IN THE SUPREME COURT OF FLORIDA

CASE NOS. 93,148 and 93,~~145~~ 195 (CONSOLIDATED)

STATE OF FLORIDA, et al.
v.
AMERICAN TOBACCO COMPANY, et al.

PHILIP MORRIS, et al.
v.
STATE OF FLORIDA, et al.

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v.
AMERICAN TOBACCO COMPANY, et al.

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CONSOLIDATED APPEALS ON A CERTIFIED QUESTION
FROM THE FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF APPELLEES KERRIGAN, MONTGOMERY AND SCHLESINGER

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CERTIFICATE OF FONT SIZE AND TYPE

The size and style of type used in this brief are: Courier New, 12 point spaced font.

James W. Beasley, Jr.

CERTIFICATE OF INTERESTED PERSONS

The following person and entities have or may have an interest in the outcome of this case:

1. The Honorable Lawton M. Chiles, Jr., Governor, State of Florida
2. Robert A. Butterworth, Attorney General, State of Florida
3. Kimberly Tucker, Deputy General Counsel, State of Florida
4. James Peters, Assistant Attorney General, State of Florida
5. Peter Antonacci, Assistant Attorney General, State of Florida
6. Louis F. Hubener, Assistant Attorney General, State of Florida
7. Richard Doran, Assistant Attorney General, State of Florida
8. Myron H. Burnstein, Deputy Attorney General, State of Florida
9. Parker D. Thomson, Thomson Muraro Razook & Hart, P.A.
10. Carol A. Licko, Thomson Muraro Razook & Hart, P.A.

11. Judge Harold J. Cohen, Circuit Judge, Fifteenth Judicial Circuit, West Palm Beach, Florida
12. Judge James T. Carlisle, Circuit Judge, Fifteenth Judicial Circuit, West Palm Beach, Florida
13. James W. Beasley, Jr., Beasley, Leacock & Hauser, P.A.
14. David Leacock, Beasley, Leacock & Hauser, P.A.
15. Robert J. Hauser, Beasley, Leacock & Hauser, P.A.
16. Bruce S. Rogow, Bruce S. Rogow, P.A.
17. Beverly A. Pohl, Bruce S. Rogow, P.A.
18. Arnold R. Ginsberg, Ginsberg & Schwartz
19. Wayne Hogan, Brown, Terrell, Hogan, et al.
20. William C. Gentry, Gentry, Phillips, Smith & Hodak, P.A.
21. Michael Maher, Maher, Gibson & Guiley
22. Richard F. Scruggs, Scruggs, Millette, Lawson, et al.
23. David C. Fonvielle, Fonvielle & Hinkle
24. Stephen J. Krigbaum, Carlton, Fields, et al.
25. Joseph Ianno, Carlton, Fields, et al.
26. Murray R. Garnick, Arnold & Porter
27. Edward A. Moss, Shook, Hardy & Bacon, L.L.P.
28. Justus Reid, Reid, Metzger & Associates, P.A.
29. James M. Landis, Foley & Lardner
30. Ronald L. Motley, Ness, Motley, Loadholt, et al.
31. Joseph Rice, Ness, Motley, Loadholt, et al.
32. J. Anderson Berly, Ness, Motley, Loadholt, et al.

33. P. Tim Howard, Howard & Associates, P.A.

34. Robert G. Kerrigan, Kerrigan, Estess, Rankin & McLeod

35. James H. Nance, Nance, Cacciatore, Sisserson, et al.

36. Sheldon J. Schlesinger, Sheldon J. Schlesinger, P.A.

37. C. Steven Yerrid, Yerrid, Knopik & Krieger, P.A.

38. Robert M. Montgomery, Jr., Montgomery & Larmoyeux

39. John Romano, Romano, Eriksen & Cronin

40. Michael Eriksen, Romano, Eriksen & Cronin

41. Thomas Carey, Carey & Hilbert

42. Stuart C. Markman, Kynes, Markman & Felman, P.A.

43. Susan H. Freemon, Kynes, Markman & Felman, P.A.

44. Gerald J. Houlihan, Houlihan & Partners, P.A.

45. W. Robert Vezina, III, Vezina, Lawrence & Piscitelli, P.A.

46. Mary N. Piccard, Vezina, Lawrence & Piscitelli, P.A.

47. Lisa K. Bennett, Stearns, Weaver, et al.

48. NationsBank, N.A.

49. Jack Scarola, Searcy, Denney, et al.

50. Thomas M. Ervin, Jr., Ervin, Varn, Jacobs & Ervin

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INTRODUCTION

The certified question is:

> Are the funds derived from the tobacco settlement subject to disbursement by the trial court?

The question arises from three trial court orders: (1) an April 16, 1998 Order requiring the State to make a payment to its lawyers; (2) an April 24, 1998 Order requiring the transfer of escrowed funds to the State's lawyers, and (3) a May 15, 1998 Order transferring escrowed funds into the court's registry to protect and secure the Court's jurisdiction over the settlement proceeds.

Appellees Robert G. Kerrigan, Robert M. Montgomery, Jr., Sheldon J. Schlesinger, and their law firms are among those who filed charging liens. The recent opinion in *Kerrigan, Estess, Rankin & McLeod v. State of Florida*, 711 So. 2d 1246, (Fla. 4th DCA 1998), (*rehearing den.* June 29, 1998), fairly summarizes the facts relating to the settlement, the charging liens, and the trial court's violation of due process of law when it summarily quashed the charging liens.

The State's Brief is replete with *ad hominem*, hyperbolic attacks on the lawyers. No principled purpose is served by "nasty" (p. 4), "manipulated" (p. 5), "exorbitant" (p. 12), "ransom" (p. 18), or "constitutional firestorm" (p. 22). There is no support in the record for the State's assertions of, *inter alia*:

- the "essential terms" of the Fee Contract (p. 5-6) (the misleading indented paragraphs are not excerpts from the contract, but are merely the State's inaccurate characterizations)

- the Standard contract was "significantly revised and manipulated" by the lawyers (p. 5 n.3)

- the lawyers "attempted to amend the Contract" but the State did not agree (p. 6 n.7)

- the lawyers "simply deleted" from the Fee Contract requirements for legislation appropriation (p. 33)

- the lawyers knew the Fee Contract was subject to annual legislative appropriation (p. 32)

- by filing non-Medicaid claims, the lawyers were on notice that their fees would be paid by the defendants, not by the State (p. 6)

- Maher and Rice were designated by the lawyers to negotiate a settlement (p. 6)

- the State obtained a $11 billion+ settlement (p. 3)

- the settlement "provided for payment of <u>all</u> the State's attorneys' fees by the settling Defendants" (p. 7) (emphasis in original)

- No one ever advised the Governor or the Attorney General of an objection to the proposed fees provision (p. 8)

- the proposed fees provision in the settlement was in fact more advantageous (p. 8)

- the lawyers knew tobacco would pay their fees (p. 6)

- the fee was restricted to the estimated $1.0 billion for Medicaid claims only (p. 9)

- all of the settlement funds became State funds in September 1997 (p. 11)

- the court-ordered negotiations failed because of the demands of the Lawyers (p. 12)

The most extreme example of all of these unfounded (and untrue) assertions, meriting its own paragraph, is at page 43:

> The responsibility of the Settling Defendants to pay all private counsel fees and costs is undisputed.

(emphasis in original).

The certified question should be answered based on the undisputed record: the Fee Contract and the Settlement Agreement and the trial court's April 16, April 24, and May 15 Orders. Who said what to whom, and when, does not inform the certified question, nor its answer.

Because the State's Statement of the Case and Facts is so replete with innuendo, and fails to provide adequate information about the relevant proceedings below, we provide a Statement of the Facts and Proceedings Below.[1]

STATEMENT OF THE FACTS

A. The Authorizing Statute

Effective July 1, 1994, the Florida Legislature amended the Medicaid Third Party Liability Act and added § 409.910

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[1] Appellees' Appendix (which contains complete copies of the documents), is cited hereinafter as "KA". References to the State's Appendix and Supplement thereto will be denoted by "SA" or "SA(Supp)".

("Medicaid Act"). The Medicaid Act empowered the State to employ private attorneys to enforce its rights, and expressly authorized contingency fee agreements for up to thirty percent of any recovery. § 409.910(15)(b), Fla. Stat.

B. The Fee Contract

In February 1995, the lawyers (the "Lawyers") entered into a contingency fee contract (the "Fee Contract") with the State under § 409.910. (SA 58) The Fee Contract was between the State of Florida and a number of "independent law firms," called the "People's Trial Advocates" ("PTA") or "Providers" in the Contract. (SA 58 at 1) The Governor authorized the contract. (KA 13 at 7-8) The Fee Contract could only be modified in writing, signed by each law firm.[2] (SA 58 at 4, ¶ III.D)

Pursuant to the Fee Contract, the Lawyers assumed the entire financial risk of the litigation. The Lawyers could obtain compensation only if there was a recovery from the tobacco product manufacturers. (SA 58 at 11)

The State agreed to a fee of "25% of the recovery" (SA 58 at 10, 11 ¶ C.1-2), plus reimbursement for costs. *Id.* The 25% contingency fee applies to recoveries "awarded in any Final Judgments, Court Orders or negotiated settlement." (*Id.* at 11,

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[2] The State asserts that "all rights and obligations under the Medicaid Provider Contract flow to the PTA collectively." State's Brief at 5. That assertion is incorrect, as shown in Argument, Section II.C below.

