IN THE SUPREME COURT
STATE OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

v.

AMERICAN TOBACCO COMPANY, et al.,

Appellees.

Case No. 93,148 and 93,195

District Court of Appeal - Fourth District
Nos. 98-1430, 98-1747,

Circuit Court Case No. CL 95-1466 AE

ANSWER BRIEF OF APPELLEES WILLIAM C. GENTRY WAYNE HOGAN AND C. DAVID FONVIELLE TO INITIAL BRIEF OF STATE OF FLORIDA

On Review from the District Court of Appeal
Fourth District of Florida

William C. Gentry
Florida Bar No. 137134
Gentry, Phillips & Hodak, P.A.
Post Office Box 837
Jacksonville, FL 32201

Wayne Hogan
Florida Bar No: 142460
Brown, Terrell, Hogan, Ellis,
McClamma & Yegelwel, P.A.
233 East Bay Street, 8th Floor
Jacksonville, Florida 32202

C. David Fonvielle
Florida Bar No: 141980
Fonvielle, Hinkle & Lewis, P.A.
3375 Capital Circle, N.E., Building A
Tallahassee, FL 32308

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in Answer Brief of Appellees William C. Gentry, Wayne Hogan and C. David Fonvielle to Initial Brief of State of Florida is 14 point Times New Roman.

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **PAGE(S)**

CASES **PAGE(S)**

OTHER **PAGE(S)**

INTRODUCTION

Since the State's "Statement of the Case and Facts" dwells on issues largely irrelevant to the certified question, ignores matters which are critical to reviewing the trial court's orders and, unfortunately, frequently forgets what actually occurred[1], we are required to provide the Court with a proper Statement of the Case and Facts.[2] For example, in determining whether "the funds" in this case were "subject to disbursement by the trial court," shouldn't it first be brought to this Court's attention that the State did not oppose the Tobacco Industry's motion to interplead the funds and place them under the Court's jurisdiction? Indeed, that the State expressly "invited" (App. 51, p. 61) the trial court to escrow the settlement proceeds under its exclusive jurisdiction pending resolution of the liens? Or that the State asked for and agreed to the trial court having jurisdiction and control over interpretation and enforcement of the Settlement Agreement (including the Most Favored Nation Provision) and that the Agreement required "the terms of this Settlement Agreement will be revised so that the State of Florida will obtain treatment as relatively favorable as any [other settling state]." (Emphasis added, App. 56, S.A. p.13.)

---

[1] In fairness to appellate counsel, we would note they were probably not personally present for many of the matters they seek to reconstruct.

[2] The State has disregarded the rudimentary appellate maxim that the record is to be presented fairly and viewed in the light most favorable to the Orders under review, *see, e.g. Thompson v. State of* Florida, 588 So.2d 687 (Fla. DCA 1991).

On the issue of the propriety of the trial court's Order adopting provisions of the Texas Attorneys' Fee Agreement under the Most Favored Nation ("MFN") provision of the Florida Settlement Agreement, shouldn't the Statement of the Case and Facts reflect the trial court's express findings as to why implementation of the MFN was beneficial to the State of Florida, instead of appellants' argumentative mischaracterization to the contrary? When undersigned counsel, as an officer of the Court, brought the recent Texas provisions to the trial court's attention, shouldn't this Court be informed that the Attorney General of the State of Florida told the trial judge:

> The Texas settlement, your Honor, I believe has some improvements over the Florida settlement. I think there are some things in the Texas settlement that are not an improvement.

(App. 36 at p. 71.)[3]

> Just as I stated, your Honor, Texas assisted with a number of paragraphs that obviously do help Florida.
>
> ...
>
> Texas is not going through this because they learned from what happened here in Florida.

(App.36, at pp. 80-81).

---

[3] We will reference the original Appendix filed by the State as "App." and the Supplemental Appendix as "Supp. App." Since it part of App. 56, we will reference pages of the Settlement Agreement as "App. 56, S.A. __."

Is it not pertinent that it was only after the State and Settling Defendants agreed that provisions of the Texas Attorneys' Fee Agreement were appropriate for incorporation under the MFN that the trial judge ordered all affected parties — the State, Tobacco, and private counsel — to confer and submit their proposal or proposals; and that the April 16, 1998 Order appealed by the State was entered on the State's Motion?

Shouldn't this Court be advised there was disagreement only as to how to apply a few[4] of the provisions of the Texas agreement to the Florida situation? And as to the State's attacks on undersigned counsel for bringing the Texas agreement to the court's attention, it is not relevant that its adoption would preserve the State's multi-billion dollar settlement, eliminate or minimize the State's exposure to attorneys' fees and resolve the disruptive attorneys' fee dispute? The State also failed to mention that at no time during the lengthy hearing did it object to counsel bringing the matter before the Court. (*See* App. 36, p. 35-146)

---

[4] Cutting through the vitriol and rhetoric of the State's brief, its complaint about the trial judge's application of the Texas provisions to Florida is that the State is required to advance the attorneys $50 million in fees (which it gets back as soon as the fee award is made against Settling Defendants), even though the Texas Settlement Agreement contains the same advance requirements. The State also generally complains about the court maintaining jurisdiction over future settlement proceeds until the attorneys' liens are resolved. Otherwise, the State apparently agrees the judge did a good job with respect to conforming everything else, most of which it asked him to do.

Because of these and many other omissions and mistakes by the State[5], we submit the following "Statement of the Case and Facts" from which this Court can fairly review the trial judge's orders and resolve the certified question. Because of the extraordinarily convoluted and machinated course of events, we believe it is essential that this Court be fully and accurately apprised of how we got here. Although it may be a painful journey, when the record is fairly viewed, it is respectfully submitted that under the circumstances of this case (which is what is before the Court and not the "constitutional crisis" sought to be engineered by the State), there can be no doubt that the trial court has jurisdiction over the Settlement Proceeds until such time as funds are remitted to the State. The only constitutional issues involved in this appeal are whether the rule of law as opposed to political whim shall control our courts; and whether the State -- although "sovereign" -- is still bound to keep its promises and comply with judicial orders it has sought and representations it has made.

---

[5] Probably one of the most misleading portions of the State's Brief is what appear to be quotes from the contract between private counsel and the State (Br. at 5-6), when it is in fact the State's argumentative characterization. The State also disingenuously implies that somehow the lawyers "revised and manipulated" the contract (Br. p. 5) and deleted language the State argues should have been included (Br. p. 33). It neglects, however, to advise this Court that the contract was negotiated with AHCA and submitted to and approved in writing by the Attorney General. *(See* App. 34, Ex.2).

STATEMENT OF THE CASE AND FACTS

1. The Settlement Between the State and Tobacco.

There was an historic settlement between the State of Florida and certain major cigarette manufacturers on August 25, 1997. The lawyers were not signatories. However, as part of the bargain, Settling Defendants (sometimes referred to herein as "Tobacco") agreed to pay "separately and apart ... reasonable attorneys' fees to private counsel." However, contrary to the State's representation at page 7 of its Brief (and in its argument), the Settlement Agreement did not provide that Tobacco would assume the State's contractual obligation to pay "all the state's attorneys' fees" (Br., p. 7). Rather, the deal between the State and Tobacco spoke of a vaguely described panel process for assessing attorneys' fees against Settling Defendants, subject to non-defined "caps" and "other conditions." (App. 56, S.A. 14). Indeed, the sum total of the written agreement regarding Tobacco's obligation to pay attorneys' fees is set out in three brief sentences (as opposed to the eight page single spaced document entered in Texas to implement the process generally referred to in Florida).

In short order, the want of specificity and ambiguity of this obligation (which Settling Defendants contended was a "crucial consideration" to settlement

with the State (App. 36, pp. 30-31)), put the entire settlement in jeopardy. (*See generally*, App. 36, pp. 25-62.) As expressly noted by the trial court,

> Subsequent to the signing of the Florida Settlement Agreement, there has been a multitude of motions, charges and countercharges, allegations and contentious litigation regarding the intent, application and implementation of Article V of the Florida Settlement Agreement regarding "Costs and Fees." Certain of plaintiffs' private counsel have sought leave to take discovery to determine the intent of the parties or whether there were agreements by the parties regarding Article V that do not appear in the agreement. Settling Defendants have stated there were agreements of the parties regarding Article V which they contend are material to the Settlement Agreement but which are not apparent on the face of the agreement. **The Court finds that these controversies are uncertain as to their outcome and detrimental to the interests of the parties as well as the paramount public interest in preserving and implementing the Florida Settlement Agreement.**

(App. 1, ¶3 at pp. 2-3, emphasis added).

2. The Filing of Liens by Some Private Counsel.

Undoubtably well-known to this Court, an extraordinarily divisive dispute quickly arose between the State and some of its private counsel regarding attorneys' fees. Indeed, one of the lawyers (without advising the client) apparently filed a charging lien on the morning before the Settlement Agreement was signed in open court.[6] Four more liens were soon filed.[7] The private

---

[6] Robert G. Kerrigan, Esquire, apparently filed his charging lien in the early morning, claiming a lien against the settlement proceeds "for and on behalf of any attorney of record for the Plaintiff." (App. 55)

[7] See liens of Montgomery, Schlesinger, Yerrid, and Nance (App. 55). Incredibly, a contract employee of private counsel also filed a lien, claiming he too was entitled to a share of

attorneys representing the State took the position they had entered a valid contingent fee contract with the State under which they expended millions of dollars in costs and extraordinary time and effort whereby the State's settlement became possible. By their liens, they asserted the right to be paid — as provided by the contract — out of the settlement proceeds. However, although acknowledging the lawyers' exceptional work and that they had successfully performed their part of the contract, the State nevertheless took the position the lawyers had no right to secure their claims against the settlement proceeds (App. 53) and that the lawyers were bound to accept the arrangement (albeit undefined and ambiguous) for them to be paid by Tobacco. (App. 51)[8]

---

the contingent fee. See P. Tim Howard lien (App. 55, (6).)

[8] The state has vacillated between telling the trial court "nobody is asking them to go to the legislature" (App. 51, p. 62), to surreptitiously putting "subject to appropriation" language in the escrow agreement (which was stricken, App. 2, ¶2-3), to reaffirming to the court that its "subject to appropriations" language only applied to settlement monies after the court determined to release funds to the State (App. 8, p. 88), to asserting in its Brief that the trial court has no jurisdiction and that the lawyers must seek payment through legislative appropriation (Br. *see* e.g., 23-29). It should also be noted that in its Brief, the State acknowledges that the legislature has determined not to pay the attorneys any fees (Brief, p. 31) Thus, according to the State, the lawyers have no right to fees under their contract, the Court has no control over settlement proceeds interplead before it, and the lawyers' sole remedy is an appropriation which the legislature will not make.

3. The State's Agreement to Escrow Settlement Proceeds Subject to the Court's Control over Disbursement

Against this backdrop, when the time came for Settling Defendants to pay the first $750 million under the Settlement Agreement, they filed a "Motion in the Nature of Interpleader" (App. 54 at 3) whereby they sought an Order

> Allowing them to deposit the funds due to be paid under the Settlement Agreement on September 15, 1997 into the registry of the Court, or any appropriate escrow fund, and (2) finding that such payment satisfies defendants' obligations under the Settlement Agreement.

At the hearing on Tobacco's motion, the State did not oppose the motion and, given the pending liens, acknowledged that the funds should be put under the control of the trial court. Indeed, the Assistant Attorney General told Judge Cohen, **"We have no objection of the Court having supervision. In fact, the State invites it."** (App. 51, p. 61, emphasis added). The only objection voiced by the State was to the lawyers' names being put in the escrow agreement. Indeed, the State made it very clear what it wanted:

> I don't want that escrow agreement to say anything on it other than it is subject to Court approval upon distribution for the protection of everybody. This order says - -
>
> THE COURT: You mean distribution from that fund is subject to Court approval.
>
> MR. ANTONACCI: Both funds, yes.

