

TOBACCO SETTLEMENT COSTS AND ATTORNEYS' FEES

In January 2000 the Attorney General requested Emergency Commission authorization for an increase in gaming grants line item appropriation authority in the amount of \$197,714. The request states the source of the funds is cost and fee recoveries from the tobacco settlement which remain after allowable expenses have been paid. The Budget Section requested this memorandum after questioning whether all moneys received by the state from the tobacco settlement, including cost and fee recovery moneys, were required by House Bill No. 1475 (1999) to be deposited in the tobacco settlement trust fund. If that is the case, cost and fee recovery moneys would not be available to fund gaming grants.

The tobacco settlement trust fund was established by House Bill No. 1475 (1999), Section 1, which is codified as North Dakota Century Code (NDCC) Section 54-27-25. Section 54-27-25 provides, in part:

There is created in the state treasury a tobacco settlement trust fund. The fund consists of the tobacco settlement dollars obtained by the state under sections IX (payments) and XI (calculation and disbursement of payments) of the master settlement agreement and consent agreement adopted by the east central judicial district court in its judgment entered December 28, 1998 [Civil No. 98-3778]. All moneys received by the state pursuant to the judgment and all moneys received by the state for enforcement of the judgment must be deposited in the fund. Interest earned on the fund must be credited to the fund and deposited in the fund.

The trust fund thus consists of:

1. Tobacco settlement dollars received by the state under Sections IX and XI of the master settlement agreement and consent agreement.
2. All moneys received by the state pursuant to the judgment.
3. All moneys received by the state for enforcement of the judgment.
4. Interest earned on the fund.

There is no mention in NDCC Section 54-27-25, or any other statutory or legislative provision, of cost and fee recoveries to the Attorney General's office from the tobacco settlement. The issue is whether such moneys are excluded from deposits in the tobacco settlement trust fund because they are not specifically mentioned or included because they are within one of

the general categories of moneys described in Section 54-27-25. Of importance for purposes of this memorandum are the moneys that are included within the dollars received under Sections IX and XI, the moneys received by the state pursuant to the judgment, and the moneys received by the state for enforcement of the judgment.

DOLLARS RECEIVED UNDER SECTIONS IX AND XI

Section IX of the master settlement agreement concerns payments made into escrow. The first sentence of Section IX provides:

All payments made pursuant to this Agreement (except those payments made pursuant to section XVII) shall be made into escrow . . . and . . . credited to the appropriate Account

....

Section XI of the master settlement agreement concerns the calculation and disbursement of payments owed under the agreement.

Section II of the master settlement agreement defines "allocable share" as the percentage set forth for each state as listed in Exhibit A attached to the master settlement agreement. Under Exhibit A, North Dakota is to receive 0.3660138 percent of payments into escrow by participating manufacturers. In numerous places in the master settlement agreement are references to payments from escrow to be made to a "Settling State." The only exception to this rule is under Section XVII of the master settlement agreement, which provides that participating manufacturers ". . . shall severally reimburse . . . the office of the Attorney General of such Settling State . . . for reasonable costs and expenses incurred in connection with the litigation or resolution of claims asserted by or against the Participating Manufacturers" Section XVII also provides "[t]he Original Participating Manufacturers further agree severally to pay the . . . [office of Attorney General] . . . in any Settling State in which State-Specific Finality has occurred an amount sufficient to compensate such Governmental Entities for time reasonably expended by attorneys and paralegals employed in such offices in connection with the litigation or resolution of claims" Section XVII also provides "[a]ll such amounts to be paid . . . shall be paid separately and apart from any other amounts due pursuant to this Agreement" Based on these provisions, cost and fee recovery moneys are not dollars received under Sections IX and XI.

