IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 95-CA-1466 AE MB

State of Florida, *et al.*,
Plaintiffs,
v.
American Tobacco Company, *et al.*,
Defendants.
_____/

ORDER GRANTING-IN-PART SETTLEMENT-AGREEMENT-ENFORCEMENT MOTIONS BY FLORIDA AND PHILIP MORRIS

THIS MATTER came before the Court December 18-20, 2017 for hearing[1] on the two motions filed January 18, 2017, one by THE STATE OF FLORIDA [hereinafter, "Florida"] and the other by PHILIP MORRIS USA [hereinafter, "Phillip Morris"] seeking, in short, enforcement of the August 25, 1997 settlement agreement [hereinafter, "Florida Agreement"] among Florida, Philip Morris and R.J. REYNOLDS TOBACCO COMPANY [hereinafter, "Reynolds"].[2] Stated

[1] Because the motions were tried to the bench instead of a jury and in the interest of judicial economy, the Court employed a hybrid procedure pursuant to which the Court provisionally received all proffered documentary and testimonial exhibits and information. As explained more fully below, the Court employed that procedure largely because while all four participants in the hearing proclaimed the Florida Agreement language was clear and unambiguous they nevertheless referred extensively to extrinsic and parol evidence.

[2] Despite the style of this case, the parties who executed the Florida Agreement other than Florida by its then-Governor Lawton M. Chiles, Jr. and then-Attorney General Robert A. Butterworth were Philip Morris; Reynolds; Brown & Williamson Tobacco Corporation; Lorillard Tobacco Company and United States Tobacco Company. It is undisputed that, following the acquisition of Lorillard by Reynolds, there remain only two tobacco-company signatories to the Florida Agreement, Reynolds and Philip Morris. The Court notes that, due to the age of this case, the Clerk's computerized file does not contain an image of the original, February 21, 1995 complaint. The original files are archived in storage outside the Courthouse. Nevertheless, the parties have provided the Court with a copy

simply, the Florida Agreement obligates the tobacco-parties to make payments to Florida every December 31 in perpetuity. The amount of each tobacco-party's annual payment is its proportionate share of $440,000,000.00.[3] The proportion is determined based on each tobacco-party's "share of sales of cigarettes for consumption in the United States."[4] In exchange for the annual payments from the tobacco-parties, Florida executed a release of all its claims for substantial damages, primarily in the form of health-care costs, which it alleged it had incurred and would continue to incur due to the tobacco-parties' alleged predatory and deceptive practices in the marketing of their cigarettes. A closing which took place on June 12, 2015, effected a complicated, twenty-seven-billion-dollar series of transactions which, in simplified relevance resulted in (1) Reynolds' entire acquisition of LORILLARD TOBACCO COMPANY [hereinafter, "Lorillard"] such that Lorillard no longer existed and (2) Reynolds' divestiture of four well-known cigarette brands, Kool, Maverick, Salem and Winston, to IMPERIAL TOBACCO GROUP [hereinafter, "Imperial"] for $7,056,202,000.00.[5] Because Reynolds modified its payments under the Florida Agreement subsequent to the mid-2015

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of the Third Amended Complaint which does expressly include as defendants a number of entities, starting with The American Tobacco Company.

[3] In pertinent part, the Florida Agreement expressly sets forth the annual-payment amount thus: "...its share of 5.5% of...$8B"illion dollars. The parties entered into a September 11, 1998 amendment to the Florida Agreement which provides the annual payments "shall be adjusted upward by the greater of 3% or the actual total percent change in the Consumer Price Index..."

[4] As discussed in greater detail below, pursuant to the Florida Agreement and as implemented by a September 11, 1998 agreement called "Florida Fee Payment Agreement," Florida also receives substantial annual payments from the tobacco-parties as payment for plaintiffs' private-sector attorneys based on the same proportion.

