SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

v. Case No. 93,148 and 93,195

AMERICAN TOBACCO COMPANY, et al.,

Appellees.
_____/

ANSWER BRIEF ON THE MERITS OF APPELLEE YERRID, KNOPIK & KRIEGER, P.A.

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

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in Answer Brief on the Merits of Appellee Yerrid, Knopik & Krieger, P.A., is 14 point Omega.

TABLE OF CONTENTS

	Page
CERTIFICATE OF TYPE SIZE AND STYLE	i
TABLE OF CONTENTS	ii
TABLE OF CITATIONS	iv
STATEMENT OF THE CASE AND OF THE FACTS	1
A. The State's promise to pay its private attorneys under a statutorily authorized contingency fee agreement	1
B. The litigation, the settlement, and the charging liens	5
C. The initial settlement payments, the Confiscation Act, and the orders on review	9
SUMMARY OF THE ARGUMENT	13
ARGUMENT	16
The trial court was correct to place the settlement funds in its registry and to disburse a portion for interim attorneys' fees.	16
A. The funds in issue are not state funds and the Legislature's attempt to appropriate them is unconstitutional.	16
1. The settlement funds are not state funds.	17
2. Because the settlement funds are not state funds, the trial court did not "judicially appropriate" them.	21
3. The Legislature's attempt to "appropriate" all settlement funds under the Confiscation Act is unconstitutional.	25

a. The Confiscation Act violates the Contract Clause of the United States Constitution because it substantially impairs the State's own contract obligation and is not reasonable and necessary to the public interest. 26

b. The Confiscation Act violates the Florida Constitution because it infringes on the right to contract. 31

B. The trial court correctly safeguarded funds equal to the private attorneys' contingent fee share of tobacco's initial payment. 33

1. The charging liens were perfected and in place long before any of the orders complained of by the State. 34

2. The private attorneys have a constitutional right to their charging liens, and no additional statutory or contractual basis is required. 37

3. The private attorneys' fixed contract rights do not require and cannot be defeated by further Legislative appropriation. 39

4. The State's disavowal of its contract cannot be excused by the doctrine of sovereign immunity. 41

C. The trial court correctly disbursed $50 million in interim attorneys' fees. 42

CONCLUSION 48

CERTIFICATE OF SERVICE 49

TABLE OF CITATIONS

CASES **PAGE(S)**

Adams v. Burns,
126 Fla. 685, 172 So. 75 (1936) 25

Allied Structural Steel Co. v. Spanaus,
438 U.S. 234 (1978) 26

Association of Surrogates & Supreme Court Reporters v. New York,
940 F.2d 766 (2d Cir. 1991) 28

Barranco, Darlson, Daniel & Bluestein, P.A. v. Winner,
386 So.2d 1277 (Fla. 3d DCA 1980) 36

Chiles v. United Faculty,
615 So.2d 671 (Fla. 1993) 31, 32

Daniel Mones, P.A. v. Smith,
486 So.2d 559 (Fla. 1986) 34

DSA Group, Inc. v. Gonzalez,
555 So.2d 1234 (Fla. 2d DCA 1989) 46

Edward C. Tietig, P.A. v. Southeast Regional Constr. Corp.,
617 So.2d 761 (Fla. 4th DCA 1993) 35

General Motors Corp. v. Romein,
503 U.S. 181 (1992) 26, 27

Humphreys v. State,
108 Fla. 92, 145 So. 858 (1933) 37

In re Warner's Estate,
160 Fla. 460, 35 So.2d 296 (1948) 37, 38

Jacobs v. Petrino,
351 So.2d 1036 (Fla. 4th DCA 1976) 19

Kerrigan, Estess, Rankin & McLeod v. State,
711 So.2d 1246 (Fla. 4th DCA 1998) 9, 20, 34

Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.,
517 So.2d 88 (Fla. 3d DCA 1987) 37

Love v. Brown Dev. Co.,
100 Fla. 1373, 131 So. 144 (1930) 17

Miles v. Katz,
405 So.2d 750 (Fla. 4th DCA 1981) 20

Nichols v. Kroelinger,
46 So.2d 722 (Fla. 1950) 39, 46

Pan-Am Tobacco Corp. v. Department of Corrections,
471 So.2d 4 (Fla. 1984) 41, 42

Philip Morris Inc. v. Glendening,
349 Md. 660, 709 A.2d 1230 (1998) 24

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 44

Republican Party v. Smith,
638 So.2d 26 (Fla. 1994) 23, 24

Shawzin v. Donald J. Sasser, P.A.,
658 So.2d 1148 (Fla. 4th DCA 1995) 34

Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom,
428 So.2d 1383 (Fla. 1983) 34, 38

Southern Crane Rentals, Inc. v. City of Gainesville,
429 So.2d 771 (Fla. 1st DCA 1983) 37

State ex rel. Bonsteel v. Allen,
83 Fla. 214, 91 So. 104 (1922) 23

State ex rel. Kurz v. Lee,
121 Fla. 360, 163 So. 859 (1935) 21, 22, 24

TM Park Ave. Assocs. v. Pataki,
986 F. Supp. 96 (N.D.N.Y. 1997) 27, 28

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977) 26, 28-30

United States v. Transocean Air Lines, Inc.,
356 F.2d 702 (5th Cir. 1966) 20

Video Super Stores of America v. Mastriana,
575 So.2d 326 (Fla. 4th DCA 1991) 19

Zell v. Cobb,
566 So.2d 806 (Fla. 3d DCA 1990) 17, 18

OTHER AUTHORITIES

U.S. CONST., art. I, § 10 ..... 26, 29

Art. I, § 10, FLA. CONST. 31

Medicaid Third-Party Liability Act,
FLA. STAT. § 409.910 ..... 1, 3, 23, 24, 27, 31, 40, 41

FLA. STAT. § 215.31 ..... 22, 23

FLA. STAT. § 409.910(15)(b) 1, 4, 23

Ch. 98-63, 1998 Fla. Sess. Law Serv. 267 (West) 10, 11, 25-31, 43-45

Symposium, *Florida Settlement with Tobacco*, FSU LAW: THE MAGAZINE, Winter 1997 4

STATEMENT OF THE CASE AND OF THE FACTS[1]

A. The State's promise to pay its private attorneys under a statutorily authorized contingency fee agreement

Under the Medicaid Third-Party Liability Act ("Medicaid Act"), the State of Florida is authorized to employ private attorneys to prosecute civil lawsuits against the tobacco industry. FLA. STAT. § 409.910(15). The statute expressly provides that private attorneys employed under the Medicaid Act may be paid contingent fees of up to 30%. Id. § 409.910(15)(b).

As authorized by the Medicaid Act, in 1995 the State entered into a contingency fee contract ("Fee Contract")[2] with a number of private attorneys,

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[1]In what it labels a "Statement of the Case and Facts" the State (1) presents arguments as fact, see, e.g., St. Init. Br. at 11 (asserts "all the settlement funds *became* State Funds" when ownership of funds is sharply in dispute) (emphasis added); (2) presents inferences as fact, see, e.g., St. Init. Br. at 11-12 (asserts failure to resolve fee dispute due solely to "exorbitant, multi-billion dollar demands made by certain PTA lawyers" while ignoring that fee dispute was sparked when the State refused to pay private attorneys under contract it made three years ago); and (3) gratuitously refers to immaterialities in the apparent hope that its references will prejudice private attorneys. See, e.g., St. Init. Br. at 11 (cites own filing to urge "the Florida Department of Law Enforcement had initiated a criminal investigation into the Medicaid Provider Contract" but does not mention no wrongdoing by any private attorney has ever been reported). Because of the sheer volume of such instances, this brief will not attempt to identify each one.

