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IN THE SUPREME COURT OF FLORIDA
CASE NO. 93,148 & 93,195
4TH DCA CASE NOS. 98-01430 & 98-1747
L.T. CASE NO. CL 95-1466 AH

FILED
SID J. WHITE
JUL 24 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

STATE OF FLORIDA, et al.,

Appellants,

v.

AMERICAN TOBACCO CO., et al.,

Appellees. /

On Petition For Discretionary Review of Appeal
Certified as Requiring Immediate Resolution

INITIAL BRIEF OF APPELLANTS STATE OF FLORIDA, LAWTON M. CHILES, JR., DEPARTMENT OF BUSINESS & PROFESSIONAL REGULATION, THE AGENCY FOR HEALTH CARE ADMINISTRATION, AND THE DEPARTMENT OF LEGAL AFFAIRS

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CERTIFICATE OF INTERESTED PERSONS

Counsel for Appellants State of Florida, Lawton M. Chiles, Jr., individually and as Governor of the State of Florida, Department of Business and Professional Regulation, the Agency for Health Care Administration, and the Department of Legal Affairs certify that the following persons and entities have or may have an interest in the outcome of this case:

1. The Honorable Lawton M. Chiles, Jr., Governor, State of Florida
2. Robert A. Butterworth, Attorney General, State of Florida
3. Kimberly Tucker, Deputy General Counsel, State of Florida
4. James Peters, Assistant Attorney General, State of Florida
5. Myron H. Burnstein, Deputy Attorney General, State of Florida
6. Parker D. Thomson, Thomson Muraro Razook & Hart, P.A.
7. Carol A. Licko, Thomson Muraro Razook & Hart, P.A.
8. Judge Harold Cohen, Circuit Judge, Fifteenth Judicial Circuit, West Palm Beach, Florida
9. Judge James T. Carlisle, Circuit Judge, Fifteenth Judicial Circuit, West Palm Beach, Florida
10. James W. Beasley, Jr., Beasley, Leacock & Hauser, P.A.
11. Bruce S. Rogow, Bruce S. Rogow, P.A.
12. Beverly A. Pohl, Bruce S. Rogow, P.A.

13. Arnold R. Ginsberg, Ginsberg & Schwartz

14. Wayne Hogan, Brown, Terrell, Hogan, et al.

15. William C. Gentry, Gentry, Phillips, Smith & Hodak, P.A.

16. Michael Maher, Maher, Gibson & Guiley

17. Richard F. Scruggs, Scruggs, Millette, Lawson, et al.

18. David C. Fonvielle, Fonvielle & Hinkle

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20. Murray R. Garnick, Arnold & Porter

21. Edward A. Moss, Anderson, Moss, Parks & Sherouse, P.A

22. Justus Reid, Reid, Metzger & Associates, P.A.

23. James M. Landis, Foley & Lardner

24. Ronald L. Motley, Ness, Motley, Loadholt, et al.

25. J. Anderson Berly, Ness, Motley, Loadholt, et al.

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

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

28. James H. Nance, Nance, Cacciatore, et al.

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32. John Romano, Romano Eriksen & Cronin

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

41. NationsBank, N.A.

42. Jack Scarola, Searcy, Denny, et al.

STATEMENT CERTIFYING FONT USED

Pursuant to the Court's Administrative Order dated July 13, 1998, In Re: Briefs Filed In The Supreme Court of Florida, we certify that the size and style of type used in this brief are: Times New Roman, 14 point proportionally spaced font.

Carol A Licke

INTRODUCTION

These consolidated appeals by the State of Florida, Lawton M. Chiles, Jr., et al.(collectively, the "State") involve a question certified by the Fourth District to be of great public importance requiring immediate resolution by this Court:

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

Subsumed in this question are fundamental issues involving Separation of Powers (whether the court can disburse, without legislative appropriation, settlement proceeds paid for the benefit of the State to its private lawyers) , sovereign immunity (whether the State's lawyers can lien State funds for payment of their fees), and the professional responsibilities of lawyers.[1] The certified question arises from the consolidated appeals of three orders entered by the Fifteenth Judicial Circuit, Palm Beach County, Florida:

(1) "Order Implementing Most Favored Nation Provision of Florida Settlement Agreement" (the "MFN Order," App. 1),[2] which judicially rewrites the

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[1]Neither the certified question nor Senate Bill 1270 (discussed at Section I.A.3) is directed at the monies separately paid and to be paid by the Settling Defendants to the State's private lawyers for their fees and costs, as required by the Settlement Agreement.

[2]"App." refers to the State's appendix accompanying the initial brief filed in the Fourth District, Case No. 98-01430, prior to this Court accepting jurisdiction and consolidating such appeal with Case No. 98-01747. "Supp. App." refers to the State's Supplemental Appendix filed with this Initial Brief.

State's Settlement Agreement with the Settling Defendants (all tobacco manufacturers) over the objections of all settling parties. The MFN Order is expressly contrary to the parties' Settlement Agreement, which required the Settling Defendants to pay the State's legal fees. Specifically, the MFN Order requires the State to pay $50 million of its settlement proceeds as an "advance" to its lawyers, even though there was no Legislative appropriation authorizing such use of these State funds. It declares all settlement funds to be "not the State's funds" until "deemed" so by the court, and mandates all future settlement proceeds to be escrowed under the court's complete control, for the purpose of securing the lawyers' $2.8 billion putative charging liens. This Order was entered April 16, 1998 over the objections of all the settling parties and at the behest of one of the State's lawyers, acting not on behalf of the State, but "individually and on behalf of the People's Trial Advocates".

(2) "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," entered April 24, 1998, which denied the State's motion to stay the MFN Order, and ordered the immediate transfer of $50 million in State funds to its private lawyers, despite a specific Legislative appropriation of all the settlement funds for public purposes ("Disbursement Order," App. 2).

(3) "Order Directing the Immediate Transfer Of All Funds into the Court's

Registry," dated May 15, 1998, which transferred over $200 million of the State's settlement funds into the court's registry for the purpose of securing the lawyers' putative charging liens. ("Judicial Appropriation Order," Supp. App. 1). This transfer has already cost the State over $2 million in court fees deducted by the Clerk, and continues to cost the State lost interest on the funds each day (collectively, the "Appealed Orders").

The case below resulted in an $11+ billion tobacco settlement in favor of the State, and has been described by the trial court as "unprecedented in the annals of Florida law." (Supp. App. 2, at 1). However, as Judge Cohen noted in his recent recusal order (entered in response to a motion for disqualification filed by three of the State's private lawyers without the State's consent), any victory by the State has been "completely soured" by a handful of the State's private lawyers:

> The court did everything in its power to have the nasty dispute concerning attorneys' fees resolved to the satisfaction of all interested parties. Referrals to mediation, facilitators and arbitration were ordered. However, the dispute concerning fees has now become a major feature of the litigation in this case and has completely soured the Plaintiffs' victory....
>
> While the Attorney's Charging Lien for 2.8 billion dollars (see copy attached) remains in effect, the Court cautions counsel once again to try and resolve the remaining dispute over fees in a fair and equitable manner short of protracted and expensive litigation. The court is convinced that if the judiciary does not apply The Rules Regulating The Florida Bar and The Rules of Professional Conduct to disputes such as this one as set forth in this Court's November 12, 1997 order,

then it will not be long before the Legislature removes the whole matter of lawyer discipline from the supervision of the judiciary.

(Supp. App. 2 and 3). This "nasty fee dispute" has festered for ten months and is the basis for these consolidated appeals.

STATEMENT OF THE CASE AND FACTS

A. The Tobacco Litigation And The People's Trial Advocates.

The case below commenced in February 1995, when the State, represented by its own State attorneys joined by a joint venture group comprised of several private law firms (identified as the "Peoples' Trial Advocates" or "PTA"), filed an initial complaint against the tobacco industry seeking reimbursement of approximately $250-350 million per year in taxpayer-borne Medicaid expenses incurred by the State (the "Medicaid Claims"). In November 1996, the State filed a Third Amended Complaint that significantly expanded the scope of the suit beyond Medicaid reimbursement, to include claims for racketeering under Chapter 895, Fla. Stat. ("RICO"), other statutory causes of action, common law torts and punitive damages (the "non-Medicaid claims"). (App. 57).