¶ C.2) Fees were due only if and as recovery proceeds were paid. The fee was to be computed "solely on the basis of the total amount of monies actually recovered and transmitted, together with all accrued interest." (SA 58 at 11, § B.6.)[3]

The State had a difficult time getting lawyers to take the case. (KA 14 at 310) The financial risks of suing the tobacco companies that were undertaken by the Lawyers were specifically and extensively acknowledged by the State:

> **The State of Florida can not handle this lawsuit on its own. . . .** The tobacco companies are known for their scorched earth litigation tactics, and can be anticipated to simultaneously do everything possible to drag out the litigation. If the State handled it, the suit would take literally 100s of lawyers and expend most of the State's legal resources. By having a

[3] The State contends repeatedly that the Fee Contract pursuant to § 409.910 only covers a portion of the recovery, the portion said to be "Medicaid claims". (E.g., State's Brief at 4, 5) This contention is in direct contradiction to the statute. Section 409.910(15) authorizes the State to enter into agreements to collect "third party benefits." The State is also authorized under subsection (19) to take "any civil action permitted at law or equity to recover the greatest possible amount, including without limitation, treble damages under s. 772.73. [RICO]" "Third party benefit" means any benefit available from, *inter alia*, a judgment or settlement. §409.901(26) "The term includes, without limitation, collateral, as defined in this section . . ." *Id.* Collateral is defined in subsection (6) as "any and all causes of action, suits, claims, counterclaims, and demands related to Medicaid, including settlements . . . ." These statutory sections, none of which are referred to in the State's Brief, make it abundantly clear that all the causes of action asserted by the State in the tobacco litigation sought "third party benefits" under Section 409.910, and are therefore covered by the Fee Contract.

> private trial team, the State can continue to maintain the protection of Floridians and take on the tobacco industry. . . . the State of Florida located the top lawyers in the State with experience in pursuing similar actions and who would agree to aggressively pursue this cause using their own money. **The listed Providers were hired by the State of Florida at no cost, with these lawyers taking the full risk.**
>
> In light of the fact that **the trial team is taking all the risks**, and the fact that **not a single case of this nature has ever been won**, the State of Florida has determined that **it is not appropriate to place taxpayer dollars at such risk**. The State will ask the Court to require the tobacco companies to pay all the attorney fees and costs. **The State and the Providers have agreed upon a fee of 25% of the recovery**, plus out-of-pocket costs incurred by the Providers to the extent the recovery meets or exceeds the total costs, with a contribution being committed by the tobacco team lawyers toward health related charities and organizations.

(SA 58 at 10, § A; emphasis added)

The State agreed in the Fee Contract that any litigation proceeds would not be paid directly into the Treasury, but would be placed in a joint bank account in the name of the State and the Lawyers. (SA 58 at 11, Attach. I ¶ B.6)

The Fee Contract was budget-neutral and self-funding: no Treasury funds were spent on private attorneys, and no appropriations from the legislature were needed or sought for that purpose. "The listed Providers were hired . . . at no cost

[to the State] . . ."; "taxpayer dollars" were not placed at risk. (SA 58 at 10, Attach. I at 2, ¶A)

C. The Litigation

The Lawyers filed the State's lawsuit against the Tobacco Defendants on February 21, 1995. The defendants committed huge resources to defeat the State's case. Massive discovery, motion practice and many appeals ensued, including proceedings in this Court. *See, e.g., Agency for Health Care Admin. v. Associated Indus., Inc.*, 678 So. 2d 1239 (Fla. 1996). A majority of the Senate voted to repeal the enabling statute, and the Governor's veto of the repeal was narrowly sustained. (KA 14 at 72)

After two and a half years, jury selection began on August 1, 1997. During *voir dire*, the prospective jurors were repeatedly told that the recovery sought by the State was $12.3 billion. (KA 2, *passim*). At no time during the litigation did the State question the Fee Contract, or its contingent fee terms. (KA 14 at 94-95) Indeed, at his deposition on July 23, 1997, only a month before the settlement, Governor Chiles affirmed the State's contractual agreement to pay 25% of any recovery to the State's private lawyers. (KA 1 at 99)

D. The Settlement

In late August 1997, while jury selection continued, the State negotiated a settlement with five major tobacco product

manufacturers (the "Settling Defendants").[4] (SA 56) The Settlement Agreement, dated August 25, 1997, settled all of the State's claims with the exception of one count for non-monetary, equitable relief. (That count was later dismissed voluntarily in April 1998. SA 9.)

The State publicly announced an $11.3 billion recovery, although no such figure appears in the Settlement Agreement. (SA 56, *passim*) The Settlement Agreement provides for two initial payments by the Settling Defendants in 1997 totaling $750 million. (SA 56 at 8-9) These payments were made on September 15, 1997. State's Brief at 10-11. The only other payment with a specific dollar amount is $220 million to be paid on September 15, 1998. (SA 56 at 10, ¶ 3)

Thereafter, the annual settlement payments over an unspecified period of time are based upon a formula that is subject to adjustment, depending on a variety of factors, including whether a pre-emptive federal settlement is enacted by Congress, and "domestic volume reduction" (which is not defined or explained.) (SA 56 at 9-11) The present value of the

[4] The negotiations were kept secret not only from the public, but, on the direct order of the Attorney General, from all of the lawyers except the two picked by the Attorney General. (KA 17 at 22-24, 118; KA 14 at 24-25)

uncertain stream of future settlement payments, whatever they may be, has never been computed, much less adjudicated.[5]

The Lawyers are not parties to the Agreement. The only parties to the Settlement Agreement are the State and the Settling Defendants; they are the only signatories. (SA 56 at 17) The Agreement states there are no third-party beneficiaries. (SA 56 at 16, § VI.H)[6] The Settlement Agreement makes no mention of the Fee Contract, and nowhere purports to modify, supersede, or vitiate that Contract. *Id.*[7]

The Settlement Agreement includes a provision in which "Settling Defendants agree to pay . . . reasonable attorneys' fees to private counsel." (SA 56 at 14 ¶ V). The Settling

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[5] For example, the Attorney General testified that he has no idea how much money Florida will receive in the future. (KA 14 at 415-16) The Governor has not done an analysis. (KA 13 at 81)

[6] The State contends that the lawyers were "legal representatives," as defined in Section I.B. of the Settlement Agreement. State's Brief at 46 n.33. This is not correct. The Fee Contract was made expressly pursuant to § 409.910. (SA 58) The definitions governing that section are found in § 409.901. "Legal representative" is defined in subsection (11) to mean a guardian, conservator, survivor, or personal representative of a recipient or applicant, or of the property or estate of a recipient or applicant.

Therefore, the lawyers were not "legal representatives of the State." There simply is no basis for arguing that the lawyers were bound by the fee arbitration provisions or any other aspect of the Settlement Agreement.

[7] The State asserts that the trial attorneys modified the Fee Contract without the assent of the State. (State's Brief at 5 n. 3) There is no record evidence of any such modification.

Defendants did not agree to reimburse the full 25% contractual fee. (*Id.*)[8] Instead, the amount agreed to be paid by the Settling Defendants is to be determined in an undefined arbitration process, subject to undefined "caps" and "other conditions." (*Id.*) Long after August 25, the participants in the settlement conceded that the Settlement Agreement "does not and was not intended to reflect the entire agreement of the parties . . ." (KA 12 at 1-2; *see also* KA 17 at 52: "there was a lot that was being left open . . . .") No date is specified by which time the arbitration should begin or end. (SA 56 at 14 ¶ V) [9] (These provisions as written were so vague that they were unenforceable. See Section H below.)

On the eve of the settlement, Sunday, August 24, 1997, the Governor, the Attorney General, and defendants' lawyers met with Circuit Judge Harold J. Cohen at the Attorney General's West Palm Beach office. (KA 11 at 40-41, 45-46,49). According to Judge Cohen, they advised him that they had reached a binding,

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[8] The Fee Contract says that "The State will ask the Court to require the tobacco companies to pay **all** the attorney's fees and costs." (SA 58 at 10. Attach. I ¶ A). This was not done.