[2]The State insists its standard contract was "significantly revised and manipulated" by the private lawyers, St. Init. Br. at 5 n.3, as if to suggest the Fee Contract contains terms to which it did not actually agree. No support in the

including Yerrid, Knopik & Krieger, P.A. ("Yerrid"). App. 58.[3] Under the Fee Contract, the private attorneys were hired to sue the major tobacco companies for damages incurred as a result of tobacco-related illnesses. App. 58 at 9, 10 ¶ B.2. The private attorneys would not be paid attorney fees or even reimbursed for costs unless a recovery were achieved. App. 58 at 3 ¶ II.A, 10, 11 ¶¶ B.3, C.1, C.2, C.4. Although the statute authorized contingent fees of up to 30%, a 25% fee was negotiated.[4] App. 58 at 10, 11 ¶¶ C.1, C.2. The Fee Contract

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record is offered or found for this assertion.

[3]Citations to the State's appendix filed with its initial brief in the Fourth District appear as "App. ___." Citations to the State's supplemental appendix filed with its initial brief in the Supreme Court appear as "Supp. App. ___." Citations to Yerrid's appendix filed with this answer brief appear as "Y App. ___."

[4]In the facts section of its brief the State purports to set out the "essential terms of the Contract relevant to these appeals." St. Init. Br. at 5-6. The three provisions set out in indented form are not actual contract provisions, however, but snippets of the Fee Contract mixed with the State's argument. For example, the State posits as fact that the private attorneys' fee "was based upon recovery for the Medicaid Claims only." St. Init. Br. at 5. The actual contractual language, however, is "Payment . . . shall be based on a contingency fee percentage of the total dollars recovered and reimbursed to the Department as provided for in Section 409.910(15), Florida Statutes," and "a total contingency fee of twenty-five percent (25%) of the total sum of monies recovered and transmitted, plus out-of-pocket costs incurred by the providers to the extent that recovery meets or exceeds total costs, awarded in any Final Judgments, Court Orders, or negotiated settlement." App. 58 at 11 ¶¶ C.1, C.2. The Fee Contract specifically provides the "contingency fee payments and percentages shall be computed solely on the basis of the total amount of monies actually recovered and transmitted together with all accrued interest." App. 58 at 11 ¶ B.6. The State's assertion that the private attorneys' contingency fee percentage applies only to monies attributable

cannot be modified except in writing, with each of the private attorneys signing. App. 58 at 4 ¶ III.D.1.

It is undisputed that the private attorneys who agreed to represent the State against the tobacco industry on a contingent fee and contingent cost repayment basis did so in the face of daunting odds and at great personal and professional risk. The Fee Contract itself recites that the State of Florida, with all its resources, was unable to take on the representation. App. 58 at 9, 10. As the Fee Contract states, it was anticipated the tobacco industry would employ its usual "scorched earth litigation tactics" to "do everything possible to drag out the litigation." App. 58 at 10. When it hired the private attorneys, the State expressly acknowledged it could not afford to do what a fight against tobacco would require — use "100s" of State lawyers and "expend most of the State's legal resources." App. 58 at 10.

It was for this reason, the parties agreed, that the private attorneys "were hired by the State of Florida at no cost, with these lawyers taking the full risk." App. 58 at 10. The Fee Contract provides:

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to the Medicaid reimbursement and not to monies attributable to other claims, which the State presents as a fact, is nothing more than the State's interpretation. It has never been adopted by any court. Nor is the argument consistent with the facts. The very day the Fee Contract was executed the private attorneys filed a complaint stating "the liability of the defendants is grounded alternatively in the common law and equity and in the Medicaid Third Party Liability Act, as amended." Y App. 11 at 15.

> In light of the fact that the trial team is taking all the risks, and the fact that not a single case of this nature has ever been won, the State of Florida has determined that it is not appropriate to place taxpayer dollars at such risk. Section 409.910(15)(b), Florida Statutes, permits the trial team to receive up to 30% of the recovery. The State will ask the Court to require the tobacco companies to pay all the attorney fees and costs. The State and the Providers have agreed upon a fee of 25% of the recovery, plus out-of-pocket costs incurred by the Provider to the extent the recovery meets or exceeds the total costs, with a contribution being committed by the tobacco team lawyers toward health related charities and organizations.

App. 58 at 10. The Florida Attorney General emphasized the risk the private attorneys took when he stated:

> The odds for winning were so low, the lawyers that took it probably should have checked into a psychiatric hospital.

Symposium, *Florida Settlement with Tobacco*, FSU LAW: THE MAGAZINE, Winter 1997, at 13 (quoting Robert Butterworth).

As noted in the Fee Contract, the private attorneys "were hired by the State of Florida at no cost." App. 58 at 10. In the event the State did prevail, the Fee Contract required the private attorneys to "[h]old any monies received as a result of any settlement, legal final judgment, or as a bond, in an interest bearing account . . . and in a joint account bearing the names of both (a) representative [attorney] and the State of Florida as account-holders." App. 58 at 11 ¶ B.6.

B. The litigation, the settlement, and the charging liens

The tobacco company defendants were sued in February 1995. App. 56 Ex. 1 at 1. In August 1997, after 2½ years of litigation, jury selection began. App. 56 at 1, Ex. 1 at 2.

During jury selection, the State negotiated a Settlement Agreement with the tobacco company defendants. App. 56 at 1, Ex. 1 at 2. The Settlement Agreement provides for initial payments in the total amount of $750 million to be followed by additional annual payments in amounts based on whether a federal settlement is reached and other factors. App. 56 Ex. 1 at 8 ¶ B.1, 9 ¶¶ B.2, B.3.

The only parties to the Settlement Agreement are the State and the settling tobacco defendants. App. 56 Ex. 1 at 17. The private attorneys are not parties to the Settlement Agreement, and the Settlement Agreement makes no mention of the Fee Contract the private attorneys and the State entered into years earlier. Although the Fee Contract provides for a 25% contingency fee, the Settlement Agreement recites a different arrangement for payment of the private attorneys. App. 56 Ex. 1 at 13-14 ¶ V. According to the Settlement Agreement, instead of receiving a percentage of amounts collected and safely in hand, the private attorneys must look directly to the tobacco defendants for future payment of

"reasonable attorneys' fees," the amount of which would be set by arbitration. App. 56 Ex. 1 at 14 ¶ V.

Because the Settlement Agreement differed from the State's preexisting contractual obligation to pay the private attorneys a 25% contingent fee, Yerrid, like several other private attorneys, promptly filed a charging lien.[5] App. 55. The State moved to quash the private attorneys' charging liens based on a number of grounds, App. 53, several of which it has resurrected in the instant appeal.

At no time did the State or the trial court suggest the private attorneys' charging liens should be quashed on the theory that the performance of the private attorneys was anything less than extraordinary. To the contrary, the trial judge

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[5]The State's initial brief states that the night before the Settlement Agreement was signed, the private attorneys "gathered at the private residence of PTA lawyer Montgomery" where the private attorneys were advised of "the settlement negotiations and the proposed settlement terms." St. Init. Br. at 7. The State neglects to mention that Yerrid was not present at that gathering. See App. 51 at 42; Y App. 5 at 93. In addition, the State fails to acknowledge that the private attorneys did not have an opportunity to read the Settlement Agreement before it was presented — already signed — in a very brief court ceremony at which the terms of the Settlement Agreement were not read. Y App. 4; 5 at 63-64; 6 at 27-28. The State also neglects to mention that Kerrigan filed a notice of charging lien "for and on behalf of any attorney of record for the Plaintiff," App. 55, before counsel appeared in court and were provided the Settlement Agreement.

> emphasize[d] that without question the private attorneys representing the [State] in this case did an extraordinary and magnificent job. Some of the best lawyering this Court has ever experienced took place during the presentation of this case. Counsel are unquestionably entitled to handsome fees . . . .

App. 46 at 4. The trial judge had previously remarked, "The legal work done thus far in this case has been about the best and most extensive I have seen in my 21 years on the bench," and the lawyers showed "the highest degree of intellectual effort." Y App. 4 at 2811.