[5] The divestiture was pursuant to a required "consent decree" to assuage anti-trust concerns of the United States Federal Trade Commission enforcement division.

closing and justified the new payments exclusively on the fact that Imperial, not Reynolds, was selling the cigarettes under the four brands Reynolds transferred to Imperial, Florida filed its motion to enforce the Florida Agreement against Reynolds[6] and Philip Morris filed a similar motion. By March 30, 2017 order this Court granted Florida's motion to join Imperial in the action. By order rendered June 8, 2017, the Court set the matter for hearing on "liability only." In the context of this matter, the liability question is whether Reynolds, Imperial, either or both is-or-are obligated to make payments to Florida for cigarettes sold for consumption in the United States under the four brands transferred by Reynolds to Imperial. The Court read and re-read the parties' written submissions, listened attentively to the parties' presentations and did its own limited legal research. Based on the foregoing and for the reasons and to the extent set forth below the Court grants the motions of Florida and Philip Morris.

Interestingly, the parties --- all of them --- asserted time-and-again that the Florida Agreement in general is, and the applicable provisions in particular are, comprised of clear and unambiguous language. The parties noted many times that during the negotiations which resulted in the Florida Agreement, the parties were represented by, to adopt the phrase utilized by the parties, "very sophisticated lawyers." The parties do not dispute --- indeed there can be no good-faith dispute -

[6] The Florida Agreement expressly provides for continuing jurisdiction in this Court.

-- that it is well-settled in the law that in determining a contract dispute, a court may not consider parol or other extrinsic evidence to determine the parties' intended meaning of disputed contract language where that language is clear and unambiguous.

In *Gulliver Schools v. Snay*, 137 So. 3d 1045 (Fla. 3d DCA 2014) the Third District reiterated long-standing law reminding that:

> A settlement agreement must generally "be interpreted like any other contract. That is, absent any evidence that the parties intended to endow a special meaning in the terms used in the agreement, the unambiguous language is to be given a realistic interpretation based on the plain, everyday meaning conveyed by the words."
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> > It is axiomatic that the clear and unambiguous words of a contract are the best evidence of the intent of the parties. Where contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning. In construing a contract, the legal effect of its provisions should be determined from the words of the entire contract.
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> "When a contract is clear and unambiguous, the court is not at liberty to give the contract 'any meaning beyond that expressed.'" "If a contract provision is clear and unambiguous, a court may not consider extrinsic or parol evidence to change the plain meaning set forth in the contract."

[137 So. 3d at 1047, internal citations omitted]

A few months ago, in *City of Pompano Beach v. Beatty*, 222 So. 3d 598 (Fla. 4th DCA 2017) in an opinion by Associate Judge Hanzman with which Judges Damoorgian and Ciklin concurred, the Fourth District instructed:

> As this court has said before, "contracts are voluntary undertakings, and contracting parties are free to bargain for—and specify—the terms and conditions of their agreement." That freedom is indeed a constitutionally protected right. And when parties choose to agree upon certain terms and conditions of their contract, it is not the province of the court to second-guess their wisdom or "substitute [its] judgment for that of the parties in order to relieve one from an alleged hardship of an improvident bargain." Rather, the court's task is to apply the parties' contract as written, not "rewrite" it under the guise of judicial construction. "Where contracts are clear and unambiguous, they should be construed as written, and the court can give them no other meaning.""[A] court cannot rewrite the clear and unambiguous terms of a voluntary contract."

[222 So. 3d at 600, internal citations omitted] Additionally, the Fourth District, five years ago, while quoting from one of its older cases, in an opinion written by Judge Gerber with which Judges Stevenson and Levine concurred, instructed:

> A primary rule of contract construction is that where provisions in an agreement appear to conflict, they should be construed so as to be reconciled, if possible. In so doing, the court should strive to give effect to the intent of the parties in accord with reason and probability as gleaned from the whole agreement and its purpose.

Anarkali Boutique v. Ortiz, 104 So. 3d 1202, 1205 (Fla. 4th DCA 2012)(internal citation omitted), review denied, 129 So. 3d 1069 (Fla. 2013).