MONEYS RECEIVED

PURSUANT TO THE JUDGMENT

It appears that resolution of the issue under consideration may lie in interpretation of the phrase, “[a]ll moneys received by the state pursuant to the judgment.” A number of arguments can be made about the meaning of this phrase. One argument is that moneys received by the Attorney General’s office are received on behalf of the state of North Dakota and therefore are “moneys received by the state.” The contrary argument is that the language “received by the state” is used to distinguish between the payments payable to the state and the payments payable to the Attorney General’s office pursuant to the master settlement agreement. The master settlement agreement provides for segregation of funds for payment of cost and fee recovery moneys and provides for two forms of payments. One form of payment is a check payable to a “settling state” and the other form of payment would be a check payable to the “Attorney General’s office” of such settling state. Under this argument, however, consideration must be given to the treatment of public moneys received by state officers under Section 12 of Article X of the Constitution of North Dakota and by the Attorney General under NDCC Section 54-12-01(13).

Section 12 of Article X of the Constitution of North Dakota provides, in part:

All public moneys, from whatever source derived, shall be paid over monthly by the public official, employee, agent, director, manager, board, bureau, or institution of the state receiving the same, to the state treasurer, and deposited by him to the credit of the state, and shall be paid out and disbursed only pursuant to appropriation first made by the legislature . . . [exceptions omitted].

Regardless of whether the costs and attorneys’ fees are received in the name of the state of North Dakota or the Attorney General’s office, it appears they would be considered public moneys. Under NDCC Section 54-12-01(13), the Attorney General is to pay into the state treasury all moneys received for use of the state. *Cf. State v. Hagerty*, 1998 N.D. 122, 580 N.W.2d 139 (although moneys awarded to the state as a result of legal action by the Attorney General on behalf of the state are public funds, fees may be paid to outside attorneys under contingent fee arrangements without violating Section 12 of Article X). Based on these authorities, it appears the cost and fee recovery moneys are public moneys, and receipt by the Attorney General is equivalent to receipt by the state.

Another argument is the language in question refers to moneys other than payments under Sections IX and XI, but of a similar nature. Thus, the language is not a catchall phrase covering everything the state receives but only payments similar to those payments received under Sections IX and XI.

The North Dakota Supreme Court has stated on many occasions that in construing a statute the objective is to ascertain the intent of the Legislative Assembly (see e.g., *Anderson v. Anderson*, 591 N.W.2d 138 (1999)). The primary determinant of legislative intent is the language of the statute construed in the plain, ordinary, and commonly understood sense of that language. Only if the statutory language is ambiguous may extrinsic aids be used to interpret the statute. An ambiguity exists when good arguments can be made for two contrary positions about the meaning of a phrase in a document. *Sellie v. North Dakota Ins. Guar. Ass’n*, 494 N.W.2d 151, 156 (N.D. 1992).

Review of the legislative history of House Bill No. 1475 (1999) provides little guidance on the language in question. This language was added through an amendment proposed by the Attorney General’s office on January 25, 1999. The portion of the testimony most closely related to the language in question is:

First, it is important to clearly identify the source of the funds and refer to the judgment and the portions in the agreement because the agreement contemplates that other manufacturers will join in at a later date under similar terms. The bill refers to a settlement agreement entered in 1998 or any successor agreement. Some manufacturers did not agree to be bound by the terms of the agreement until 1999. However, their agreements are not “successor agreements”. Adding the suggested language will assure that all aspects of the agreement we entered in 1998 and the agreements with subsequent participating manufacturers will be covered by the terms of the bill.

The minutes for House Bill No. 1475 (1999) show extensive discussions of the provisions of the bill relating to how the amounts in the tobacco settlement trust fund could be used, but there is nothing in the minutes other than the testimony of the Attorney General’s office quoted above with regard to what funds are to be deposited in the tobacco settlement trust fund. It appears the rationale for adding the language in question was to include payments by manufacturers who were not participating manufacturers but who subsequently become participating manufacturers under other agreements.

Examination of the two fiscal notes prepared for House Bill No. 1475 (1999) does not provide much guidance on tobacco settlement trust fund deposits from the tobacco settlement. The initial fiscal note (prepared before adoption of the amendment proposed by the Attorney General’s office) stated that the bill “requires all tobacco settlement funds to be deposited into a tobacco settlement trust fund,” and during the 1999-2001 biennium, payments totaling \$57.6 million would be paid into an escrow account

and should be available to North Dakota. This fiscal note was prepared by the State Department of Health and states that the payment information was provided by the Attorney General's office. The second fiscal note was prepared by the Department of Public Instruction and states only that the fiscal effect of the bill is unknown. Neither fiscal note indicates anticipated receipt by the Attorney General's office of cost and fee recovery moneys under the settlement. It may be significant to observe that the first fiscal note is based on payments from an "escrow account" because Section XVII of the master settlement agreement makes no mention of an escrow account, and it appears only payments under Sections IX and XI of the Act originate from payments into escrow.