For its part the State acknowledged its private attorneys were "the top lawyers in the State with experience in pursuing similar actions,"[6] App. 58 at 10, and they should "be paid handsomely." App. 51 at 48. According to the State, the discovery phase of the litigation created "the most massive record production and deposition activity in [the State's] litigation history." Y App. 7 at 1. The State conceded, "Without [the private attorneys] we could not have won the suit." App. 51 at 48. In his deposition the governor said he "thought [the lawyers] had done an excellent job," "that is one of the main reasons we had been able to obtain the settlement that we had," and "they were entitled to a very good fee." Y App. 9 at 172. The governor also said, "I have said at all times we had an

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[6]Governor Chiles testified in deposition, "[W]e were looking for good lawyers, the best." Y App. 9 at 37.

excellent trial team, we had the best and that they did excellent work for us, and that they should be well paid for that work." Y App. 9 at 151.

Notwithstanding the extraordinary results achieved through the efforts of the private attorneys, the trial court granted the State's motion to quash the charging liens. App. 46 at 1. It did so on a theory not advanced by the State — that the 25% of the recovery the State promised to pay the private attorneys was "clearly excessive" and "unreasonable."[7] App. 46 at 4. The Fourth District

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[7]The State sought to quash the charging liens based on "novation" and "sovereign immunity," App. 53 at 4, 5, not on the theory that the Fee Contract was unenforceable because it provided for excessive fees. In fact, it was not until after the trial court first voiced the theory that the State argued the private attorneys' contingent fee shares were excessive. Significantly, both before and after the Settlement Agreement, the State has acknowledged the private attorneys' fees may well be hundreds of millions of dollars. In a deposition Governor Chiles acknowledged the State's private lawyers have a contingent fee agreement entitling them to "25 percent of whatever the recovery was in this case," and expressed hope it would be "hundreds of millions of dollars." Y App. 8 at 98-99. When asked in a post-settlement deposition about the State's disputed assertion that the Fee Contract only entitles the private attorneys to a percentage of monies deemed to represent Medicaid reimbursement (which the State estimates at $1.3 billion), the governor acknowledged the State "should pay up to or that they should be entitled to at least 25 percent of the $1.3 billion." Y App.9 at 172-73. The governor also said the State "should be responsible for that contingent fee agreement up to about $1.3 billion." Y App. 9 at 151. Even the trial judge, who ruled the 25% contingency fee in the Fee Contract "excessive," admitted he believed fees equal to "Perhaps tens of millions or hundreds of millions of dollars might be reasonable . . . ." App. 46 at 4.

reversed the trial court's order and reinstated the liens.[8] Kerrigan, Estess, Rankin & McLeod v. State, 711 So.2d 1246 (Fla. 4th DCA 1998).

C. The initial settlement payments, the Confiscation Act, and the orders on review

Because of the controversy surrounding the private attorneys' fees and their charging liens, when the initial $750 million was paid by the tobacco defendants almost a year ago, it was placed in escrow under the supervision of the trial court.[9] App. 52 at 1-2. The State agreed to the arrangement, App. 51 at 61, and did not appeal the order escrowing these monies. Nor did the State appeal the February 11, 1998, order designating the purposes to which escrowed funds would be apportioned, which included setting them aside for fees. App. 35 at 3.

Several months after the settlement funds were placed in escrow, the State of Texas settled its litigation against the tobacco industry. App. 34 Ex. 1; App.

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[8]The Fourth District held the trial court ruled without giving the private attorneys an opportunity to be heard in violation of the private attorneys' due process rights. Kerrigan, Estess, Rankin & McLeod v. State, 711 So.2d 1246 (Fla. 4th DCA 1998).

[9]The initial payment made by the settling tobacco defendants was $550 million plus an additional $200 million to be used for a pilot program aimed at reducing tobacco use by minors. App. 56 Ex. 1 at 8-9. The private attorneys' 25% contingent fee of this $750 million payment is $187.5 million. Hundreds of millions of dollars have been disbursed to the State, see, e.g., App. 35 at 3, and the private attorneys have not claimed as fees any funds to be held in safekeeping beyond their 25% share.

40 Ex. 3. Invoking the "Most Favored Nation" provision of the Florida Settlement Agreement, App. 56 Ex. 1 at 13 ¶ IV, the trial judge entered the first of the orders on review, the "MFN Order," which incorporated a provision from the Texas settlement. App. 1; Y App. 1. Among other things, the provision gave the private attorneys an immediate payment of $50 million of the escrowed proceeds and credited that amount against fees to be awarded in arbitration. App. 1 at 4, 5; Y App. 1 at 4, 5. To protect the interests of all parties, the trial court ordered future settlement payments to be paid into escrow and disbursed only on court order. App. 1 at 5; Y App. 1 at 5.

Based on the anticipated passage of an act by the Florida legislature which seeks to appropriate *all* funds paid by the settling tobacco defendants into the state treasury, CSSB 1270, enacted as Ch. 98-63, 1998 Fla. Sess. Law Serv. 267 (West), ("Confiscation Act"),[10] App. 59, the State moved to stay the MFN Order. App. 14. In denying the stay, the trial court entered the second order on review and declared, "[t]he release of the escrow funds is solely conditioned upon

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[10]The legislature passed CSSB 1270 on May 1, 1998, two weeks after the April 16, 1998, MFN Order directing transfer of $50 million for advance payment to the private lawyers and one week after the April 24, 1998, order denying a stay of the MFN Order. The bill took effect just after entry of the trial court's order placing the funds in the registry of the court. Ch. 98-63 § 3(2), 1998 Fla. Sess. Law Serv. 268 (West); Supp. App. 1; Y App. 3.

further order of this Court." App. 2 at 2; Y App. 2 at 2. After the Confiscation Act was passed but before it took effect, the trial court entered the third order on review, under which the remaining $200 million[11] was transferred from private escrow into the registry of the court.[12] Supp. App. 1 at 1; Y App. 3 at 1. The trial court took this step for the purpose of compliance with a stay previously entered by the Fourth District and "to protect these funds from the application of recent legislation [the Confiscation Act] that may unconstitutionally vacate the prior orders of this Court, deny parties due process of law and impair contract." Supp. App. 1 at 1; Y App. 3 at 1.

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[11]The State's complaint that the $200 million transferred into the registry of the court in May 1998 exceeds 25% of the $750 million payment, St. Init. Br. at 18, overlooks the fact that the $187.5 million has earned interest. A few days before the initial $750 million payment was due, the trial court ordered the funds be deposited "into an appropriate interest-bearing account, in which such funds will remain pending until further order of this Court." App. 52 at 1-2. The Fee Contract provides computation of the contingent fee includes all accrued interest. App. 58 at 11 ¶ B.6.

[12]The trial court had repeatedly required settlement payments remain in escrow pending further court order. App. 52 at 1-2; App. 35 at 3; App. 1 at 5; Y App. 1 at 5. Despite these explicit directions, the State used the Confiscation Act to make a demand on NationsBank, the escrow agent, to pay all of the escrowed money to the state treasurer. Y App. 10 Ex. A. The $200 million having already been transferred to the registry of the court, NationsBank wired the remaining $149 million of the escrow monies to the state treasurer's account. A day later NationsBank realized the impropriety of the State's request and demanded return of the funds. Y App. 10 Ex. B.

The combined effect of the orders on review[13] is that $187.5 million plus accrued interest — an amount equal to the private attorneys' 25% contingent share of the initial $750 million settlement payment — has been placed in the registry of the court for safekeeping, and $50 million has been ordered disbursed as a partial payment of attorneys' fees but has not been paid. The certified question is

> whether the funds derived from the tobacco settlement are subject to disbursement by the trial court.

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[13]The appealed orders are titled Order Implementing Most Favored Nation Provision of Florida Settlement Agreement, App. 1; Y App. 1, referred to above and by the State as the "MFN Order," St. Init. Br. at 1, 16; Order on State of Florida's Motion Requesting Stay of Court Order of April 16, 1998 — Implementing Most Favored Nation Provision of Florida Settlement Agreement, App. 2; Y App. 2, referred to by the State as the "Disbursement Order," St. Init. Br. at 2, 18; and Order Granting Motion to Protect Escrow Funds, Supp. App. 1; Y App. 3, referred to by the State as the "Order Directing the Immediate Transfer Of All Funds into the Court's Registry" or "Judicial Appropriation Order." St. Init. Br. at 2-3, 18; App. 6, 7.