When lienors told the Court "Don't let it go into the black hole and let us go to the Legislature...," the State responded, "No, nobody is asking them to go to the Legislature. They have a contract and if they have a problem with the contract there is an appropriate forum." (App. 51, pp. 62-63.) Thus, the court granted Settling Defendants' interpleader motion (App. 52):

> This Court orders Defendants on September 15, 1997 to deposit the funds due to be paid under the Settlement Agreement into an appropriate interest-bearing account, in which such funds will remain pending until further order of this Court.

So that the funds could draw maximum interest, the State and Settling Defendants were entrusted with the ministerial task of establishing a private account under the court's jurisdiction. The escrow agreement drafted by the State appropriately provided (App. 49, Sec. 4(a)):

> After an application to the Court by counsel for the Settling Defendants and/or the Attorney General for the State of Florida stating that the Settlement Agreement has received Final Approval according to its terms, the Escrow Agent shall, upon receipt of an order of the Court so directing, distribute the entire Escrow Amount (including any interest or profits thereon).

But, unnoticed by private counsel and the court, the State added the following to the escrow agreement governing $550 million (*Id.*):

> The disbursement shall be pursuant to authorization under Chapter 216, Florida Statutes, or shall be otherwise appropriated.

Tellingly, the other $200 million fund (from which the State wanted early disbursement) omitted the "appropriations" language. (App. 50, *See* 4(a).)

Subsequently, when the added escrow language was brought to the court's attention (App. 8 at pp. 58-60), the trial court struck the offending language (App. 8 at pp. 99-104; App. 2). At that hearing, an Assistant Attorney General explained that the stricken language did not mean what the State previously argued it meant, and that the intent simply was "that language is to the authorization of the Attorney General to close out an escrow. It's not an authorization to the court.... This is only the authority of the Attorney General to close out in total the escrow agreement." (App. 8, p. 88.)

4. The Court's Efforts to Facilitate Resolution of the Fee Dispute.

In conjunction with the Order escrowing settlement proceeds, the court ordered the parties to mediate their disputes in hope of resolving what most charitably could be described as an unseemly mess. Unquestionably, regrettable conduct of some counsel has caused the profession to be held up to ridicule and this highly publicized controversy has undoubtably undermined not only the public's confidence in the legal profession, but in government as well. Nevertheless, the State's unsupported account of the failed efforts at amicable resolution are at best incomplete and irrelevant.[9] What is relevant to the issues on

[9] The State's statement that the mediation and other efforts failed "because of the exorbitant, multi-billion dollar demands made by certain PTA lawyers" (Brief, p. 12) is unsupported by any record, is a gross mischaracterization and apparently offered to try to prejudice this Court against counsel. Although undoubtably some of the positions and conduct of some of the lawyers aggravated the situation, the mediation ultimately failed because notwithstanding Settling Defendants' willingness to advance fees to resolve or abate the

appeal, however, is that while in mediation and while ordered to work with its counsel and Settling Defendants to attempt to mediate a resolution, the State served a motion to compel early arbitration of Tobacco's obligation to pay attorneys' fees (App. 47). By so doing, it breached its commitment to Settling Defendants and precipitated a series of events that put the entire settlement in jeopardy *(See* ¶6-7, *infra)*.

5. Montgomery, et al.'s Liens Are Stricken.

Upon being advised that the efforts to mediate the attorneys' fee issue had failed, the trial court entered its order of November 12, 1997, striking the pending liens. (App. 46.) Although acknowledging the valid contingency fee contract, the extraordinary work and service provided by private counsel, and that the lawyers were undoubtably entitled to multi-millions of dollars in fees, the trial judge construed the liens as seeking $2.8 billion and found the claim to be unreasonable on its face. Kerrigan, Montgomery and the other lienholders appealed from the Order. In reversing, the Fourth District found the lien claimants were denied due process and also recognized counsel's "equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit." *Kerrigan, Estes, Rankin &*

---

controversy, the State of Florida offered nothing.

McLeod, et al. v. State of Florida, et al., 23 Fla. L. Weekly D1243 (Fla. 4th DCA 1998) (emphasis in opinion).

6. The Trial Court Grants the State's Motion to Compel Arbitration under Article V of the Settlement Agreement to Assess Attorneys' Fees Against Settling Defendants.

While the appeal of the Order striking his lien was pending, Mr. Montgomery took a different tact in the trial court. The State's motion to compel early arbitration of Tobacco's obligation to pay fees had never been heard.[10] Montgomery called it up on January 22, 1998.[11]

Settling Defendants vigorously opposed the entry of an order requiring arbitration in 1997, offered parole evidence of the intent of the vague and ambiguous provisions of Article V of the Settlement Agreement, and argued that the parties intent was for fees to be assessed after efforts to pass national legislation were completed or November 15, 1998, whichever occurred first (*See* GHF 1, pp. 40-47). However, given the ambiguous language of the Settlement Agreement and the fact the State argued it "did not withdraw the motion. The

---

[10] The title of the State's motion, served during mediation on November 4, 1997, is Plaintiff's Motion to Enforce Section V of the August 25, 1997 Settlement Agreement and Request for Order Directing Commencement of Arbitration of Plaintiffs' Attorneys' Fees Commencing on December 1, 1997 (App. 47).

[11] This important hearing is not included in the State appendices. (Indeed, it was this hearing and the court's Order granting the motion that ultimately led to the three orders and certified question on appeal.) Accordingly, Gentry, Hogan, and Fonvielle file an additional Appendix including this and other relevant matters which will be designated "GHF ___".

State wished to have the earliest possible arbitration it can get ..." (*Id.*, p. 40), the court exercised the authority vested in him by Settling Defendants and the State to enter "further orders and directions as may be necessary and appropriate to implement or enforce the Settlement Agreement" (App. 56, S.A. IA) and ordered arbitration proceedings within 30 days to determine attorneys fees to be paid by Settling Defendants. (GHF 2)

7. Tobacco's Motion for Rehearing of Order Setting Early Arbitration and the State's Motion to Vacate the Orders Directing Expedited Commencement of Arbitration of Plaintiffs' Attorneys' Fees.

At the hearing on February 3, 1998, Settling Defendants offered evidence from one of its principal negotiators of the Settlement Agreement to show the parties' intent as to timing, procedures, "caps" and "conditions" contemplated by Article V of the Settlement Agreement. GHF 3 . Settling Defendants vigorously argued that the attorneys fee "understanding" was essential and critical to their agreeing to the Settlement Agreement (App. 36, pp. 30-32):

> The agreement that there would be a waiting — a period of no judicial activity in this case, no arbitration activity in this case, so that attention could be focused on Congress, was central to the willingness of the defendants to settle this case.
>
> It's crucial, crucial to the companies that that part of the consideration, you know, for the enormous concessions in regard to the things that were flowing the other way, toward the State, that consideration was absolutely crucial for the companies to receive.

Mr. Montgomery's counsel argued the court should have an evidentiary hearing to determine whether there was a meeting of the minds in entering the Settlement Agreement (App. 36, p. 104):

> It is now abundantly clear that the arbitration provisions, that were disclosed to you and approved by you through the written document dated August 25th, are in question.
>
> That there seemed to be ambiguities, that there seemed to be side deals, which may or may not have been approved by both parties.
>
> We don't know whether ultimately there could be found to be a meeting of the minds between the State and Tobacco on all these things or whether they were ships passing however closely in the night.

On the State's motion, the trial court had ordered immediate arbitration of attorneys fees under the Settlement Agreement but now learned that to do so might constitute a material breach of the Settlement Agreement. Montgomery, of course, insisted on going forward with "arbitration" or engaging in "discovery" and the State now joined in Settling Defendants' motion.[12] It was in this extraordinary context that undersigned counsel Gentry brought to the court's attention the recent Texas Settlement and suggested that the court's application of the Most Favored Nations provision of the Florida Settlement Agreement to

---

[12] The attorneys fee panel process had of course initially arisen out of the "National" settlement reached between the State's Attorneys Generals and the tobacco companies to which Attorney General Butterworth was a primary participant. As has been acknowledged by Attorney General Butterworth, he was well aware of and assisted in developing various aspects of the attorneys' fee panel process. (App. 4)

incorporate the Texas Attorneys' Fees provisions would protect the integrity of the Florida settlement and resolve the legal quagmire gripping the parties and the court.

8. The February 3, 1998 Order Vacating the Previous Orders Requiring Early Arbitration, Escrowing Funds for Attorneys Fees and Incorporating Certain Provisions of the Texas Settlement Under the Most Favored Nation Clause of the Florida Settlement Agreement.

Shortly before the February 3rd hearing, undersigned counsel, having exhausted every possible means of trying to amicably resolve the issue, served his "Notice of Plaintiffs Counsel's Charging Lien for Reasonable Fees under Contract of Employment and Notice of Incorporation of Texas Fee Agreement under Florida Settlement, Article IV." Gentry's lien showed that he had a contract with the State whereby he was to be paid a contingent fee from the client's recovery; that the client had repudiated the contract; and that the State's conduct was not only in derogation of counsel's rights, but potentially detrimental to the public interest by jeopardizing the underlying settlement (App. 40, ¶6):

> Because of the State's exclusion of counsel of record from significant activities in the case which has resulted not only in detriment to counsel's rights but the potential detriment of the public, its repeated efforts to repudiate or impair counsel's rights under the contract and its repeated refusal to work with counsel to professionally and amicably resolve the attorneys' fee issue, it has become necessary for undersigned counsel to file this lien.

Unlike the previous liens which were stricken, Gentry sought to enforce the contract only to the extent the fee was consistent with the Rules Regulating The

Florida Bar. He further requested the lien be enforced to require the State to pay $50 million (for the benefit of all counsel) so as to trigger the obligations of Settling Defendants under the Texas Settlement Agreement and initiate a process which should resolve the disputes and ultimately protect the State from exposure for attorneys' fees. (App. 40, pp. 5-9.)

Counsel made an extensive presentation to the court, explaining how the Texas Attorneys' Fee Agreement resolved the material disputes that had arisen under the ambiguous Article V to the Florida Settlement Agreement. Counsel also argued that the Most Favored Nations provision of the Florida Settlement was "self-executing," that the parties had vested the trial court with authority to construe and enforce it, and that it required more favorable terms of a subsequent settlement to be incorporated. These issues were discussed for some two hours and the State never objected to Gentry's bringing the matter to the court's attention.[13] In fact, the State and Tobacco agreed there were "favorable" terms in the Texas Attorneys Fee Agreement and that it should be considered (*See generally*, App. 36, pp. 36-140). The matters presented showed that if the Texas provisions were faithfully incorporated into the Florida Settlement, it would provide a specific time period for the attorneys' fee panel process; specify how

[13] On the day of the hearing, the State served a motion by mail to strike undersigned counsel's Notice of Incorporation of the Texas agreement (App. 37). However, it obviously determined at the hearing not to oppose counsel's submission.

the panel was to be chosen and consider the attorneys' fee application; define the ambiguous reference to "caps" and "other conditions" in Article V of the Florida Settlement Agreement; vest Florida in the right to have a $250 million attorney fee fund for 1997 made applicable to its attorneys; vest Florida in an allocation of $42 million per month nationally for 1998 to be applied to Florida attorneys' fees; and otherwise establish specific and favorable provisions for payment of fees to Florida counsel by Tobacco so as to minimize or eliminate any obligation the State might have under its contract.[14]

In discussing whether the Texas Exhibit I should be incorporated into the Florida Settlement Agreement under the Most Favored Nation provision ("after due consideration of relevant differences in population or other appropriate factors," (App. 56, S.A. Art. IV)), the Attorney General confirmed there were Texas provisions favorable to Florida; that the State had been reviewing the issue; that "when we heard that Tobacco was going to give $50 million and then the State would have to give $50 million later, that looked like something...." (App. 36, p.71); that he was hopeful the political issues could be resolved so the $50 million could be paid (*Id.* at 73); and that the Governor and the legislature might have different views, but that "Texas assisted with a number of paragraphs that

---

[14] In his deposition taken two weeks later, Attorney General Butterworth testified that "They [Tobacco] said they could provide it with us, and they definitely provided it in Texas. So if there is any doubt about it, this does become part of the Florida agreement <u>because it is of benefit to the State of Florida</u>." GHF, p. 191, emphasis added.

obviously do help Florida" and he was hopeful the State could resolve its political problems so as to reach a solution (*Id.* at 80-81).