The PTA originally agreed to provide legal services in connection with the State's prosecution of the Medicaid Claims pursuant to a document titled "Standard Contract - State of Florida, Agency for Health Care Administration" (the "Medicaid

Provider Contract,"App. 58).[3] This Contract was entered pursuant to §409.910(15)(b), Fla. Stat.,[4] and was signed by each member-firm of the PTA. The essential terms of the Contract relevant to these appeals are:

> --All rights and obligations under the Medicaid Provider Contract flowed to the PTA collectively, as a joint venture, for one fee. This fee was based upon recovery for the Medicaid Claims only, and was to be shared and distributed in accordance with the PTA's internal arrangements. See para. I.C. to Att. 1 of the Contract, "the total 25 percent contingency fee sum is agreed to be shared and distributed among the providers.[5] (App. 58, at 11, ¶C.1). The PTA was so organized. (Supp. App. 8).
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> --The contingency fee, which was expressly based upon any recovery of the State's Medicaid expenditures (estimated to be a maximum of $1.0 billion),[6] was further subject to the statutory limitations of Section 409.910(15)(b), Fla. Stat., and "any [other] limitations imposed by law or the Rules of the Florida Bar..." (App. 58, at 11, ¶B.3).
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> --An essential term of the Contract agreed to by the PTA was that "the State will ask the Court to require the [Tobacco Defendants] to pay all the [State's]

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[3]This "Standard Contract" was in fact significantly revised and manipulated by the PTA's counsel prior to execution. See, i.e., App. 60.

[4]The constitutionality of the 1994 amendments to Section 409.910, Fla. Stat., was upheld by this Court in Agency For Health Care Administration v. Associated Industries of Florida, Inc., 678 So.2d 1239 (Fla. 1996), cert denied, 137 L.Ed. 327, 117 S.Ct. 1245 (U.S. 1997), except for three provisions of the amendments not here applicable which were stricken as written.

[5]Section 409.910(15)(b), Fla. Stat., specifically limited the fees recoverable. The Medicaid Provider Contract reduced the potential maximum fee recovery from 30 percent to 25 percent. (App. 58 at 10, ¶A).

[6]The trial court limited the State's recovery on Medicaid Claims to those occurring after July 1, 1994 and prohibited future damages, thus limiting claims to a three-year period.

attorneys' fees and costs." (App. 58 at 10) (emphasis added).

The Contract was not amended when these non-Medicaid Claims were later filed.[7] In fact, many of these claims were based upon fee-shifting statutes, such as RICO, which provided for recovery of the State's attorneys' fees incurred in prevailing upon these claims from the losing defendants. §895.05(7), Fla. Stat. But the non-Medicaid claims increased the maximum potential recovery in the tobacco litigation from an estimated $1.0 billion ($250-$350 million for each of three years) to a total of over $12.0 billion. By filing these non-Medicaid claims, the PTA lawyers were on notice that if they prevailed they would be seeking their fees not from the State, but from the tobacco industry, as provided by the applicable Florida statutes.

B. The Settlement Agreement And The Settlement Order.

Jury selection began in August 1997. Prior to the completion of jury selection, however, settlement negotiations had commenced. Representing the State in these negotiations were the Governor, the Attorney General, representatives from each of their staffs, two designees of the PTA (PTA Designees Maher and Rice) and Parker Thomson. Ultimately, the State and five "Settling Defendants" agreed to a proposed

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[7]The PTA attempted to amend the Contract to include these non-Medicaid claims, but the State did not agree. Of course, without any written amendment, the Medicaid Provider Contract would apply in accordance with its specific terms, as this Court has recently ruled. County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997).

settlement of all the State's monetary claims.[8] ("Settlement Agreement," App. 56). Consistent with the requirements of the Medicaid Provider Contract and the statutory fee-shifting provisions predicating the non-Medicaid claims, the State (with the assistance of the two PTA Designees), negotiated for payment of all its attorneys' fees by the Settling Defendants. The State and PTA prevailed on this issue, and thus the proposed Settlement provided for payment of all the State's attorneys' fees by the Settling Defendants. The parties agreed on arbitration as the methodology for determining a "reasonable fee" for the State's private lawyers. (App. 56, at 14, Section V). PTA Designee Rice requested that only a broad outline of the arbitration provisions be included in the Settlement Agreement. (Supp. App. 9, 10). The Agreement required written signatures of the State and Settling Defendants, but not the PTA.

On August 24, 1997, the PTA gathered at the private residence of PTA lawyer Montgomery in West Palm Beach, at the request of the Governor and for what they believed to be a dinner to celebrate the commencement of trial. Instead, at the conclusion of the meal, the Governor advised those present of the settlement negotiations and the proposed settlement terms. PTA Designees Rice and Maher

[8]The exact recovery cannot be calculated, but is estimated to be at least $11.0 billion over the next 25 years.

were to explain and discuss the attorneys' fees provision contained in the proposed Settlement Agreement with the entire PTA. (Supp. App. 7)

The Governor advised the PTA lawyers that if the PTA did not agree to the fees provision negotiated by their PTA Designees, that the settlement would not be signed. (App. 63 at pgs. 120-123; 164-176). No one ever advised the Governor or the Attorney General of an objection to the proposed fees provision. (App. 63 at pgs. 120-123; 164-176; Supp. App. 7). To the contrary, the PTA Designees represented that the PTA had agreed to this fees provision. (App. 63 at pgs. 120-123; 164-176; Supp. App. 7, 9, 10). The proposed fees provision was in fact more advantageous than that provided through the Medicaid Provider Contract -- first, under, the Settlement Agreement, the State's lawyers could claim fees through arbitration based upon the entire $11+ billion settlement, rather than for only the $1.0 billion in Medicaid reimbursements as required by the Contract and §409.910(15)(b), Fla. Stat; second, the requirement that the Settling Defendants rather than the State pay these fees freed the PTA from the legal requirement for an annual appropriation of its fees by the Legislature. The State relied upon the PTA Designees' representations that the PTA had agreed to this fees proposal, and signed the Settlement Agreement. (App. 63 at pgs. 120-123; 164-176; Supp. App. 7, 9, 10).

The Settlement Agreement was approved and adopted as an enforceable order

of the court on the next day. (App. 56, "Settlement Order").[9] All PTA members were present, and no one objected to, or appealed the Settlement Order.

C. The PTA's Disintegration And The Unprecedented Charging Liens.

Securing the approval of the Settlement Agreement was the last "joint" effort by the PTA. Immediately thereafter, the PTA lawyers, once referred to as the State's "dream team," dissolved from a "joint venture" into several hostile, warring factions.[10] Six PTA firms filed individual "Notices of Charging Liens" against the State (App. 55), each claiming an individual right to 25% of the "total recovery"--in other words, a fee based upon all $11+ billion in estimated settlement proceeds from all claims, rather than the fee required by the Contract and §409.910(15(b), which was restricted to a fee based upon the estimated $1.0 billion for Medicaid Claims only. (App. 55).[11] Three Notices demanded a lien against the State equal to $2.8 billion in claimed attorneys' fees.[12] The State moved to quash these Notices of Lien

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[9]Certain equitable claims remained pending at that time, which claims were voluntarily dismissed on April 24, 1998.

[10]To date, at least three separate lawsuits have been filed by members of the PTA against other members of the PTA, one such suit also naming several of the Settling Defendants. (App. 19, 44 and 45).

[11]See, i.e., Montgomery's Notice of Charging Lien. One Notice (Kerrigan's) stated that "[t]his lien is filed for and on behalf of any attorney of record for the Plaintiff who may wish to assert a lien for fees." (App. 55).

[12]Because the PTA, through PTA Designee Rice, requested not to include detailed arbitration provisions in the Settlement Agreement, arguments arose over every

("Motion to Quash"), alleging the putative charging liens were void as a matter of Florida law and that the court had no jurisdiction to enforce any such liens against the State's settlement funds. (App. 53).

D. The Initial Settlement Payments And The Escrow Agreements.

The Settlement Agreement required that "immediate benefits" be paid to the State. Thus, two initial payments, totaling $750 million, were required by September 15, 1997. These payments were to be placed into two escrow accounts for the "benefit of the State," to be held pending "Final Approval of the Settlement Agreement" (a term contractually defined in the Settlement Agreement). (App. 49, 50). The escrows were designed for one purpose -- to protect the Settling Defendants during the period pending "Final Approval." Because of concerns over the Notices of Charging Liens, on September 11, 1997, the Settling Defendants filed a "Motion In The Nature of Interpleader" ("Interpleader Motion") seeking direction as to where they should deposit these initial payments. (App. 54).

After hearing argument, the court entered an order on September 11, 1997 granting Defendants' Interpleader Motion ("Order on Interpleader Motion", App. 52).

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aspect of the contemplated arbitration proceeding, including, but certainly not limited to when it would commence -- some demanded an immediate arbitration date; others wanted to delay the arbitration until after consideration of a proposed national settlement -- still others insisted on no arbitration at all.

