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

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

REPLY 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
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6. Parker D. Thomson, Thomson Muraro Razook & Hart, P.A.
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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.
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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

19. Stephen J. Krigbaum, Carlton, Fields, et al.

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.

29. Sheldon J. Schlesinger, Sheldon J. Schlesinger, P.A.

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

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

41. NationsBank, N.A.

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

43. Cynthia M. Moore, Boies & Schiller, L.L.P.

44. Thomas M. Ervin, Jr.

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.

INTRODUCTION

This consolidated reply responds to the six answer briefs filed -- one by the Settling Defendants;[1] and five briefs filed by nine of the twelve PTA Lawyers. All the settling parties — that is, the State and the Settling Defendants — agree the trial court had no authority to amend the Settlement Agreement over their objections — and that these two orders (the April 16 MFN Order and the April 24 Disbursement Order) must be reversed. (See App. 1 and 2). The Settling Defendants have taken no position as to the third Appealed Order - the May 15 Judicial Appropriation Order (Supp. App. 1). There is no consolidated "PTA" brief, and the legal positions of the twelve PTA Lawyers can be summarized as follows:

--Three PTA Lawyers have filed nothing in these consolidated appeals. The three law firms (Ness Motley; Maher; and Scruggs) are three of the four designated "representatives of the provider" under the Medicaid Provider Contract. (App. 58).

--Three briefs (filed on behalf of five PTA Lawyers) agree with their client, the State, that the trial court had no authority to amend the Settlement Agreement over the objections of the settling parties (See the briefs filed by Nance; Kerrigan, Montgomery & Schlesinger ("Mont. Br."); and Howard & Associates). These five PTA Lawyers agree the MFN and Disbursement Orders should be reversed.[2]

--Only one brief (on behalf of lawyers Gentry, Hogan and Fonvielle) argues that

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[1]Capitalized terms and abbreviations used herein shall have the same meanings as set forth in the State's Initial Brief.

[2]Howard & Associates adopts the brief of Montgomery, Kerrigan & Schlesinger to the extent it is not "inconsistent" with Howard's position that he is a proper member of the PTA (a position disputed by certain other PTA Lawyers).

the trial court had authority to amend the Settlement Agreement over the objections of the settling parties.

--One brief (Lawyer Yerrid's) argues that all three Appealed Orders should be affirmed insofar as they set aside monies for the Lawyers, even if the trial court "misinterpreted" its authority in entering the MFN and Disbursement Orders.[3]

The five PTA briefs "agree" on only two points[4] -- that the certified question should be answered in the affirmative, and that the Judicial Appropriation Order should be affirmed.[5]

REPLY TO PTA LAWYERS' STATEMENTS OF THE FACTS

The Settling Defendants have not taken issue with the State's statement of facts. The various PTA Lawyers have, however, and their briefs set forth five different, and often contradictory "versions" of the so-called "relevant facts." When all is said and

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[3]Notice is hereby given of a related complaint and emergency motion recently filed by Lawyer Yerrid in federal court, seeking control of all the State's settlement proceeds. See, Yerrid v. American Tobacco Company, et.al., Case No. 98-1600 (M.D.Fla.).

[4]The Lawyers disagree as to what happened, what relief they seek, and why they believe what they seek is proper. They even disagree among themselves as to the effect of the Kerrigan decision, 711 So.2d 1246 (Fla. 4th DCA 1998) which is the subject of a pending conflict certiorari petition. See State v. Kerrigan, Estess, Rankin & McCleod, et al., Case No. 93,614.

[5]Not one of the Lawyers' briefs addresses the issue of how any one of them (or even two or three of them collectively) can claim the right (as they do) to 25% of the settlement funds. It is undisputed that the Medicaid Provider Contract provides for only one, collective fee to the PTA, for the benefit of all the Lawyers -- one fee equal to 25% of the Medicaid recovery.

done, the "facts" matter little to the fundamental issues of law before this Court, and have been used by the Lawyers to confuse the legal issues. The State stands by its Statement of the Facts as the only accurate summary of the relevant facts in the record, and will briefly address only the Lawyers' misstatements that have some relevance to the legal issues:

1. The Assertion That Deputy Attorney Antonacci "Waived" The State's Immunity And "Stipulated" The Lawyers Would Not Have To "Go To The Legislature."

The Lawyers repeatedly assert that then-Deputy Attorney General Antonacci "waived" the State's immunity by "stipulating" there would be "no need to go to the Legislature" for their fees and "agreeing" to the court's "control" of the settlement funds. (See Mont. Br. at 16). The Lawyers are only half-right. What actually occurred is that in response to the Lawyers' demands that they not be made to "go to the Legislature" for their fees, Mr. Antonacci did respond that "No, nobody is asking them to go to the Legislature." (App. 51 at 63). He was correct. The State had provided, through the Settlement Agreement, an appropriation-free way for the PTA Lawyers to be paid. They were to be paid by the Settling Defendants, "separately and apart" from the State's settlement proceeds, a "reasonable fee" as determined through arbitration. (App. 56, Section V, pg. 13). This is exactly what Mr. Antonacci explained to the court. ("What we have is a settlement agreement and the settlement

agreement provides for a fee arrangement. They are not permitted to lien the State's property.") (App. 51 at 63). Thus, the Lawyers do not have to "go to the Legislature" to be paid. Moreover, their fees, since they will be paid by Settling Defendants "separately and apart" from the settlement funds, are not subject to SB 1270, and can be paid directly to the Lawyers.