The court then was advised by Settling Defendants they were agreeable to incorporating the Texas provisions into the Florida Settlement, but "we shouldn't get into a situation where we start making substantive changes to the Texas agreement when we bring it back into Florida." (App. 36, p. 89-90.)

Also considered at the February 3rd hearing was the State's motion to release the entire $550 million that had been placed in escrow pursuant to the court's September 11, 1997 order. At the conclusion of the hearing, the court announced the following relevant rulings (App. 36, pp. 142-3):

a. Its previous order of January 22, 1998 ordering early arbitration under Article V of the Settlement Agreement was vacated;

b. The State's motion for immediate possession of the $550 million was DENIED. Instead, the court ordered $362.5 million to be released to the State Treasury, "$137.5 million is to be maintained in the escrow account, representing 25% of the 550-million-dollar escrow funds pending final appellate decision on the appeal from the Court's November 12, 1997 order going to the issue of contingency contracts and attorneys' fees" and "$50 million is to be held in the same escrow account, that is, a total of $187.5 million. The $50 million is to be held in the escrow account earmarked for plaintiffs' private counsel attorneys' fees first payment pending further order of the court."

c. Texas Settlement provisions under the most favored nation clause were incorporated into the Florida settlement "because I

believe we've got a most favored nation clause, and the Texas settlement very well may have some beneficial provisions";

d. The court further ordered that the Executive Department should review the Texas Settlement Agreement, submit its views to settling defendants and private counsel and set a further hearing to implement its order for March 6, 1998.

A formal order memorializing the court's rulings of February 3, 1998 was entered on February 11, 1998. Although the court denied "Plaintiff's motion for an order directing the immediate release of escrowed funds to the State of Florida" (emphasis added) and set aside funds to pay the lawyers (App. 35), the State took no appeal.[15]

On February 27, 1998 Gentry's motion to enforce charging lien (App. 34) was filed because "the State has refused to comply with this Court's Order and direction of February 3, 1998, to in good faith cooperate with all parties to draft a comparable Florida Agreement to Exhibit I of the Texas Settlement Agreement" and the State was attempting to "extinguish counsels' rights under the contract and subject any payment of fees to Legislative 'grace'. ..." *Id.* at 5. The motion was joined by the other private counsel who previously had not filed charging liens. (App. 26, 32, 33.) Although Gentry and participating private counsel had been largely successful in working with Settling Defendants to conform the Texas

[15] Rule 9.130(a)(3)(C) provides for review of non-final orders which "determine the right to immediate monetary relief."

provisions to the Florida Settlement as ordered by the court, the State had failed to participate in the process.[16] Instead, it proposed to use the MFN to adopt a "Texas/Florida" addendum which eliminated the attorneys' contract rights (expressly contrary to what is provided in the Texas Agreement); created a "preamble" whereby the "finality" of the settlement agreement was resolved in the State's favor (which was the subject of an ongoing dispute with Tobacco and the subject of a pending appeal); provided that all settlement payments for 1997-98 were for "public health" expenditures and not Medicaid, even though such claims were never made in the Florida lawsuit (thereby allowing the State to argue the attorneys were not entitled to fees against those proceeds because they were not the recovery of Medicaid benefits;) and conditioned the State's advance of attorneys' fees upon legislative appropriation (which also was not in the Texas Settlement Agreement). (*See* review of the State's proposal by Settling Defendants' counsel Lockman at App. 26, pp. 143-161). The State also served its motion to compel Settling Defendants to revise the Florida Settlement Agreement pursuant to the Most Favored Nation clause, to which it attached its Executive Branch of the State of Florida's proposal regarding 'Most Favored Nation' clause (App. 25).

---

[16] As suggested by an Assistant Attorney General at the April 24 hearing, the Attorney General was apparently handcuffed by political in-fighting between the Legislature and the Executive Branch involving a myriad of political issues. (App. 8, p.51.)

Unlike the submission by the State, Settling Defendants' proposal (App. 27) essentially tracked the Texas provisions as modified to incorporate previously agreed favorable Florida terms, except in two significant respects: (1) Settling Defendants added a sentence to the Texas Settlement Agreement whereby it sought to require a release from private counsel "from any and all claims" (thereby seeking to cut-off the lawsuit filed against them by Montgomery) and (2) did not provide for reimbursement to the State of its $50 million advance from the panel's award. A lengthy hearing was held (App. 26, pp. 113-195) in which the State and Settling Defendants argued their respective positions and private counsel were permitted to participate and offer their observations and suggestions. At the conclusion of the hearing, the court again ordered all affected parties to meet and undertake to agree on an appropriate addendum to the Florida Settlement Agreement. In so doing, the court gave the parties very specific guidelines as to what it expected.

The court made it clear it would not allow any party to modify the Texas provisions so as to gain an advantage against any other party or counsel regarding matters which were in dispute. Accordingly, the court noted it would not adopt any language on "final approval" because "that doesn't come out of the Texas Agreement." (App. 26, p. 197); that the question of whether the legislature had to approve the $50 million advance did not come from the Texas Agreement; that

it was not going to require the lawyers to waive their appeals or contract claims to participate in the arbitration process,[17] and that it was going to require the State to advance $50 million as provided by Texas, with the State's advance being refunded once the fee award was made. *Id.* at 197-8.

Pursuant to the court's directive, the State of Florida and Settling Defendants made further submissions regarding an appropriate Texas Exhibit I to be incorporated into the Florida Settlement Agreement (*see* App. 24; App. 22). William C. Gentry also wrote the court because, "I have undertaken to coordinate this process with all concerned parties and would like to report to you what I understand to be the differing positions of various parties and briefly explain the reasoning behind our submission." (App. 23, ¶1) He also submitted an addendum and proposed order which counsel believed were most faithful to the Texas provisions and expressed the court's intent and directions as set out in the hearings.

As of the time of the final submissions by Settling Defendants and the State of Florida, both parties had acknowledged that the Texas Attorneys Fee Agreement was favorable to the State of Florida. The State and Tobacco had

---

[17] The Texas Agreement expressly provided "The State of Texas has hired and employed Private Counsel to represent it in connection with this action, and has advised Settling Defendants that it has entered into a separate agreement dated March 22, 1996 regarding the payment of attorneys' fees to Private Counsel. The obligations and rights of the parties to that agreement are unaffected by the Settlement Agreement and this Exhibit thereto." (App. 40, Exhibit 4, Ex 1 [Texas], Sec. 2(a), p.2.)

long before, of course, asked the court to retain jurisdiction over this matter and expressly acknowledged jurisdiction "by the Court for the purpose of enabling any party to this Settlement Agreement to apply to the Court at any time for further orders and directions as may be necessary and appropriate to implement or enforce this Settlement Agreement...." (App. 56, S.A. 3.) Indeed, the State had filed its motion to compel Defendants to revise the Florida Settlement Agreement so as to incorporate more favorable Texas terms. (App. 25).[18] In most respects, the submissions by Settling Defendants and the State of Florida tracked the procedures and substantive provisions of the Texas Settlement Agreement. However, each continued to try to interject language not contained in the Texas Agreement (and which the court had advised it would not permit) to give them some advantage with respect to disputed matters.

After reviewing all of the proposals, the court wrote Gentry and advised him to prepare an order consistent with counsel's prior submission as modified by the court. (App. 20.) Counsel complied with the court's direction and the court's order of April 16, 1998 implementing Most Favored Nation provision of the Florida Settlement Agreement was thereafter entered. Since it is the basis of this appeal and is self-explanatory, the April 16 Order is attached for the Court's convenient reference.

---

[18] The April 16 Order appealed by the State was, in fact, entered on the State's motion and Gentry's charging lien (App 1).

Appeals were taken by the State and by Settling Defendants. The State primarily complains of the $50 million advance and the court retaining jurisdiction over the settlement proceeds pending final resolution of the liens.

9. The Court's Order Denying the State's Motion to Stay and Ordering Release from Escrow of the $50 Million Advance Payment to Counsel

During the hearing on the State's motion to stay the April 16 Order implementing Most Favored Nation Provision of Florida Settlement Agreement, the Deputy Attorney General admitted that the reasons for seeking a stay of the Court's Order were purely political:

> Appreciating and firmly understanding this court's sense of its ruling and sense of the nature of how that money lies in escrow, but if we can take this case and allow that 216 [budget amendment] process to work its way through, once those hard passions between the governor and the legislature and the Democrats and Republicans and the north and the south and all of those things that go on in Tallahassee this time of year, we can let those things go by.
>
> By May 15th we are not going to have any fight about this because, from out perspective, we'll have closure on that issue and that is the purpose of this motion, Your Honor. Northing more.

(App. 8, p. 51). (It should be noted that "By May 15th" the legislature would have adjourned.) The trial court, obligated to follow the law and undoubtably wary of the State's political arguments, denied the State's motion to stay. The appeal from that Order has been consolidated before this Court.

10. The Court's Order Granting Motion to Protect Escrow Funds.

Pursuant to the court's prior orders, $50 million was escrowed to trigger Settling Defendants' obligation to pay advance attorneys' fees under the Texas/Florida addendum to the Settlement Agreement. An additional $137.5 million was being held in escrow pending resolution of the liens of Montgomery et al. At the hearing on May 15, 1998, it was brought to the court's attention that there loomed an incredible piece of legislation (CS/SB 1270) which sought to confiscate the $187.5 million, required the private escrow agent to pay the money to the Comptroller of the State of Florida, lodged exclusive jurisdiction in Leon County for the seizure of the money, and insured that none of the attorneys who had liens against the fund would be permitted to intervene or participate. In addition to the State's having previously agreed to the settlement funds being placed in escrow under the court's control and the court having designated the $187.5 million for attorneys' fees, the appeal of Kerrigan, Montgomery, et al. was pending in the Fourth District where the very issue of entitlement to such funds was being contested by the State. Faced with the prospect of the State seizing the funds and thereby usurping the power of the court to determine the disputed issues, the trial judge ordered the $187.5 million plus accrued interest transferred to the Registry of the Court.[19] At the time the court transferred the escrowed

[19] It should be noted that after the legislation was signed into law, the Comptroller did seize the remaining funds held in escrow (i.e. the Pilot program funds), even though as previously acknowledged by the State and expressly provided in the settlement agreement, such funds were only to be paid pursuant to court order and at the rate of $100 million per year

funds from a private banking institution into the Registry of the Court, the proposed legislation had not yet become law.

11. The Certification to This Court

The State appealed the April 16th Order implementing Most Favored Nations provision, the April 24 order denying a stay of that Order, and the May 15th order transferring the escrowed funds from a private banking facility into the protective custody of the Court. Without the benefit of appellees' being permitted to file briefs to acquaint the appellate court with the true course of events as set out herein, and on the motion of the State of Florida representing great constitutional issues were afoot, the Fourth District certified the question,

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

SUMMARY OF ARGUMENT

Under the rubric of the certified question, "Are the funds derived from the tobacco settlement subject to disbursement by the trial court?", this Court has before it an underlying Order that is indeed of great public importance. For if the trial court's Order incorporating the Texas attorney fee provisions into the Florida Settlement is not upheld, the vague and ambiguous agreement of Tobacco to pay the State's attorneys' fees is illusory. Without the Texas provisions, there is only

---

(Settlement Agreement at p. 9; App. 36 at pp. 113-4). Moreover, the Kerrigan, Montgomery appeal was decided adversely to the State three days after the subject order and their liens were reinstated.

endless litigation over what was meant by "caps" or "other conditions." There is not even a method for picking the "panel" -- as favorably provided under the detailed Texas Agreement. There is no vesting -- as provided under Texas and agreed by Tobacco -- in a $750 million fund to pay fees in 1998 to the first settling (and agreeing) States: Mississippi, Florida and Texas. There is no provision that requires the lawyers to forego enforcement of any contract claims until after it is determined what Tobacco will pay.