The court ordered the initial payments to be paid into the escrow accounts, to be disbursed upon "further court order." (App. 52). Nothing in this Order on Interpleader Motion changed the requirements of the Settlement Agreement that there be "immediate benefits" paid to the State of Florida. Accordingly, the Settling Defendants deposited $750 million "for the benefit of the State of Florida," into two separate escrow accounts, and agreed to two Escrow Agreements, dated September 15, 1997. No one objected to the terms of the Escrow Agreements. (App. 48.) Final approval of the Settlement Agreement occurred on September 24, 1997, and on that date, all the settlement funds became State Funds.[13]

E. The November 12 Order Quashing The Notices of Charging Liens And The Fourth District's Opinion Quashing Such Order

Various competing PTA lawyers continued their highly publicized demands for fees. By the fall of 1997, the Florida Department of Law Enforcement had initiated a criminal investigation into the Medicaid Provider Contract. (Supp. App. 12). Despite the fact that "the court did everything within its power to have the nasty dispute concerning attorneys' fees resolved to the satisfaction of all parties, including "[r]eferrals to mediation, facilitators and [the ordering of] arbitration," all such efforts

[13]The Settling Defendants do not dispute that "Final Approval" of the Settlement Agreement has now occurred, but contend that it occurred on June 25, 1998, 30 days after entry of the final judgment.

were unsuccessful because of the exorbitant, multi-billion dollar demands made by certain PTA lawyers. Finally, on November 12, 1997, after two hearings on the matter, the court rendered its "Order Granting Motion to Quash Charging Liens"(the "November Order," App. 46), which found the lawyers' multi-billion dollar demands to be excessive and unreasonable under the Rule 4-1.5, Rules Regulating the Florida Bar. The Order voided the PTA's notices to the extent they sought fees of $2.8 billion, and did not address the State's dispositive, sovereign immunity arguments. Six months later, the Fourth District vacated this November Order, granting petitions for certiorari by three lawyers on due process grounds, and ruling that the PTA lawyers were entitled to a further hearing on their putative liens. Kerrigan et. al. v. State, 23 Fla.L.Wkly.1243 (Fla. 4th DCA May 18, 1998). (App. 61). The Fourth District's opinion did not address the State's dispositive, jurisdictional sovereign immunity arguments. Id.

F. PTA Lawyer Montgomery's Tortious Interference Suit.

In its November Order, the court held that "no discovery or further hearings shall be conducted or held regarding attorneys' fees or costs." (App. 46, pg. 1). PTA member Montgomery wanted discovery on his fee claim, however, and circumvented this order by filing a tortious interference suit in the same court: Montgomery & Larmoyeux, et. al. v. Philip Morris, Inc., et al., Case No. Cl 97-10357 AE (the

"Montgomery suit," App. 45). In this suit, Montgomery alleges the two PTA Designees and two of the Settling Defendants "tortiously interfered" with "his individual rights" under the Medicaid Provider Contract by settling the tobacco litigation. Immediately after filing this suit on November 18, 1997, Montgomery began scheduling depositions of those he sought to depose but had been precluded from deposing in this case — including his own client, the Governor, and the Attorney General, and also including the trial judge, Judge Cohen. Despite representations to the court by Montgomery's partner and attorney that Montgomery would not use any such depositions as grounds to move to recuse Judge Cohen,[14] in fact Montgomery soon did just that. On July 9, 1998, Montgomery and two other PTA lawyers, without their client's (the State's) consent, moved to disqualify Judge Cohen from the entire case, on grounds he was "biased" as to their $2.8 billion charging liens, and that he could be a witness (quoting the depositions of the Governor and Attorney General taken by Montgomery's partner as purportedly contradicting what the trial judge had stated). (Supp. App. 3).

[14]See, Supp. App. 11, at pg. 18, lines 13-17; App. 62 at pgs. 64-64.

G. PTA Lawyer Gentry's Motion To Amend The Settlement Agreement For The PTA's Benefit And Further Notice Of A Charging Lien.

The "appeal" of the November Order via what the Fourth District ultimately determined to be petitions for certiorari remained pending for six months. In the interim, PTA lawyers filed several motions relating to their claimed fees. In February 1998, PTA lawyer Gentry, purporting to act not on behalf of the State, but "individually and on behalf of the joint venture/partnership PTA," filed a motion attempting to amend the settling parties' Settlement Agreement. The motion, titled "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 Agreement, Article IV" ("Gentry's MFN Amendment," App. 40), was based upon Gentry's assertion that the "most favored nation" provision in the State's Settlement Agreement was "self-executing," and could be "invoked" by his "Notice" alone.[15] Gentry tried to "invoke" selected terms of the Texas settlement (1) to impose a charging lien equal to $50 million against the State's Settlement Funds; and (2) to impose upon the State and the Settling Defendants certain provisions of the Texas

[15]In recognition of the "important leadership role" played by the Governor and the Attorney General, and to protect the State of Florida in the event any other state was later able to obtain a more favorable settlement, the settling parties had agreed to a "most favored nation" provision in their Settlement Agreement ("MFN Provision"). (App. 56, at Section IV., pg. 13).

settlement agreement deemed by him to be "more favorable" to the PTA (namely, to advance $50 million of the State's Settlement Funds and to require another $50 million advance of "new" money by the Settling Defendants), on a theory that what was "more favorable" to the PTA was also "more favorable" to the State of Florida. (App. 40).[16]

The State, the Settling Defendants, and even other members of the PTA opposed Gentry's MFN Amendment -- albeit for different reasons. (App. 11, 12, 22, 24, 27 and 31).[17] Some PTA members, while opposed to Gentry's MFN Amendment, nonetheless filed notices joining in his putative charging lien (collectively, the "Gentry Charging Lien," App. 32, 33).

At a February 11 hearing, the court urged all parties to attempt some resolution of their differences ("Interim Order", App. 35 at pp. 4-5). The court further ruled that during these negotiations, $50 million would remain in the State's escrow account "earmarked for plaintiffs' private counsel attorneys' fees first payment pending further order of the court" and directed the "parties" (to include

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[16]In January 1998, Texas reached a settlement with the tobacco industry. (App. 40, Exh. 3), which included terms favorable to that state's private counsel. Unlike Florida's PTA, however, the Texas lawyers were signatories to the settlement agreement. (App. 40, Exh. 3).

[17]Some PTA members opposed Gentry's MFN Amendment because it allegedly "needlessly delayed" fee arbitration until November 1, 1998. These PTA members instead demanded that "fee arbitration proceed forthwith." (App. 11, 12, 14, 30, 31).

Gentry and other PTA members) to negotiate terms to be incorporated from the Texas settlement. The Interim Order did not resolve any disputes over these escrowed funds, did not grant Gentry's Charging Lien, and did not direct the disbursement of any State Funds to the PTA.

Several weeks of unsuccessful negotiations ensued. After failing to reach a resolution, the State, the Settling Defendants and Gentry each submitted its own "version" of a proposed MFN Amendment. (See, the "State's MFN Amendment," App. 22, 23, 24). Gentry also moved to "enforce" his putative Charging Lien (again joined by some but not all PTA members), seeking alternatively an order to enforce a charging lien equal to $137.5 million or entry of Gentry's MFN Amendment. (App. 34).

H. The MFN Order And The "Granting" Of Gentry's Charging Lien.

On April 16, 1998, the court entered its Order Implementing Most Favored Nation Provision of Florida Settlement Agreement, the MFN Order. (App. 1) The MFN Order adopted and copied, verbatim, the text of PTA Lawyer Gentry's MFN Amendment, even though it departed significantly and materially from the Texas agreement, and only benefitted the PTA lawyers, all to the detriment of the State of Florida, the PTA's "client". (App. 1; App. 20, 23).

The MFN Order rewrites the Settlement Agreement, adding material

amendments over the express opposition of all the settling parties. (App. 1). It directs the immediate disbursement, without Legislative appropriation, of $50 million of the State's Funds to the PTA as an advance fee payment (interest-free and to be reimbursed following arbitration). It also requires all future settlement payments to be placed in escrow under the court's "exclusive jurisdiction" and "complete control," in direct conflict with the court-approved Settlement Agreement terminating all escrows and providing for direct payments to the State upon "Final Approval of the Settlement Agreement," and ignoring the fact that Gentry's prayer for relief was in the alternative. Gentry thus received more than he requested. (App. 1, App. 8 at 14, 99-104). This MFN Order, without so stating, effectively grants Gentry's Charging Lien (and takes complete control even over what is not paid to the PTA, which Gentry requested only if he did not get his MFN Order), while ignoring the dispositive arguments raised by the State's motion to quash such Charging Lien. (App. 26). In the name of the MFN Provision, the court imposed terms that are clearly less favorable to the State of Florida, over the State's objections.

I. The Disbursement Order And Express Legislative Appropriation.

The State immediately moved for a stay of the court's MFN Order. (App. 14). The Florida Legislature passed the FY 1998-1999 Appropriations Act on April 18, 1998, specifically appropriating all of the settlement funds into the State Treasury,

effective July 1, 1998. Notice of this appropriation was filed. (App. 13). Nonetheless, at the April 24 hearing, the court entered its Disbursement Order.[18] This Order denied any stay, and ordered the immediate transfer of $50 million to the PTA, now asserting "exclusive jurisdiction" and "complete control" over all (current and future, escrowed and non-escrowed) settlement proceeds ("Settlement Funds") (App. 2; 8 at 14, 99-104).

