defendants' proposal, just like the proposal of the PTA lawyers at the trial court level, eviscerates the fundamental purpose of the MFN provision in the State's Settlement Agreement with the Settling Defendants. The MFN provision is intended to be implemented at the request of--and for the exclusive benefit of--the State Plaintiffs. Non-plaintiff third parties, whether PTA lawyers or Settling Defendants, may not invoke the MFN provision to the detriment and contrary to the will of the State Plaintiffs if the MFN provision is to accomplish its intended salutary purpose.

CONCLUSION

The State concurs with the Settling Defendants that the MFN Order must be reversed, but opposes the limited, one-sided relief sought by the Settling Defendants, and respectfully requests that this Court grant the relief sought by the

State in its Initial Brief insofar as it relates to the April 16 MFN Order. The State thus requests this Court answer the certified question in the negative, reverse the three Appealed Orders in their entirety, and declare: (a) the tobacco settlement funds are State funds and cannot be disbursed by the court; (b) the State's funds can neither be retained nor disbursed for the purpose of protecting or securing the PTA lawyers' charging liens, which are void as a matter of law; (c) any attorneys' fees claimed under the Medicaid Provider Contract can be claimed only by the PTA, as a joint venture, and not by individual lawyers or law firms, and is subject to legislative appropriation; (d) all settlement funds in the court's registry shall be disbursed to the State immediately; (e) all future settlement funds shall be paid directly to the State; and (f) only parties to the Settlement Agreement have any right to amend the Agreement.

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WE HEREBY CERTIFY that a true copy of the foregoing was served via U.S. Mail on August 19, 1998, to those on the attached Service List.

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