Faced with the Florida Settlement Agreement being placed in serious jeopardy, witnessing a damaging and disruptive escalation of litigation over attorneys' fees, and having both the State and Tobacco acknowledge that the Texas agreement provided solutions and was beneficial to the State, the trial court exercised the authority given him by the parties and his sound judicial discretion to incorporate corollary provisions of the Texas attorneys' fee agreement into the Florida Settlement.

By virtue of his Order, the State of Florida's exposure to pay its attorneys under the Contract will likely be eliminated by virtue of payments by Settling Defendants; the ambiguities of the Florida Settlement Agreement will be cured and the State's billion dollar settlement will be secure; and the unseemly and repugnant litigation between the State and its private counsel should be largely mooted. In addition, lawyers who served the State so well and sacrificed so

much for over four years will finally be paid for their services. Properly viewed, the three Orders on appeal present the following questions: After having been expressly authorized by the parties to enforce the Settlement Agreement and resolve disputes thereunder, (1) Did the trial court abuse its discretion in granting the State's motion to invoke the Most Favored Nation Provision to incorporate the Texas Settlement but in so doing, reject certain elements of the State's and Settling Defendants proposals which were in dispute, inconsistent with Texas provisions and designed to give the requesting party an advantage regarding a disputed issue? (2) Did the trial court abuse its discretion in denying the State's motion to stay enforcement of its order because the State argued it would be politically expedient to wait until the legislature was out of session? (3) Did the trial court abuse its discretion in transferring settlement proceeds -- which the State "invited" and agreed to the court's controlling -- out of a private banking account into the registry of the court so as to protect its jurisdiction and that of the appellate court to determine legal entitlement to such funds?

Ultimately, these three appealed orders devolve into the question of whether the subject funds are subject to disbursement by the trial court. Obviously, the answer is "Yes." Otherwise fundamental rules of practice and procedure and the administration of justice are meaningless. Otherwise, the courts have no power to protect the rights of litigants -- and even lawyers --

appearing before them. Otherwise, this debacle will continue, not only to the detriment of those lawyers who prefer that Tobacco pay their fees instead of the State, but to the ultimate detriment of the State and the Public.

Furthermore, the law of contracts, the law of sovereign immunity and the law of attorneys' fee liens clearly support the right of the lawyers under the statutorily-authorized, express, written contract to be paid for successfully representing the State against Tobacco, to have their rights adjudicated in the courts and not to be relegated to seeking "an act of grace from the legislature." Accordingly, those subjects are not and should not be the main issues in this appeal. Nevertheless, because the State, like Sisyphus, keeps trying to push the rock uphill, this Brief will show the repeated rulings of this Court directly defeat the State's contention which, stripped to its essence, is "We are the State, and we, and only we, can walk away from our valid contracts with no obligation to fulfill our promises and no Court can help those we wrong, even our lawyers without whom we could not have succeeded."

ARGUMENT

I. The Trial Court Did Not Abuse its Discretion in Exercising its Authority over the Escrowed Funds and Implementing the Most Favored Nation Provision

It is fundamental that "a party cannot successfully complain about an error for which he or she is responsible or of rulings that he or she has invited the trial court

to make." *Gupton v. Village Key & Saw Shop, Inc.* 656 So. 2d 475, 478 (Fla. 1995). *See Fuller v. Palm Auto Plaza, Inc.*, 683 So. 2d 654, 655 (Fla. 4th DCA 1996); *Held v. Held.*, 617 So. 2d 358, 360 (Fla. 4th DCA 1993). Much less should a party be permitted to complain about the manner in which a court exercises discretion when the party has invited the exercise of that discretion. The State understandably forgets it stipulated to the court having exclusive jurisdiction over the escrow fund and stipulated to the court issuing orders determining how it should be disbursed. It also forgets the funds were escrowed pursuant to the court's Order **granting** (with the State's acquiescence) Settling Defendants' Motion in the Nature of Interpleader requesting the monies be deposited "into the registry of the court, or any appropriate escrow fund" so as to protect Settling Defendant themselves from liability on the liens. Unquestionably, by the State's agreement, the funds derived from the Tobacco settlement [were] subject to disbursement by the trial court."

It is also clear that the trial court did not err in entering the order implementing the Most Favored Nation provision to incorporate corollary provisions of the Texas Attorneys' Fee Agreement. The record is undisputed that the State and Settling Defendants requested the court to approve their settlement agreement and make it an enforceable order of the court and they expressly consented to the court retaining jurisdiction to resolve any disputes under the Settlement Agreement and to enter "further orders and directions as may be

necessary and appropriate to implement or enforce this Settlement Agreement." (App. 56, S.A. 3) The record is also manifestly clear that both the State and Settling Defendants agreed that the Most Favored Nation provision should be invoked to incorporate the comprehensive provisions of the Texas Attorneys' Fee Agreement, and the State so moved. It is also clear that the Texas provisions not only benefitted Florida's private counsel by finally providing a vehicle by which Tobacco's obligation to pay fees could be implemented, but such provisions were critically important and favorable to the State of Florida. For without the Florida Settlement Agreement being amended to specifically define what was intended by the parties in regard to Settling Defendants' agreement to pay attorneys's fees, the entire settlement was in grave jeopardy. Moreover, as expressly acknowledged by the Attorney General, the payment of substantial attorneys' fees by Settling Defendants was beneficial to the State. Indeed, the trial court's order adopting the Texas provisions not only greatly minimizes the State's exposure to attorneys' fees under the contract, but very likely will eliminate its exposure by virtue of Tobacco's payments and should moot the highly publicized and harmful attorneys' fee dispute that has overshadowed what should have been one of the greatest accomplishments of the State of Florida and the legal profession.

The trial court was presented with a dispute between the State and Settling Defendants as to how to conform the comprehensive Texas provisions to the Florida

situation — the very sort of circumstance envisioned by the parties' agreement to vest the trial court with authority to resolve such disputes and enter orders and directions as "necessary and appropriate." Basically, the dispute came down to the State's argument that it could "cherry pick" provisions at random for incorporation and Settling Defendants' position that the Most Favored Nation provision required all relevant terms of the Texas agreement to be incorporated into Florida. (*See* App. 36, p. 71, 89)

Ultimately, the parties agreed to incorporate essentially all of the Texas agreement (except the State did not want to advance the $50 million, even if it were reimbursed a few months later) and the remaining disputed issues involved each of the parties' efforts to interject non-Texas provisions which would give it an advantage over the other or private counsel. The court judiciously considered the issues, expending several hours of hearing and reviewing a plethora of submissions, and entered an order which faithfully and properly incorporates the Texas provisions into the Florida Settlement. In so doing, it is correct that the trial judge asked for and received the in-put of undersigned counsel who attempted to perform his duties as an officer of the court [20] by coordinating the process with all concerned parties,

---

[20] Although undersigned counsel's efforts to try to reach a sensible and fair resolution of the fee dispute have been intermittently assailed by other private counsel and occasionally his "client", we believe it is clear that "the advocate has more than a private fiduciary relationship with a client; he also has a public trust". Linowitz, *The Betrayed Profession* at p. 3.

identifying areas of dispute and pointing out provisions which were inconsistent with the court's directive that it would not incorporate concepts that were not in Texas, nor would it modify the Texas agreement to give any party an unfair advantage.

In fine, the trial judge did exactly what the parties asked him to do and empowered him to do -- he acted as a finder of fact in resolving the disputed issues as to how to implement the Most Favored Nation provision of the Florida Settlement Agreement and thereby preserved the settlement and resolved the attorneys' fee debacle that had been raging before him. The court's determinations are presumed to be correct and should not be disturbed unless there is no basis to support them. *See, Malt v. Deese,* 399 So. 2d 41, 46 (Fla. 4th DCA 1981), "Resolution of the ambiguity is a question of fact and we are bound by the findings of the trial court as long as they are supported by the record." *See also, Goldfarb v. Robertson,* 82 So. 2d 504 (Fla. 1955); *Vance v. Florida Reduction Corporation,* 263 So. 2d 585 (Fla. 1st DCA 1972). Clearly, the record supports the trial judge's findings as to how to correlate the Texas provisions into the Florida settlement and should be affirmed.

II. When the State Makes an Express, Written Contract Authorized by Statute, It Is Obligated to Perform, It Waives Sovereign Immunity as to the Contract and the Obligation Is Enforceable By Attorneys' Fee Lien.

Introduction

A dominant error afflicts the State's thinking. It is capsulized on page 23 of its Initial Brief. There it acknowledges that any other plaintiff with a contingency fee contract would have a charging lien and the right to disbursement of settlement proceeds to pay attorneys' fees: "But [says the State] the State is not "any other plaintiff." Its settlement funds are State funds."

This *ipse dixit* reflects an outmoded form of thought explicitly corrected by this Court over a decade ago. *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4 (Fla. 1984). There the funds were actually "State funds." They were in the State coffers. However, that the State was the State and "not any other" litigant, did not relieve it of the obligation to perform under its express, written, mutual contract, i.e., to pay what it owed without the contractor's having "to seek an act of grace from the legislature." 471 So.2d at 5. How is it that the State insists its anti-tobacco lawyers must seek legislative grace to enforce their contract, while Pan-Am Tobacco Corporation could be paid its prison vending machine profits by turning to the courts? And, the State's lawyers are to seek such beneficence from a legislature that repealed the 1994 amendments to the Medicaid Third-Party Liability Act?

Surely, the State argues with tongue-in-cheek when it insists the lawyers go to the legislature for contingency fee compensation.

✣ ✣ ✣ ✣ ✣

Mutual promises notwithstanding, the State says that sovereign immunity:

- permits the State to take the benefit of other contracting parties' performance of all their obligations under an express, written, statutorily-authorized contract - e.g., recovering billions of dollars from a previously invincible wrongdoer - and, then,

- permits the State to walk away from its own obligation to perform its part of the bargain.

None of the standard defenses against enforcement of a contract are at issue in this case. The government had full authority to enter into the contract, solicited the private parties to make it, understood its terms, acquiesced in those parties' full performance and accepted the benefits, but nevertheless chooses not to continue to be bound by the contract's unperformed parts.

The law is clear. Sovereign immunity is no defense when the State makes an express, written, statutorily-authorized contract. *Pan-Am Tobacco Corp. 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). Accordingly, the State has no immunity from liability on such contracts, whether by lawsuit or lien.

Pan-Am Tobacco, *supra*. The State cites cases about tort judgments. (Br., pp. 39, 40.) They are plainly off the mark.[21]

Moreover, §409.910, Florida Statutes, the Medicaid Third-Party Liability Act, holds in subsection (15)(b) that lawyers retained by the State on a contingency basis are to be paid a percentage of any recovery. Thus, as contemplated by *Pan-Am Tobacco*, general law provided for the State to enter the contract with private counsel. In fact, this is just the kind of authorization this Court held in *Pan-Am Tobacco* constitutes a waiver of sovereign immunity.

There was an authorized, express, written contract: there were mutual promises; the lawyers performed; the State reneged. The State now says "thanks for the billions" and walks away leaving counsel to the vagaries of what Justice Raymond Ehrlich called "the chance to seek an act of grace from the legislature." *Pan-Am Tobacco*, 471 So.2d at 5. However, sovereign immunity cannot eliminate the required mutuality of remedy. The opportunity to seek legislative grace cannot "in good conscience" be held to be "sufficient remedy to create mutuality." *Id.* In the same vein, the First District has written:

---

[21] Also, strangely, perhaps inadvertently, the State cites *State Road Department of Florida v. Tharp*, 146 Fla. 745, 1 So.2d 868 (Fla. 1941) where this Court upheld judgment against the State which, reminiscently of this case, had been "other than square and generous" in dealing with the citizenry by choosing "to deprive the citizen of his property by other than legal processes and depend on escape from the consequences under cover of nonsuability of the State." *Id.* at 870.

> In dealing with its citizenry, the Government is required to adhere to the same strict rule of rectitude of conduct and the turning of the same square corner as the Government requires of its citizens.