SUMMARY OF THE ARGUMENT

Eager to take on the tobacco companies, but acutely aware it lacked the legal and financial resources to do battle against a united group that had never before been defeated, the State offered the private attorneys a deal the attorney general himself said they were crazy to take. Under the 1995 Fee Contract, the private attorneys agreed to represent the State against the tobacco companies for no compensation — not even cost reimbursement — unless the suit proved successful. In the years that followed, the private attorneys spent millions of dollars and turned away other business to devote their time and energies to the State's case, knowing that if they did not succeed they would not be reimbursed for their expenditures or compensated for their labors. In the end, the private attorneys' hard work and perseverance yielded an unprecedented result: the tobacco companies agreed to pay the largest settlement ever won in Florida.

Against this background, one fact emerges from this appeal as undeniably true. The parties are before the Supreme Court of Florida because the State has refused to pay the private attorneys the contingent fee it promised to pay them. The irony is that the private attorneys are being penalized because they carried out their contracted responsibilities "too well" — the recovery won for the client is so large that the State is unwilling to honor its obligation. Although the State

has received payments of hundreds of millions of dollars and expects billions more in the future, the private attorneys have not been paid even one penny. According to the State, if they hope to be paid, the private attorneys will have to litigate further in arbitration.

In its continuing effort to withhold from the private attorneys the fees for which they contracted, the State presents three arguments. It contends the trial court's orders protecting the settlement funds and disbursing a portion of them to the private attorneys (1) are an impermissible "judicial appropriation" of "state funds"; (2) "effectively impose" the private attorneys' charging liens, which the State insists are "void"; and (3) improperly "rewrite" the Settlement Agreement in applying its MFN provision.

As detailed below, each of the State's arguments fails. The trial court's placement in its registry of an amount equal to the private attorneys' contingent shares of the $750 million was not an impermissible judicial "appropriation," but a valid and correct exercise of its authority to protect disputed funds, which do not belong to the State. The Legislature's attempt to seize the funds by an appropriation, on the other hand, is legally ineffective because the funds are not the State's to take and because the Legislature's action is unconstitutional. The trial court did not, as the State suggests, "effectively impose" the private

attorneys' charging liens because the funds in issue were already subject to the liens. In any event, the charging liens are valid, and their imposition is entirely proper in this case. Finally, the State's attack on the trial court's interpretation of the MFN provision is of no consequence because the trial court's actions were correct and should be affirmed without regard to its interpretation.[14] The certified question should be answered "yes."

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[14]Because the trial court's orders should be affirmed irrespective of the MFN, no response to the separate brief filed by the settling tobacco defendants is necessary. That brief is based entirely on the MFN.

ARGUMENT

The trial court was correct to place the settlement funds in its registry and to disburse a portion for interim attorneys' fees.

A. The funds in issue are not state funds and the Legislature's attempt to appropriate them is unconstitutional.

Ignoring its own considerable role in placing the settlement funds under the trial court's control,[15] the State begins its brief by arguing the trial court's assertion of jurisdiction over the funds was an impermissible "appropriation" of "state funds" in violation of the separation of powers. St. Init. Br. at 21-29. The State's insurmountable problem is that its characterization of the trial court's order as an "appropriation" hinges entirely on a legally and factually indefensible premise — that the funds in issue are truly "state funds." Because both of the State's first two arguments rest on the assertion that this appeal involves "state funds," see St. Init. Br. at 21-43, once the error in the State's premise is exposed, both arguments collapse.

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[15]The State agreed with tobacco's motion that the settlement funds be placed in escrow under the trial court's supervision.

> MR. ANTONACCI: We have no objection of the Court having supervision. In fact, the state invites it.

App. 51 at 61.

1. The settlement funds are not state funds.

Without almost no reference to case law or other legal authority, the State insists that because there is language in the Settlement Agreement, the escrow agreements, and certain orders which describe the funds in issue as "for the benefit" of the State, it automatically follows that the State owns the funds. St. Init. Br. at 23-26. The State is wrong for at least four reasons.

First, the rule in Florida is that ownership of escrowed funds does not pass until the funds are released from escrow. See Love v. Brown Dev. Co., 100 Fla. 1373, 131 So. 144, 146 (1930); Zell v. Cobb, 566 So.2d 806, 809 (Fla. 3d DCA 1990). Consistent with the Florida rule, the trial court's September 11, 1997, order — which the State never objected to, much less appealed — specifically states escrowed funds will not be released without a court order. App. 52 at 1-2.

Second, the State has not cited and the undersigned has not found any authority for the proposition that the above general rule is inoperative if there is language in a court order, escrow agreement, or settlement paper which describes funds as "for the benefit" of one party or the other. Notwithstanding the inference the State struggles to draw from the snippets it cites, St. Init. Br. at 23-25, not one of the documents says the State actually *owns* the funds in controversy. That there is no such declaration is no surprise because the very

purpose of an escrow is to suspend the transfer of ownership of property.[16] See Zell, 566 So.2d at 809 ("The effect of . . . escrow is to place the funds into the hands of a third person until the occurrence of a certain event and *then* to deliver them out of escrow to the promisee.") (emphasis added).

The State's critical problem is that its argument is constructed not from law but from self-serving semantics and misapprehension of what it means to say litigation is "for the benefit of" a party. Contingent fee suits, like other suits, are instituted "for the benefit of" the client. But this fact has never meant an attorney's contingent fee will not be paid out of proceeds won "for the benefit" of the client.[17] In fact, as all attorneys know, the very opposite is true.

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[16]The State's assertion that the escrow agreements prohibited the trial court from implementing the Settlement Agreement in such a way that funds could not be released to anyone other than the State, St. Init. Br. at 24, is not supported by the documents' language. See App. 49 at 3 § 4; App. 50 at 2-3 § 4 (providing for release of the escrowed funds with no requirement that they be released only to the State). This assertion is also at odds with the trial court's unappealed September 11, 1997, order, which states that the funds will not be disbursed "until further order of this Court." App. 52 at 1-2.

[17]The State's suggestion that the Settlement Agreement contemplates the settlement funds will be used to reimburse the State for past and future expenditures, St. Init. Br. at 23 n.20, does not change this conclusion. Awards of compensatory damages are always "reimbursement," but that fact has never meant they are not subject to contingent fees.

The point is that one can argue in every contingent fee case that the attorney is receiving money that would otherwise go to the client. This feature of contingent fee contracts has never furnished a valid reason for a client to dodge its contractual obligation. The instant case illustrates why the law should never countenance such a theory. It is undisputed that if it had not been for the efforts of the State's still-uncompensated private attorneys, there would be no settlement funds at all.

Third, even if it is assumed for the sake of argument that the "for the benefit" language in the Settlement Agreement could be read to mean the State *owns* the funds, the language would be immaterial. The private attorneys are not parties to the Settlement Agreement and therefore cannot be bound by its terms. See Video Super Stores of America v. Mastriana, 575 So.2d 326, 326 (Fla. 4th DCA 1991). If the law were otherwise and an attorney's existing right to payment under a contract with a client could be altered and governed by a separate agreement between the client and a third party, there would be nothing to stop the client and the third party from agreeing the attorney will not be paid *at all*.

The law does not permit this harsh and illogical result. "[A] contract once entered into may not be unilaterally modified." Jacobs v. Petrino, 351 So.2d

1036, 1039 (Fla. 4th DCA 1976). The State cannot sidestep its contractual obligation to pay its private attorneys a 25% contingent fee on the theory that a separate agreement it made with tobacco years later permits it to do so.