J. The Court's Appropriation of the State's Settlement Funds.

At the May 15 hearing, the court, in response to a motion by one PTA member to "protect" the escrowed settlement funds, ordered the immediate transfer of over $200 million of the State's funds into the court registry, for the purpose of protecting and securing the PTA lawyers' putative liens. (Judicial Appropriation Order, Supp. App. 1). Before the close of business on May 15, 1998, over $200 million of the State's funds --representing more than 25% of the $750 million in settlement payments received to date -- had been transferred into the court's registry.

SUMMARY OF THE ARGUMENT

The crux of these consolidated appeals is the right, if any, of the various PTA lawyers to lien, freeze, ransom and otherwise demand State funds for payment of

[18]At this same hearing, the parties dismissed, without prejudice, all remaining equitable claims, counterclaims, and a third party complaint. (App. 9). Final judgment in this case was entered on May 26, 1998.

their claimed multi-billion dollar fee, absent Legislative appropriation, and absent any determination such fee is owed. Here, the trial court has permitted PTA lawyers, acting individually, contrary to the requirements of the PTA joint venture, and often times at odds with other PTA lawyers, to dominate and control the proceedings below, materially prejudicing the State (their client), and jeopardizing the State's Settlement Agreement. The PTA lawyers have acted, and continue to act, contrary to their client's best interests, while unwilling to test the reasonableness of their claimed multi-billion dollar fee by arbitration or alleged breach of contract claim.

The fee-driven Appealed Orders unconstitutionally usurp the Legislature's exclusive power to appropriate the $750 million in Settlement Funds already received, and the estimated $11+ billion in Settlement Funds still to be received over the next 25 years. The trial court's actions, taken without jurisdiction or legal authority, effectively impose and enforce a charging lien against State funds, in derogation of fundamental Florida law, and constitute an illegal taking of State monies for the benefit of PTA members. Moreover the Appealed Orders violate the terms of the parties' court-approved Settlement Agreement and the Escrow Agreements. Such judicial intrusion upon the sovereign immunity of the State and upon the exclusive power of the Legislature to appropriate State funds is unprecedented and patently unconstitutional.

The trial court had neither jurisdiction nor legal authority to rewrite the parties' Settlement Agreement over the objections of all the settling parties. Mr. Gentry, a PTA lawyer, had no right, standing or authority to seek to impose these material amendments upon the settling parties, for the benefit of the PTA and to the detriment of the PTA's client, the State, under a "most favored nation" provision of the Settlement Agreement. Clearly, only the State can make the initial determination as to what is or is not more favorable to it (and only the other parties -- the Settling Defendants -- can comment on it). As a result of the trial court's acceptance of Mr. Gentry's amendments, the Appealed Orders impose and incorporate into the Florida settlement provisions significantly less favorable to the State, materially prejudicing the Florida settlement for the benefit of the lawyers. The Appealed Orders should be reversed, and the certified question answered in the negative, with these declarations: (a) the court cannot judicially appropriate the State's tobacco settlement funds; (b) the State's funds can neither be retained nor disbursed for the purpose of protecting or securing the PTA's charging liens, which are void as a matter of law; (c) any attorneys' fees claimed under the Medicaid Provider Contract can be claimed only by the PTA, as a joint venture, and are subject to Legislative appropriation; (d) all settlement funds in the court's registry shall be disbursed to the State immediately; (e) all future settlement funds shall be paid to the State; and (f) only parties to the

Settlement Agreement have a right to amend it.

ARGUMENT

I. THE TRIAL COURT HAS NO AUTHORITY TO DISBURSE THE STATE'S SETTLEMENT FUNDS.

A. Ordering All Settlement Proceeds To Be Placed Under The Court's Complete Control Unconstitutionally Usurps The Legislature's Exclusive Power To Appropriate $11+ Billion In State Funds.

The trial court, in a well-meaning but misguided attempt to resolve the attorneys' fee dispute, entered a series of orders that patently violate the separation of powers doctrine and constitute a fundamental assault upon the integrity, independence, and exclusive powers of the Florida Legislature. As the court itself acknowledged, the Appealed Orders have created a constitutional crisis between the trial court and the Florida Legislature without precedent:

> --first, by requiring the disbursement of $50 million of the State's Settlement Funds to the PTA, in express contravention of a Legislative appropriation of this money for public purposes, and contrary to the parties' Settlement Agreement requiring all such attorneys' fees to be paid by the Settling Defendants;
>
> --second, by ordering the transfer of over $200 million of the State's Settlement Funds (already received) into the court's registry for the purpose of protecting and securing the lawyers' multi-billion dollar putative charging liens;
>
> --third, by ordering all future Settlement Funds to be placed "under the court's continuing exclusive jurisdiction" and "complete control," again for the stated purpose of protecting and securing the lawyers' $2.8 billion charging liens; and

--fourth, by declaring the Settlement Funds to be not the State's Funds until "deemed" so and released by the trial court. (App. 1; 8).

The court acknowledged these Orders would ignite a constitutional firestorm (App. 13; 8 at 14, 99-104), and place it in direct conflict with the Legislature. The Appealed Orders violate Article II, Section 3 (separation of powers); Article III, Section 1 ("legislative power is vested in the legislature"); Article VII, Section 1(c) ("no money shall be drawn from the treasury except in pursuance of appropriation made by law") and 10 (prohibiting the pledging of credit); and Article V, Section 14 ("the judiciary shall have no power to fix appropriations").

The court's purported justification of its "complete control" of all Settlement Funds was its declaration that such Funds are "not the State's Funds" until specifically "released" by the trial court. (App. 1; 8 at 14, 99-104). The court "distinguished" the State's Settlement Funds from "other" State monies, and held it had the authority to "appropriate" the Settlement Funds judicially because the monies were paid by the Settling Defendants rather than Florida taxpayers.[19] The court had

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[19](App. 8). The logic alone is faulty. In fact, the Settlement Funds are taxpayer funds — they are specifically intended to reimburse the State and its taxpayers for tax dollars already spent and to be spent in treating smoking-related illnesses, and for other public purposes. Every dollar disbursed by the court to the PTA is a dollar out of Florida taxpayers' pockets. But in any case, "state funds" have never been restricted to just "taxpayer funds." State funds are all revenues, however collected or received under the authority of the laws of the State. Section 215.31, Fla. Stat. Such revenues include federal funds, licenses, road fees, lottery monies, trust funds,

to make this artificial "distinction," because if the Settlement Funds are in fact "State Funds," then unquestionably such Funds could be disbursed and spent only through Legislative appropriation. Article VII, Section 1(c), Fla. Const. This is undisputed, fundamental Florida law. See Chiles v. Children A-F, 589 So.2d 260, 264 (Fla. 1991); Coalition for Adequacy and Fairness in School Funding v. Chiles, 680 So.2d 400, 408 (Fla. 1996). In short, had the State been any other plaintiff receiving a settlement award, the court may well have had the authority to impose a charging lien and disburse certain settlement proceeds to the lawyers. But the State is not "any other plaintiff." Its settlement funds are State funds.

1. The Settlement Funds Are State Funds.

The Settlement Agreement is clear. All the settlement payments are State Funds, paid by the Settling Defendants "for the benefit of the State of Florida":

> H. Intended Beneficiaries. This Action was brought by the State of Florida, through its Governor and Attorney General, to recover certain monies and to promote the health and welfare of the people of Florida.

(App. 56, at Section VI. H., pg. 16). The parties specifically agreed to, and the court approved, the use of these Settlement Funds for public purposes. [20]

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royalties, copyright revenues, etc., as well as tax revenues.

[20] 4. Use of Funds. The monies received under this Settlement Agreement constitute not only reimbursement for Medicaid expenses incurred by

The Settlement Funds are thus public funds, reimbursing Florida taxpayers for funds spent and to be spent. Nothing in the Agreement permits the use of these Settlement Funds to pay lawyers' fees to the PTA; to the contrary, it specifically provides that all such fees will be separately paid by the Settling Defendants as determined through an arbitration proceeding. (App. 56 at Section V, pg. 14).

The Escrow Agreements executed by the State and the Settling Defendants are equally clear. While the trial court was given "supervision" and "jurisdiction" over the escrowed funds, such jurisdiction was limited to enforcing and implementing the parties' Settlement Agreement -- the court was not given jurisdiction to take or in any way direct the disbursement of the Settlement Funds to anyone other than the State. Indeed, the court has no authority under the terms of the Settlement Agreement to amend the Agreement -- and certainly not sua sponte or upon a private lawyer's

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> the State of Florida, but also settlement of all of Florida's other claims, including those for punitive damages, RICO and other statutory theories....[t]he parties hereto anticipate that funds provided hereunder, only after approval by the Court, will be used for children's health care coverage and other health-related services, to reimburse the State of Florida for medical expenses incurred by the State, for mandated improvements in State enforcement efforts regarding the reduction of sales of Tobacco Products to minors, and to ensure the Proposed Resolution's performance targets.

(App. 56, pg. 10, Section II.B.4) (emphasis added).

"invocation" and notice of charging lien.