A possible source of legislative intent with regard to use of cost and fee recovery moneys by the Attorney General's office is the appropriation for the Attorney General in Senate Bill No. 2003 (1999). Review of the extensive standing committee minutes and budget detail for the appropriation bill discloses no discussion that cost and fee recovery moneys were coming to the Attorney General's office as reimbursement for expenses. The extensive testimony provided by the Attorney General regarding the tobacco settlement contains a statement that "[t]obacco companies will reimburse offices of state Attorneys General and other political subdivisions for all reasonable costs and expenses and in-house attorney fees (up to a total of \$150 million)."

A possible reason for not specifically including the anticipated cost and fee recovery moneys in Senate Bill No. 2003 is the existence of a statute that provides for a continuing appropriation from the Attorney General refund fund. North Dakota Century Code Section 54-12-18 provides:

Special fund established - Continuing appropriation. A special fund is established in the state treasury and designated as the attorney general refund fund. **The attorney general shall deposit** all moneys recovered by the consumer protection division for refunds to consumers in cases where persons or parties are found to have violated the consumer fraud laws, **all costs, expenses, attorney's fees, and civil penalties collected by the division regarding any consumer protection or anti-trust matter**, all cash deposit bonds paid by applicants for a transient merchant's license who do not provide a surety bond, and all funds and fees collected by the gaming section for licensing tribal gaming and for the investigation of gaming employees, applicants, organizations, manufacturers, distributors, or tribes involved in state or tribal gaming. **The moneys in the fund are appropriated**, as necessary, for the following purposes:

1. To provide refunds of moneys recovered by the consumer protection and

antitrust division on behalf of specifically named consumers;

2. To pay valid claims against cash deposit bonds posted by transient merchant licensees;
3. To refund, upon expiration of the two-year period after the expiration of the transient merchant's license, the balance of any cash deposit bond remaining after the payment of valid claims;
4. **To pay costs, expenses, and attorney's fees and salaries incurred in the operation of the consumer protection division;** and
5. To pay the actual costs of background investigations, licensing, and enforcement of gaming in the state or pursuant to Indian gaming compacts.

At the end of each fiscal year any moneys in the fund in excess of the amounts required for subsections 1, 2, 3, and 5 must be deposited in the general fund. The attorney general, with the concurrence of the director of the office of management and budget, shall establish the necessary accounting procedures for use of the attorney general refund fund, particularly with respect to expenditures under subsection 4. (emphasis supplied)

The Attorney General's office received cost and fee recovery moneys in December 1999 under Section XVII of the master settlement agreement. These funds were expended for payment of allowable expenses, presumably under the continuing appropriation authority of NDCC Section 54-12-18. There is now the remaining amount of \$197,714 received as reimbursement of costs and fees.

MONEYS RECEIVED FOR ENFORCEMENT OF THE JUDGMENT

Another factor to consider regarding the treatment of cost and fee recovery moneys is whether those moneys are "moneys received for enforcement of the judgment." Enforcement of a judgment can be construed as acceptance of the benefits of a judgment. See generally *State ex rel. Wenzel v. Langer*, 64 N.D. 744, 256 N.W. 194 (1934).

The master settlement agreement has numerous limitations and prohibitions on future behavior that have been agreed to by participating manufacturers. These include prohibitions on sponsorships of certain events, outdoor advertising, payments to display tobacco products in movies and other media, tobacco brand name merchandise, certain lobbying activities, and material misrepresentation of fact regarding health consequences of using tobacco products. Enforcement of these terms of the agreement would fall to the Attorney General after entry of the

judgment, so it appears the phrase "all moneys received by the state for enforcement of the judgment" was intended to cover deposit of any award to the state of North Dakota from future actions to enforce the limitations under the agreement. As an aside, if there are future enforcement actions, the question of where costs and attorneys' fees would be deposited will arise again, and these are not addressed in Section XVII or any other part of the master settlement agreement. It appears there would be no question in that event but those costs and fees would appropriately be deposited in the tobacco settlement trust fund.