[9] The State claims that Rice was a "Designee" who *requested* that the essential terms be left out of Article V. There is no record evidence supporting such a designation by the Lawyers. (*See* KA 17) Rice was picked as a negotiator by the Attorney General. (KA 14 at 153) There is no evidence that Rice had any authority to negotiate for these Appellees. The Fee Contract could only be modified in writing signed by all of the Lawyers. (SA 58 at 4)

final settlement. (*Id.* at 46-48, 56, 58-59, 67) Of the private law firms representing the State, however, only two--the firms of Rice and Maher--were represented at this meeting.[10] (KA 6 at 7-8; KA 11 at 51) Maher and Rice were there to assist the State, not to represent the interest of the Lawyers as to their rights under the Fee Contract. Many of the Lawyers, including Kerrigan, Montgomery and Schlesinger, were deliberately excluded from such discussions by direction of the Attorney General. (KA 14 at 24-25; KA 17 at 22-24, 118)

Kerrigan, Montgomery (the State's lead trial counsel) and Schlesinger did not learn of the settlement until later that evening. The Governor had arranged a dinner with the Lawyers in Palm Beach at Montgomery's home. (State's Brief at 7; KA 13 at 166) After the meal was over, the Governor rose and informed the Lawyers that the case had been settled for $11.3 billion. (KA 13 at 121-22, 166-67; KA 16 at 97-98) (The Governor later testified that he had no basis for that amount. (KA 13 at 81) The Attorney General testified similarly. (KA 14 at 415-16)) The Governor did not discuss the Fee Contract or explain the attorneys' fees scheme. (KA 13 at 166-67) After celebratory

[10] The evidence would show that Rice and Maher may have been motivated at the time by their interests in the representation of other states and the proposed national settlement. (*See* KA 17 at 102) Kerrigan, Montgomery and Schlesinger only represented Florida, and had no such other interests. (*See* KA 16 at 29)

champagne toasts, the Governor retired to bed. (KA 16 at 97-98; KA 13 at 166-67)

Then, Rice and Maher disclosed for the first time to the others present, including Kerrigan, Montgomery and Schlesinger, that legal fees were to be paid by the Settling Defendants *via* an arbitration process.[11] (KA 16 at 100, 104-115). (Two of the Lawyers, Yerrid and Nance, were not even present. KA 16 at 103-04) No draft of the agreement was presented during the discussion. (KA 17 at 221-22) Kerrigan, Montgomery and Schlesinger rejected (and continue to reject), any abrogation of their rights under the Fee Contract. (KA 16 at 110-115)[12] Neither Rice nor Maher had authority to compromise the rights of the other law firms under the Fee Contract. The State and some of the Lawyers assumed a majority could bind the trial team (KA 14 at 66, 88, 90, 257, 261, 412; KA 13 at 122), but no legal research was conducted to support their theory (KA 17 at 141-42, 162; KA 14 at 258-59, 414; KA 13 at 122-23), which was contrary

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[11] The State asserts that Governor Chiles asked PTA members to let him know if they objected to the settlement terms. See State's Brief at 8. In fact, the Governor's testimony is that he left for bed before these and other appellees were even told of the fee provisions, let alone approving or rejecting it. (SA 63 at 166-167).

[12] Kerrigan, Montgomery and Schlesinger have previously advised the State that they will assist the State to recover fees from the Tobacco Defendants in order to indemnify or reduce the State's contractual obligation to them.

to the Fee Contract and Florida law.[13] The Attorney General testified that he proceeded on the assumption that the Fee Contract had been replaced on the basis of a "thumbs up" gesture from Rice sometime after midnight. (KA 14 at 360)

STATEMENT OF PROCEEDINGS BELOW

A. The Charging Liens

At the earliest opportunity, 8:23 a.m. on the following Monday morning, August 25, 1997, the first charging lien was filed by Kerrigan "for and on behalf of any attorney of record for the Plaintiff that may wish to assert a lien for fees." (KA 4) (This key fact is not mentioned in the State's Brief, and this notice of lien is not contained in the State's Appendix). Montgomery and Schlesinger, among others, filed additional charging liens over the next several days.[14] (SA 55) By February 1998, twelve law firms had filed or joined in charging liens.[15]

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[13] See Argument, Section II.C below.

[14] Several of these charging liens referred to a settlement of $11 billion, but the Lawyers who filed them had relied on the Governor's use of that figure on Sunday night. The pending motion to enforce charging liens seeks 25% of the $750 million paid to date. (KA 44)

[15] Five firms initially filed charging liens. (SA 55) A sixth firm, that of Howard, filed a lien on October 28, 1998. (SA 55) Gentry, Phillips and Hodak, P.A., filed a seventh charging lien on February 2, 1998, citing the State's "efforts to avoid compensating its private counsel" and its "refus[al] . . . to make necessary arrangements to provide reasonable compensation or security for their fee." (SA 40 at 4) Three additional firms, those of Rice, Hogan and Fonvielle, joined Gentry's lien.

B. The Approval Ceremony

Several hours after the first charging lien had been filed of record, the State and the Settling Defendants presented their Settlement Agreement in open court in a brief ceremony. (They had actually signed it prior to the court proceeding. (KA 16 at 63-64; KA 14 at 427) The terms of the Settlement Agreement were not described, and there was no mention of any dollar amount of the settlement. (KA 3) The trial court summarily approved the Settlement Agreement as an enforceable order of the court.[16] (SA 56; KA 3 at 2817) Kerrigan, Montgomery and Schlesinger did not receive copies of the Settlement Agreement or any drafts of it until after the courtroom ceremony. (KA 16 at 63-64; SA 26 at 167))

Kerrigan, Montgomery and Schlesinger were required to abide by their client's decision to settle its case.[17] Similarly, they had no right or obligation to appeal the settlement order

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(SA 32,33) Finally, on February 3, 1998, Scruggs, Maher and their firms announced their joinder in Gentry's lien as well. (SA 36 at 66)

[16] The State and the Settling Defendants did not disclose all of the material terms of their settlement to Judge Cohen. In subsequent proceedings, the trial court has learned that the Settlement Agreement left many material terms to be resolved, and other "side deals" were being negotiated which the parties concealed from the Court and the lawyers. (KA 9 at 41,45,50,51; KA 12 at 2-3 and Exhibits) (See Section C of the Facts above.)

[17] *See* Fla. Bar Rule 4-1.2(a); Rule 4-1.5, Statement of Clients' Rights ¶ 10; *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v.*

itself. The charging lien was filed to protect their rights under the Fee Contract.

C. The Attorney's Fees Dispute

On September 8, 1997 the State moved to quash the charging liens. (SA 53) At the hearing on September 11, 1997, the State argued that "sovereign immunity" barred the charging liens. (SA 51 at 13-17; 47-51) The State did not question the validity of the Fee Contract itself. To the contrary, the State told the trial court "we are not seeking to quash their contract." (*Id.* at 50) Nor did the State claim that the agreed fees were not owed; the State argued only that because of "sovereign immunity," the fees should not be paid from the recovery. (*Id.* at 13-17, 47-51).

The State also contended in its motion and memorandum that its settlement of the case was a "novation" of the Fee Contract, which excused the State from all of its obligations to the Lawyers. (SA 53). This argument was not pursued at the hearing. (SA 51 at 47-48)

The Settling Defendants asked for relief in the nature of interpleader, so that they could avoid additional liability as a result of the charging liens. (SA 54) They asserted that the Settlement Agreement was not intended to alter the Lawyers' rights under the Fee Contract, acknowledging: "private counsel

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Scheller, 629 So. 2d 947 (Fla. 4th DCA 1993).

can pursue any contingent fee contractual rights they may have. . . ." (SA 54)

D. The Settlement Proceeds are Escrowed

On September 11, 1997, the trial court granted the defendants' motion and ordered the settlement payments of $750 million to be deposited by the defendants into a court-supervised escrow account, *i.e.*, in *custodia legis*. (SA 52) The State consented. "We have no objection to the Court having supervision. In fact, the state invites it." (SA 51 at 61) Moreover, the State stipulated that the Lawyers could be paid without any legislative action: "[N]obody is asking them to go to the legislature." (SA 51 at 63)

The State did not appeal the order of September 11. As ordered, the State and the Settling Defendants created escrow agreements with a bank as escrow agent. (The agreement was not approved by the court). In those agreements, the State inserted language purporting to alter the Lawyers' contract rights, and qualifying the trial court's authority over the funds. (*See* SA 49) When this language was first called to the court's attention in April 1998, it was stricken as contrary to the court's orders. (SA 6, April 24, 1998 order)

Also in the order of September 11, 1997, the trial court stayed all proceedings for 60 days, and ordered the lawyers and

the State to attempt to negotiate their differences before a facilitator. (SA 52)

E. The November 12 Order

After negotiations of the fee dispute proved unsuccessful, on November 12, 1997, the trial court ruled *sua sponte* that the Fee Contract violated the Rules Regulating Florida Bar, and was therefore invalid. (SA 46 at 2-5) Without evidence or argument, the trial court assumed that the total amount of the settlement would be $11.3 billion, and that the Lawyers would be paid $2.8 billion under the Fee Contract. (*Id.* at 4) The trial court summarily ruled, without evidence or argument, that this was a *per se* unconscionable fee; as a result, the entire Fee Contract was held unenforceable. The court stated that no evidence would ever cause it to change its mind. (*Id.*)

Six law firms appealed the November 12 Order. On May 18, 1998, the Fourth District quashed the November 12 Order and remanded for further proceedings. *Kerrigan, Estess, Rankin & McLeod v. State of Florida*, 711 So. 2d 1246 (Fla. 4th DCA 1998).

F. Montgomery Sues for Interference

On November 18,1997, Montgomery filed suit against the Settling Defendants and Maher for tortious interference with the Fee Contract. (SA 45) Montgomery alleged that the deal struck among Maher, the State, and the Settling Defendants was collusive, unauthorized, and designed to impair the Fee Contract

rights of other Lawyers. (*Id.*) (Rice and his South Carolina law firm were later added as defendants.)