Moreover, the court's declaration that the Settlement Funds are "not State funds" completely contradicts earlier orders of the same court. (App. 1). The Settlement Order itself designates all Settlement Funds as funds "for the benefit of the State." (App. 56 at pg. 8, Section II.B). Likewise, the trial court in its November Order ruled that "The whole point and purpose of this lawsuit was to recover Florida taxpayer dollars." (App. 46 at pg. 5, Case Nos. 97-4008, 97-4222, 97-4311 and 97-4328, reversed and remanded on other grounds, 23 Fla.L.Wkly 1243, May 18, 1998; also see App. 61). The court further noted that "a considerable amount of the damages recovered in this case are earmarked for the benefit of minors through programs to be instituted on minors' behalf." (App. 46 at pg. 2).[21]

In accordance with the parties' Settlement Agreement and Florida law, once the Settling Defendants deposited the Settlement Funds into the escrow accounts, they lost control over them. Ullendorff v. Graham, 87 So. 50, 52 (Fla. 1920); Gibson v. Resolution Trust Corp., 51 F.3d 1016, 1021 (11th Cir. 1995)(applying Florida law).[22] The Settling Defendants retained only bare legal title to these funds, and the

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[21]After the date of Final Approval (September 24, 1997), all future Settlement Funds were to be paid directly to the State. (App. 56 at pg. 9, Section II.B.3).

[22]A depositor can obtain the return of an escrowed item only if the ultimate recipient fails to perform the conditions of the escrow for which the recipient is responsible. Ullendorff, 87 So.2d at 52-53.

State acquired equitable title, pending "Final Approval of the Settlement Agreement." Houston v. Adams, 95 So. 859, 860 (Fla. 1923). The Settling Defendants further confirmed as a matter of law that they had no interest in these Settlement Funds by the filing of their Interpleader Motion in September 1997. See 32 Fla. Jur. 2d Interpleader 1 (1994). At the time of "Final Approval of the Settlement Agreement," all the Settlement Funds held in the escrowed accounts became State Funds.

2. Judicial Appropriation Of State Funds Is Unconstitutional.

If in fact the settlement funds are State Funds, there can be no dispute that the Appealed Orders are unconstitutional on several grounds. First, the court's judicial appropriation of State Funds patently violates a fundamental constitutional principle mandating a separation of powers -- a doctrine "strictly adhered to" by this Court. State v. Florida Police Benevolent Ass'n., 613 So.2d 415, 418 (Fla. 1992). This doctrine is codified in Article II, Section 3, Fla. Const.:

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

This Court has noted that governmental immunity derives from this doctrine of separation of powers, meaning that the judicial branch simply cannot interfere with or decree the liability of other branches of government in the exercise of their fundamental powers. Kaisner v. Kolb, 543 So.2d 732, 736-737 (Fla. 1989).

Second, the Florida Constitution has vested legislative power in the Legislature (Article III, Section I), and one such power is the exclusive power to appropriate all State funds. (Article VII, Section 1(c)). There is every reason for assigning this exclusive appropriations power to the Legislature, as this Court has observed:

> The Florida Constitution specifically provides for the legislature alone to have the power to appropriate state funds. More importantly, only the legislature, as the voice of the people, may determine and weigh the multitude of needs and fiscal priorities of the State of Florida. The legislature must carry out its constitutional duty to establish fiscal priorities in light of the financial resources it has provided.

Chiles, supra, 589 So.2d at 267.

Because the Legislature's appropriation power is exclusive, Article VII, Section 1(c), Fla. Const., which prohibits the withdrawal of any money from the State treasury without a lawful appropriation, has been broadly construed to include not only money already actually in the State treasury, but also (as here) public funds potentially therein. See State ex rel. Kurz v. Lee, 121 Fla. 360, 384, 163 So. 859, 868 (1935). Here, the Third Party Liability Act (§409.910, Fla. Stat.) provides a potential source of State revenue, designed to reimburse taxpayer dollars already spent and to be spent. All funds received through the use of this Florida law are State Funds, and State Funds cannot be appropriated by the judiciary. Article V, Section 14, Fla. Const.

In their arguments to the trial court, PTA lawyers asserted that the Medicaid Provider Contract imposed upon the State an obligation to pay their contingent fee outside the Legislative appropriation process. (App. 8). Such arguments have no merit.

Because all state monies are subject to the appropriations power of the Legislature, all contracts requiring the State to spend money are also subject to the appropriations power of the Legislature.[23] See, State v. Florida Police Benevolent Ass'n, supra. See, e.g., §§216.311 and 287.0582, Fla. Stat.; see also, Florida Department of Health & Rehabilitative Services v. Southern Energy, Ltd., 493 So.2d 1082, 1083 (Fla. 1st DCA 1986), review denied, 501 So.2d 1283 (Fla. 1986); United Faculty of Florida v. Board of Regents, 365 So.2d 1073, 1084 (Fla. 1st DCA 1979); State v. Florida Police Benevolent, Ass'n, supra; Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993); Pan American Hosp. v. Dept. Of Health & Rehab.Serv., 433 So.2d 568, 571 (Fla. 3d DCA 1983).

The Appealed Orders constitute an improper judicial appropriation that strikes

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[23]This is true as a matter of law, regardless of whether the language is included in the contract. In this case, the standard Medicaid Provider Contract included the requirement for appropriation, and no party had the right, power or authority to delete this language from the final, signed version of the Medicaid Provider Contract with the PTA. The Medicaid Provider Contract was also subject by law to §287.0582, Fla. Stat. and §287.059(11), Fla. Stat.

at the very heart of these fundamental constitutional principles. See Florida Department Of Health and Rehabilitative Services v. Southern Energy, Ltd., 493 So.2d 1082, 1084-1085 (Fla. 1st DCA 1986), rev.denied, 501 So.2d 1283 (Fla. 1986). The unprecedented amount of the seized funds exacerbates the impact of that strike. Clearly, the Legislative responsibility to set fiscal priorities through appropriations is obliterated when the power to spend the State's money is usurped by a state court judge.[24]

3. The Trial Court Appropriated The Settlement Funds Upon An Improper Determination That The Legislative Appropriation Of Such Funds For Public Purposes "May" Be Unconstitutional.

The trial court's affront to the Legislature was not unintentional. Indeed, with full knowledge of the Legislature's appropriation of the Settlement Funds, effective July 1, the trial court acted immediately to order the disbursement of $50 million to the PTA lawyers, and then when this Disbursement Order was stayed by the Fourth District, entered the Judicial Appropriation Order ordering over $200 million of the State's Settlement Funds into the court's registry under its exclusive jurisdiction. These Orders were entered in direct contravention of an express appropriation by the Florida Legislature, adopted as part of its annual budget-making process on April 18,

[24]The fact that the Settling Defendants were to reimburse the State for this $50 million at a later date out of the arbitration award does not alter the unconstitutional judicial intrusion upon the Legislature's power.

1998, and to be effective as of July 1, 1998:

> Section 16. The $330,500,000, plus accrued interest and any other funds on deposit in accounts 3660512058 and 3660510843 at NationsBank, N.A., pursuant to Escrow Agreements dated September 15, 1997, and raised as a result of litigation entitled The State of Florida et. al. vs. American Tobacco Company, et. al., Case No. 95-1466 AH, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, are funds of the State of Florida and are hereby appropriated to the General Revenue Fund, and shall be transferred to the Comptroller's Tobacco Settlement Clearing Trust Fund and Tobacco Pilot Program Clearing Trust Fund if those funds are created by law. Further, all subsequent payments made by the settling defendants in said litigation are funds of the State of Florida and are hereby appropriated to said trust funds, or, if those trust funds are not created by law, to the General Revenue Fund.

Conference Report on House Bill 4201, the 1998/1999 General Appropriations Act, The Florida Legislature, dated April 18, 1998, effective as of July 1, 1998. (App. 13).

Senate Bill 1270, which was signed into law on May 15, 1998, similarly appropriated all Settlement Funds received and to be received. (App. 59). [25] Yet, just minutes before this bill was signed into law, one PTA lawyer convinced the trial court to enter the Judicial Appropriation Order, confiscating over $200 million of the State's Settlement Funds into the court's registry, and effectively "declaring" such Senate Bill 1270 to be "unconstitutional" — even though any such legislation must

[25]Senate Bill 1270 does not include the monies paid and to be paid directly and separately by the Settling Defendants to the PTA for its fees and costs, as required by the Settlement Agreement.

by law be presumed to be constitutional, and even though no such issue was even properly before the court. As the Order states:

> This order is entered to comply with the Stay Order entered by the 4th DCA concerning the funds and to protect these funds from the application of recent legislation that may unconstitutionally vacate the prior orders of this Court, deny parties due process of law, and impair contract.