A fourth and final reason the funds in issue are not the State's, which is discussed in greater detail below, *see infra* Section B., is that the funds are subject to valid charging liens.[18] Under Florida law, a charging lien "attaches to the judgment but relates back and takes effect from the time of the commencement of the services rendered in the action." Miles v. Katz, 405 So.2d 750, 752 (Fla. 4th DCA 1981); see also United States v. Transocean Air Lines, Inc., 356 F.2d 702, 705 (5th Cir. 1966) (under Florida law, "a contract for the payment of attorneys' fees out of the judgment recovered operates as an equitable assignment of the fund pro tanto and creates a lien."). Applied here, this rule means that when the Settlement Agreement was reached, equitable ownership of 25% of the recovery passed to the private attorneys. Because that ownership relates back to the date in 1995 when the State hired the private attorneys, the funds could not possibly have become "state funds."

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[18]As noted, the trial court's order quashing the private attorneys' charging liens was reversed on appeal and the liens were reinstated. See Kerrigan, Estess, Rankin & McLeod v. State, 711 So.2d 1246 (Fla. 4th DCA 1998).

2. Because the settlement funds are not state funds, the trial court did not "judicially appropriate" them.

The State acknowledges that its contention that the orders on review pose a separation of powers problem involving an unconstitutional "judicial appropriation" hinges on the correctness of its characterization of the funds in issue as "state funds." St. Init. Br. at 23. As established, the funds in the court's registry are not the State's. The State's separation of powers argument therefore falls, and its characterization of the orders on review as a "judicial appropriation" falls with it.

The State's separation of powers argument cannot be saved by its assertion that the settlement funds are state funds because they are under "the Legislature's appropriation power" as a "potential source of State revenue." St. Init. Br. at 27. If the State's "potential revenue" argument is literally correct, no trial judge could ever enter any order affecting money subject to sales tax in the coffers of a Florida business without any appropriation.

That the State is mistaken and the law does not compel such an illogical and impractical result is illustrated by the case the State relies on, State ex rel. Kurz v. Lee, 121 Fla. 360, 163 So. 859 (1935). Like the instant case, State ex rel. Kurz involves an attempt by the State to renege on a contractual obligation. See

id. at 873-74. On the page of State ex rel. Kurz the State cites, the Supreme Court distinguishes between an *appropriation* and a *disbursement* and states:

> Presumably, the Legislature does not undertake to make an appropriation of any funds not actually or potentially in hand. This is so since the making of an appropriation without having provided revenues from some source to meet it, or without any right to anticipate the accrual otherwise of funds in the treasury to enable the appropriation to be discharged by an actual disbursement of funds when it is due to be paid, would be the creation of an illegal state debt . . . .

Id. at 868. As this passage shows, State ex rel. Kurz does not hold funds "potentially" in the state treasury are state funds and cannot be disbursed unless appropriated, much less suggest that settlement funds in the custody of the court to protect a contingent fee the State promised to pay may be deemed "potentially" public funds. Instead, State ex rel. Kurz conveys the common sense admonition that the Legislature should not make an appropriation unless the funds to be appropriated are actually or potentially in the treasury.[19]

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[19]The State makes essentially the same mistake when it relies on section 215.31, Florida Statutes. St. Init. Br. at 22-23 n.19. The statute provides:

> *Revenue*, including licenses, fees, imposts, or exactions *collected or received* under the authority of the laws of the state by each and every state official, office, employee, bureau, division, board, commission, institution, agency, or undertaking of the state or the judicial branch shall be promptly deposited in the State Treasury, and immediately credited to the appropriate fund as herein provided, properly accounted for by the Department of Banking and

Lost in the shuffle of the State's rush to characterize the trial court's recent actions as an "appropriation" is the fact that the *Legislature* appropriated to the private attorneys their contingent fees three years ago. Under the Medicaid Act — the same statute that created the cause of action against tobacco and enabled the State to hire private attorneys to prosecute this suit — the payment of a contingent fee not to "exceed the lesser of a percentage determined to be commercially reasonable or 30 percent of the amount actually collected" is specifically authorized. FLA. STAT. § 409.910(15)(b).

This provision is a legislative appropriation of fees to the private attorneys. "[A]cts of substantive law may contain an appropriation," Republican Party v. Smith, 638 So.2d 26, 28 n.4 (Fla. 1994), even if the appropriation is not specifically designated as such. See id. at 28; State ex rel. Bonsteel v. Allen, 83 Fla. 214, 91 So. 104, 106 (1922) ("Statutes setting apart or designating public moneys for special governmental purposes have been held to be appropriations,

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> Finance as to source and no money shall be paid from the State Treasury except as appropriated and provided by the annual General Appropriations Act, or as otherwise provided by law.

FLA. STAT. § 215.31 (emphasis added). This statute states funds actually "collected or received" by the State shall be disbursed only by legislative appropriation. As the funds in issue in this case were not collected or received by the State but were instead placed in escrow and transferred to the registry of the court, section 215.31 is inapplicable.

notwithstanding the word appropriation is not used."). That the Medicaid Act authorizes fees calculated on a percentage of the recovery does not change this result because the use of a formula in an appropriation rather than a specific dollar amount or specific funding source is a valid appropriation. Republican Party, 638 So.2d at 28.

The point is that if the State is correct that the private attorneys' contingent fee had to be "appropriated,"[20] that event occurred three years ago when the parties entered into a statutorily authorized contingent fee agreement. The private attorneys' rights to the appropriated funds vested when the recovery was achieved. App. 1 at 3; Y App. 1 at 3. The State cannot now be heard to argue that it owns funds it previously appropriated. See State ex rel. Kurz, 163 So. at 872 ("[A]ny attempt by the Legislature to diminish a payment of a constitutionally created obligation of the state [is] unenforceable and void.").

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[20]Essentially the same argument — that a legislative appropriation is required because the monies are state funds — was made and rejected by Maryland's highest court in Philip Morris Inc. v. Glendening, 349 Md. 660, 682, 709 A.2d 1230 (1998) (in contingent fee litigation against tobacco state monies are balance remaining after contingent fee paid to private attorneys from funds collected).

3. The Legislature's attempt to "appropriate" all settlement funds under the Confiscation Act is unconstitutional.

The Confiscation Act, passed by the Legislature in its 1998 session, purports to appropriate to the State treasury *all* tobacco settlement funds, including the monies in issue here and all monies to be paid in the future, without regard to the private attorneys' rights under the Fee Contract. Just before the Confiscation Act became law, the trial judge ordered the funds in issue transferred from escrow into the security of the court's registry.

The trial court's action — which the State now terms an "affront to the Legislature," St. Init. Br. at 29 — was anything but. It is well settled that the judiciary is vested with the power to retain property in its custody. "Property once placed in custodia legis will remain there, by operation of law, until it is withdrawn by order of a competent court." Adams v. Burns, 126 Fla. 685, 172 So. 75, 79 (1936). As the trial court recognized, Supp. App. 1 at 1; Y App. 3 at 1, the Legislature's attempt to use the Confiscation Act to override this settled rule is unconstitutional.[21] The State faults the trial court for not "presuming" the Confiscation Act's constitutionality, St. Init. Br. at 29-32, but offers no legal

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[21]The trial court also stated the Confiscation Act appears to be "a violation of due process[,] . . . a violation of separation of powers, [and] . . . to arguably impair a contract." Supp. App. 4 at 56.

reason that it should have done so. As shown below, the Confiscation Act violates both the Contract Clause of the United States Constitution and the right to contract under the Florida Constitution.

a. The Confiscation Act violates the Contract Clause of the United States Constitution because it substantially impairs the State's own contract obligation and is not reasonable and necessary to the public interest.

The Contract Clause expressly forbids states from passing any "Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. The determination of whether legislative action violates the Contract Clause involves a two-step analysis. It must first be determined "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'" General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992) (quoting Allied Structural Steel Co. v. Spanaus, 438 U.S. 234, 244 (1978)). If there is a substantial impairment, it must next be decided whether the impairment is nonetheless constitutional because "it is reasonable and necessary to serve an important public purpose." United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977). The Confiscation Act cannot survive this two-step analysis.

It cannot credibly be denied that the Confiscation Act substantially impaired the contractual relationship between the State and the private attorneys. The question of whether legislative action substantially impairs a contractual

relationship "has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." Romein, 503 U.S. at 186. There is no dispute with respect to the first component — the existence of a contract between the State and the private attorneys.[22] The other two substantial impairment requirements are also readily met.