It bears noting that, not only did all the parties claim the Florida Agreement is clear and unambiguous, but also none of them asserted that the Florida Agreement suffered from either patent or latent ambiguity. Because it was unclear to the Court whether any of the parties would eventually argue the existence of

ambiguity, the Court received all the proffered evidence provisionally.[7] By the end of the presentations, none of the parties had argued the existence of ambiguity. Accordingly, the Court did not and does not consider the extrinsic evidence.

With guidance from the foregoing law, the Court examines the language at issue here.

The Florida Agreement contains this provision:

> This Settlement Agreement shall be binding upon all Settling Defendants and their successors and assigns in the manner expressly provided for herein and shall inure to their benefit and to that of their respective directors, officers, employees, attorneys, representatives, insurers, suppliers, distributors, agents and of any of their present or former parents, subsidiaries, affiliates, divisions, or other organizational units of any kind. This Settlement Agreement shall be binding on and inure to the benefit of the State of Florida, the named Plaintiffs, their administrators, representatives, employees, officers, agents, legal representatives; all Agencies, Departments, Commissions, and Divisions of the State; all subdivisions, public entities, public corporations, instrumentalities, and educational institutions over which the State has control; and their predecessors, successors and assigns.

Also, the Florida Agreement (1) expressly defines "Settling Defendants" as "those Defendants in this Action that are signatories to this Settlement Agreement;" (2) expressly declares that the parties voluntarily entered into it; (3) plainly states that its overarching purposes are to (a) settle the underlying action "to recover certain monies and to promote the health and welfare of the people of Florida;" (b) effect

[7] The Court offers for the parties' consideration the recent Fourth District opinion in *Nationstar Mortgage v. Levine*, 216 So. 3d 711, n.2 (Fla. 4th DCA 2017) in which the Court, citing its own 1981 opinion, instructs that, if there is ambiguity, whether patent or latent, "the introduction of parol evidence to probe the true intent of the parties is proper."

for Florida a "resolution of the principal issues and controversies associated with the manufacture, marketing and sale of tobacco products in the United States;" and (c) obtain "for Florida immediately the financial benefits it would receive pursuant to the national Proposed Resolution, should it ever become law."[8] [9]

The asset-purchase agreement did not create an assumption by Imperial of liability for the Florida-Agreement payments

Although Florida made clear it does not claim that by closing on the asset-purchase agreement Imperial automatically assumed liability for the payments under the Florida Agreement, Reynolds and Imperial expended some effort countering the automatic-assumption notion.

To determine whether Imperial assumed Reynolds' liabilities under the Florida Agreement by buying four brands from Reynolds, it is appropriate to

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[8] The federal government failed to create such a law.

[9] The basis for and purpose of Florida's law suit, and, per force, the Florida Agreement which settled the suit is succinctly set forth in the first paragraph of the Third Amended Complaint. The complaint uses the term "cartel" to describe the defendants which were named in the style of the case: The American Tobacco Company; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; B.A.T. Industries, PLC; Batus Holdings, Inc.; Brown & Williamson Tobacco Corporation; Philip Morris Companies, Inc.; Philip Morris Incorporated (Philip Morris U.S.A.); Loews Corporation; Lorillard Tobacco Company; United States Tobacco Company; UST Inc.; The Council for Tobacco Research-USA Inc. (successor to Tobacco Institute Research Committee); The Tobacco Institute, Inc.; Hill & Knowlton, Inc.; British American Tobacco Co., Ltd.; and Dosal Tobacco Corp., Inc. The Third Amended Complaint's first paragraph alleges:

> Cigarette-related disease has killed and continues to kill untold millions of Americans. In the name of profits, cigarette manufacturers choose to ignore and suppress the truth about the hazards of cigarette smoking. As a result, Medicaid recipients have contracted smoking-related diseases including without limitation cancer, emphysema, and heart disease. The care of these Medicaid recipients has placed a significant burden on the State. This burden should rightfully be borne by the cigarette manufacturers. The Governor of the State of Florida has determined that the State of Florida can no longer afford to allow cigarette manufacturers to reap this windfall. Therefore, the Governor, the State of Florida and its various agencies as set out below have filed this lawsuit to force the cigarette manufacturers to pay for the health care crisis their products have caused. The defendants have significantly benefited over many years from not having to pay the medical costs of the impoverished Medicaid recipients injured by their products and behavior. The defendants have been able to privatize the profits while socializing the costs of their misconduct. The impact on the State of Florida and its taxpayers has been felt in every department as the dollars flow out.