Supp. App. 1. In making its appropriation, the Legislature was aware of the April 16 MFN Order and the attempted "judicial appropriation" of State Funds for the PTA. Accordingly, the Legislative determination not to appropriate any State Funds for the PTA must be given great weight and must be presumed to be valid.[26] State v. Housing Finance Authority of Polk County, 376 So.2d 1158, 1160 (Fla. 1979); Jackson Lumber Co. v. Walton County, 95 Fla. 632, 116 So. 771 (1928); State v. Housing, supra, 376 So.2d at 1160; Wald v. Sarasota County Health Facilities Authority, 360 So.2d 763 (Fla. 1978); Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971).[27]

Yet, the trial court did not "presume" the Bill's legality. Instead, the trial court reviewed Senate Bill 1270, declared it "may" be "unconstitutional," and then acted

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[26]There has been no challenge filed to Senate Bill 1270, which became law effective as of July 1, 1998. Even though the Bill is law, and presumed constitutional, over $200 million of the State's funds still remains in the court's registry.

[27]It is fundamental that public funds must be applied for the purpose for which they were raised and appropriated. Dickinson v. Stone, 251 So.2d 268, 273 (Fla. 1971).

upon an improper presumption that it was unconstitutional. (Supp. App. 1). The trial court's orders have clearly usurped the Legislature's exclusive power to appropriate State Funds, and are patently unconstitutional. Permitting these Orders to stand would require this Court to abrogate years of strict adherence to the separation of powers doctrine. State v. Florida Benevolent Police Assn., 613 So.2d at 419; see generally Chiles v. Children A-F, 589 So.2d 260 (Fla. 1991). State ex rel. Kurz v. Lee, 121 Fla. 360, 384, 163 So. 859, 868 (1935) (requiring Legislative appropriation prevents expenditure of public money "without the consent of the public given by the representatives in formal Legislative Acts...[and secured to the Legislature] the exclusive power of deciding how, when and for what purpose the public funds shall be applied in carrying on the government.")

B. The Court Had No Jurisdiction To Disburse State Funds To Pay Lawyers' Putative Charging Liens That Are Void As A Matter Of Law.

Charging liens are merely a convenient enforcement mechanism for lawyers to enforce a contract right to their fee against their client's settlement proceeds. Obviously, if there is no such contract right, there can be no charging lien — and here, there is no such contract right. As a matter of law, the PTA's "contractual right" to fees under its "fee agreement" -- here, the Medicaid Provider Contract -- is subject to annual Legislative appropriation. The PTA knew this, reviewed this language in

the State's standard form, and simply deleted it — but deleting such language does not, and can not, change the Constitution or Florida law. (App. 58). As a matter of law, all payments under contracts such as the Medicaid Provider Contract are subject to annual appropriation by the Legislature. Sections 287.052 and 287.059(11), Fla. Stat. Thus, there is no "right" to fees that would permit the PTA to use a charging lien for enforcement. The PTA lawyers' charging liens are simply an attempt to circumvent the Florida Constitution and well-established Florida law, and are void as a matter of law.

The Appealed Orders, however, effectively impose just such improper charging liens on the State's $11+ billion Settlement Funds, by declaring them to be not State Funds, and by ordering all such Funds to be paid into the court's registry for the purpose of securing and paying the lawyers' $2.8 billion putative charging liens -- all without any judicial determination that there is any validity whatsoever to such putative charging liens. The trial court improperly put the cart before the horse.

In fact, the only judicial determination to date on the issue of the lawyers' multi-billion dollar charging liens has been the trial court's November Order quashing any such liens and holding that $2.8 billion would be an excessive and unreasonable fee under the Rules Regulating The Florida Bar.[28] On consolidated

[28]Not only is the fee excessive under the laws of the State of Florida, the Rules

petitions for certiorari filed by the lawyers, the Fourth District quashed the November Order, and ruled the lawyers were entitled to a "further hearing" on this issue, asserting the lawyers had "no notice" that they (and their putative charging liens) were subject to the Florida Rules Regulating The Florida Bar. (App.61).

The effect of the court's Orders is clearly improper. The court has ordered over $200 million into the court registry, and has ordered all future settlement funds to be placed under its exclusive control. Such confiscation is tantamount to an illegal injunction freezing State Funds in advance of any determination (let alone any judgment) that any State monies are due to the PTA lawyers. All the PTA lawyers have done to date is to file putative charging liens. (App.55). No such liens have been imposed or enforced by the court. No court has ruled on the State's dispositive arguments that any such liens are void as a matter of law. No court has determined what amounts, if any, are due under any of the putative charging liens. Thus, even if sovereign immunity is not an absolute bar to the lawyers' claims, these lawyers have no more right than do other plaintiffs to "freeze" assets in advance of a money judgment. The PTA lawyers have not shown they would be entitled to any such

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Regulating The Florida Bar, and all relevant case law interpreting those rules, the Contract itself does not entitle the charging lienors to the $2.8 billion in fees claimed. The Medicaid Provider Contract provided a fee only for Medicaid damages, with no provision for fees recovered under any other legal theory.

injunctive relief in advance of a judgment -- they cannot show a substantial likelihood of success on the merits of their fee claim against the State, nor could they show any irreparable harm if the injunctive relief they sought was not entered. See Rosen v. Cascade Int'l, Inc., 21 F.3d 1520 (11th Cir. 1994); Mitsubishi Int'l, Inc. v. Cardinal Textile Sales, Inc., 14 F.3d 1507 (11th Cir. 1994), cert. denied, 513 U.S. 1146 (1995). Nor can the PTA lawyers satisfy the statutory prerequisites for prejudgment attachment. Section 76.04, Fla. Stat.; Action Electric & Repair, Inc., v. Batelli, 416 So.2d 888 (Fla. 4th DCA 1982); Acquafredda v. Messina, 408 So.2d 828 (Fla. 5th DCA 1982); Konover Realty Assocs. v. Mladen, 511 So.2d 705 (Fla. 3d DCA 1987). Clearly, the court's Orders here, seizing all the settlement proceeds in the absence of any stated cause of action that the PTA lawyers are entitled to a sum certain from the State, are improper and without any legal basis.

1. PTA Members Had No Authorization Under The Medicaid Provider Contract Or The Florida Statutes To File Any Notice of Lien.

The Medicaid Provider Contract, which provided no rights to individual members of the PTA to act separately and apart from the collective joint venture, made no reference to any authority to impose a charging lien to coerce collection of attorneys' fees. The absence of such text or of any authority for such text was fatal to the legitimacy of any putative charging liens filed by members of the PTA. (App. 34). A provision that the intention of the parties may not be effectuated in violation

of law is implicit in every contract. H.B. Holding Company v. Girtman, 96 So.2d 781 (Fla. 1957). Moreover, Section 409.910, Fla. Stat., prohibits and abrogates any lien rights. See Humphreys v. State, 108 Fla. 92, 145 So. 858 (1933); Southern Crane Rentals v. City of Gainesville, 429 So.2d 771 (Fla. 1st DCA 1983) (laws which exist at the time and place of the making of a contract enter into and become a part of the contract, as if they were expressly referred to and incorporated in its terms, including those laws which affect its construction, validity, enforcement or discharge).

2. The PTA Lawyers Had No Authority Under Florida Statutes To Either Delete Legally Required Appropriations Language From Their Contract Or To File Notices of Charging Lien.

The PTA lawyers had no right nor authority to delete the legally required appropriations language from their Medicaid Provider Contract -- nor did any other party to the Contract. It is fundamental law that any contract, or construction thereof, that is violative of public policy or State law renders the subject contract void and unenforceable. Local No. 234 v. Henley & Beckwith, Inc., 66 So.2d 818 (Fla. 1953); City of Leesburg v. Ware, 153 So. 87 (Fla. 1934); Finley Method Co. v. Standard Asphalt Co. of Florida, Inc., 139 So. 795 (Fla. 1932). This Court has long required that State courts have jurisdiction to entertain contract claims based only on "express written contract into which the agency has statutory authority to enter" (emphasis supplied). Pan-Am. Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla.

1984). Here, no party — neither the PTA nor any state agency — could lawfully delete the statutory and constitutional requirement that the Medicaid Provider Contract be expressly subject to appropriation.

Nor did (or could) the Medicaid Provider Contract authorize any charging liens. Florida, unlike many other American jurisdictions, has not codified common law liens. Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.,517 So.2d 88, 91 (Fla. 3d DCA 1987), review denied, 525 So.2d 879 (Fla. 1988); Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, 428 So.2d 1383, 1386 (Fla. 1983) recognizes "proceedings at law between attorney and client for collection of fees have long been disfavored." Not one PTA lawyer ever recited any statutory authority for the Notices of Charging Liens. Nor could they find such authorization expressed in the text of the Medicaid Provider Contract or in the common law and statutory law embraced in the Contract. There was no statutory authorization for the Notices of Charging Liens against the State, and Florida courts have uniformly defeated attempts to impose such liens against the State. See, i.e., G & J Investments Corp. v. Florida Department of Health and Rehabilitative Services, 429 So.2d 391 (Fla. 3d DCA 1983); City of St. Augustine v. Brooks, 55 So.2d 96 (Fla. 1951) (holding, in the context of a claim against a city, that "this Court has held that a mechanics' lien will not attach to property held and used for a public purpose").