First, the Confiscation Act changes the law in such a way as to impair the contract between the State and its private attorneys. The Fee Contract, which is specifically authorized by the Medicaid Act, specifies the private attorneys will receive 25% of the funds recovered. App. 58 at 10, 11. Under the Confiscation Act, on the other hand, all settlement funds recovered are appropriated to the State. This appropriation includes the monies already paid and still held by the court, which represent the private attorneys' 25% share of tobacco's initial $750 million payment.

In an analogous case, the New York legislature attempted to avoid a binding contract — a lease — by eliminating all appropriation for payment of its rental obligation. TM Park Ave. Assocs. v. Pataki, 986 F. Supp. 96, 100-01

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[22]The State acknowledged the existence of a contract at a hearing on the charging liens, stating, "They have a contract and if they have a problem with the contract there is an appropriate forum." App. 51 at 63.

(N.D.N.Y. 1997). As here, the enactment of the New York legislature unconstitutionally impaired the contractual relationship between the state and a private party. Id. at 113. Just as in this case, New York's unilateral attempt to walk away from its financial obligations under an existing contract misused the state's appropriations power in violation of the Contract Clause. Id.

Second, it is undeniable that the instant impairment is substantial. The Fee Contract entitles the private attorneys to a 25% contingent fee from tobacco's initial $750 million payment, or $187.5 million. The Confiscation Act strips the private attorneys of their percentage interest in the $750 million already paid and leaves them to arbitrate against tobacco for a so-called "reasonable" fee to be paid in the future. Again, such an impairment is "substantial"[23] as analogous case

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[23]In United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), for example, the Supreme Court held that the repeal of a statutory security provision for bondholders resulted in a substantial impairment of the contractual relationship between the bondholders and the states involved. Id. at 19; see also Association of Surrogates & Supreme Court Reporters v. New York, 940 F.2d 766, 772 (2d Cir. 1991) (finding law "withholding ten percent of each employee's expected wages over a period of twenty weeks and postponing their payment indefinitely" to be a substantial impairment); TM Park Ave. Assocs. v. Pataki, 986 F. Supp. 96, 108 (N.D.N.Y. 1997) (holding statute eliminating appropriations to pay rent was a substantial impairment). The instant impairment is greater in both absolute and relative terms than the substantial impairments in these cases. The attorneys' fees in question are more than $187 million, a far greater amount. Further, the Confiscation Act does not merely deny the private attorneys a security interest or part of a payment due; it denies the private attorneys the entire compensation to which they are contractually entitled.

law teaches. The Confiscation Act fails the first part of the Contract Clause's constitutionality test.

The Confiscation Act also fails the second part of the Contract Clause test — whether the impairment is reasonable and necessary to further an important public purpose. That the State can articulate and has articulated an important public use for the funds in issue — the battle against tobacco and all its ill effects — does not salvage the Confiscation Act. As the Supreme Court held in United States Trust Co., when a state does what the State has done here and impairs its *own* contractual obligation to a private party, the inquiry does not turn on "a utilitarian comparison of public benefit and private loss." 431 U.S. at 29. "[A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." Id.

In other words, a state impairing its own contract is not entitled to the deference usually given "to legislative judgment as to the necessity and reasonableness of a particular measure." Id. at 23. To defer to a state's assessment of its own reasonableness would render the Contract Clause a nullity:

> [C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could

> reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

Id. at 26.

In the instant case, the State's decision to abrogate its contractual obligation to its private attorneys cannot be defended as legally reasonable or necessary. Although perhaps politically popular, the State's refusal to pay its private attorneys under the terms of the Fee Contract does not serve a cognizable public purpose. As noted, the State has already received hundreds of millions in furtherance of its stated goals, with billions more to come.[24]

The State's decision to attempt to duck its contractual obligation to the private attorneys may have been politically expedient. It was not, however, constitutional. The Legislature's substantial impairment of the State's obligation under its own contract cannot be defended as reasonable or necessary to meet an important state goal. The Confiscation Act is unconstitutional.

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[24]Even if the record showed the huge settlement does not provide all the revenue the State wants to meet all of its goals, the Confiscation Act would still be unconstitutional. "[A] State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." United States Trust Co., 431 U.S. at 30-31.

b. The Confiscation Act violates the Florida Constitution because it infringes on the right to contract.

The right to contract is "one of the most sacrosanct rights guaranteed by our fundamental law." Chiles v. United Faculty, 615 So.2d 671, 673 (Fla. 1993). Because the right is guaranteed by the Florida Constitution, Art. I, § 10, FLA. CONST., "[t]he legislature has only a very severely limited authority to change the law to eliminate a contractual obligation it has itself created." Chiles, 615 So.2d at 673.

In Chiles the Legislature attempted to do precisely what it is attempting to do in this case — unilaterally modify and abrogate a state contract for which it already has appropriated the funding.[25] Id. at 672. Rejecting the same "separation of powers" and "judicial appropriation" arguments the State relies on here, the Supreme Court enforced the contract in Chiles. Id. at 673-74. With words that apply with equal if not greater force to the instant case, the Supreme Court stated:

> The present case does not itself present a violation of separation of powers, nor are we attempting a judicial appropriation of public money. Here, the legislature acted pursuant to its powers, appropriated funds for collective bargaining agreements, and thereby created a binding contract. Having exercised its

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[25]The Legislature appropriated the contingent fee to the private attorneys in the Medicaid Act. *See supra* Section A.2.

> appropriation powers, the legislature cannot now change its mind and renege on the contract so created without sufficient reason. Separation of powers does not allow the unilateral and unjustified legislative abrogation of a valid contract.

Id. at 673.

The Legislature's attempt to deny the instant private attorneys the contingent fees owed is an even more egregious violation of the Florida Constitution than the conduct in Chiles. In Chiles, the "unjustified legislative abrogation of a valid contract" was the revocation of *future* raises the Legislature had previously agreed to fund. Id. at 672-73. The Legislature sought to revoke pay increases *before* the other parties to the contract had performed in reliance on them. Id. at 672. By contrast, in the instant case the private attorneys have already performed in reliance on their contract, and the Legislature is attempting to deny them *any payment at all* from the settlement proceeds the private attorneys secured. Even worse, the Legislature has taken this step notwithstanding the fact that the State has received hundreds of millions of dollars as the result of the private attorneys' labors, while the attorneys themselves have not been paid a penny in fees.

B. The trial court correctly safeguarded funds equal to the private attorneys' contingent fee share of tobacco's initial payment.

The State argues that because the trial court set aside an amount equal to the private attorneys' 25% contingent fee share of tobacco's initial payment and required future settlement funds to be deposited in the registry of the court, it has "effectively imposed" the private attorneys' charging liens. St. Init. Br. at 33. According to the State, the order setting aside these funds should be reversed because there is no contractual or statutory basis for imposing the charging liens and because the State is protected from the liens by sovereign immunity. St. Init. Br. at 32-44.

The State is mistaken. As detailed below, neither the order safeguarding the funds nor the order disbursing a portion of them "effectively imposed" charging liens. By operation of law, the funds were *already subject* to charging liens before the trial court entered any of the appealed orders. That the ability to impose charging liens is not recited in a statute or in a contract does not undermine the private attorneys' constitutional right to assert them. Nor does the doctrine of sovereign immunity apply to the private attorneys' right to impose charging liens in this case.

1. The charging liens were perfected and in place long before any of the orders complained of by the State.

The State's contention that the trial court "effectively imposed" the charging liens, St. Init. Br. at 33, necessarily assumes the charging liens were not already in place before the orders on review were entered. This assumption is erroneous. The private attorneys perfected their charging liens against the funds recovered from the tobacco companies when they filed notices of the liens. Imposition of the liens required no further action by the trial court.[26]

In Florida, there are four requirements for the imposition of a charging lien:

> (1) In order for a charging lien to be imposed, there must first be a contract between the attorney and the client.
> (2) There must also be an understanding, express or implied, between the parties that the payment is either dependent upon recovery or that payment will come from the recovery.
> (3) The remedy is available where there has been an attempt to avoid the payment of fees or a dispute as to the amount involved.
> (4) There are no requirements for perfecting a charging lien beyond timely notice.

