

'Why Are You Even Here?' Judge Prods Big Tobacco

By **Greg Lamm**

Law360 (June 7, 2024, 9:19 PM EDT) -- A Washington state appellate panel on Friday criticized Philip Morris USA Inc. and other tobacco companies for attempting to pay the state less under a 1998 master settlement agreement, with one judge asking a Big Tobacco attorney why they were in court in the first place.

The tobacco companies argued that an arbitration panel refused to consider evidence spelling out how many states that signed the settlement diligently enforced their tobacco laws, which could slash the tobacco companies' payments to the state by millions of dollars.

In urging the three-judge panel to side with the tobacco companies, Kolya D. Glick of Arnold & Porter Kaye Scholer LLP said the error by the arbitration panel affects how payments are allocated to the states.

Judge David Mann said the arbitration panel interpreted the language of settlement agreement, which doesn't allow them to "get to the evidentiary argument because the settlement doesn't get there."

Judge Mann also said the master settlement agreement does not say that the participating tobacco companies "get to come in and say" that some of the states were diligent or not diligent, because the burden is on the states to prove their diligence, not the tobacco companies.

Judge Mann questioned if the amount of payments the tobacco companies pay into the settlement fund would be affected by how the money is divided among the states.

"Why are you even here?" Judge Mann said.

Glick said that a state's diligence is a fact that the arbitrators should have considered when determining the 2022 reallocation payments from the settlement fund. Glick added that under a reallocation provision in the settlement agreement, if another state is diligent, the participating tobacco companies pay less, and the state of Washington would receive less.

"There is money on the table here to the tune of millions of dollars," Glick said.

The state of Washington's counsel, Joshua Weissman of the Washington State Office of the Attorney General, said the panel should uphold the arbitration panel's 2022 reallocation payments from the settlement fund.

Weissman said whether a state is deemed to diligently enforce its tobacco laws does affect the tobacco company payments. But under the settlement agreement, "only a state has the authority to step forward and prove that it is diligent," he said.

Judges Lori Smith, Cecily Hazelrigg and David Mann sat on the panel for the Washington State Court of Appeals, Division I.

The state is represented by Joshua Weissman and Kate S. Worthington of the Washington State Office of the Attorney General.

Philip Morris USA Inc. and Sherman's 1400 Broadway NYC LLC are represented by Alexander Shaknes, Manvin S. Mayell and Kolya D. Glick of Arnold & Porter Kaye Scholer LLP and Warren Rheaume and Jim Grant of Davis Wright Tremaine LLP.

R.J. Reynolds Tobacco Co. and Santa Fe Natural Tobacco Co. are represented by Elli Leibenstein and Gregory Ostfeld of Greenberg Traurig LLP and Bradley S. Keller and John A. Tondini of Byrnes Keller Cromwell LLP.

Farmers Tobacco Co. of Cynthiana Inc. and Wind River Tobacco Co. LLC are represented by Mark A. Loyd and Lauren R. Nichols of Dentons Bingham Greenebaum LLP and Vanessa S. Power and Jenna M. Poligo of Stoel Rives LLP.

Commonwealth Brands Inc. and a dozen other tobacco companies are represented by Alexander Vitruk and Logan Peppin of BakerHostetler.

The case is State of Washington v. American Tobacco Co. et al., case number 853601-1, in the Washington Court of Appeals, Division I.

--Editing by Dave Trumbore.