In City of Coral Gables v. Hepkins, 144 So. 385 (Fla. 1932), this Court recognized that execution may be ordered against a judgment rendered against a municipal government under some circumstances but with the admonition that property so subject "must be unconnected with any public function" and that "structures which are public property...cannot be seized...to satisfy a judgment...." Id., at 386. Clearly, the proceeds of the State's tobacco litigation were "connected" to a State Medicaid program function, were "connected" to independent RICO claims, and were "connected" to State punitive damages claims - all "public functions" in pursuit of State of Florida health and welfare.

The terms of the Medicaid Provider Contract, and the absent terms thereof, were especially significant given the fact that "the State" at all times was a contracting party to which constitutional and statutory limitations applied, whether implied or expressed in the contract. Veix v. Sixth Ward Building and Loan Ass'n of Newark, 310 U.S. 32, 38 (1940); Department of Insurance v. Teachers Insurance Company, 404 So.2d 735 (Fla. 1981); United States Trust Company of New York v. New Jersey, 431 U.S. 1 (1977).

It is fundamental law that State contracts may not be read to violate public policy and law. Any construction violative of public policy or law renders the subject contract provisions void and unenforceable. Local No. 234 v. Henley & Beckwith,

66 So.2d 818, 821 (Fla. 1953); Edwards v. Trulis, 212 So.2d 893, 896 (Fla. 1st DCA 1968); City of Leesburg v. Ware, 153 So. 87, 89 (Fla. 1934); Finley Method Co. v. Standard Asphalt Co. of Florida, 104 Fla. 126, 139 So. 795 (Fla. 1932). In that regard this Court has long required that the State courts have jurisdiction to entertain contract claims based only on an "express written contract into which the agency has statutory authority to enter." (Emphasis supplied.) Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984). Where, as here, there was no written contract expressing a right to a charging lien and there was no express statute authorizing a charging lien, Pan-Am bars the imposition of the PTA lawyers' putative charging liens or any enforcement thereof, as a matter of law.

3. The Court Had No Jurisdiction To Impose A Charging Lien Against State Funds.

The PTA lawyers' Notices of Charging Liens, and the putative liens, have been indisputably disruptive encroachments on the State Treasury and the orderly administration of State government. Spangler v. Florida State Turnpike Authority, 106 So.2d 421 (Fla. 1958); State Road Department of Florida v. Tharp, 146 Fla. 745, 1 So.2d 868 (Fla. 1941); Berek v. Metropolitan Dade County, 396 So.2d 756 (Fla. 3d DCA 1981), affirmed, 442 So.2d 838 (Fla. 1982). The State did not waive its sovereign immunity to permit imposition of this or any other putative charging liens. The circumstances for waiver of sovereign immunity, or for any other interference

with the powers of the sovereign, are narrowly circumscribed, and cannot be casually implied. Surely there is no provision of the Medicaid Provider Contract which expressly or impliedly authorized the PTA, or individual members thereof, to file a lien on recovered funds intended for public purposes. See, County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997). Nor could there be. Such a provision would be without statutory basis and would violate public policy. Local No. 234 v. Henley, supra; Edwards v. Trulis, supra; City of Leesburg v. Ware, supra; Finley Method Co. v. Standard Asphalt, supra. Not one of the putative charging liens recited any legitimate authority, statutory or case law, in the context of a lien claim against the State. There simply is no such authority in Florida.

Berek, supra, recognizes "the doctrine of sovereign immunity rests on two public policy considerations: the protection of the public against profligate encroachments on the public treasury (citations omitted) and the need for the orderly administration of government which, in the absence of immunity would be disrupted if the State could be sued at the instance of every citizen." Id., at 758. For that reason, the court recognized it must employ a rule of strict construction against waiver of immunity. Id.; see also, Spangler, supra, (requiring strict construction against waiver); Hernando County v. George Warner, 705 So.2d. 1053 (Fla. 5th DCA 1998). Further dispositive is Florida Statute §11.066(4) (1997) which provides:

> Notwithstanding §74.091, a judgment for monetary damages against the state or any of its agencies may not be enforced through execution or any common-law remedy against property of the state or its agencies, and a writ of execution therefor may not be issued against the state or its agencies.

The trial court's November Order, and the Fourth District's opinion reversing such Order on "due process" grounds, and the trial court's Appealed Orders here, all ignore a fundamental premise -- there can be no "charging lien" against State Funds, because the State has sovereign immunity. Thus, the Orders improperly direct the disbursement of $50 million in State Settlement Funds to be paid immediately to the PTA lawyers, contrary to the terms of the Settlement Agreement, contrary to a valid appropriation by the Florida Legislature, and over the express opposition of the State of Florida. (App. 1-2, Supp. App. 1). The Appealed Orders also have destroyed the State's power to use billions of dollars in Settlement Funds expected to be received over the next 25 years. (App. 1-2, Supp. App. 1). As such, the Appealed Orders effectively grant (without so specifically stating) the PTA lawyers' $2.8 billion charging liens. (See App. 28-29). The trial court has no legal, statutory or factual basis upon which to impose, either directly or indirectly, any such liens under the guise of so-called "restrictions" on the Legislature's power to appropriate these State Funds. (App. 28-29). In fact, as a matter of fundamental Florida law, the court had no jurisdiction whatsoever to impose or enforce any such lien, either directly or

indirectly in the absence of an express waiver of sovereign immunity. See Department of Natural Resources v. Circuit Court of the Twelfth Judicial Circuit, 317 So.2d 772, 774 (Fla. 2d DCA 1975), aff'd, 339 So.2d 113 (Fla. 1976); see also, State Department of Transportation v. Bailey, 603 So.2d 1384, 1387 (Fla. 1st DCA 1992); Schmass v. Snoll, 245 So.2d 112, 113 (Fla. 3d DCA 1971).

No court has yet ruled on this dispositive issue of law, even though the arguments have been before both the trial court and the Fourth District. Without resolution of this issue now, by this Court, there can be no answer to the certified question -- for clearly, if a charging lien cannot be enforced against the sovereign State as a matter of law, then the trial court had no authority to disburse the State's settlement funds to pay for the lawyers' putative charging liens.

4. The Lawyers' Notices of Charging Liens Were Prohibited By The Medicaid Third Party Liability Recovery Act

The introductory text of the 1994 amendments to the Medicaid recovery law makes clear that the Legislative intent was to make its recovery proceedings different from all others. The trial court acknowledged, and the PTA advocated, the vigor of those amendments under this unique law. §409.910(1), Fla. Stat. Florida's Medicaid program has yet to be repaid in full, due in large part to the uncertainty created by the PTA lawyers' Notices of Charging Liens. Clearly, the imposition of any such charging liens, whether express or implied, is contrary to the Legislative intent for a

prompt and full recovery and to the very Medicaid statute that the PTA relied upon, on the State's behalf, in the tobacco litigation.

5. The Lawyers' Notices of Charging Liens Were Contrary To The Settlement Agreement.

Not one of the PTA lawyers' Notices of Charging Liens alleged, or implied, that the PTA would not be paid handsomely for their undisputed skills and crucial contributions to the case below. On the contrary, the Settlement Agreement, approved by the court, expressly provided for the Settling Defendants to pay them $12,000,000 for costs and expenses plus "reasonable attorneys' fees." (App. 56, at Art. V of the Settlement Agreement). The $12 million for costs and expenses has already been paid to the PTA. It is clear that the intent and purpose of that Agreement at part II.B is that all other monies and benefits designated in the Agreement for "the benefit of the State of Florida" were to remain intact and that the obligations to pay private attorneys' costs and attorneys' fees are assumed by and shall be paid by the Settling Defendants, separately and apart from the State's recovery. (App. 56). The responsibility of the Settling Defendants to pay all private counsel fees and costs is undisputed. The agreed upon arbitration of attorneys' fees with payment by the tobacco industry from a dedicated pool of dollars was (at the very least) a reasonable, timely, and appropriation-free alternative to fee payment by the State. The settlement provided a deep and appropriation-free pocket, one without

the limitation of §409.910(15) (b) which authorizes only a percentage fee based on the Medicaid "amount actually collected and reimbursed to the department...to the extent of medical assistance paid by Medicaid." (emphasis supplied.) Also, unlike the Medicaid Provider Contract, which by law was contingent upon continuing appropriations by the Legislature, the Settlement Agreement provides an appropriation-free alternative -- all fees and costs are to be paid by the Settling Defendants. It was for that reason that the State believes the PTA accepted the Settlement Agreement — and on that basis all the various, individual Notices of Charging Lien should have been quashed.[29]

C. The Trial Court Has No Authority To Rewrite The Settlement Agreement Over The Objections Of The Settling Parties.

The trial court has no authority to rewrite the parties' Settlement Agreement over the objections of the settling parties and at the request of a PTA lawyer. [30] The Settlement Agreement and the Settlement Order reserve to the trial court jurisdiction

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[29]It is fundamental Florida law that individual PTA lawyers, as members of a joint venture, have no such individual rights to pursue claims or actions on behalf of the joint venture. Waterfront Developers, Inc. v. Miami Beach, 467 So.2d 733 (Fla. 3d DCA 1985); Deal Farms, Inc. v. Farm & Ranch Supply, Inc., 382 So.2d 888 (Fla. 1st DCA 1980); Aronovitz v. Stein Properties, 322 So.2d 74 (Fla. 3d DCA 1975); Elting Center Corp. v. Diversified Title Corp., 306 So.2d 542 (Fla. 3d DCA 1974), cert. denied, 321 So.2d 554 (Fla. 1975).