examine the July 15, 2014, two-hundred-and-seven-page asset-purchase agreement among them and a guarantor. Section 2.04 of the asset-purchase agreement expressly required (1) not only that Imperial pay Reynolds more than seven billion dollars but also (2) Imperial's "assumption of the Assumed Liabilities." As relevant to liability-determination only, section 2.01(c)(vii) provides in pertinent part that Imperial assumes "subject to the Agreed Assumption Terms, all Liabilities under the State Settlements in respect of the Acquired Tobacco Cigarette Brands that relate to the period after the Closing Date…" The asset-purchase agreement's definition of "State Settlements" expressly includes the Florida Agreement and its September 11, 1998 amendments. The Florida Agreement is also expressly included as one of the Previously Settled States Agreements. Exhibit F to the asset purchase agreement provides at section 2.2 that Imperial, with the required assistance and cooperation of Reynolds,

> "shall use its reasonable best efforts to reach agreement with each of the Previously Settled States, by which…[Imperial] will assume, as of the Closing, the obligations of a Settling Defendant under the PSS Agreement with each such State, with respect to the Acquired Tobacco Cigarette Brands, on the same basis as the Settling Defendants prior to the Closing. Provided, however, that such agreements shall include terms providing either that any direct-pay statute (also known as an equity-fee law or NPM-fee law) of a previously Settled State does not apply to the Acquired Tobacco Cigarette Brands or that, if …[Imperial] is required to make payments with respect to Acquired Tobacco Cigarette Brands under a direct-pay statute (or any distributor or other party is required to make such payments with respect to the Acquired Tobacco Cigarette Brands),…[Imperial] will receive a credit against otherwise due payments under the PSS settlement equal to the full payments made.

Put in simple terms, the foregoing provision purports to relieve Imperial of liability for at least some of the payments required by the Florida Agreement unless, with the assistance of Reynolds, Imperial can persuade Florida to agree to certain favorable treatment in the event it passes legislation which would otherwise impose fees on Imperial with respect to Imperial's sale of cigarettes under any of the four brands it purchased from Reynolds.[10] While determination of the effect this provision may have on the overall series of transactions between Reynolds and Imperial is to be determined by the Delaware Chancery Court, it is nonetheless clear that the closing on the asset-purchase agreement did not result in Imperial's assumption, either expressly or impliedly, of the payment liability created by the Florida Agreement.[11] A contract requiring "reasonable best efforts to reach agreement" with a third party is simply not tantamount to a contract requiring a party to reach agreement with a third party. Here, the asset-purchase agreement merely established conditions for Imperial's presumed, eventual assumption of financial and other obligations under the Florida Agreement.

Imperial is not liable under Florida's successor-liability law

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[10] While Florida continually refers to the transferred brands as having been assigned to Imperial by Reynolds, this Court does not perceive that type of "assignment" as effectively making Imperial an "assign" of Reynolds in the broad sense denoted by the relevant provision in the Florida Agreement.

[11] The Delaware Chancery Court has already determined, by November 30, 2017 opinion and December 6, 2017 order that Imperial's obligations to make reasonable best efforts to become successor to or assign of Reynolds' obligations under the Florida Agreement did not expire as of the mid-2015 closing on the asset-purchase agreement and related transactions.

There is no dispute that not only did Imperial not execute the Florida Agreement, the September 11, 1998 amendments or the June 1, 2001 Florida Fee Payment Agreement, but it did not exist as an entity as of the execution of those agreements.[12] Thus, Florida and Philip Morris argue that Imperial is liable for the payments under what Florida calls "Florida's successor liability law."