The Tobacco Defendants removed the case to federal court alleging that Montgomery had "fraudulently joined" Maher to defeat diversity. On January 14, 1998, United States District Judge Alan S. Gold remanded the case. *Montgomery & Larmoyeux v. Philip Morris Inc.*, 992 F. Supp. 1372 (S.D. Fla. 1998). In his order, Judge Gold concluded that the Lawyers were not a "collective," but had separate and independent contractual rights under the Fee Contract. *Id.* at 1375. It was therefore possible that Mr. Maher had wrongfully interfered with the contract rights of his co-counsel. *Id.*[18]

G. Court Supervision of the Settlement Funds Continues

In January and February 1998, the State successfully requested the release of hundreds of millions of the escrowed funds to the Treasury. In court, the Attorney General specifically acknowledged the Court's right to disburse the funds: "[Y]ou have to approve that money coming out." (KA 10 at 24)

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[18]Although the State implies otherwise (State's Brief at 12), Judge Cohen himself permitted Montgomery's discovery to go forward in the tort case. (KA 10 at 68) When Montgomery's lawsuit was challenged by the State (a non-party to that case), Judge Cohen expressly ruled that he never intended to impair discovery in another case, and that Montgomery had a "good faith" basis to bring the tort action against the named defendants. (*Id.* at 65)

H. The Most Favored Nation Orders

Pursuant to Article IV of the Florida Settlement Agreement, the so-called "Most Favored Nation" or "MFN" provision, the State has the right to incorporate into its agreement more favorable terms of subsequent tobacco settlements. (SA 56 at 13) On January 22, 1998, the State of Texas entered into a settlement agreement with the tobacco industry (the "Texas Agreement"). (SA 40, Ex. 3) The Texas Settlement triggered the two orders that are central to the certified question.

In Texas, unlike Florida, the parties settled their case ***with*** the knowledge, participation and consent of all of Texas' private lawyers. (SA 40, Ex. 3) Texas' private lawyers' signed the Texas settlement agreement. (*Id.* at 30) The rights of the Texas lawyers under the fee contract were expressly preserved. (SA 40 Ex. 4 (Texas Agreement, Ex. 1 at 2 § 2(a))) The State of Texas and the tobacco industry each agreed to advance $50 million toward the payment of attorneys' fees. (SA 40, Ex. 4, Texas Agreement, Ex. 1 at 6 § (2)(f)(i)) The tobacco defendants also agreed to reimburse the State of Texas for part of its attorneys' fees through an arbitration proceeding. (*Id.* at 6-7)

In consideration for the $100 million in advance payments, the Texas lawyers agreed to defer (but not to waive) collection of their contractual 15% contingency fee from the settlement until Texas received its arbitration payments. (*Id.*) The

lawyers in Texas voluntarily released the tobacco industry from further liability for fees.[19] (*Id.*)

The Texas attorney's fee provision was justified as more favorable to Florida because on November 12, Judge Cohen had ordered the Lawyers to arbitration under the Settlement Agreement as their sole basis for recovery of fees. (SA 46) In February and March, Judge Cohen was told by Lawyer Gentry that the arbitration provisions in the Settlement Agreement were so vague they were unenforceable. (SA 36 at 36-41, 43-51; SA 26 at 179-180) Therefore, Gentry argued, Texas incorporation was essential to give meaning to the Florida Settlement Agreement's arbitration provisions. *Id.* In other words, the Texas incorporation issue arose as a result of the November 12 Order, which has since been quashed.

1. The State's Proposal

On March 6, 1997, the State of Florida filed a motion in the Circuit Court to adopt selected terms from the Texas Agreement. (SA 25) The State wanted to incorporate the Settling Defendants' obligation to immediately advance $50 million towards attorneys' fees, but did not want to incorporate the

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[19] The United States District Judge in Texas ruled that Texas' contingency fee contract with its attorneys was reasonable and enforceable. Memorandum Opinion and Order, *State of Texas v. American Tobacco Co.* No. 5: 96cv91 (W.D. Tex. Jan 22, 1998) (KA8).

Texas obligation that the State itself advance $50 million from the state's recovery. (SA 25 at 4) Moreover, unlike Texas, the State of Florida sought to make the fee arbitration the exclusive method of payment to private counsel, thereby unilaterally eradicating the Fee Contract. (*Id.*; *see also* KA 23 at 4-5)

2. Gentry's Proposal

Gentry, one of the Lawyers and a charging lien holder, submitted his own proposal, requiring the State to advance $50 million to match Tobacco. (*See* SA 40)

3. The Settling Defendants' Position

The Settling Defendants objected, noting that the arbitration in Texas was consensual, not forced. The Texas scheme, therefore, did not fit the Florida situation. (KA 25 at 3-4). In their own proposal, the Settling Defendants demanded, *inter alia*, a general release from the Lawyers. (SA 22 at 3 Ex. at 3 ¶ 5(c))

4. Kerrigan, Montgomery and Schlesinger Object

All of these proposals would have altered the Fee Contract without the consent of all of the Lawyers, which was expressly required by the Contract. (SA 58 at 4)

Kerrigan, Montgomery and Schlesinger therefore objected to all of the proposals as inconsistent with their rights to compensation as set forth in their express, statutorily-

authorized contract with the State of Florida. (KA 24, 26 at 12-16) For example, the State refused to incorporate the critical Texas provision preserving the rights of the Lawyers under their Fee Contract. (KA 24 at 2) Here, the trial court was simply imposing arbitration by judicial fiat upon the unwilling participants, in violation of Florida law. (*Id.* at 5-6)

Kerrigan, Montgomery and Schlesinger argued that instead of adopting any of the MFN proposals, the court should rescind its November 12 Order and reinstate the charging liens. (KA 24 at 3)

5. The April 16, 1998 MFN Order

On April 16, 1998, the trial court entered its Most Favored Nation ("MFN") order. (SA 1) The trial court essentially accepted Gentry's proposal over the objections of the State, Tobacco, and Kerrigan, Montgomery and Schlesinger. The Court ordered the transfer of $50 million of escrowed settlement proceeds to the Lawyers. (SA 1 at 4) This payment was to be set off against the proceeds of the arbitration. (SA 1, Ex. 1 at 6)

The court ordered the Settling Defendants to match the State's transfer with an additional payment of $50 million. (*Id.* at 6-7) The court ordered the Lawyers to defer all claims for fees until the fee arbitration was concluded. (*Id.* at 5)

6. Fourth District Case No. 98-1430: The April 24th Most Favored Nation Transfer of Funds

On April 24, 1998, the trial court ordered the escrow agent to immediately transfer $50 million of the escrowed recovery to one of the Lawyers on behalf of all of them. (SA 6) Although the State had stipulated that "nobody is asking them to go to the legislature" (SA 51 at 63), the State now contended that the legislature was in fact in control of the settlement fund in the court-ordered escrow account. The Fourth District granted an emergency stay, which remains in effect. (SA 5) The State's appeals from portions of the April 16th and April 24th MFN orders are the subject of Fourth District Case No. 98-1430.

7. Fourth District Case No. 98-1669: the Settling Defendants' Obligation to Pay $50 million

Because the State refusal to pay $50 million, the Settling Defendants requested relief in the trial and appellate courts from their matching obligation to pay $50 million under the MFN order. (KA 31, 32) On May 15, 1998, the Fourth District stayed the Settling Defendants' obligation to make their $50 million matching payment. (KA 35)

The Settling Defendants' objection to paying $50 million toward attorneys' fees is the subject of Fourth District Case No. 98-1669.

I. The Confiscation Statute, and The Trial Court's Transfer of Funds to the Registry of the Court

On May 1, 1998, the Florida Legislature passed a bill that includes an amendment purporting to confiscate all of the settlement proceeds in the court-supervised escrow account. The statute specifically expropriates

> funds on deposit in accounts 3660512058 and 3660510843 at NationsBank, N.A., pursuant to Escrow Agreement dated September 15, 1997, and raised as a result of litigation entitled *The State of Florida et al. vs. American Tobacco Company, et al.*, Case #95-1466 AH, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County . . . ."

Senate Bill 1270, Section 3. Senate Bill 1270 also provides:

- the entire escrow account in *custodia legis* is declared "state funds" (§ 3(1));
- the Comptroller is directed to demand all of the money in the account, and if refused, to sue NationsBank in a mandamus lawsuit to "affirm" the state's "title" to the funds (§ 4(1));
- the Comptroller's lawsuit against NationsBank can be heard only in Leon County (*id.*);
- other interested parties, (i.e., the Lawyers and the Settling Defendants) are statutorily denied any right to intervene in the Comptroller's lawsuit (*id.*); and

- all future settlement payments are declared "state funds."

(KA 29, Ex. at 5-6)

J. The Transfer Order

Several charging lienholders filed motions with the Circuit Court to transfer the escrowed $187.5 million plus interest into the Registry of the Circuit Court. (KA 29, 30)

On May 15, 1998, shortly before Senate Bill 1270 was signed into law by the Governor[20], the trial court transferred 25% of the settlement proceeds--$187.5 million plus interest -- from NationsBank into the Registry of the Court of the Fifteenth Judicial Circuit (the "Transfer Order').[21] (SA (Supp.) 1) The court stated that the Transfer Order was entered to protect its jurisdiction and the rights of the parties to a lawful adjudication of their fee claims. *Id.*; *see also* SA 4 at 55-56:

> THE COURT: The Court has looked at the statute, and it does appear to me to be unconstitutional as to those protections [sic] that seek to appropriate those funds, bar interested parties who might have some claims on those funds from even being heard, it appears to be to be a violation of due process. It appears to be a violation of separation of powers, and violation to arguably impair a contract . . . .

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[20] Ch. 98-63 § 3(2), 1998 Fla. Sess. Law Serv. 268 (West).

[21] The State labels this order, the "Judicial Appropriation Order." State's Brief at 3.

> So there are three major constitutional problems with those provisions in the bill that seeks to direct the comptroller from [sic] taking funds from NationsBank. That is, on its face, reading from the statute.