[30]The Medicaid Provider Contract does not designate Gentry as one of the four "representatives of the provider responsible for administration of the program under this contract." (App. 58, Section III.C.).

to "enforce and implement" the Settlement Agreement -- not to rewrite or otherwise modify the Agreement. (App. 56). To the contrary, the Settlement Agreement specifically prohibits any such amendment, other than by virtue of the MFN Provision, without the written consent of the signatories:

> This Settlement Agreement may be amended only by a writing executed by all signatories hereto and any provision hereof may be waived only by an instrument in writing executed by the waiving party.

(App. 56, Section VI, D. pg. 15). The PTA is not a signatory to the Settlement Agreement; nor are any individual members a signatory, even though they have rights and obligations under the Settlement Agreement as the State's "legal representatives" and "agents."[31] The PTA is also not a beneficiary. (App. 56).

The only party with authority to invoke rights under the MFN Provision is the State. Once the State determined, pursuant to the MFN Provision, what provisions of the Texas settlement agreement were "more favorable to the State," it could -- and did -- invoke those provisions. (See State MFN Amendment, App. 24, 25). When the Settling Defendants disagreed with certain provisions of the State's MFN

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[31]Such rights include the right to participate in a fee arbitration and receive attorneys' fees for the entire recovery rather than only the Medicaid recovery; the right to have attorneys' fees paid by the Settling Defendants, free from the necessity for Legislative appropriation. Their obligations include, for example, the obligation to cooperate in the settlement. (App. 56, Section VI.E., pg. 15).

Amendment, they had the right to present their own revisions for the State's consideration. (See Settling Defendants' Revisions, App. 22). The Settling Defendants could not, however, "determine" what was "more favorable to the State." Nor could the PTA,[32] or its individual members.[33] That determination was for the Executive branch of the State government to make, subject to the limits imposed on its authority by the State Constitution.

Upon receiving the State's MFN Amendment, the trial court could have engaged in dispute resolution. It could have provided the settling parties with an opportunity to be heard; it could have conducted or facilitated mediation. If unsuccessful, the trial court could have thereafter resolved any disputes among the

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[32]Whatever rights the PTA has derived from its Medicaid Provider Contract (in which the PTA is limited to a fee based upon recovery for Medicaid claims only), confiscating the Medicaid, RICO and punitive damages recoveries is not one of those rights. Indeed, the PTA members' role is "sui generis", as they were acting as quasi-deputies – "a posse" – for the State under this unique statutory relationship, unlike that of other private attorneys making incidental recovery of Medicaid or other dollars on behalf of their private citizen clients.

[33]The private counsel have no independent right to invoke the provisions of Article IV, have no authority to speak on behalf of the State of Florida as to the provisions of Article IV, and have no right to determine for the State those Most Favored Nation Provisions from the Texas settlement that should be incorporated into the Florida Settlement. Thus, although the Settlement Agreement, including the provisions for arbitration of attorneys' fees, "shall be binding on and inure to the benefit of the State of Florida, the named Plaintiffs, their ...representatives, agents, [and] legal representatives," there is no independent right given to any entity other than the State to invoke Article IV. (See Article I.B., Settlement Agreement, App. 56).

settling parties--it could have accepted the State's MFN Amendment and incorporated it into the Settlement Agreement, or, to the extent not inconsistent with the State's MFN Amendment, the Settling Defendants' revisions to the form–not substance--of the State's MFN Amendment. But the trial court could not do what it did -- that is, to engage in a rewrite of the Settlement Agreement to include provisions that no signatory wanted, and which bear no resemblance to the Texas agreement itself.[34]

Certainly, the public policy of this State highly favors settlement agreements among parties, and courts must seek to enforce them whenever possible. AmeriSteel Corp. v. Clark, 691 So.2d 473 (Fla. 1997); see Robbie v. City of Miami, 469 So.2d 1384 (Fla. 1985). It is also correct that the trial court has the inherent authority to enforce a settlement agreement. State, Department of Health & Rehabilitative Services v. Schreiber, 561 So.2d 1236, review denied, 581 So.2d 1310 (Fla. 4th DCA 1990). However, a settlement agreement must be enforced and interpreted in accordance with its terms and underlying intent. Sun Microsystems of California, Inc. v. Engineering & Manufacturing Systems, C.A. , 682 So.2d 219 (Fla. 3d DCA

[34]The trial court could no more rewrite the Settlement Agreement than it could have written it and imposed it upon the parties. Courts patently cannot impose settlements upon parties against their wishes. See Epps. v. Epps, 440 So.2d 1314 (Fla. 3d DCA 1983).

1996); Morales v. Dade County, 652 So.2d 925 (Fla. 3d DCA) review denied, 662 So.2d 343 (Fla. 1995).

Courts have no jurisdiction to modify, unilaterally, the terms of the parties' settlement agreement. Wallace v. Townsell, 471 So.2d 662, 664 (Fla. 5th DCA 1985) (court had no jurisdiction to modify terms of settlement agreement as was attempted to be done by orders purporting to extend time provided in settlement agreement for party's performance). Indeed, even where modifications to a settlement or consent decree are proposed by one or more parties, federal courts require evidence of "a clear showing of grievous wrong evoked by new and unforeseen conditions" before amendments can be judicially imposed. Rufo v. Inmates of Suffolk County Jail et. al., 502 U.S. 367, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992).

Nor can a court rewrite a contract or impose a settlement in the name of equity. Haenal v. United States Fidelity & Guaranty Co., 88 So.2d 888 (Fla. 1956); Camicho v. Diana Stores Corp., 25 So.2d 865, 869-70 (Fla. 1946); First Bank of Clermont v. Fitch, 141 So. 299 (Fla. 1932); Orr v. Trask, 464 So.2d 131 (Fla. 1985). A court clearly cannot substitute its judgment for that of the settling parties. Jacobs v. Petrino, 351 So.2d 1037 (Fla. 4th DCA 1976).

Here, the MFN Order entered by the court is wrongly named. It imposes and incorporates into the Florida Settlement provisions significantly less favorable to

Florida, and which in fact materially prejudice Florida's settlement.[35] The MFN Order benefits only the members of the PTA -- and some of those members do not even believe it benefits them. (App. 11-12). More importantly, the MFN Order does not incorporate the Texas settlement, whether Texas is or is not more favorable to the State of Florida. Instead, the MFN Order incorporates a new document with terms written and conceived by one PTA lawyer for the personal benefit of the PTA lawyers -- over the objections of the signatories to the Settlement Agreement. [36] The PTA lawyers had no right to demand, and the trial court had no authority to impose, any such material amendments to the parties' Settlement Agreement.

CONCLUSION

The trial court had neither the jurisdiction nor authority to enter the MFN Order, the Disbursement Order or the Judicial Appropriation Order. The State thus

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[35]Nor did the trial court have any authority, pursuant to its Disbursement Order, to strike provisions of the parties' Escrow Agreement, effectively rewriting it.

[36]In Texas, the fee advance to that State's private counsel made some sense because the settlement agreement had been signed by all counsel (not true in Florida), the Settling Defendants had been released of any other liability to such counsel (not true in Florida, where several are currently being sued by certain PTA members), and, in Texas, all counsel agreed to arbitration as an agreed fee methodology (not true in Florida, according to some members of the PTA). (App. 40, Exh. 3). Thus, in Texas, the total $100 million advance was given in consideration of concessions and agreements by Texas' private counsel. (App. 40, Exh. 3). That is not true here in Florida. Here, the warring factions of the PTA have not and will not "agree" to anything.

requests this Court answer the certified question in the negative, reverse the three Appealed Orders in their entirety, and declare: (a) the tobacco settlement funds are State funds and cannot be disbursed by the court; (b) the State's funds can neither be retained nor disbursed for the purpose of protecting or securing the PTA lawyers' charging liens, which are void as a matter of law; (c) any attorneys' fees claimed under the Medicaid Provider Contract can be claimed only by the PTA, as a joint venture, and not by individual lawyers or law firms, and is subject to legislative appropriation; (d) all settlement funds in the court's registry shall be disbursed to the State immediately; (e) all future settlement funds shall be paid directly to the State; and (f) only parties to the Settlement Agreement have any right to amend the Agreement.

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WE HEREBY CERTIFY that a true copy of the foregoing was served via U.S. Mail on July 23, 1998, to those on the attached Service List.

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