Okaloosa Island Leaseholder's Ass'n v. Hayes, 362 So.2d 101, 103 (Fla. 1st DCA 1978). In *Pan-Am Tobacco*, this Court provided a cogent, controlling analysis:

> Where the legislature has, by general law [here, Section 409.910(15)(b)], authorized entities of the state to enter into contract ... **the legislature** has clearly **intended** that such **contracts** be valid and **binding** on **both parties**.

Pan-Am Tobacco, 471 So.2d at 5 (emphasis added). Of course, this is all directly in line with the bedrock set down by this Court through Justice Glenn Terrell:

> It is contrary to all human experience to contend that after a litigant has hired an attorney and secured the fruits of his labor and then refuses to pay, that a court of competent jurisdiction is helpless to grant relief against a litigant who is attempting to escape with the proceeds of his attorneys labor. Courts were created to resolve conflicting claims and are clothed with the power to do so. To hold otherwise the law is nothing more than an effete system of abstract rights by which one may accomplish his designs and snap his finger in the face of the court and bid the law au revoir.

In re Warner's Estate, 160 Fla. 460, 35 So.2d 296, 298 (1948).

Having reminded the State that "it is basic hornbook law that a contract which is not mutually enforceable is an illusory contract," this Court declared:

> We therefore hold that where the state has entered into a contract fairly authorized by the powers granted by general law, the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract.

Pan-Am Tobacco, 471 So.2d at 5. A half-century ago, this Court taught a lesson sadly lost on the State:

> The law is settled in this jurisdiction that a litigant should not be permitted to walk away with his judgment and refuse to pay his attorney for securing it.

In re Warner's Estate, *supra*, 35 So.2d at 298 (1948)

Thus, there is no sovereign immunity when the State, pursuant to statutory authority, expressly contracts in writing with private lawyers on a contingency fee basis. Accordingly, the State's attempt to argue that the trial court cannot enforce the authorized contingency fee contract through charging liens is without merit.

The time-honored method for enforcing an attorneys' fee contract is by a charging lien in the original action, not by a separate action. *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavernick, P.A. v. Baucom*, 428 So.2d 1383 (Fla. 1983). A charging lien, an equitable right, secures the payment of fees against efforts to avoid payment.[22] *Id.* This Court rejects attempts to renege on attorneys' fee contracts:

> When the purpose of a contract is accomplished it is too late to haggle over its validity.
> ...

---

[22] Since charging liens are equitable in nature, there are rare instances in which they fail, e.g., where a spouse would be deprived of sustenance. *See Leone v. Leone*, 619 So.2d 323 (Fla. 3d DCA 1993) and cases cited there.

> An attempt to evade payment of an attorney's fee comes in poor grace after the work is done, the results accomplished and there is no question of bona fides.

In re Barker's Estate, 75 So.2d 303, 304 (Fla. 1954). In *Miller v. Scobie*, 11 So.2d 892, 894 (Fla. 1943), this Court stopped a party from giving his attorney the "run around" and from escaping "freehanded with the fruits of the litigation."

> This court is committed to the doctrine that when a litigant contracts with an attorney to litigate a cause and pay him a percentage of the recovery for his fee, he is entitled to a lien on the judgment therefor.
> ...
>
> When honor and good faith cease to be the very bed rock on which the law practice is anchored, the right of litigants will then cease to be actuated by right and justice and will turn on the practice of tricks and feats of legerdemain.

Id. Accord, Carter v. Davis, 8 Fla. 183 (1858); *Mabry v. Knabb*, 10 So.2d 330 (Fla. 1942); *Nichols v. Kroelinger*, 46 So.2d 722, 724 (Fla. 1950).

Further, Justice Ehrlich, wrote for this Court on the subject of charging liens in *Sinclair, Louis, supra* at 1385:

> The policy underlying the granting an enforcement of charging liens was clearly expressed early in their development in this state:
>
> > While our courts hold the members of the bar to strict accountability and fidelity to their clients, they should afford them protection and every facility in securing them their remuneration for their services. An attorney has a right to be remunerated out of the results of his industry,

and his lien on these fruits is founded in equity and justice.

> Carter, 6 Fla. at 258 (emphasis in original). [*Carter v. Bennett*, 6 Fla. 214 (1855)] The intervening years have not diminished the attorney's duty of loyalty and confidentiality to his client. For this reason, proceedings at law between attorney and client for collection of fees have long been disfavored. The equitable enforcement of charging liens in the proceeding in which they arise best serves to protect the attorney's right to payment for services rendered while protecting the confidential nature of the attorney-client relationship. *In re Warner's Estate.*

And, it was in the cited *In Re Warner's Estate*, *supra*, 35 So.2d at 299, that this Court stated with particular pertinence to this controversy:

> It is further consistent with law that an attorney's lien in a case like this be enforced in the proceeding where it arose. The parties are before the court, the subject matter is there [as the Court later said, "the fund was in custodia legis"], and there is no reason whatsoever why they should be relegated to another forum to settle the controversy.
>
> ...
>
> In our view the contract of employment between Warner and attorney was sufficient to authorize the court to protect attorney in the manner shown.

Accordingly, contract law, sovereign immunity law and attorneys' fee lien law, all from this Court, hold squarely against the State in this matter.

III. The Medicaid Third-Party Liability Statute Supports the Right to Compensation on a Contingency Basis

Grasping at straws, the State argues that §409.910(1) of the Medicaid Third-Party Liability Act itself prevents its lawyers from being paid from the recovery. However, the State disregards the key language defeating its argument: "Principles of common law and equity as to ... lien ... and all other defenses available to a liable third party are to be abrogated...." (Emphasis added.) The State's own lawyers are not "a liable third party" as this Court knows. In *Agency for Health Care v. Associated Indus.*, 678 So.2d 1239, 1250 (Fla. 1996), this Court described the legislative intent of §409.910(1):

> As previously explained, the Act created, by legislation enacted in 1990 and 1994, a new cause of action by which the State may pursue liable third parties to recover Medicaid expenditures. This new cause of action was created with the intent that no affirmative defenses be available to defendants.

(Emphasis added.) Section 409.910(15)(b) expressly authorizes the contingency fee approach to payment of the State's lawyers. The State's argument based on §409.910(1) is frivolous.

Moreover, the Gentry motion to enforce charging lien specifically made the point to the trial court that the contingency contract was expressly approved by the Attorney General's office and that the Attorney General had noted, "According to the Contract, the law firms are responsible for all costs attendant to this litigation and will be paid for their services only upon a recovery." (App. 34, p. 7, Exh. 2.)

Further, the court was informed that the contingency fee contract was submitted for approval by the Executive Office of the Governor to the United States Department of Health and Human Services. Medicaid is a cooperative federal/state program - and the authorized federal agency, the Health Care Financing Administration (HCFA), recognized the contingency fee contract was appropriate and met the federal government's obligation to bear the cost (including attorneys' fees) of the litigation. (App. 34, p. 7, Exh. 3.) Further, the HCFA quoted its Medicaid Manual:

> "[l]egitimate costs of obtaining [third party liability] ... , such as attorneys fees, may be **deducted prior to** reimbursement to the Medicaid program."

(emphasis added) and then the Administration confirmed that "[i]n our view, the proposal to pay a contingency fee of 25% clearly reasonably falls within the scope of this provision for payment of attorneys' fees as a cost of TPL [Third-Party Liability] recovery." (App. 34, Exh. 3.) Finally, the HCFA concluded by informing the Governor's office that:

> **We thus find that the contingency contract in question complies fully with federal requirements, and indeed is fully consistent with the requirement in 42 U.S.C. §1396(a) (25) that states "take all reasonable measures to ascertain the liability of third parties ... to pay for care and services under the plan."**

(App. 34, Exh. 3, emphasis added.)

Further, despite the Attorney General's and the federal government's blessing of the express written contract and notwithstanding that this was a statutorily-

authorized contingency fee lawsuit against the tobacco industry defendants, if the State truly believed that an annual legislative appropriation was required, one would suppose that the officials of the State of Florida would have proposed such annual appropriations for fiscal years 1995-96, 1996-97, 1997-98, 1998-99, that the legislature would have passed them and that the Governor would have approved them. However, the record is indisputable that the following appropriations were requested, passed and approved:

1995-96	$0.00
1996-97	$0.00
1997-98	$0.00
1998-99	$0.00

Of course, the 1998-99 budget, as the State unwittingly confesses, was passed many months after the contingency had occurred; long after the lawsuit was settled and the State's monetary claims were released in consideration of the pledge by Settling Defendants to pay billions of dollars. Nevertheless, to quote the State, there was a **"Legislative determination not to appropriate any State Funds for the PTA...."** (Br., p. 31, underlining in original, emphasis added.)

The State says it considers the funds in the registry of the trial court to be State funds. The contingency has occurred under the express, written contract the Attorney General approved. Taking the State at its word, the lawyers are entitled to be paid. Yet, says the State, the legislature has decided neither to pay what is owed

under the contract nor to pay any part of it. This proves again the wisdom of Justice Ehrlich's declaration for this Court that **"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."** *Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4, 5 (Fla. 1984) (emphasis added).

So, today, having fully performed their express written contract obligations, Florida's lawyers face a legal challenge from the State, with whom they contracted in good faith, while other states, e.g., Maryland, Massachusetts and Utah, which entered express written contingency fee contracts with private counsel have stood with their lawyers against tobacco industry legal challenges to the contracts. There, it is the tobacco industry that claims the potential recovery is "state funds" and that it is "subject to legislative appropriations." There, it is the Attorney Generals who defend the contracts and the rights of the lawyers to be paid under the contingent fee contract if they succeed in felling the giant. Here, it is the Attorney General who approved the contract and now says it is unenforceable except by legislative grace.

One can only wonder, given the State's admission of its complete inability to have handled this lawsuit without its contingency fee counsel (App. 58, p. 10), how the State would have briefed these issues ("State funds", "subject to appropriations") had the tobacco industry attacked the contingency fee contract in the declaratory judgment action that eventually reached this Court in *Agency for Health Care v.*

Assoc. Indus., 678 So.2d 1239 (Fla. 1996). At any rate, we know that presently the Florida Attorney General, whose contingency fee lawyers were successful against the tobacco industry, is now taking a diametrically different position from those Attorneys General who are facing legal efforts by the tobacco industry to prevent their states from having the benefit of the type of representation that proved so successful for Florida. In Maryland, Massachusetts and Utah the courts accepted the efforts of those states' respective Attorneys General to defend their right to employ contingency counsel and denied tobacco industry efforts to preemptively defeat those anti-tobacco lawsuits. *Philip Morris v. Glendening*, 709 A.2d 1230 (Md. 1998); *Commonwealth of Massachusetts v. Philip Morris, Inc., et al.*, Civ. Doc. No. MICV95-07378, Superior Court, County of Middlesex, January 22, 1998; *Philip Morris Incorporated, et al. v. Janet C. Graham, Attorney General of the State of Utah, et. al.*, Case No. 960904948 CV, Third Judicial District Court, St. Lake County, Utah, February 13, 1997. Further, Texas' Attorney General supported by affidavit the post-settlement motion for approval of attorneys' fees submitted by private counsel who had a contingency fee contract with Texas. The court granted the motion for approval of attorneys' fees, subject only to the provisions of the Texas Settlement Agreement (the terms of which were the subject of the Order Implementing MFN at issue in this appeal). (App. 1.) *State of Texas v. The*

American Tobacco Company, et al., Case No. 5:96cv91, United States District Court, E.D. Tex., January 22, 1998.

IV. The Contingency Fee Contract Is Not Limited to Less Than All of the Recovery.[23]

Although elated by the results of the lawyering of its contingency fee counsel, the State hopes to limit its obligation by attempting to revise history as to the claims and the recovery.