SUPREME COURT GUIDANCE ON STATUTORY CONSTRUCTION

The North Dakota Supreme Court has had many occasions to interpret statutory provisions. Among the statements of the Supreme Court regarding statutory interpretation are:

1. Statutes are to be considered as a whole and in relation to other provisions, with each provision harmonized, if possible, to avoid conflicts. *Dundee Mut. Ins. Co. v. Balvitsch*, 540 N.W.2d 609 (1995).
2. Statutory provisions which do not expressly exclude each other from application must be considered together and, if possible, apparently conflicting provisions should be made to harmonize. *Elliot v. Drayton Pub. Sch. Dist. No. 19*, 406 N.W.2d 655 (1987).
3. In interpreting statutory provisions, every effort must be made to give each word, phrase, clause, and sentence meaning and effect. *County of Stutsman v. State Historical Soc'y*, 371 N.W.2d 321 (1985).
4. Statutory language is to be construed so that an ordinary person reading it would get from it the usual, accepted meaning. *Wills v. Schroeder Aviation, Inc.*, 390 N.W.2d 544 (1986).
5. We consider the ordinary sense of statutory words, the context in which they were enacted, and the purpose which prompted the enactment. *Coldwell Banker v. Meide & Son, Inc.*, 422 N.W.2d 375 (1988).
6. A statute is ambiguous if it is susceptible to differing, but rational meanings. *Northern X-Ray Co. v. State*, 542 N.W.2d 733 (1996).
7. If the language of a statute is ambiguous, we look to extrinsic aids, such as legislative history and administrative construction, to determine the legislature's intent. *State v. Eldred*, 564 N.W.2d 283 (1997).
8. We will normally defer to a reasonable interpretation of a statute by the agency enforcing it, especially when that interpretation does not contradict clear and unambiguous

statutory language. *Schaefer v. Job Serv. N. D.*, 463 N.W.2d 665 (1990).

The Supreme Court has also said that, although not binding on the court, opinions of the Attorney General are entitled to respect and the court will follow them if they are persuasive. *City of Bismarck v. Fetting*, 601 N.W.2d 247 (1999), *Glaspie v. Little*, 564 N.W.2d 651 (1997), *United Hospital v. D'Annunzio*, 514 N.W.2d 681 (1994). Construction of a statute by an administrative agency charged with its execution is entitled to weight and the court will defer to a reasonable interpretation of that agency unless it contradicts clear and unambiguous statutory language. *Frank v. Traynor*, 600 N.W.2d 516 (1999).

ANALYSIS

A first reading of NDCC Section 54-27-25 appears to require cost and fee recoveries from the tobacco settlement to be deposited in the tobacco settlement trust fund. One sentence in this section states that all moneys received by the state pursuant to the judgment must go to the fund. If this were the only statement about deposits in the fund, it appears there would be no room for argument. However, the section also has a sentence with a different statement regarding deposits, specifying that payments under Sections IX and XI of the agreement adopted by the court must go to the fund. The North Dakota Supreme Court has held that in statutory interpretation the usual, accepted meaning to an ordinary person should be the objective; provisions should be harmonized, if possible, to avoid conflicts; every effort should be made to give meaning and effect to each word; and consideration should be given to the ordinary sense of words, the context in which they were enacted, and the purpose of the enactment.

Cost and fee recoveries are not dollars obtained under Sections IX and XI of the agreement, but it can be argued that the usual, accepted meaning of the language used requires the conclusion that such moneys are "moneys received by the state pursuant to the judgment." It can also be argued that this phrase is ambiguous for various reasons, including the issue of how to harmonize and give effect to two provisions that appear to require different results regarding the funds in question.

Only if the language of the statute is ambiguous is it appropriate to go beyond the language to consider extrinsic aids such as legislative history and administrative construction.