Senate Bill 1270 referred only to the NationsBank accounts, and did not authorize the Comptroller to confiscate funds directly from the Registry of the Court. Accordingly, the trial court reasoned that the funds could remain safely in its Registry until the Lawyers' rights to compensation were adjudicated. (SA (Supp.) 1)

As a result of the Transfer Order, the funds to pay the attorney's fees have not been confiscated by the State, but remain in *custodia legis*, in the registry of the court. (KA 38).

K. Fourth District Case Nos. 98-1738 and 98-1747: The State Seeks Prohibition, Mandamus, Appellate Review and Other Relief

On May 15, 1998, the State filed Case No. 93,009, seeking a writ of prohibition or mandamus from this Court to preempt or reverse any such transfer. (KA 36) By order of May 18, 1998, this Court transferred the petition to the Fourth District Court of Appeal, creating Fourth District Case No. 98-1738. (KA 37)

The State also filed an emergency motion asking the Fourth District to "undo" the Transfer Order, i.e., to compel the return of funds in the registry to NationsBank (so that the Comptroller could seize them). (KA 33)

Finally, the State filed a direct appeal of the Transfer Order in the Fourth District, Case No. 98-1747. (KA 34)

By orders dated May 26, 1998, and June 11, 1998 the Fourth District certified a question in Case Nos. 98-1430, 98-1669, 98-1738 and 98-1747 to this Court. (KA 39, 42)

L. The *Kerrigan* Decision

Meanwhile, on May 18, 1998 the Fourth District granted certiorari and reversed the November 12 Order quashing the charging liens. *Kerrigan, supra.* The Fourth District ruled that the trial court denied due process to the petitioning Lawyers when it *sua sponte* declared the Fee Contract "unconscionable." 711 So. 2d at 1248-49. The appellate court remanded so that Kerrigan, Schlesinger, Montgomery, and other petitioners could be heard on their charging liens.[22]

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[22] Following the denial of rehearing in *Kerrigan,* Messrs. Kerrigan, Montgomery, and Schlesinger and their law firms filed a motion to disqualify Judge Cohen. (SA (Supp.) 3) The motion was premised on Judge Cohen's public declaration in the November 12 Order that his position on attorneys' fees was immutable, *id.* at 2-12, and that he was a material witness to the secret settlement meetings on the night of August 24th, 1997. *Id.* at 13-14.

Judge Cohen granted the motion and recused himself on July 9, 1998. (SA (Supp.) 2). However, in his order recusing himself, Judge Cohen defended his (quashed) November 12 Order, and warned that the lawyers' charging liens would cause the legislature to assume control of the legal profession. Obviously, these remarks were improper (see Rule 2.160(f), Fla. R. Jud. Admin).

The State's repeated invocations of Judge Cohen's recusal order and its *ad hominem* attacks should be disregarded. They beg the real questions, and reveal the State's preference for stridency over reasoned argument. In any event, the July 9 order

The Fourth District acknowledged but did not rule upon the State's claimed defense of sovereign immunity.[23] The State is now seeking discretionary review of *Kerrigan* in this Court, Case No. 93,614. (KA 46)

M. Status of Proceedings Below

After nearly a year of hearings and appeals, proceedings were finally underway below to determine the rights of private counsel under the Fee Contract. On July 10, 1998, Kerrigan, Montgomery, and Schlesinger filed, for the first time, a Motion to Enforce Charging Liens, seeking fees based on 25% of the $750 million recovery to date. (KA 44) To prevent that motion from being heard, the State sought a writ of prohibition, and an order to show cause was entered by this Court on August 10, 1998 (Case No. 93, 633), which stayed all proceedings in the trial court. *See* Fla. R. App. P., Rule 9.100(h).

This brief is filed on the eve of the one year anniversary of the August 25, 1997 settlement. The State has received over $550 million from the settlement; the Lawyers have not received one penny of legal fees.

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post-dates all of the orders on appeal, making it inappropriate for inclusion in the State's appendix.

[23] Nevertheless, the State moved for rehearing and certification, arguing that the November 12 Order was correct because the State enjoyed absolute sovereign immunity from the Lawyers' claims. (KA 41) The Fourth District denied rehearing. (KA 43).

SUMMARY OF THE ARGUMENT

If the State had abided by its Fee Contract and followed the terms of the Settlement Agreement, this dispute would not have occurred. The Fee Contract called for a contingent fee of 25%. The Settlement Agreement called for the defendants to pay "reasonable attorneys' fees." Thus, like any statutory or contractual fee shifting case, the plaintiff is obligated to pay the contractual contingent fee, and then is indemnified by any amount received from the defendant. Had the State honored the complementary obligations created by the Fee Contract and the Settlement Agreement, there would have been no need for the April 16 and April 24 MFN Orders.

Those Orders were an attempt by the trial court to make the State assume at least some of its obligation to pay fees to its Lawyers. But the Orders should be reversed because the court had no authority to impose the Texas terms. Therefore these Appellees do not address the State's arguments aimed at the two MFN Orders, because they agree that the trial court exceeded its authority in entering those Orders.

The Settling Defendants want the two MFN orders reversed and remanded, but with directions to revise the orders to incorporate a release provision that is favorable to them, but detrimental to the Lawyers, requiring the Lawyers to release all claims against the defendants, including tortious interference claims and claims

under the charging liens. Settling Defendants' Brief at 7, 13. For the reasons summarized above, the MFN orders should be reversed; they should certainly not be modified, which would compound the trial court's error.

The May 15, 1998 Order, which transferred funds from the previously established escrow accounts to the registry of the court, should be affirmed.

The funds in *custodia legis* are not "State funds." Payment of attorneys' fees pursuant to an express written contingent fee contract with the State is not a matter of legislative appropriation. The contract never contemplated nor required any expenditure of State monies.

Nor did Senate Bill 1270 preclude the Court from protecting the funds subject to the charging liens. First, the bill was not law when the Order transferring the funds to the Registry of the Court was entered. Second, it violated the Florida and United States constitutions, most obviously the Separation of Powers provisions of the Florida Constitution. In addition, Senate Bill 1270 impairs vested rights, denies access to the courts, is an unconstitutional special law, violates the single subject requirement of the Florida Constitution, and violates Florida and federal due process of law principles.

The validity *vel non* of the charging liens is not before this Court. That is the subject of the motion to enforce

charging liens pending in the trial court following remand in *Kerrigan*. In any event, the State is wrong as to the validity of the charging liens. The Fee Contract with the State is enforceable; sovereign immunity is no defense to a statutorily authorized contract.

The certified question should be answered affirmatively: The proceeds from the recovery resulting from the tobacco settlement are in *custodia legis* and are subject to disbursement by the trial court. How and when the funds should be disbursed must await disposition of the motion to enforce the charging liens that is pending below.

ARGUMENT

I.

THE COURT HAD AUTHORITY TO DISBURSE THE TOBACCO SETTLEMENT FUNDS IN *CUSTODIA LEGIS*

The essence of the State's argument is captured in this quotation from its Brief:

> [I]f the Settlement Funds are in fact "State Funds," then unquestionably such Funds could be disbursed and spent only through Legislative appropriation . . . . In short, had the State been any other plaintiff receiving a settlement award, the court may well have had the authority to impose a charging lien and disburse certain settlement proceeds to the lawyers. But the State is not "any other plaintiff." Its settlement funds are State funds.

State's Brief at 23 (emphasis in original). Not a single citation of authority is offered by the State to support the novel notion that its governmental "persona" changes the usual rules of litigation recovery and payment of attorneys' fees. *See* State's Brief at 23-25. Indeed, the State's resort to Senate Bill 1270 as the vehicle for expropriating the escrowed funds from the registry of the court indicates that established law did not aid its cause, so self-help was necessary. As shown below, the proceeds to be paid from the settlement are not "State funds" until they are paid to the State and deposited into the Treasury. Senate Bill 1270 is both inapplicable and unconstitutional.

A. The Settlement Proceeds in *Custodia Legis* Are Not "State Funds" Until Paid into the State's Treasury

The State contends that as soon as the Settlement Agreement was signed, all proceeds of the settlement became "State funds," even though nothing had yet been paid to or received by the State. (State's Brief at 23 ff.). The State then contends that as "State funds," the proceeds could not be subjected to the imposition of charging liens.

By statute, state funds are "all moneys received by the state," which shall be deposited into the State Treasury. § 215.32(1). Obviously, the funds at issue have not been

"received" by the State and deposited into the Treasury. The funds are in the registry of the court. "Property in *custodia legis* will remain there, by operation of law, until it is withdrawn by order of a competent court." *Adams v. Burns*, 126 Fla. 685, 172 SO. 75, 79 (1936). That is sufficient to conclude this issue.

In a case directly on point, Maryland's highest court recently rejected the same "state funds" argument presented here. *See Philip Morris, Inc. v. Glendening*, 709 A. 2d 1230 (Md. 1998). The Maryland court held that enforcement of a contingency fee agreement between the state and private lawyers pursuing its tobacco litigation would not constitute an unlawful appropriation of "state funds:"

> [T]he gross recovery from the tobacco litigation is not "State" or "public" money subject to legislative appropriation until the State has fulfilled its obligation under the Contract, collected the recovery, net of the contingency fee and litigation expenses, and deposited the funds into the State Treasury.

Id. at 1241. The reasoning of *Glendening* is dispositive of the "state funds" and "appropriation" arguments presented here.