The State says that "non-Medicaid claims increased the maximum potential recovery in the tobacco litigation from an estimated $1.0 billion ... to a total of over $12.0 billion." (Br., p. 6; emphasis added.) However, the truth is quite different. There is no record basis for claiming that Medicaid recovery constitutes but 1/12th of the settlement.[24] To the contrary, the State conveniently ignores the indisputable fact that Count Four and Counts Five through Eight (fraud and RICO, respectively) of the Third Amended Complaint specifically adopted the same allegations that were adopted in Counts One and Two (negligence and strict liability), including those seeking recovery of all the same Medicaid expenditures. (App. 57, ¶174, 190, 213, 219, 233.) Moreover, paragraph 1, for example, begins the Third Amended

---

[23] Like most of the State's arguments, this issue has never been considered before and is not properly before this Court. Nevertheless, since the State throws it up, we feel obligated to respond.

[24] Under the contract the State must pay its lawyers for "successfully achieving a monetary recovery ..." (App. 58, §II.A., R 217)

Complaint, as to all counts, with a clear declaration that the lawsuit is pursued because "the care of these Medicaid recipients has placed a significant burden on the State." (App. 57, ¶1.) And, paragraph 2 of the Third Amended Complaint alleged as to all counts:

> 2. The Governor, the State of Florida, the Department for Business and Professional Regulation, the Agency for Health Care Administration, and the Department of Legal Affairs do hereby bring this action to recover all money paid for medical assistance to Medicaid recipients as a result of diseases or injuries caused by the foreseeable and intended use of the defendants' tobacco products, cigarettes.

Count Four, fraudulent practices under §817.41, Florida Statutes, had the Medicaid expenditures as the basis for compensatory damages. (*See* App. 57, incorporated paragraphs cited above and ¶177.) Counts Five and Six, RICO, sought the Medicaid expenditures as damages to be trebled under the racketeering statutes.[25] (*See* App. 57, incorporated paragraphs cited out above and ¶192, 211, 213 incorporating 192 and 217.)

Thus, there is no basis for the State's attempt to diminish the recovery of Medicaid expenditures achieved in the settlement.

---

[25] Count Three was the equity count. Counts Seven and Eight had been dismissed by the court before trial on technical grounds having to do with the issue of the defendants' investment of the proceeds of racketeering into themselves as corporations not into the "racketeering enterprise."

The State also curiously suggests that the fee shifting statutes pursued in Counts Four through Six somehow superseded the contract. However, the case was settled. The trial court made no assessment of attorneys' fees at all, much less an assessment of fees under Counts Four, Five and Six. There was no verdict, no motion for attorneys' fees.

The State also acts as though future Medicaid expenditures were not part of the settlement. While that argument is thought by the State to help it avoid its obligations to its lawyers, the State disregards the how and the why of the trial court ruling that limited the Medicaid expenditures sought in the 1997 trial to past Medicaid payments. In fact, that ruling was the result of strategic planning initiated by contingency fee counsel, who fully consulted on the matter with the clients, in order to protect the ability to recover future Medicaid expenditures through the assertion of collateral estoppel in the event of a verdict of liability, while preserving the ability to pursue recovery of future Medicaid expenditures in the event of a defense verdict as to the past Medicaid expenditures. In other words, contingency fee counsel devised a method to allow the State to lock-in its ability, without having to retry fault, to recover future damages if the State won the trial, and to avoid losing the ability to recover future damages if the State lost the trial. Had contingency fee counsel not thought of, recommended and pursued the concept of attempting to claim future Medicaid expenditures in the 1997 trial, the defendants, if they had

received a defense verdict, would have contended against future actions that the State was attempting to split its cause of action. It is plain that the Settling Defendants faced the spectre of the application of collateral estoppel enabling the State to return to the Palm Beach County Circuit Court year-in and year-out to recover future Medicaid expenditures as they occurred. At any rate, it is wholly disingenuous for the State, now, to claim that over $10 billion unrelated to any expected Medicaid costs simply materialized out of thin air and that the settlement obtained by contingency fee counsel did not recover future Medicaid expenditures.

CONCLUSION

The imperative for judicial diligence in protecting the Court's prerogative is well articulated in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219, 221-222 115 S. Ct. 1447, 1453, 1454 (1995).

> The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution, and which after the Revolution had produced factional strife and partisan oppression.
>
> ...
>
> Madison's Federalist No. 48, [provides] the famous description of the process by which "[the legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex, ... [and provided] as one example of the dangerous concentration of governmental powers into the hands of the legislature, that "the Legislature ... in many instances decided rights which should have been left to judiciary controversy.

After tracing the genesis of the fundamental policies behind prohibiting legislative intrusion into the work of the Court, the Supreme Court struck down a provision of the Securities and Exchange Act, noting:

> The great constitutional scholar Thomas Cooley addressed precisely the question before us in his 1868 treatise:
>
> > 'If the Legislature cannot thus indirectly control the action of the courts, ... it is very plain it cannot do so directly, by setting aside their judgments, ... or directing what particular steps shall be taken in the progress of a judicial inquiry.' T. Cooley, supra at 94-95.

Plaut, 514 U.S. at 225, 115 S. Ct. at 1456. Likewise, these teachings that form the very foundation of our governmental system answer the question posed to this Court: "Are the funds derived from the Tobacco settlement subject to disbursement by the trial court?" Unequivocally, the answer is yes. The appealed orders of the trial court should be affirmed.

Respectfully submitted,

Wayne Hogan (FBN 142460)
Brown, Terrell, Hogan, Ellis,
McClamma & Yegelwel, P.A.
233 East Bay Street, 8th Floor
Jacksonville, Florida 32202

William C. Gentry (FBN 137134)
Gentry, Phillips & Hodak, P.A.
Post Office Box 837
Jacksonville, FL 32201

C. David Fonvielle (FBN 141980)
Fonvielle, Hinkle & Lewis, P.A.
3375 Capital Circle, N.E., Bldg. A
Tallahassee, FL 32308

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing ANSWER BRIEF OF APPELLEES WILLIAM C. GENTRY, WAYNE HOGAN AND C. DAVID FONVIELLE TO INITIAL BRIEF OF STATE OF FLORIDA and Appendix have been furnished by U. S. Mail, this 20th day of August, 1998, to the following:

Parker D. Thomson, Esquire
Carol A. Licko, Esquire
Thomson Muraro Razook & Hart
One S.E. Third Ave., Suite 1700
Miami, FL 33131

Robert A. Butterworth, Attorney General
Kim Tucker, Deputy General Counsel
James A. Peters, Special Counsel
Louis F. Hubener, Asst. Attorney General
Office of the Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050

Myron H. Burnstein,
Deputy Attorney General
Office of the Attorney General
110 Tower, 10th Floor
110 S.E. 6th Street
Fort Lauderdale, FL 33301

Murray R. Garnick, Esquire
Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004-1202

Stephen J. Krigbaum, Esquire
F. Townsend Hawkes, Esquire
Joseph Ianno, Jr., Esquire
Carlton, Fields, Ward, et al.
Post Office Box 150
West Palm Beach, FL 33402

Edward A. Moss, Esquire
Anderson, Moss, Parks & Sherouse
25th Floor, New World Tower
100 North Biscayne Boulevard
Miami, FL 33132

Justus Reid, Esquire
Reid, Metzger & Associates, P.A.
250 Australian Ave. S., Suite 700
West Palm Beach, FL 33401

Robert M. Montgomery, Jr., Esquire
Montgomery & Larmoyeux
1016 Clearwater Place
Post Office Drawer 3086
West Palm Beach, FL 33402

Ronald L. Motley, Esquire
J. Anderson Berly, III, Esquire
Ness, Motley, Loadholt,
Richardson & Poole
Post Office Box 1137
Charleston, SC 29402

Jack Scarola, Esquire
Searcy Denney Scarola
Barnhart & Shipley, P.A.
Post Office Drawer 3626
West Palm Beach, FL 33402-3626

Michael Maher, Esquire
Maher, Gibson & Guiley
90 East Livingston, Suite 200
Orlando, FL 32801

Richard F. Scruggs, Esquire
Scruggs, Millette, Lawson, et al.
734 Delmas Street
Pascagoula, MS 39568-1425

Michael D. Eriksen, Esquire
John F. Romano, Esquire
Romano, Eriksen & Cronin
Post Office Box 21349
West Palm Beach, FL 33416-1349

C. David Fonvielle, Esquire
Fonvielle, Hinkle & Lewis, P.A.
3375 Capital Circle, N.E., Building A
Tallahassee, FL 32308

P. Tim Howard, Esquire
Howard & Associates, P.A.
1424 E. Piedmont Dr., Suite 202
Tallahassee, FL 32312

Robert G. Kerrigan, Esquire
Kerrigan, Estes, Rankin & McLeod
400 East Government Street
Pensacola, FL 32501

James H. Nance, Esquire
Nance, Cacciatore, Sisserson, et al.
Post Office Drawer 361817
Melbourne, FL 32936-1817

Sheldon J. Schlesinger, Esquire
Sheldon J. Schlesinger, P.A.
1212 Southeast Third Avenue
Fort Lauderdale, FL 33316

C. Steven Yerrid, Esquire
Yerrid, Knopik & Krieger, P.A.
101 E. Kennedy Blvd., Suite 2160
Tampa, FL 33602

Thomas W. Carey, Esquire
Carey & Hilbert
622 Bypass Drive, Suite 100
Clearwater, FL 33764

Bruce S. Rogow, Esquire
500 E. Broward Blvd., Suite 1930
Fort Lauderdale, FL 33394

James W. Beasley, Esquire
Beasley, Leacock & Hauser, P.A.
505 S. Flagler Drive, Suite 1400
West Palm Beach, FL 33401

Arnold R. Ginsberg, Esquire
Ginsberg & Schwartz
66 W. Flagler Street, Suite 410
Miami, FL 33130

Stuart C. Markman, Esquire
Susan H. Freemon, Esquire
Kynes, Markman & Felman, P.a.
Post Office Box 3396
Tampa, FL 33601-3396

Gerald J. Houlihan, Esquire
Houlihan & Partners, P.A.
2600 Douglas Road, Suite 600
Miami, FL 33134

Cynthia M. Moore, Esquire
Gary K. Harris, Esquire
Boies & Schiller, L.L.P.
390 N. Orange Ave., Suite 1890
Orlando, FL 32801

W. Robert Vezina, III, Esquire
Mary N. Piccard, Esquire
Vezina, Lawrence & Piscitelli, P.A.
318 N. Calhoun Street
Tallahassee, FL 32301

Lisa K. Bennett, Esquire
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
200 E. Broward Blvd., Suite 1900
Fort Lauderdale, FL 33301

WILLIAM C. GENTRY

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

CIVIL DIVISION
CASE NO. 95-1466AH

THE STATE OF FLORIDA, et al.,

Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY, et al.,

Defendants.
_____/

ORDER IMPLEMENTING MOST FAVORED NATION PROVISION OF FLORIDA SETTLEMENT AGREEMENT

THIS CAUSE came on for hearing on the Motion of William C. Gentry, Esquire to Enforce Charging Lien, the State of Florida's Motion to Enforce Settlement Agreement,[1] and pursuant to this Court's previous Order requiring the parties to meet and confer in regard to incorporation of Exhibit 1 of the Texas Settlement Agreement, and after having heard argument of all parties and fully considering the matter, IT IS ORDERED AND ADJUDGED:

1. The plaintiffs and Settling Defendants entered into a Settlement Agreement whereby the parties stipulated to the jurisdiction of this Court to implement and enforce the provisions of the Agreement. The Settlement Agreement was approved and adopted as an Order of this Court on August 25, 1997. By agreement of the parties, this Court assumed exclusive jurisdiction over the settlement proceeds which are to be disbursed pursuant to orders of this Court and the parties agreed

[1] The full title of the State's motion, filed on March 4, 1998, is "State's Motion to Enforce Settlement Agreement by Compelling Settling Defendants to Revise The Florida Settlement Agreement as Required to Give The State of Florida Treatment as Favorable as That Obtained by The State of Texas in its Settlement."

that this Court should enter such further orders as necessary to implement or enforce the Settlement Agreement. The Court finds that it has, and continues to have, jurisdiction over the sum of $187,500,000, which pursuant to this Court's Order of February 11, 1998, was escrowed for (a) $50 million attorneys' fee prepayment and (b) on account of the liens of plaintiffs' private counsel. 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.

