

## Wash. Judges Won't Upend Tobacco Payout Ruling

By **Greg Lamm**

Law360 (August 20, 2024, 8:07 PM EDT) -- A Washington appellate court on Monday rejected attempts by Philip Morris and other tobacco companies to pay the state less under a 1998 master settlement agreement, upholding an arbitrator's determination that the state was enforcing a law covering payment.

In siding with the state, a three-judge panel affirmed a ruling by a state court judge who rejected the tobacco companies' attempts to block a reallocation order issued by a 2004 arbitration panel. The trial court determined there were no statutory grounds to toss the arbitration order.

"We conclude that the trial court did not err in declining to vacate the award because it correctly concluded that the Panel did not fail to consider material evidence," said the **unanimous opinion** written by Washington State Court of Appeals Judge David Mann.

Under the master settlement agreement, more than 50 tobacco companies agreed to make annual cash payments to states in perpetuity to offset rising healthcare costs from illnesses caused by smoking.

In seeking to adjust payments to Washington, the participating 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 affect how payments are allocated to states and slash the tobacco companies' payments to Washington by millions of dollars.

At a **hearing in June**, Judge Mann said the master settlement agreement does not give the participating tobacco companies the green light "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 also questioned if the amounts the tobacco companies pay into the settlement fund would be affected by how the money is divided among the states.

In Monday's unpublished opinion, the appellate judges said the arbitration panel correctly interpreted the master settlement agreement as allowing only the state to prove a diligence claim.

"While the [participating companies] strenuously oppose the Panel's interpretation of the MSA, the Panel had the authority to interpret the MSA, interpreted the MSA, and determined how to reallocate the 2004 [non-participating manufacturers] adjustment," the appellate judges said.

In a footnote, the opinion said the participating tobacco companies made similar arguments in challenging a 2022 reallocation order in New Mexico, but a court there rejected them.

Representatives for the state and the tobacco companies did not immediately respond Tuesday to requests for comment.

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, in the Washington State Court of Appeals, Division I.

--Editing by Peter Rozovsky.