If further consideration of the issue is warranted, the applicable statute, the language of the Fee Contract, and dispositive law of charging liens, all of which are ignored in

the State's Brief, show the State's argument to be without merit.[24]

The statute provides that the State may enter into contingency fee agreements that provide for the attorney to be paid "a percentage of the amount actually collected . . ." § 409.910(15)(b). Similarly, costs are "to be paid from the department's recovery . . ." § 409.910(15)(c).

The Fee Contract was entered into "pursuant to Section 409.910 . . ." using a "contingency fee method of payments" under § 409.910(15). (SA 58 at 9, Attach. I, ¶ A) The Contract recites that the State has received the Statement of Client Rights under Rule 4 - 1.5, Rules Regulating the Florida Bar. (SA 58 at 5, ¶ G) Rule 4-1.5(f)(1) states that contingency fee agreements shall provide the percentage of the recovery "that shall accrue to the lawyer in the event of settlement . . . to be deducted from the recovery . . ."

The Fee Contract states that it does not place "taxpayer dollars" at risk, and that the Lawyers were hired at "no cost" to the State. (SA 58 at 10, Attach. I, ¶ A) The Lawyers are to receive "25% of the recovery." (*Id.*) If there is a recovery,

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[24] The State cites three cases for the proposition that the Settling Defendants "lost control" of the settlement funds when they were deposited into the court-supervised escrow accounts. (State's Brief at 25-26) Neither that proposition nor any of these cases has anything remotely to do with the issue in this case - the authority of a court with respect to funds held

including a settlement, the Lawyers shall "hold any monies received" in a joint account in the name of the Lawyers and the State, and the "contingency fee payments and percentages" shall be based on the money received. (*Id.* at 11, Attach. I, ¶ B.6) The Contract reiterates that the Lawyers are entitled to "a total contingency fee" of 25% "of the total sum of monies recovered . . ." (*Id.* at 11, Attach. I, ¶ C.2)

The Settlement Agreement provided for initial payments totaling $750 million to be paid by the Settling Defendants into escrow. (SA 56 at 8, § 2 ¶ B.1) The payments were to remain in escrow pending "Final Approval" as defined in the Agreement. (*Id.*; *see* § I. ¶ D.9 at 5-6) The Settlement Agreement did not mention the Fee Contract.

As a result of the filing of the charging liens, the Settling Defendants filed a Motion in the Nature of Interpleader on September 4, 1997. (SA 54) The motion sought "an Order allowing them [the Settling Defendants] to deposit all monies due to be paid under the Settlement Agreement on September 15, 1997, to the registry of the Court, or a special escrow account under the Court's supervision, until competing claims with respect to entitlement to the monies between the State and certain of its private lawyers can be determined." (*Id.* at 1) The motion recognized that as a result of the charging liens, the defendants

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pursuant to court order.

"were obliged to take action in order to protect the putative interests of the lienholders." (*Id.* at 2, ¶ 5).

The trial court granted the motion on September 11, 1997. (SA 52) The funds were ordered to be paid into an account where they would remain "until further order of this Court." (*Id.* at 2). The State said it had "no objection." (SA 51 at 61)

The trial court correctly summarized the situation in its order of April 16, 1998 (SA 1) "By agreement of the parties, this Court assumed exclusive jurisdiction over the settlement proceeds . . ." (*Id.* at 1, ¶ 1) "These sums have not been paid to the State of Florida but rather have been paid into an agreed escrow account under the jurisdiction of this Court pending further orders of this Court regarding disposition of such funds." (*Id.* at 2, ¶ 1).

Therefore, the funds subject to the charging liens are not "State funds," but are in *custodia legis*. It is the Lawyers who have "vested rights" to these funds as a result of their charging liens. *See Mabry v. Knabb*, 10 So. 2d 330, 336 (Fla. 1942). As a matter of law, a contingency fee agreement operates as an equitable assignment of a percentage of any recovery. *Forman v. Kennedy*, 22 So. 2d 890 (Fla. 1945); *United States v. Transocean Air Lines*, 356 F. 2d 702, 705 (5th Cir. 1966); *Litman v. Fine Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So. 2d 88, 92 n. 5 (Fla. 3d DCA 1987).

Since the proceeds of the settlement are not "State funds" until paid to and received by the State's Treasury, the trial court had and continues to have authority to order the disbursement of the funds. The only "disbursement" that has occurred (other than over $550 million disbursed to the State) is disbursement into the registry of the court. The authorities cited by the State as to the lack of judicial power to appropriate "State funds" are therefore inapposite. *See* State's Brief at 26-29.[25]

Finally, the State asserts that all State contracts are subject to appropriations by the legislature. State's Brief at 28. None of the authorities cited by the State supports this proposition. The State conceded in the trial court that it was not asking the Lawyers to go to the legislature. (SA 51 at 63)

The appropriations power is found in Article VII, § 1(a) of the Constitution, which provides that no money shall be withdrawn from the state treasury except by appropriations. Here, the legal fees are to be paid from the recovery, not from the Treasury. The appropriations power is never implicated.

Moreover, as § 216.311 states, it does not apply to

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[25] The State cites *State ex rel. Kurz v. Lee*, 163 So. 859, 868 (Fla. 1935) for the proposition that State funds include "potential" State funds, but the State's reliance on *Karz* is misplaced. *Kurz* only referred to potential revenue from "tax sources" as State funds requiring appropriations for expenditure.

contracts specifically authorized by law. Section 409.910(15) is such an authorization, overruling § 216.311. For the same reasons, § 287.0582, relating to "Contracts which require annual appropriation," is inapplicable to the Fee Contract, which provides for the fees to be paid only from a successful recovery, as does the enabling statute, § 409.910(15).[26] That is obviously the reason the State did not use the Standard Contract language in Section III.B.2 of the Fee Contract.[27] (SA 58 at 4)[28]

B. Senate Bill 1270 is Unconstitutional

1. Senate Bill 1270 Violates Article II, § 3, Separation Of Powers

Senate Bill 1270 specifically expropriates "funds on deposit in accounts 3660512058 and 3660510843 at NationsBank, N.A.,

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[26] If any conflict is seen between the general provisions of § 287.0582 and the specific authority of § 409.910(15), the more specific statute controls.

> [A] specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms. The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.

McKendry v. State, 641 So.2d 45, 46 (Fla. 1994) (citations omitted).

[27] The State's implication that the lawyers unilaterally deleted any provision is unsupported (and untrue). *See* State's Brief at 33.

[28] Moreover, the Governor knew the legislature would not authorize legal fees for the tobacco case. (KA 13 at 18)

pursuant to Escrow Agreement dated September 15, 1997, and raised as a result of litigation entitled The State of Florida et al. vs. American Tobacco Company, et al., Case #95-1466AH, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County . . . ." Senate Bill 1270 Section 3. (KA 29) That Act is a patent usurpation of judicial authority and violates Article II, § 3, Fla. Const.[29]

> "the courts have authority to do things that are absolutely essential to the performance of their judicial functions[.]" . . . "**[a]ny legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional** . . . .
>
> The citizens of this state have expressly codified this doctrine in article II, section 3 of the Florida Constitution, ... "**no branch may encroach upon the powers of another.**" To achieve this constitutional goal of separation of governmental powers, **the courts of this state are charged with diligently safeguarding the powers vested in one branch from encroachment by another** . . . .

Walker v. Bentley, 660 So. 2d 313, 320 (Fla. 2d DCA 1995), *approved*, 678 So. 2d 1265 (Fla. 1996) (emphasis added, citations omitted).

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[29] Article II, § 3, Fla. Const., provides:

> The powers of the state government shall be divided in to legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

In The Federalist Papers, Alexander Hamilton described the danger that would be created by the aggregation, rather than the proper separation, of these governmental powers:

> From a body which had even a partial agency in passing bad laws we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them; still less could it be expected that men who had infringed the Constitution in the character of legislators would be disposed to repair the breach in the character of judges.

The Federalist No. 81.

To avoid such evil, the classic American allocation of powers was created: "the power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 222, 115 S. Ct. 1447, 1454 (1995) (quoting The Federalist No. 78).

Senate Bill 1270 not only intrudes upon judicial authority generally, it also encroaches upon this Court's exclusive power to prescribe rules of procedure for Florida courts. Article V, § 2(a), Fla. Const. provides, "The supreme court shall adopt rules for the practice and procedure in all courts. . . ." Senate Bill 1270, § 4(1), violates Article II, § 3 by empowering the Comptroller to enforce the appropriation in Section 3 by bringing a lawsuit "to ensure that the state's title to these funds is affirmed," and then specifically precluding

intervention in the lawsuit by parties who might otherwise be entitled to intervene under Rule 1.230, Fla.R.Civ.P.[30]

Kerrigan, Montgomery and Schlesinger would obviously have an interest in any litigation that would be initiated by the Comptroller pursuant to Senate Bill 1270, and would assert their Rule 1.230 right to intervene in any such action. To the extent that the statute purports to trump the Rule, it is unconstitutional as violative of Article II, § 3, Florida Constitution.

2. Senate Bill 1270 Violates The Right To Access To Court

The Florida Constitution guarantees access to court for redress of grievances. Art. I, § 21, Fla. Const. Section 4 of Senate Bill 1270 - purporting to eliminate interested parties' right to intervene in litigation - violates the putative intervenors' rights under Article I, § 21. *See Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) (abolishment of right to access to court must be based on "an overpowering public necessity for the

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[30] Rule 1.230 provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

abolishment of such right, and no alternative method of meeting such public necessity").