In *Bernard v. Kee Manufacturing*, 409 So. 2d 1047, 1049 (Fla. 1982) Florida's Supreme Court, expressly rejected an invitation to adopt an approach to successor tort-liability for a product-line asset-purchase.[13] Despite the fact that California, New Jersey and Pennsylvania had, as of thirty-five years ago, determined that "(A) party which acquires a manufacturing business and continues the output of its line of products…assumes strict tort liability for the defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired," the Court declined to adopt that approach. Instead, the Court held that Florida would continue to follow the majority rule instructing:

> The vast majority of jurisdictions follow the traditional corporate law rule which does not impose the liabilities of the selling predecessor upon the buying successor company unless (1) the successor expressly or impliedly assumes obligations of the predecessor, (2) the transaction is a de facto merger, (3) the successor is a mere continuation of the predecessor, or (4)

[12] The parties provided no evidence concerning inter-relationships Imperial or its shareholders, owners, directors or officers may have or have had, if any, with any of the original defendants in this matter.

[13] Here, of course, the original defendants' potential liability sounded in tort while Imperial's potential liability at this point would be determined as a matter of contract law.

> the transaction is a fraudulent effort to avoid liabilities of the predecessor. *See Sens v. Slavia, Inc.*, 304 So.2d 438 (Fla. 1974)...

Id. The parties on both sides refer to *Corporate Express Office Products v. Phillips*, 847 So. 2d 406 (Fla. 2003). From that opinion and others including some this Court's research yielded,[14] it seems that Florida still rejects the exception to the general rule. Recognizing that to be the case, Florida argues that it is the first of the four *Bernard v. Kee* circumstances which is applicable here. In other words, Florida argues that Imperial has expressly or impliedly assumed the liabilities of Reynolds by purchasing the four cigarette brands and continuing to market them for sale in the United States. As discussed above, the terms of the asset-purchase agreement make it crystal clear that Imperial has not expressly or impliedly assumed the liabilities under the Florida Agreement. Instead, it has expressly assumed the duty to employ "reasonable best efforts" to enter into an agreement with Florida to assume the liabilities imposed by the Florida Agreement. While the Court need not --- indeed, as noted above, does not --- consider any of the extrinsic evidence offered on this issue, that information merely reinforces this Court's conclusion based on the asset-purchase-agreement language that Imperial has simply contracted with Reynolds to attempt to join the Florida Agreement on

[14] For example, see *Krogen Express Yachts v. Nobili*, 947 So. 2d 581 (Fla. 4th DCA 2007) and *Keller Ladders v. McCormack*, 968 So. 2d 667 (Fla. 4th DCA 2007).

conditional terms to which Florida has not agreed and upon which it seems unlikely Florida will ever agree.

Once again, it is for the Delaware Court, not this Court, to determine Reynolds' and Imperial's rights and obligations under their asset-purchase agreement. As the parties are beyond question acutely aware, the Delaware Court's proceedings will determine what the impact will be on the twenty-seven-billion-dollar transactions which closed a year-and-a-half ago after at least a year of doubtless extremely-expensive pre-closing activities and negotiations.

Reynolds' liability for payments under the Florida Agreement continues

In *Moring v. Miller*, 330 So. 2d 93 (Fla. 1st DCA 1976) the First District reviewed a suit by a pecan-tree developer to recover for royalties for pecan sales from the owner of a nursery who bought the trees from the developer. Eventually, the nursery sold its assets to a different entity. The trial court found that the nursery was not liable for the royalty payments to the developer as of the date of the nursery's sale to the new entity. The First District reversed, in an opinion which, so far as this issue is concerned is 2-1, explaining:

> Whether or not Simpson's contract with appellant was assignable, such assignment did not relieve Simpson of liability under the original contract with appellant. (6 Am.Jur.2d 293, "Assignments", Section 110; 6A CJS Assignments § 97, p. 753.) Appellees claim that there was a complete novation when appellant became aware of the assignments of his agreement, and continued to receive and accept reports and royalty payments from the successor assignees. However, the law is well settled that in order to constitute a novation, the parties must agree to a contract which is intended

