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SEP 2 1998

**IN THE SUPREME COURT
STATE OF FLORIDA**

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

THE STATE OF FLORIDA, et al.,	:	Case Nos. 93,148 &
	:	93,195
Appellants,	:	(consolidated)
	:	
v.	:	District Court of Appeal
	:	- Fourth District
THE AMERICAN TOBACCO	:	Nos. 98-1430 & 98-1747
COMPANY, et al.,	:	
	:	Circuit Court Case
Appellees.	:	No. CL 95-1466 AE
	:	

REPLY BRIEF OF APPELLANTS, PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY, LORILLARD TOBACCO
COMPANY, BROWN & WILLIAMSON TOBACCO CORPORATION,
AND UNITED STATES TOBACCO COMPANY

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INTRODUCTION

The State, as well as several of its private counsel, agree that the Most Favored Nations Order ("MFN Order") is flawed and should be reversed. The State, however, notes that the Settling Defendants only address the issues which concerned them as being incorrectly excluded from or included in the MFN Order. Naturally, Settling Defendants only raise those issues on appeal with which they were aggrieved. Settling Defendants simply point out the terms that must be altered for the MFN Order to comply with the parties' Settlement Agreement. Having invoked the MFN provision, the State must accept all parallel provisions from the Texas Settlement Agreement dealing with attorneys' fees, including those provisions which respond to the concerns of Settling Defendants.

It is undoubtedly advantageous to all parties that a detailed process for arbitration of attorneys' fees is established. Settling Defendants respectfully request that the Court either correct the few errors the trial court made and salvage the otherwise beneficial procedures for arbitrating attorneys' fees, or vacate the MFN Order and remand with instructions for implementing procedures that properly conform to the Texas Settlement provisions for payment of attorneys' fees.

ARGUMENT

I.

THE MFN ORDER FAILS TO FOLLOW THE TEXAS AGREEMENT BECAUSE IT DOES NOT INCLUDE A RELEASE OF SETTLING DEFENDANTS.

The State, as well as certain of its private counsel (Gentry, Hogan, Fonvielle) (the "Gentry Group"), assert that the Texas Settlement Agreement does not contain a provision for release of the Settling Defendants by private counsel electing to participate in the arbitration process. Although the original Texas Settlement may have lacked an express release, it was necessary to include a release in the MFN Order for two reasons. First, Texas' private counsel signed the Texas Settlement Agreement and agreed to abide by the arbitration process, so that no claims could be asserted against Settling Defendants based on that settlement. In contrast, Florida's private counsel are not parties to the Florida Settlement, allowing them to assert claims that the settlement tortiously interfered with their contract rights. Second, the Texas Settlement Agreement has now been amended to directly express such a release by Texas' private counsel as a condition of payment of fees. See Appellants', Settling Defendants, Answer Brief, App. 3. Thus, because the Florida Settlement Agreement can be amended only to parallel the Texas Settlement, such a release provision is essential in the MFN Order.

The Gentry Group, which attempts to support the MFN Order, also asserts that this release is designed to force Montgomery & Larmoyeux, another of the State's private counsel, to give up their suit for interference with contract, which was filed against some of the Settling Defendants.¹ This assertion is incorrect. An arbitration process conforming to the Texas Settlement would simply offer Florida's private counsel (including the firm of Montgomery & Larmoyeux) the option to arbitrate fees, and would not compel private counsel to do so. If Florida's private counsel chose arbitration (as Texas' private counsel have chosen), only then would they be required to release claims against the Settling Defendants. Although the MFN Order does state that the arbitration process is the exclusive means of seeking payment of fees from Settling Defendants, Settling Defendants are entitled to have their release stated with absolute clarity, particularly now that Texas' private counsel have expressly released Settling Defendants.

¹ Notably, the Gentry Group was neither a party nor a third-party beneficiary to the Settlement Agreement, and can hardly be heard to support the MFN Order which improperly modified the Texas Settlement provisions.

II.

THE MFN ORDER INCORRECTLY CONTAINED PROVISIONS NOT INCLUDED IN THE TEXAS SETTLEMENT AGREEMENT.

The Gentry Group argues that inclusion of two provisions in the MFN Order that are not part of Texas Settlement Agreement is harmless error. The inclusion of terms not contained in the Texas Settlement Agreement is far from harmless and must be reversed. These errors in the MFN Order directly affect the rights of the Settling Defendants established under the Texas Settlement. The Gentry Group certainly cannot determine whether these right are significant. Instead, the issue before this Court is whether the trial court can judicially rewrite the Florida Settlement Agreement to include terms that Settling Defendants never agreed to in the Texas Settlement.

Reimbursement Of State's \$50 Million Advance. The MFN Order changes Settling Defendants' obligations by requiring reimbursement by Settling Defendants of a \$50 million advance fee payment by the State that is simply not part of the Texas Agreement. The Settling Defendants objected to this change. The trial court had no power to impose such an alteration of the Texas Settlement over this objection.

No Opposition To Additional Award. Likewise, the addition of a sentence

stating that the Settling Defendants would not oppose a \$250 million additional award to Florida based on a claim of exceptional contribution had no basis in the Texas Settlement. Settling Defendants may have acknowledged in a different context that they would not oppose such a request as part of a broader agreement with the State, but this collateral agreement provides no basis for a court order obligating Settling Defendants to comply with this term, ostensibly based on the Texas Settlement. Addition of this new limitation on Settling Defendants was also error, and cannot be sustained.

CONCLUSION

All parties to the Settlement Agreement agree that the MFN Order must be reversed. If this Court determines the central features of the MFN Order can be preserved, the Settling Defendants submit that the express release provision proposed by the Settling Defendants must be included, and the added language (1) imposing a duty to reimburse the State for its \$50 million advance fees payment, and (2) limiting opposition to Florida's claim for an additional award must be stricken.

Respectfully submitted,

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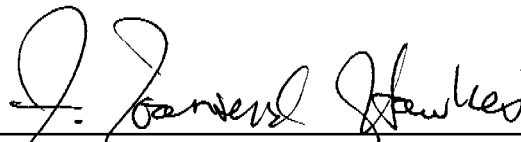
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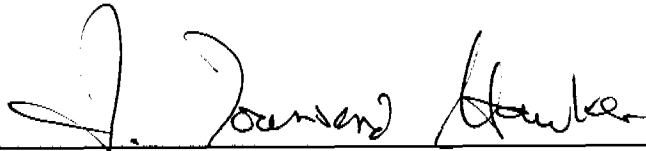
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CERTIFICATE OF PRINT COMPLIANCE AND OF SERVICE

I HEREBY CERTIFY that this brief is printed in CG Times 14 point type proportionately spaced font, and that a true and correct copy of the foregoing has been sent via U.S. Mail to all persons on the attached Service List this 2nd day of September, 1998.

A handwritten signature in cursive script, appearing to read "J. Janssen Hawker", written over a horizontal line.

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