Legislative history provides little guidance to interpreting the provisions of NDCC Section 54-27-25 regarding deposit of cost and fee recoveries. There is no evidence in the record that this issue was discussed by any legislative standing committee considering 1999 House Bill No. 1475 or the appropriation for the Attorney General under 1999 Senate Bill No. 2003. The evidence that cost and fee recoveries were intended to go to the Attorney General

refund fund is limited to a statement in the first fiscal note (prepared before the language in question was amended into the bill) that the estimate was based on payments expected from an "escrow account" and a single sentence on page nine of a 10-page summary of the tobacco settlement agreement stating that tobacco companies will reimburse "offices of state Attorneys General" for costs and fees. On the other hand, there appears to be nothing in the legislative history suggesting or implying that cost and fee recoveries were intended to go the tobacco settlement trust fund.

Administrative construction of NDCC Sections 54-27-25 and 54-12-18 by the Attorney General's office supports the conclusion that cost and fee recoveries are not part of "all moneys received by the state pursuant to the judgment." The Attorney General's office received these moneys, deposited them in the Attorney General refund fund, applied them to allowable expenses under Section 54-12-18(4), and now seeks authorization to apply the excess to increase gaming grants line item appropriation authority.

If it were to be concluded that cost and fee recoveries are part of "all moneys received by the state pursuant to the judgment," NDCC Section 54-27-25 requires those funds to be deposited in the tobacco settlement trust fund. This would mean those funds should not have been deposited in the Attorney General refund fund, the excess amount on hand should be transferred to the tobacco settlement trust fund, and the amount already expended should be reconstituted and transferred to the tobacco settlement trust fund. Section 54-27-25 would be the controlling authority to the extent of any conflict with Section 54-12-18, because under statutory provisions to resolve such conflicts, Section 54-27-25 is both more recent (see *State v. Link*, 232 N.W.2d 823 (1975)) and more specific (see NDCC Section 1-02-07).

If it were to be concluded that Section XVII has been incorporated in NDCC Section 54-27-25 by reference and governs treatment of cost and fee recoveries received by the Attorney General's office, the issue arises of what happens to excess amounts. Because Section XVII of the master settlement agreement uses the terms "reimburse" and "compensate" with regard to cost and fee recoveries, it could be argued that the amount exceeding what is necessary

for actual reimbursement and compensation is not governed by Section XVII once allowable costs and fees have been paid. Under Section 54-27-25, such excess amounts would no longer be governed by Section XVII, would not be moneys received under Sections IX and XI, and would apparently fall into the category of "all moneys received by the state pursuant to the judgment," which would mean they should be transferred to the tobacco settlement trust fund. The contrary argument (which would be supported by administrative construction) is that the entire amount paid to the Attorney General's office is not governed by Section 54-27-25 after it has been segregated by Section XVII and deposited in the Attorney General refund fund. After deposit, the moneys would be governed by Section 54-12-18, which appears to require the excess amount to be transferred to the general fund at the end of the fiscal year. If this argument prevails, the request of the Attorney General for an increase in gaming grants appropriation authority is properly before the Budget Section for consideration.

CONCLUSION

There are two plausible conclusions that can be reached concerning the appropriate handling of cost and fee recoveries under the tobacco settlement. The first conclusion is that cost and fee recoveries are part of "all moneys received by the state pursuant to the judgment," and NDCC Section 54-27-25 requires those funds to be deposited in the tobacco settlement trust fund. The other conclusion is that because the master settlement segregates funds for costs and fees, those funds are not included in the provision regarding moneys received pursuant to the judgment and Section 54-12-18 applies. Section 54-12-18 provides a continuing appropriation for costs and expenses incurred in consumer protection cases. The second conclusion is the one reached by the Attorney General's office. The North Dakota Supreme Court has held that Attorney General's opinions are entitled to respect and the court will follow them if they are persuasive. The Attorney General's office is also the administrative agency responsible for this matter, and the Supreme Court has said the court will defer to a reasonable interpretation of an administrative agency unless the interpretation contradicts clear and unambiguous statutory language.