3. Senate Bill 1270 is an Unconstitutional Special Law

The Florida Constitution governs the procedures for enactment of special laws. *See* Art. III, § 10, Fla. Const. It prohibits certain special or local laws that are inconsistent with general law. Art. III, § 11, Fla. Const. (listing 21 prohibited special laws or general laws of local application). Senate Bill 1270 violates Article III, § 11(a)(6) (prohibiting special laws pertaining to "change of civil or criminal venue"). Senate Bill 1270 is also prohibited, because no notice was provided in advance of its enactment.

General principles governing prohibited "special laws" are set forth in *Department of Business Regulation v. Classic Mile, Inc.*, 541 So. 2d 1155 (Fla. 1989)(emphasis added):

> The constitution defines a special law as a special or local law. Art. X, § 12(g), Fla. Const. As explained in case law, **a special law is one relating to, or designed to operate upon, particular persons or things**, or one that purports to operate upon classified persons or things when classification is not permissible or the classification adopted is illegal; . . .
>
> . . . A special law is not converted into a general law by the legislature's treating it and passing it as a general law.

Senate Bill 1270 violates Article III, §11(a)(6) by eliminating Palm Beach County as an appropriate venue for the action created by the statute - an action pertaining exclusively to the settlement funds in the Florida tobacco litigation.

Section 4 of the new statute impermissibly dictates that "[s]uch action shall be filed in the circuit court of the Second Judicial Circuit, in and for Leon County, which circuit shall have exclusive jurisdiction thereof." The subject of venue, generally, is a state-wide subject, governed by Chapter 47, Florida Statutes.[31] Because it purports to define venue for a particular action other than as provided in Chapter 47, Senate Bill 1270 is a "special law," and conflicts with the prohibition contained in Article III, § 11(a)(6).

4. Senate Bill 1270 Violates The Single Subject Requirement Of Article III, § 12, Florida Constitution

Senate Bill 1270 violates the single subject rule of Article III, § 12. In addition to appropriating State funds, and matters relating to appropriations, the statute expropriates funds under court control, prescribes causes of action to be brought by the Comptroller, limits the venue for the action contrary to general law, limits the parties to the action

[31] Section 47.011, Fla. Stat., provides in relevant part: "Actions shall be brought only in the county where the defendant resides, where the cause of action accrued, or where the property in litigation is located . . ."

contrary to Rules of Civil Procedure, and prescribes the means of service of "notice of such action" to be provided to the financial institution. Those matters go beyond the single subject of appropriations, and render the statute invalid under Article III, § 12, Florida Constitution.[32]

5. Senate Bill 1270 Violates Due Process of Law and Impairs Contractual Obligations

Senate Bill 1270 is unprecedented. It names a pending lawsuit, identifies an account number for funds being held in *custodia legis* by agreement of the parties, and seeks to invade the province of that court by expropriating those funds from the court's control. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447 (1995) (striking down as unconstitutional an unprecedented federal statute which purported to require Article III federal courts to re-open certain final judgments).[33] The

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[32] Article III, § 12, Florida Constitution, as a "corollary" to Article III, § 6 (*Department of Education v. Lewis*, 416 So. 2d 455, 459 (Fla. 1982)), requires that "[l]aws making appropriations for . . . current expenses of the state shall contain provisions on no other subject." "[A] general appropriations bill must deal only with appropriations and matters properly connected therewith." *Brown v. Firestone*, 382 So. 2d 654, 663 (Fla. 1980).

[33] In *Plaut*, 514 U.S. at 230, 115 S. Ct. at 1458, the Supreme Court wrote:

> Apart from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation. That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed.

Comptroller's action contemplated by Section 4 of the statute, in which the lienholders would be statutorily excluded from intervening and litigating their claims to be paid attorneys' fees from the settlement fund, is a blatant violation of the most elemental aspect of due process of law - the right to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783 (1914).

The statute's non-intervention provision deprives the Lawyers of their right to be heard in the only proceeding which is contemplated to have jurisdiction over the subject funds. Those funds are inextricably linked to the Fee Contract. Therefore, the statute denies them due process of law and impairs the contract, and thus is unconstitutional under both the Florida and federal constitutions.

> The right to contract is one of the most sacrosanct rights guaranteed by our fundamental law. It is expressly guaranteed by article I, section 10 of the Florida Constitution . . . . The legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created. Art. I, § 10, Fla. Const.

Chiles v. United Faculty of Florida, 615 So. 2d 671, 672 (Fla. 1993). The enactment of Senate Bill 1270 violates the State's constitutional duty to respect its contractual obligations.

C. Senate Bill 1270 Has No Application to Funds in the Registry of the Court

The trial court's May 15 Order was signed at 2:45 p.m., before Senate Bill 1270 became law upon the Governor's signature at 4:10 p.m. At the time Judge Cohen acted, his Order did not violate an as-yet-unsigned "law." The question then arises whether Senate Bill 1270 applies retroactively to trump pre-enactment judicial acts. It does not. "[A] substantive statute will not operate retrospectively absent clear legislative intent to the contrary, but . . . a procedural or remedial statute is to operate retrospectively. (Emphasis supplied)." *State Farm Mutual Auto Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995). Senate Bill 1270 is therefore not retroactive because it creates (and purports to eliminate) substantive rights: "The Legislature asserts its rights to appropriate all funds paid or payable to the state through the tobacco settlement." Senate Bill 1270, Section 2(1).[34]

The Lawyers who have filed charging liens in the circuit court have a vested contractual right to be paid fees from the settlement funds. *See, e.g., Mabry v. Knabb*, 10 So. 2d 330, 336 (Fla. 1942). The contingency contemplated in the Fee Contract

[34] Even if a statute is expressly stated to be retroactive, this Court "has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties." *State Farm, supra. See also Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 477 (Fla. 1995).

with the State has occurred; therefore, the Lawyers' right to be paid is a "vested right."

Therefore, Senate Bill 1270 is unconstitutional, and in any event is not retroactively applicable to funds in *custodia legis*.

II.

THE CHARGING LIENS ARE VALID

Although the charging liens are not before this Court for review, the State devotes a good deal of its brief attacking them. The State's arguments are not properly presented in this appeal, and in any event are without merit, but we are compelled to respond.

A. The Fee Contract is Valid

The charging liens against the recovery are valid.[35] The charging liens are based on the Fee Contract. The charging liens secure the Lawyers' right to be paid, as agreed, from the settlement proceeds. *E.g.*, *Kerrigan*, 711 So. 2d at 1248. Unless the charging liens are respected, "there may be no other way to secure counsels' claims for fees and costs." *Id.* *See also*, *Forman v. Kennedy*, 22 So. 2d 890 (Fla. 1945).

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[35] This Court has consistently rejected belated attempts to dishonor fee agreements; *Carter v. Davis*, 8 Fla. 183 (1858); *Mabry v. Knabb*, 10 So. 2d 330 (Fla. 1942); *Miller v. Scobie*, 11 So. 2d 892 (Fla. 1943); *Nichols v. Kroelinger*, 46 So. 2d 722, 724 (Fla. 1950); *In re Barker's Estate*, 75 So. 2d 303, 304 (Fla. 1954); *see Brown v. Vermont Mut. Ins. Co.*, 614 So. 2d 574, 580

Faced with this uncontrovertable law, the State contends that the Fee Contract does not mean what it says, and that any legal fee—even one paid directly from the escrowed recovery—is subject to "appropriation." State's Brief at 33. In the alternative, the State now says the entire contract is "void." *Id.* at 35. The State had conceded below that "we are not seeking to quash their contract." (SA 51 at 50).

The State's arguments are procedurally barred, because it never contended below that the Fee Contract is invalid. *See Cartee v. Fla. Dept. of Health and Rehab. Svcs.*, 354 So. 2d 81 (Fla. 1st DCA 1978) (§ 216.311 cannot be raised for first time on motion for rehearing.) To the contrary, the Governor (KA 14 at 99; KA 13 at 173) and the Attorney General (KA 14 at 94-95) have testified under oath that the Fee Contract is valid. The State represented to the court below that a legislative act was <u>not</u> needed to compensate the attorneys. (SA 51 at 63)

By changing its position, and now advocating the need for an "appropriation," the State ignores the specific statute which governs here, § 409.910(15)(b). (As discussed above in Section I. A, the State's reliance on statutes outside of Chapter 409 is misplaced.)

It is self-evident that "appropriations" have no place in a self-funding, contingency-based Fee Contract under § 409.910(15).

(Fla. 1st DCA 1993).

That is because no state funds were ever needed for the Fee Contract to be performed. No matter when a recovery was obtained—if ever--the Fee Contract was fully funded from external sources. As stated in the Fee Contract, taxpayer funds were not at risk. (SA 58, Attach. I, §A) *See Glendening, supra; cf. Navajo Tribe v. Ariz. Dept of Admin.*, 528 P.2d 623, 624-25 (Az. 1975) (funds received and earmarked from federal source may be used for that purpose without appropriation).[36]

The State's proposed construction of the Medicaid Act, on the other hand, would render § 409.910(15)(b) completely meaningless. The State's position

> represents a reading of the statute as a whole which is no less than absurd since it contravenes both its express provisions and, more important, the entire reason it was enacted in the first place . . . [W]e are not permitted, much less obliged, to interpret a statute in such a manner . . . .