2. Article IV of the Settlement Agreement adopted by this Court provides that if any other state enters into a settlement which has terms that are more favorable than the Florida Settlement Agreement, "The terms of this Settlement Agreement **will** be revised so that the State of Florida will obtain treatment at least as relatively favorable as any such non-federal governmental entity." This Court has authority and jurisdiction to apply and enforce this provision of its Order. Pursuant to such authority, in paragraph 5 of its Order of February 11, 1998, the Court ruled that it "will incorporate certain provisions of the Texas tobacco litigation Settlement under the "Most Favored Nation" clause (Section IV) of the August 25, 1997 Settlement Agreement." This Court also escrowed the $50 million to be used as a prepayment of attorneys' fees in order to trigger the provisions of the Texas Settlement Agreement whereby Settling Defendants would be obligated to advance an additional $50 million as part of the detailed settlement process set out in Exhibit 1 of the Texas Agreement.

3. Subsequent to the signing of the Florida Settlement Agreement, there has been a multitude of motions, charges and countercharges, allegations and contentious litigation regarding the intent, application and implementation of Article V of the Florida Settlement Agreement regarding

"Costs and Fees." Certain of plaintiffs' private counsel have sought leave to take discovery to determine the intent of the parties or whether there were agreements by the parties regarding Article V that do not appear in the agreement. Settling Defendants have stated there were agreements of the parties regarding Article V which they contend are material to the Settlement Agreement but which are not apparent on the face of the agreement. The Court finds that these controversies are uncertain as to their outcome and detrimental to the interests of the parties as well as the paramount public interest in preserving and implementing the Florida Settlement Agreement.

4. As previously observed in the Court's Order of November 12, 1997, the State of Florida entered into a contingent fee contract with private counsel to prosecute the subject action. Although the Court has found the contract is subject to the Rules Regulating the Florida Bar which prohibit enforcement of the contract to the extent it would result in an excessive fee, the Court has noted that counsel should be entitled to substantial fees for their services under such contract. The Court finds the contingency has occurred and that private counsel's right to fees vested as of the monetary settlement entered into by the State of Florida on August 25, 1997. Article V of the Florida Settlement Agreement contemplates payment of attorneys' fees to the State's private counsel by Settling Defendants. However, unless an unambiguous and meaningful procedure is adopted to implement the provisions of Article V, the State of Florida may be exposed to payment of very substantial attorneys' fees from the recovery that could be avoided if the Florida Settlement Agreement contained specific provisions such as Exhibit 1 to the Texas Settlement Agreement. The Court finds that the terms of Exhibit 1 to the Texas Settlement Agreement governing fees favorably resolve many of the pending issues in this case and provides an integrally related, reasonable and favorable implementation procedure for payment of attorneys' fees by Settling Defendants. The

invoking of the Most Favored Nation provision and incorporating corollary Florida provisions to Exhibit 1 of the Texas Settlement Agreement will greatly benefit the State of Florida and provide it with as favorable treatment as provided to Texas by reducing or potentially eliminating the fees that may otherwise be due from the settlement.

5. Attached hereto as Exhibit 1 is an Addendum which provides corollary provisions of the Texas Settlement Agreement necessary to implementation of Article V of the Florida Settlement Agreement on more favorable terms than provided by the original Florida agreement. Pursuant to the Most Favored Nations provision of the Florida Settlement Agreement, the attached Addendum is hereby adopted and incorporated into this Court's Order of August 25, 1997, adopting and approving the Florida Settlement Agreement.

6. The $50 million previously escrowed for prepayment of attorneys' fees by this Court's Order of February 11, 1998, shall be immediately transferred to an attorneys' fee trust account maintained by David Fonvielle, Esquire as the State's advance payment pursuant to the Addendum to the Florida Settlement Agreement. Within thirty (30) days of the date hereof, Settling Defendants shall make the advance payment required by the Addendum to the Florida Settlement Agreement by depositing its advance payment in the attorneys' fee trust account maintained by David Fonvielle, Esquire. Such sums shall be made immediately available as an advance payment of private counsel's fees.

7. It is the intent of the Court that private counsel shall fully cooperate and participate in the panel procedures set out in Exhibit 1 hereto. Participation in the panel procedure for establishing a fee to be paid by Settling Defendants or acceptance of such fee shall not waive or affect the rights of private counsel or the obligations of the State of Florida, if any, under the contract

between the State of Florida and its counsel. However, any amounts paid by Settling Defendants to private counsel for their services in the subject representation of the State of Florida shall constitute a credit or a set-off against any fees which may be determined to be due to such private counsel by the State of Florida.

8. The Court believes it is in the public interest for the State of Florida and its private counsel to cooperate in submitting counsel's fee application for payment by Settling Defendants so as to minimize the exposure to payment of fees out of the settlement. In the interest of fairness in determining total fees and in the interest of judicial economy, the Court has determined that the obligations of Settling Defendants to pay fees should be established prior to the Court considering any claims for fees by private counsel against the State of Florida. Any private counsel that accepts any payment from the $100 million advance shall thereby agree to defer any further action to enforce any claimed contract rights (subject to preservation of any matters on appeal or as otherwise permitted by the Court) until such time as fees are awarded as provided by Exhibit 1 hereto. Thereafter, if any private counsel deems it necessary or appropriate, private counsel may apply for fees under the contract and the Court will conduct further proceedings to determine any disputed issues.

9. In consideration of the foregoing and to protect the interests of all affected parties, future payments from Settling Defendants under the Florida Settlement Agreement shall be paid into the Escrow Account and will be disbursed pursuant to further order of the Court.

DONE AND ORDERED in Chambers, in Palm Beach County, Florida, this 16th day of April, 1998.

Circuit Court Judge

Copies furnished to
Attorneys on Attached List:

cy William C. Gentry, Esq.

J. Anderson Berly, III, Esq.
Post Office Box 1137
Charleston, SC 29402

Robert M. Montgomery, Jr., Esq.
P.O. Drawer 3086
West Palm Beach, FL 33402

Michael Maher, Esq.
90 East Livingston, Suite 200
Orlando, FL 32801

Murray R. Garnick, Esq.
555 Twelfth Street, N.W.
Washington, DC 20004-1202

Stephen J. Krigbaum, Esq.
P.O. Box 150
West Palm Beach, FL 33402

Edward A. Moss, Esq.
25th Floor, New World Tower
100 North Biscayne Blvd.
Miami, FL 33132

Wayne Hogan, Esquire
233 East Bay Street, Ste. 804
Jacksonville, FL 32202

Justus Reid, Esquire
250 Australian Avenue South, Suite 700
West Palm Beach, FL 33401

William C. Gentry, Esquire
P.O. Box 837
Jacksonville, FL 32201

Attorney General Robert Butterworth
Office of the Attorney General
The Capital, PL-01
Tallahassee, FL 32399-1050

Myron H. Burnstein
Office of the Attorney General
110 Tower, 10th Floor
110 S.E. 6th Street
Fort Lauderdale, FL 33301

P. Timothy Howard, Esquire
1424 E. Piedmont Drive, Ste. 202
Tallahassee, FL 32312

Gerald J. Houlihan, Esquire
2600 Douglas Road, Ste. 600
Miami, FL 33314

Cynthia M. Moore, Esquire
200 E. Robinson St., Ste. 325
Orlando, FL 32801

Thomas W. Carey, Esquire
622 Bypass Drive
Clearwater, FL 34624

James W. Beasley, Jr., Esquire
319 Clematis St., Ste. 1000
West Palm Beach, FL 33401

Exhibit 1

MOST FAVORED NATION ADDENDUM TO ARTICLE V OF FLORIDA SETTLEMENT AGREEMENT AND ORDER OF AUGUST 25, 1998

ATTORNEYS' FEES

Payment of Fees

Pursuant to paragraph V of the Settlement Agreement and the terms hereof, Settling Defendants will pay reasonable attorneys' fees to private counsel retained by the State of Florida that undertook the risks and responsibilities of this litigation under a contingency fee contract with the State of Florida ("Private Counsel") and to any other counsel retained by the State of Florida in connection with this action, for their representation of the State of Florida in connection with this action. The amount of such fees will be set by a panel of three independent arbitrators (the "Panel") whose decisions shall be final and not appealable. The procedures governing Settling Defendants' obligations to pay such fees, including the procedures for awarding fees and the timing of payments on such awards, shall be as provided herein.

Payment of such fees shall be subject to an annual aggregate national cap of $250 million for 1997 and of $500 million for each year thereafter for all attorneys' fees and certain other professional fees to be paid by Settling Defendants (including such fees to be paid by any one or more of the Settling Defendants) in connection with tobacco and health cases settled by any of the Settling Defendants or legislatively resolved by operation of law through enactment of federal legislation implementing the terms of the Proposed Resolution (or a substantially equivalent federal program).

For 1997, Settling Defendants will pay the amount of unsatisfied fee awards set by the Panel for Florida's Private Counsel as provided herein, and the Settling Defendants so obligated under the terms of the relevant settlement agreements will pay the amount of unsatisfied fee awards set by the Panel for private counsel retained by plaintiffs in *In re Mike Moore, Attorney General, ex rel. State of Mississippi Tobacco Litig.*, No. 94-1429 (Miss. Ch. Ct., Jackson County), and *Mangini v. R.J. Reynolds Tobacco Co.*, No. 939359 (Cal. Super. Ct., San Francisco County), in an aggregate amount up to $250 million for all such payments by all Settling Defendants for 1997. In the event that the sum of such awards exceeds $250 million, the amount available for payment shall be allocated among the fee awards set by the Panel in proportion to the amounts of the respective fee awards.

For each year after 1997, Settling Defendants will pay the amount of all unsatisfied fee awards set by the Panel up to $500 million per year, but in no year shall Settling Defendants be required to pay more than $500 million dollars with respect to such fees (except insofar as payments under the separate $250 million cap for 1997 are made in 1998 pursuant to section (e)(ii), and except insofar as payments for 1998 may be made in 1999 pursuant to sections (e)(ii)(B)). Nothing in this Addendum shall require any Settling Defendant to pay unsatisfied fee awards set by the Panel in connection with any litigation other than this action.

(a) *Exclusive Obligation of Settling Defendants as to Fees.* The provisions for payment of fees set forth herein constitute the entire obligation of Settling Defendants with respect to attorneys' fees in connection with this action and the exclusive means by which Private Counsel may seek payment of fees by the Settling Defendants in connection with this action. Settling Defendants shall have no other obligation to pay fees or otherwise compensate Private Counsel or any other counsel or representative of the State of Florida, or the State of Florida itself for any fees the State may pay. The State of Florida has hired and employed certain Private Counsel to represent it in connection with this action under a contingent fee contract. The obligations and rights, if any, of the parties to that contract are unaffected by this Addendum to the Settlement Agreement. Acceptance of attorneys' fees pursuant to this Addendum by any Private Counsel shall not constitute a waiver or affect counsel's rights under such contract but shall be credited against any payment that may be due from the State of Florida under such contract.

(b) Composition of the Panel

(i) The members of the Panel shall be selected as follows. The first member shall be a person selected by the Settling Defendants. The second member shall be person selected by agreement of Settling Defendants and a majority of the members of a committee which shall be composed of the following members: Joseph F. Rice, Richard F. Scruggs, Steven W. Berman, Walter Umphrey, two representatives of the Castano Plaintiffs' Legal Committee and, at the option of Settling Defendants, one additional representative to serve on behalf of counsel for any one or more States that, subsequent to the date hereof, enters into a settlement agreement with Settling Defendants (if such agreement provides for a similar method for determining fees for such State's private counsel).