> to take the place of a prior obligation. (23 Fla.Jur. 486, "Novation", Section 4) In general terms, mere acceptance of the obligation of the assignee without any intention to relieve the original debtor is not, in and of itself, sufficient to constitute a novation. (61 ALR2d 755 (1958)) There is no indication in the record that the parties intended that appellee Simpson be relieved from liability under the original contract. In the absence of such evidence, as a matter of law, there was no novation. (*See Evans v. Borkowski*, Fla.App.2d 1962, 139 So.2d 472))

330 So. 2d t 95. The one-sentence opinion by the dissent is not enlightening.

Here, Reynolds argues that because it transferred brands to Imperial and because the Florida Agreement does not refer to brands the transfer allows Reynolds to avoid liability for payment resulting from the sale of cigarettes under the transferred brands. However, it is clear under *Moring* that while the Florida Agreement expressly does allow Reynolds to transfer its obligations and benefits, nothing in the Florida Agreement allows Reynolds to relieve itself from its obligations unless the transferee becomes a successor or assign/assignee. As is manifestly obvious, there can be no successor or assign/assignee unless the transferee-entity agrees to be bound by all, not merely some, of the provisions of the Florida Agreement. Under the asset-purchase agreement, Reynolds and Imperial simply set the stage for the latter to become the former's successor or assign/assignee. In *Collier HMA v. Menichello*, 223 So. 3d 334 (Fla. 2d DCA 2017) the Second District considered enforceability of a employment restrictive covenant in the context of a successor employer. The Second District explained:

> Section 542.335 does not provide a definition of the term "successor." The context in which the term is used requires us to seek the meaning of the term as it relates to corporations and other business entities. In this context, the term "successor" denotes "[a] corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation." *Black's Law Dictionary* 1660 (10th ed. 2014); *see also Corneal v. CF Hosting, Inc.*, 187 F. Supp. 2d 1372, 1375 (S.D. Fla. 2001) ("The term successor 'is generally applicable to corporations wherein one corporation by a process of amalgamation, consolidation or duly authorized legal succession becomes vested in the rights and assumes the burdens of its predecessor corporation.' " (quoting *Int'l Ass'n of Machinists & Local Lodge # 954 v. Shawnee Indus., Inc.*, 224 F. Supp. 347, 352 (W.D. Okla. 1963))).

223 So. 3d at 339-340. In other words, to be a successor, an entity or person must become vested in both the rights and the burdens of its or their predecessor.[15]

Florida's argument that Reynolds' continued payments under the fee-payment agreement, which, as noted above employs the same pro-rata share based on nationwide cigarette sales, evinces Reynolds' acknowledgment of its continuing obligation to make all payments under the Florida Agreement is not entirely persuasive. Nevertheless, the fact Reynolds contracted with Imperial to continue to pay Florida under the fee-payment agreement does prove that Reynolds understood that it was obligated to persuade Imperial to become --- not merely endeavor to become --- Reynolds' successor or assign with respect to ***all*** Florida Agreement obligations based on pro-rated share of nationwide cigarette sales.

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[15] Also see §672.210(4) and (5), Fla. Stat. regarding assignment of a contract under the Uniform Commercial Code. In the probate context see, §733.614, Fla. Stat. which provides that a successor personal representative has the same powers and duty as the original P.R.

In short, Reynolds is still obligated to make the payments pursuant to the Florida Agreement unless and until it is able to have Imperial (or some other entity) actually become its true "successor" or true "assign."

Conclusion

This Court is not unmindful of the significance and effect of this decision. The private-sector parties in this case are involved in litigation in other jurisdictions involving similar and related issues. They are large business concerns operating world-wide. They are, to use their word, sophisticated enough to come to resolution of their differences which is consistent with both the clear meaning, intent and purpose of the Florida Agreement on the one hand and their business objectives and shareholder interests on the other. It seems unlikely that any of the parties would relish the ramifications of failure in this regard.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida, on this 27th day of December 2017.

Jeffrey Dana Gillen

Circuit Judge

Furnished via email to all record lawyers to registered addresses