Cooper v. Brickell Bayview Real Estate, Inc., 711 So.2d 258, 258 (Fla. 3d DCA 1998).[37]

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[36]As a matter of law, the Fee Contract is an equitable assignment of the litigation recovery. *Forman v. Kennedy*, 22 So. 2d 890 (Fla. 1945); *see United States v. Transocean Air Lines; Litman v. Fine Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So. 2d 88, 92 n.5 (Fla. 3d DCA 1987). This assignment has been complete for years.

[37] If the State's interpretation of the Fee Contract were correct, the Fee Contract would be rendered completely illusory for lack of mutuality. *See Pan Am Tobacco v. Department of Corrections*, 471 So. 2d 4,5 (Fla. 1984):

B. The Court's Supervision of Funds in *Custodia Legis* is Proper

The State complains that the trial court is supervising 25% of the settlement, representing the sum presently claimed by the Lawyers under the Fee Contract. The State neglects to mention that it "invit[ed]" such supervision below. (SA 51 at 61). The disbursement of the fund to the Treasury would cause irreparable harm to the Lawyers (*see Kerrigan*), and render the charging liens, and this litigation, entirely moot. Moreover, payment to the State in disregard of the charging liens would subject the Settling Defendants to liability for payment of the fees, precisely the result the defendants sought to avoid in their interpleader motion that resulted in the court-supervised escrow. (SA 54)

Although it requests the summary quashal of the Lawyers' charging liens here, the State concedes that "no court [below] has yet ruled on the State's . . . arguments that any such liens are void." State's Brief at 34. In other words, there is nothing for this Court to review as to the validity of the charging liens. That was the point of *Kerrigan*: the Lawyers are entitled to a hearing, in accordance with due process, on the

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> We cannot now, in good conscience, hold that the chance to seek an act of grace from the legislature is sufficient remedy to create mutuality.

validity of their charging liens. 711 So. 2d 1246. It would be anomalous in the extreme for this Court to grant the State's request to act as a court of first resort, and summarily rule on the charging liens, preempting all orderly adjudication below.

C. The Lawyers have Independent, not Collective Rights

The State contends that the charging liens are invalid, because the law firms have only collective rights, and that no single law firm has a right to assert a charging lien. State's Brief at 35. The State is wrong, and its contention is irrelevant. As shown above, twelve firms have filed or joined in charging liens.

In any event, the validity of the charging liens are not dependent upon whether the Lawyers are a collective or independent. Kerrigan's lien, for example, was filed "on behalf of any attorney of record for the Plaintiff that may which to assert a lien for fees." (KA 4 at 2)

The Fee Contract is between the State and the independent law firms. Each firm has independent contract rights against the State, as if each had executed a separate contract with the State. *Montgomery v. Philip Morris*, 992 F. Supp. 1372, 1375(S.D. Fla. 1998). (The lawyers "signed the contingency fee contract as independent law firms.") The Contract is explicitly with "independent law firms" (SA 58 at 1); each "individual" firm had the right to "unilaterally withdraw" from the contract

(SA 58 at 2, ¶ III.B.1)

Moreover, the Fee Contract could only be modified in writing, signed by all of the Lawyers. SA 58 at 4; *see also County of Brevard v. Miorelli Engineering*, 703 So. 2d 1049 (Fla. 1997) (oral contracts with the State cannot be enforced).[38] Therefore, even if some Lawyers waived their own contract rights, the Fee Contract remains in force until unanimously abrogated in writing.[39]

D. The Medicaid Act Does not Prohibit Charging Liens

The Medicaid Act itself does not preclude the charging liens. The State bases its novel argument upon § 409.910(1) (State's Brief at 36), but glosses over the relevant text as if it did not exist:

> Principles of common law and equity as to ... lien ... and all other defenses available to a liable third party are to be abrogated .... (emphasis supplied)

The State's own lawyers are not "a liable third party." Moreover, § 409.910(1) does not govern the retention and

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[38] Since the State could never been bound by any alleged parol modification, any parol modification would be void for lack of mutuality. *See Pan Am Tobacco*, 471 So.2d at 5.

[39] Assuming, *arguendo*, that the private lawyers formed a "joint venture" under Florida law, unanimity among them would be needed to waive the "venture's" contract rights and bind the venture to arbitration. § 620.60(3)(e). Similarly, in order to bind the law firms to arbitration, a written agreement would be required by § 682.02, Florida Statutes. No such writing exists.

compensation of counsel. The State's argument would make it impossible to pay counsel on a contingency fee basis, thereby defeating the whole point of Section 409.910(15)(b), which expressly calls for payment to counsel of "a percentage of the amount actually collected and reimbursed."

E. No Special Authorization is Needed to File a Charging Lien Based on a Contingency Fee Contract

In its Brief at 37, the State suggests that the Lawyers needed special "authoriz[ation]" (from it, no doubt) to seek a charging lien. It is well-established in Florida, however, that a charging lien is an equitable lien which may be filed in any case where a party has contracted to pay a portion of its litigation recovery to its attorney. *E.g, Mabry v. Knabb*, 10 So. 2d 330, 336 (Fla. 1942) Because the State assigned a portion of the recovery *via* the Fee Contract, the State is subject to an equitable charging lien against the escrowed litigation recovery to enforce the Fee Contract.[40] No law requires anything different in this case.

F. Sovereign Immunity is Not a Defense to the Fee Contract or the Charging Liens

The State asserts that the trial court lacks "jurisdiction" to enforce the Fee Contract due to "sovereign immunity." The State's suggestions of absolute sovereign immunity are without

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[40]Even proceeds generated from State property may be subject to an equitable lien. *City of St. Augustine v. Brooks*, 55 So. 2d

merit. The tort cases cited by the State in its Brief at 40, 42, are inapposite in a contract case. The State is not immune from lawsuits, ***or related actions*** arising from contract debts, which would include charging liens to secure the payment of those debts. *Pan Am Tobacco v. Department of Corrections*, 471 So. 2d 4, 5 (Fla. 1984)

County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049, 1050 (Fla. 1997), resolves the issue:

> Although no express legislative waiver has been granted for contract claims, this Court in *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984), found an implied waiver of sovereign immunity in contract on the premise that because the legislature authorized state entities to enter into contracts, it must have intended such contracts to be valid and binding on both parties.

G. <u>The Settlement Agreement is an Indemnification, not a Substitution</u>

The State asserts that the charging liens were contrary to its Settlement Agreement (although it admits the Lawyers are not parties or signatories to it. State's Brief at 45). The State is mistaken. Moreover, it certainly is <u>not</u> undisputed that the Settling Defendants are responsible for "all private counsel fees and costs." State's Brief at 43. In fact, the Settling Defendants have only agreed to reimburse an unspecified amount, subject to undefined "caps" and "conditions." The actual amount

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96(Fla. 1951).

will be determined in the arbitration vaguely alluded to in the Settlement Agreement. (SA 56 at 13-14, § V)

The attorneys' fees clause in the Settlement Agreement does not bind the Lawyers, and has no effect on their pre-existing contract rights under the Fee Contract. As a matter of law, contract clauses requiring payment of reasonable attorneys' fees do not abrogate a party's separate obligation to pay its counsel. Rather, such agreements are in the nature of indemnification. *Sholkoff v. Boca Raton Community Hosp.*, 693 So. 2d 1114, 1116 (Fla. 4th DCA 1997). *See, e.g., Florida Patients' Compensation Fund v. Rowe*, 472 So. 2d 1145, 1151(Fla. 1985) (amount to be paid by third-party indemnitor for fees is not the same as client's own obligation to counsel).

There is no evidence below of any new agreement discharging the Fee Contract. No basis exists for the State's assertion that the Settlement Agreement somehow pre-empts the Fee Contract.[41]

[41] As a matter of law, there could not have been an oral novation of the Fee Contract. Every contract with the State must be in writing. §287.0581(1). ("Every procurement of contractual services . . . shall be evidenced by a written agreement embodying all provisions and conditions . . .") Pursuant to the express terms of the Fee Contract, the Contract cannot be modified except in writing signed by all parties. (SA 58 at 4, ¶ III.D) There was no such writing.

CONCLUSION

For the reasons given above, the certified question should be answered in the affirmative.

Both of the Most Favored Nation Orders should be reversed. The two orders are erroneous because they altered contract rights between the settling parties without their consent. Moreover, the orders erroneously impair rights under the Fee Contract between the State and the Lawyers.

The State has no sovereign immunity from charging liens where it contracts pursuant to statutory authority with private lawyers on a contingency fee basis. The funds from the settlement that are in *custodia legis* will not be "state funds" until paid into the Treasury. Senate Bill 1270 is unconstitutional and inapplicable.

The May 15th Transfer Order should be sustained as a proper and reasonable exercise of the trial court's plenary authority over the settlement proceeds as provided in the Settlement Agreement. By law, and by stipulation of the State below, the trial court has the authority to disburse the funds under its supervision. The trial court properly avoided the attempted legislative interference with the ongoing exercise of judicial supervision of settlement funds in *custodia legis* by moving the funds to the registry of the court.

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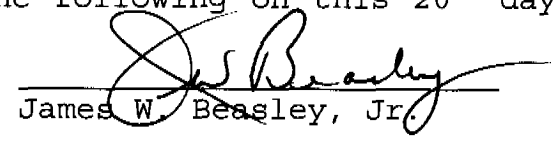
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following on this 20th day of August, 1998.



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