Shawzin v. Donald J. Sasser, P.A., 658 So.2d 1148, 1150 (Fla. 4th DCA 1995); see also Daniel Mones, P.A. v. Smith, 486 So.2d 559, 561 (Fla. 1986); Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, 428 So.2d 1383,

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[26]As noted, the trial court's order quashing the private attorneys' charging liens was reversed on appeal. See Kerrigan, Estess, Rankin & McLeod v. Florida, 711 So.2d 1246 (Fla. 4th DCA 1998).

1385 (Fla. 1983). All four requirements were met here. The Fee Contract between the State and the private attorneys expressly makes payment contingent on the recovery of funds from the tobacco companies. App. 58 at 3 ¶ II.A. The State has refused to compensate its attorneys as it agreed to do. Timely notice has been given.[27] App. 55.

The State argues the charging liens are invalid because the *Settlement Agreement* requires the tobacco defendants to pay reasonable attorney costs and fees. St. Init. Br. at 43-44 ("The responsibility of the Settling Defendants to pay all private counsel fees and costs is undisputed.") (emphasis omitted). As between the parties to the Settlement Agreement — the State and the settling tobacco defendants — the State may well be correct. The private attorneys, however, are not parties to the Settlement Agreement, and their contractual rights against the State cannot be vitiated by it.

In other words, that the tobacco defendants have agreed to pay "reasonable" attorneys' fees as set by arbitration does not satisfy the *State's* obligation to pay the private attorneys. The requirement that one party be responsible for part or all of the legal fees of another is an indemnification

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[27]Notice of a charging lien need be no more than "an appropriate motion in a proceeding which has not been closed." See Edward C. Tietig, P.A. v. Southeast Regional Constr. Corp., 617 So.2d 761, 763 (Fla. 4th DCA 1993).

agreement and does not abrogate the contractual rights an attorney has against his or her client. See Barranco, Darlson, Daniel & Bluestein, P.A. v. Winner, 386 So.2d 1277, 1279 (Fla. 3d DCA 1980). The net result is that the agreement that the tobacco defendants will pay "reasonable" attorney's fees cannot relieve the State of *its* separate, independent, and preexisting obligation although it may serve to indemnify the State for some or all of the fees it is required to pay.[28]

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[28]The State's suggestion that the private attorneys should be happy to arbitrate their fees with tobacco and give up their liens on the money in the registry of the court, St. Init Br. at 43-44, rings hollow. The language of the State's own Fee Contract describes the tactics of the tobacco companies as follows:

> The tobacco companies' hard ball tactics have resulted in their never settling claims, coordinating with all cigarette makers and related industry groups to wear down opponents, and spending as much as it takes to win. Their approach, as quoted from a memo by an attorney for RJR Nabisco Holding Corp., "To paraphrase General Patton, the way we won these cases was not by spending all of RJR's money, but in making the other son of a bitch spend all of his." WSJ, May 10, 1994. . . . The tobacco companies are known for their scorched earth litigation tactics, and can be anticipated to simultaneously do everything possible to drag out the litigation.

App. 58 at 10. The private attorneys have no guarantee or safeguard against the possibility the tobacco companies will seek bankruptcy protection or employ other means in an effort to escape payment.

2. The private attorneys have a constitutional right to their charging liens, and no additional statutory or contractual basis is required.

The State argues the private attorneys' charging liens are invalid because neither their Fee Contract nor any Florida statute references the right to file charging liens. St. Init. Br. at 35-36, 37-39, 40. In Florida, the right to file a charging lien originates in the Florida Constitution. No relevant authority has been cited or found holding this right is somehow withdrawn with respect to funds recovered for the State unless it is restored by contract or statute.[29]

Fifty years ago, the Florida Supreme Court recognized "[t]he 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, 160 Fla. 460, 35 So.2d 296, 298-99 (1948); see also Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A., 517 So.2d 88, 91 (Fla. 3d DCA 1987). The authority to enforce charging liens, the Supreme Court noted, is not statutory

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[29]The State cites Humphreys v. State, 108 Fla. 92, 145 So. 858 (1933), and Southern Crane Rentals, Inc. v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983), which stand for a proposition not in dispute here — that the laws in existence at the time a contract is entered into are treated as if they are a part of the contract. St. Init. Br. at 36. The State also cites inapposite cases addressing attempts by parties to file liens against real property and to garnish state funds. St. Init. Br. at 37-38. The lien and garnishment cases turn on restrictions in specific statutes that are inapplicable and not in issue.

but instead derived from the courts' plenary powers and the guarantee of "due course of law" found in the Florida Constitution. See In re Warner's Estate, 35 So.2d at 298; see also Sinclair, Louis, 428 So.2d at 1384 ("[t]he requirements for perfection of [the charging] lien are not statutorily imposed"). As the Supreme Court stated in In re Warner's Estate,

> 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 in control of its processes and judgment 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 they are clothed with 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.

35 So.2d at 298.

The facts of the instant case vividly illustrate why the "due course of law" requires the private attorneys be given the protection of charging liens. In its Fee Contract with the private attorneys, the State specifically recognized it could not afford and would not risk public funds and personnel in a costly, time-consuming, and risky struggle against a powerful and undefeated foe. App. 58 at 10. It was for this specific reason that the State hired the private attorneys on a contingent fee and contingent cost reimbursement basis. As the Florida Supreme Court stated:

> Certainly no laborer is better entitled to have his charging lien secured than an attorney. The litigant would be helpless and stranded without his advice and labor, and to permit litigants to give him the runaround and settle or deprive him of payment for his services is reprehensible.

Nichols v. Kroelinger, 46 So.2d 722, 724 (Fla. 1950). Now that the State is enjoying the fruits of the private attorneys' labor, it cannot be permitted to refuse to pay and "bid the law au revoir."

3. The private attorneys' fixed contract rights do not require and cannot be defeated by further Legislative appropriation.

The State urges the Fee Contract does not entitle the private attorneys to collect their promised contingent fee because the Legislature has not appropriated funds to pay the fee. St. Init. Br. at 32-33. Although the Fee Contract contains no appropriation requirement, the State contends such a requirement must now be read into the Fee Contract and claims the parties had no right to "delete" it from the standard State form contract that was used.[30] St. Init. Br. at 33, 36-37.

Assuming for the sake of argument that an appropriation of the private attorneys' fees is required, the State's argument overlooks that the appropriation

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[30]Although both sides signed the Fee Contract, the State now asserts it was the private attorneys who "simply deleted" the appropriation provision, suggesting the State did not agree with the deletion. St. Init. Br. at 33. No record support has been cited or found for this assertion.

occurred years ago. As noted, the Medicaid Act appropriated a percentage of the funds recovered to pay the private attorneys' fees, and the Fee Contract tracked the statute. *See supra* Section A.2.

But even if it could be said the Legislature has not already made an appropriation, the State's argument that an appropriation is now required collapses under its own weight. Under the State's reasoning, the State is at liberty to enter into a contract, reap tremendous benefits from its contracting partners' labors, and then tell its contracting partners it is now up to the Legislature to decide whether they will be paid as promised. Such a state of affairs is not only patently unfair but also at odds with the State's best interests. If payment to those who rely on the State's contractual promises becomes a matter of legislative grace rather than law, there is no reason for any rational person to contract with the State.

It is no surprise, then, that both the federal and the state constitutions prohibit the State from disregarding its contractual commitments.[31] In a nation of laws, contract rights do not and cannot hinge on the brevity of the State's memory, the whim of the Legislature, or the direction of the political winds.

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[31] *See supra* Section A.3.

4. The State's disavowal of its contract cannot be excused by the doctrine of sovereign immunity.

The State cannot successfully defend its breach of the Fee Contract by relying on the sovereign immunity defense. See St. Init. Br. at 39-42. In the Medicaid Act, the Legislature expressly authorized the State to enter into the instant Fee Contract with the private attorneys. When the State took this statutorily authorized step, it waived the defense of sovereign immunity as to matters related to the enforcement of the Fee Contract.

In Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984), the Supreme Court held that where a state entity has entered into a written contract under statutory authority, "the defense of sovereign immunity will not protect the state from action arising from the state's breach of that contract." Id. at 5. To allow sovereign immunity to act as a defense in this situation would render the state's contracts illusory. Id. The Court stated:

> Where the legislature has, by general law, authorized entities of the state to enter into contract or to undertake those activities which, as a matter of practicality, require entering into contract, the legislature has clearly intended that such contracts be valid and binding on both parties. As a matter of law, the state must be obligated to the private citizen or the legislative authorization for such action is void and meaningless.

Id.

As noted, it was under the express authority of the Medicaid Act that the State entered into a Fee Contract to pay the private attorneys 25% of the funds they recovered. The State's refusal to compensate its lawyers as agreed violates the Fee Contract. In this precise situation, Pan-Am Tobacco holds sovereign immunity will not shield the State from its agreement or from the consequences of its failure to honor it.

C. The trial court correctly disbursed $50 million in interim attorneys' fees.

The State and the settling tobacco defendants appeal the trial court's incorporation of Texas' Settlement Agreement under the Most Favored Nation provision. St. Init. Br. at 44-49; Tobacco Def. Init. Br. at 11-17. The MFN Order should be affirmed.[32] Irrespective of the merits of the parties' interpretation of the MFN provision, the trial court was completely correct to safeguard funds sufficient to cover the private attorneys' 25% contingent fee and to disburse $50 million as a partial fees payment. As noted, the trial court's order transferring the funds into the protection of the court's registry was not connected to the trial court's interpretation of the MFN provision. It was instead prompted by the State's startling and unconstitutional attempt to wrest the funds from judicial

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[32]In any event, as Yerrid has emphasized throughout the course of this litigation, the rights of private counsel under the Fee Contract are separate from and independent of any rights granted by the MFN Order.

control under the Confiscation Act. *See supra* Section A.3. In addition, while the stated basis for the disbursal of $50 million to the private attorneys is the trial court's interpretation of the MFN provision, the disbursal was fully justified for reasons independent of that interpretation.

As established above, the private attorneys hold valid charging liens against $187.5 million, 25% of the $750 million first payment by the settling tobacco defendants. *See supra* Section B.1. In an unappealed order predating the orders on review, the trial court ruled the funds representing the private attorneys' 25% interest in the State's recovery would remain in escrow pending appeal of the trial court's order — now reversed — which quashed the private attorneys' charging liens. App. 35 at 3. In the same unappealed order, the trial court ruled $50 million was "earmarked" for the private attorneys' first fee payment "pending further order of the Court." App. 35 at 3.

Against this background, the trial court's statement in the MFN order that it "has, and continues to have, jurisdiction over the sum of $187,500,000" merely reiterates the earlier order. App. 1 at 2; Y App. 1 at 2; App. 56 at 1. It was only after the Legislature passed the Confiscation Act in an unconstitutional attempt to interfere with the power of the judiciary that the trial court entered the

order on review transferring the funds into the registry of the court.[33] As the trial court stated, this action was taken "to protect these funds from the application of recent legislation [the Confiscation Act] that may unconstitutionally vacate the prior orders of this Court, deny parties due process of law and impair contract." Supp. App. 1 at 1; Y App. 3 at 1. Had the trial court failed to act, the Legislature would have been permitted to violate the separation of powers by reversing a court order and removing funds from court custody. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995) (legislative reversal of judicial judgments violated separation of powers); Adams, 172 So. at 79 (power to retain property in court custody among powers of judiciary).

If the steps the trial court took to safeguard these funds were necessary to protect its *own* order from the legislative branch, they were absolutely critical to protection of the contract rights of the *private attorneys*. The Confiscation Act appropriates all settlement funds received and to be received in the future. Ch. 98-63 § 3(1); App. 59. If this unconstitutional measure is given its intended effect, the private attorneys will be stripped of any security for their contractual percentage interest in the recovery they won. If the settlement funds are out of

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[33]The MFN Order was entered on April 16, 1998. App. 1; Y App. 1. The Confiscation Act became law *after* the trial court signed the order transferring the funds into the registry of the court. Supp. App. 1; Y App. 3.

the trial court's control and in the treasury, the funds will truly be state funds, subject to disbursement only by appropriation. Considering the State has succeeded in keeping the private attorneys from receiving any attorneys' fees while the funds have been under court control, transfer of the funds to State control under the Confiscation Act gives the private attorneys little reason for optimism.

Just as the trial court's order protecting the funds in its registry should be affirmed without regard to its MFN reasoning, the order disbursing $50 million of the funds to the private attorneys should be affirmed for reasons independent of the MFN Order. The $50 million was set aside as the first payment of the private attorneys' fees *before* the MFN Order was even entered. App. 35 at 3. In the MFN Order the trial court made explicit the finding implicit in its earlier order:

> [T]he 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.

App. 1 at 3; Y App. 1 at 3 (emphasis added).

The point is that the trial court's finding that the private attorneys are entitled to "substantial fees" does not depend on its interpretation of the MFN provision. To the contrary, the trial court's MFN analysis is based on the underlying determination that the private attorneys are entitled to "substantial fees." And the trial court's finding that the private attorneys are entitled to "substantial fees" has never been disputed. While the State argues the private attorneys' fees should not be paid out of the settlement funds, it does not deny and has not challenged the trial court's statements that the private attorneys are entitled to a great deal of money.[34]

The net result is that irrespective of its MFN analysis,[35] the trial court was correct to order a limited disbursal of funds under its control. "If the product of the litigation is in the hands of the court, the latter may on application of the attorney, enter an order directing payment of the fee." Nichols, 46 So.2d at 724. At this writing — three years after this litigation began and one year after it settled

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[34]In fact, the State has recognized the private attorneys should be "paid handsomely," App. 51 at 48, and that they are "entitled to a very good fee." Y App. 9 at 172. Even in the order quashing the private attorneys' charging liens, the trial court acknowledged that fees of "tens of millions or hundreds of millions of dollars might be reasonable" to compensate the private attorneys. App. 46 at 4.

[35]The trial court should be affirmed if it reached the right result, even if it was right for the wrong reason. DSA Group, Inc. v. Gonzalez, 555 So.2d 1234, 1235 (Fla. 2d DCA 1989).

— the private attorneys remain uncompensated for their extraordinary efforts. This fact, coupled with the trial court's finding that the private attorneys' rights under the contingency fee contract have vested, fully supports the present disbursal of $50 million in fees without regard to the MFN provision. Neither the State nor the trial court has *ever* suggested the private attorneys' fees, however and whenever set, should not exceed $50 million.[36]

In sum, the orders protecting the settlement funds and disbursing $50 million are correct even if the trial court's interpretation of the MFN provision is not. The transfer of funds from the escrow account into the registry of the court was made necessary by the Legislature's attempted unconstitutional encroachment on the powers of the judiciary. The $50 million fee disbursal is appropriate because there is no doubt the private attorneys' fees will exceed this amount.

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[36]The State cannot be heard to complain that even if it is appropriate to make this interim payment, the $50 million should come from the tobacco defendants and not the State. If the private attorneys are correct and the Fee Contract controls, the State now owes $187.5 million. If the State is correct and the Settlement Agreement controls, the tobacco defendants have agreed to pay reasonable attorney's fees, App. 56 Ex. 1 at 14, and no one has suggested "reasonable fees" will be less than $50 million.

CONCLUSION

For the foregoing reasons, the Supreme Court should answer the certified question "yes." It should affirm the trial court's authority to safeguard settlement funds in its registry and its disbursal of $50 million in interim attorneys' fees.

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I CERTIFY that a copy of the foregoing ANSWER BRIEF ON THE MERITS OF APPELLEE YERRID, KNOPIK & KRIEGER, P.A., and Appendix have been furnished by U. S. Mail, this 20th day of August, 1998, to the following:

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