(ii) The first and the second Panel members to be selected as described above shall both be permanent members of the panel and, as such, shall participate in the determination of all awards of attorneys' fees in connection with tobacco and health cases settled by the Settling Defendants or resolved by operation of law through enactment of legislation incorporating the terms of the Proposed Resolution (or a substantially equivalent federal program). The third Panel member shall not be a permanent Panel member, but instead shall be a state-specific member selected to determine fees in connection with all fee applications relating to litigation within a single state. For purposes of determining the amount of fees to be awarded to Private Counsel in connection with their representation of the State of Florida in this action, the state-specific member of the Panel shall be selected by a majority of the members of the Florida trial team as identified in their co-counsel agreement on behalf of Private Counsel. As a state-specific member of the Panel, the person so selected shall not participate in any determination as to the amount of fees to be awarded on any applications other than those in connection with litigation within the State of Florida (unless also selected to participate in determinations on fee applications in connection with litigation in states other than the State of Florida by such persons as may be authorized to make such selections under the terms of other settlement agreements).

(c) *Commencement of Panel Proceedings.* The membership of the Panel shall have been established, and the Panel shall begin deliberations on any pending fee applications, either within 30 days after the date of enactment of legislation implementing the terms of the Proposed Resolution (or a substantially equivalent federal program) or by November 1, 1998, whichever is earlier. No fee application may be presented to the Panel until 30 days after the date of enactment of such legislation or November 1, 1998, whichever is earlier. Private Counsel shall apply for fees collectively and the amount of the fee awarded to Private Counsel by the Panel shall be on behalf of all Private Counsel for their total fees and the Panel shall not consider or make any determination as to the allocation or distribution of such fees among or between private counsel. Any other counsel for the State of Florida (or any person or entity seeking an award from the Panel in their stead) shall submit any applications for fees within 10 days of the submissions by Private Counsel, or shall forfeit the right to any award of fees by the Panel. The Panel shall render a determination on the amount of fees to be awarded to Private Counsel no later than 30 days after the date on which all completed applications for fees on behalf of Private Counsel have been submitted. The Panel shall consider and award fees for private counsel in the order in which their respective fee applications are submitted; in the event that fee applications are submitted on the same date, the Panel will consider and award fees on such fee applications in the order in which their respective cases were settled.

(d) *Procedures Before the Panel.*

(i) All interested parties, including persons not parties hereto, may submit to the Panel any material that they wish. Given the significance and uniqueness of the Florida tobacco litigation, the Panel's consideration of Private Counsel's fee award shall not be limited to an hourly rate or lodestar analysis, but shall take into account the totality of the circumstances. The members of the Panel will consider all information submitted to them in reaching a decision that fairly provides for full reasonable compensation for Private Counsel for their representation of the State of Florida in connection with this action. Settling Defendants will not take any position adverse to the size of the fee award requested by Private Counsel, nor will they or their representatives express any opinion (even upon request) as to the appropriateness or inappropriateness of any proposed amount. The undersigned outside counsel for Settling Defendants Philip Morris Incorporated and R.J. Reynolds Tobacco Company will appear, if requested, to provide information as to the nature and efficacy of the work of Private Counsel and to advise the Panel that they support an award of full reasonable compensation under the circumstances.

(ii) The Panel may, in view of the order of the respective settlements for which fees may be awarded, consider and award fees to Private Counsel and private counsel for the State of Mississippi before doing so with respect to counsel for any other States or public entities. In any event, in considering the amount of fees to be awarded to Private Counsel as provided above, the Panel shall award fees to Private Counsel without consideration of any other fees that already have been or yet may be awarded by the Panel.

(iii) In the event that fewer than all Private Counsel elect to participate in an award of fees from the Panel, any payment of fees to Private Counsel (including the advance fee payments described in section (f)), that are allocable to Private Counsel that do not elect to participate in the fee process described herein, shall be held in an interest-bearing escrow account maintained by David Fonvielle, Esquire in an appropriate money center bank. Disbursement of such escrowed funds shall be subject to further order of the Court upon motion by the State of Florida, the Settling Defendants or Private Counsel.

(e) *Operation of the Annual Cap.*

(i) *In General.*

A. Settling Defendants will pay the amount of unsatisfied fee awards set by the Panel for Private Counsel in connection with this action, and the Settling Defendants so obligated under the terms of the relevant settlement agreements will pay the amount of unsatisfied fee awards set by the Panel for private counsel retained by plaintiffs in *In re Mike Moore, Attorney General, ex rel. State of Mississippi Tobacco Litig.*, No. 94-1429 (Miss. Ch. Ct., Jackson County), and *Mangini v. R.J. Reynolds Tobacco Co.*, No. 939359 (Cal. Super. Ct., San Francisco County), in an aggregate amount up to $250 million for 1997 for all such payments by all Settling Defendants. In the event that the sum of such awards exceeds $250 million, the amount available for payment shall be allocated among the fee awards set by the Panel in proportion to the amounts of the respective fee awards.

B. The Annual $500 million cap for each calendar year beginning with 1998 shall be allocated equally among each month of the year. A case shall be eligible to participate in the amount allocated for a given month if it was settled, or was legislatively resolved by operation of federal legislation implementing the Proposed Resolution (or a substantially equivalent federal program), in or before that month (each such case hereinafter referred to as an "Eligible case"). Except as provided in subsection (iii), the available payment for each month shall be allocated among all unsatisfied fee awards rendered by the Panel as of the applicable payment date with respect to Eligible Cases in proportion to their respective unsatisfied amounts.

(ii) *Payments with Respect to 1997 and 1998.*

(A) Settling Defendants shall make an initial payment (the "Initial Fee Payment") on the earlier of December 15, 1998 or 15 days from the date the Panel awards fees for Private Counsel. The Initial Fee Payment shall include.

(1) payment of Private Counsel's allocable share for 1997; and

(2) payment of Private Counsel's allocable share for each month of 1998 preceding the month in which such payment is made; except that the Initial Fee Payment shall not include payment of a share for any such month for which an Eligible Case exists, but as to which case no award of fees has been made (either because the fee award is still under consideration by the Panel or for any other reason).

(B) Settling Defendants shall make a second payment on January 15, 1999 of Private Counsel's allocable share for each month of 1998 as to which no payment was made pursuant to subparagraph (A)(2).

(iii) *Payments with Respect to 1999 and Subsequent Years.* Settling Defendants shall pay private counsel's allocable share for each month in a calendar quarter within 10 business days after the end of such calendar quarter, subject to the following:

(A) In the event that federal legislation implementing the Proposed Resolution (or a substantially equivalent federal program) is enacted during or before the calendar year in which such calendar quarter occurs, all unsatisfied fee awards set by the Panel with respect to cases settled (or legislatively resolved pursuant to such legislation) before the end of the calendar year in question shall be entitled to share in the total amount to be paid for that year, in proportion to their respective unsatisfied amounts. To accomplish this end, with respect to the second through fourth quarterly payments in any year in question, any unsatisfied fee awards set by the Panel that have not received a proportional share (as described in the preceding sentence) of all prior quarterly payments in that year shall be the exclusive recipients of subsequent quarterly payments for the year until each such award has received the principal amount of its proportional share of all prior quarterly payments for that year.

(B) In the event that federal legislation implementing the Proposed Resolution (or a substantially equivalent federal program) is not enacted during or before the calendar year in which such calendar quarter occurs, all unsatisfied fee awards set by the Panel with respect to cases settled before the end of the calendar year in question shall be entitled to share in the payments for each month of that year beginning with the month of settlement, in proportion to their respective unsatisfied amounts. To accomplish this end, with respect to the second through fourth quarterly payments in any year in question, any unsatisfied fee awards set by the Panel that have not received a proportional share (as described in the preceding sentence) of all prior payments for months of such year beginning with the month of settlement

shall be the exclusive recipients of subsequent quarterly payments for the year until each such award has received the principal amount of its proportional share of all prior payments for months for which the respective awards were eligible.

(C) Adjustments pursuant to paragraphs (A) and (B) of this subsection (iii) shall be made separately for each calendar year in which there is a fee award. No amounts paid in any calendar year shall be subject to refund, nor shall any payment made in any prior calendar year affect the allocation of payments to be made in any subsequent calendar year.

(iv) *Credits and Limitations.*

(A) All payments pursuant to this section are subject to a credit as provided in section (f)(ii) regarding fees advanced to Private Counsel.

(B) In no event shall Settling Defendants be required to make any payments for 1997 totaling more than $250 million less any advances described in section (f), with respect to all attorney's fees and certain professional fees.

(C) In no event shall Settling Defendants be required to make payments for 1998 totaling more than $500 million less any advances described in section (f) and, for payments made for 1998 pursuant to subsection (ii)(B), less any payments described in section (g), with respect to all attorney's fees and certain professional fees.

(D) In no event shall Settling Defendants be required to make any quarterly payment pursuant to subsection (iii) greater than $125 million unless necessary in the final quarter to satisfy unsatisfied fee awards up to the aggregate annual amount of $500 million. Nor shall settling Defendants be required to make payments in any calendar year after 1998 totaling more than $500 million less any advances described ins section (f) and any payments described in section (g), with respect to all attorneys' fees and certain professional fees (but excluding payments made during 1999 in respect of 1998 pursuant to subsection (ii)(B)).

(f) *Advance on Payment of Fees.*

(i) Settling Defendants collectively and the State of Florida each will advance $50 million to Private Counsel toward payment of attorneys' fees to counsel retained by the State of Florida in this action, such amounts to be credited to the Settling Defendants and the State of Florida, in the amounts of their respective advances, against subsequent payments of attorney's fees awarded by the panel. The

State of Florida shall be repaid its advance from the first $50 million paid by Settling Defendants as a result of the panel's award and Settling Defendants shall receive a credit against the next $50 million awarded. The obligation of Settling Defendants to advance such amount is expressly conditioned on the continuing agreement of the State of Florida to advance an equal amount. Such advance will be made by Settling Defendants severally and not jointly in proportion to their respective market shares, within 30 days of adoption of this agreement and shall be paid to David Fonvielle, Esquire on behalf of Private Counsel. The advance to be made by the State of Florida shall be made from the escrow account for prepayment of attorneys' fees pursuant to Order of Court. If the full amount of the advance to be made by the State of Florida is not paid, the Settling Defendants shall be entitled to a refund of the advance paid by Settling Defendants in an amount equal to the unpaid portion of the State's advance.

(ii) Any advance made by Settling Defendants pursuant to this paragraph shall be credited against any amounts payable by Settling Defendants to Private Counsel on any award of fees pursuant to the Settlement Agreement. Such credit shall apply as provided above until the amount of the advance is repaid in full. Notwithstanding any other provision of the Settlement Agreement or this addendum, any advances paid by Settling Defendants to Private Counsel (or paid to private counsel for any other State or governmental entity with which a settlement has been reached providing for a similar method for determining fees) shall count against and operate to reduce the $500 million annual cap described above for the year in which the case is settled or, if the amount remaining for payment of fees under the annual cap for that year has already been paid, in the following year.

(g) *Contribution to National Legislation.* If legislation implementing the Proposed Resolution (or a substantially equivalent federal program) is enacted, a three-member national panel including the two permanent members of the Panel shall consider any application by Private Counsel for fees for any contributions made toward the enactment of such legislation, along with all applications by any other persons who claim to have made similar contributions. No person shall make more than one application for fees in connection with any such contributions toward enactment of the legislation. All payments of fees awarded for such contributions shall be subject to, and shall count against, the same $500 million aggregate annual cap referenced herein and shall be paid in accordance with the provisions of subsection (e).

(h) *Application by State in Event of National Legislation.* If legislation implementing the Proposed Resolution (or a substantially equivalent federal program) is enacted, Settling Defendants and the State of Florida contemplate that the State of Florida and any other similar state which has made an exceptional contribution to secure the resolution of these matters may apply to the national panel of independent arbitrators described in subsection (g) for reasonable compensation for its efforts in securing enactment of such legislation. As provided in defendants' 8 K submissions, Settling Defendants will not oppose application of $250 million by the State of Florida. Any amount awarded to the State of Florida by such panel shall be paid in conjunction with awards to other

governmental entities and shall be paid in proportion to the respective unpaid amounts of such awards, subject to a separate annual cap of $100 million on the total of all such payments to be made by Settling Defendants.

ftp\Florida.mfn