The Lawyers' further "quotes" of Mr. Antonacci have been taken out of context. Read fairly, the hearing transcripts make clear that Mr. Antonacci drew a clear line in the sand (as had the Attorney General and Governor): there were to be no charging liens; and because fees would be paid by the Settling Defendants, no settlement funds would be used to pay for attorneys' fees:

> The State, I think I can fairly represent to you, Judge, that the Governor, the House, the Senate, and the Attorney General are not going to acquiesce to taking any of these proceeds and paying legal fees with them. (App. 51 at pg. 64).
>
> We would like for you to handle this like any other case and that is to treat the State as the State has been treated in every other court in this State. Liens do not attach to funds of this State. The funds of the State are subject to the appropriation of the Legislature and the Legislative bodies, the Governor and the Senate and the House. That is what we want, to handle it this way. (Montg. App. 6, pg.33).

Not only was Mr. Antonacci clear about his position during hearings, but the State's position was also set forth in its papers. (App. 53). While Mr. Antonacci agreed to "the court's supervision" of the temporary escrows (Supp. App. 51 at 61), he did not

(and in fact could not) agree to give the court "control" over the State's funds.[6]

2. The Assertion That Lawyers "Have Not Received One Penny" Due To "The State's Refusal To Pay Their Fees".

It is true that the Lawyers have received no attorneys' fees to date, but this is true only because the PTA agreed, in August 1997, to accept a "reasonable fee" to be paid "separately and apart" by the Settling Defendants and to be determined through an arbitration to be held in the fall of 1998. This arbitrated fee is likely to be hundreds of millions of dollars, and is above and beyond the $12 million paid by Settling Defendants to cover the Lawyers' costs. Certain PTA Lawyers have since reneged upon the PTA's agreement, demanding multi-billion dollar fees from the State's settlement funds. The well-publicized conduct of the Lawyers has caught the attention of the Legislature, the Florida Department of Law Enforcement, the press, and the public, and has provoked strong reaction from the Florida Legislature. (See SB 1270, App. 59). Judge Cohen himself, in his order withdrawing from the case as a result of three PTA Lawyers, observed that if the Lawyers' conduct is not checked by the judiciary, "then it will not be long before the Legislature removes the whole matter of

[6]Section 4 of the Escrow Agreement (non-Pilot Project) specifically conditioned any disbursement of funds from the escrow account on both receipt of a court order and legislative appropriation. ("The disbursement shall be pursuant to authorization under Chapter 216, Fla. Stat., or shall be otherwise appropriated.") No Lawyers objected to this Escrow Agreement when filed or for six months thereafter.

lawyer discipline from the supervision of the judiciary." (Supp. App. 2).[7]

3. The Assertion That The Lawyers Are Entitled To More Than A Reasonable Fee, And That Lawyers Rice and Maher Had No Authority To Represent The PTA's Agreement To A Reasonable, Arbitrated Fee.

Some PTA Lawyers (and the Settling Defendants) have disputed the State's contention that the Settling Defendants must pay "all" the State's attorneys' fees, arguing that the Settlement Agreement obligates the Settling Defendants to pay only a "reasonable fee." But the only fee the PTA could ever collect, either through their Contract or through arbitration, is a "reasonable fee." See Rule 4-1.5, Fla.R.Prof.Resp.[8] The PTA Lawyers cannot obtain more than a reasonable fee, either under their Contract or in arbitration. Thus, the Settling Defendants will pay all the State's attorneys' fees, and that will be the "reasonable fee" determined through arbitration.[9]

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[7]Certain Lawyers have argued that this order is not properly before this Court. However, Judge Cohen's order withdrawing from the case below has already been brought before this Court, has been referred to by other PTA Lawyers, and is a significant development below of which this Court has already taken note. See Case No. 93,633.

[8]The Medicaid Provider Contract expressly provides at pg. 11.B that any attorneys' fee is "subject to any limitations imposed by law or the rules of the Florida Bar." (App. 58). The premise of Montgomery's tortious interference suit, however, is seemingly that the Settling Defendants, having agreed to pay a "reasonable fee," have deprived him of a legal right to claim and collect an "unreasonable fee." (App. 45).

[9]Lawyers Montgomery, Kerrigan & Schlesinger profess "not to know" where the "$2.8 billion claim" came from — but they need look no further than Montgomery's

The same Lawyers take exception with the State's assertion that Lawyers Rice and Maher had been "designated" as the PTA Lawyers responsible for the fee provision in the Settlement Agreement. (See Mont. Brief at 7-13). But the Medicaid Provider Contract specifically designates Rice's law firm (Ness Motley) and Maher as "representatives of the provider" at par. III.C. The PTA's client, the State, had the right to rely upon the PTA's written designation, and upon the representations of Lawyers Rice and Maher that the PTA had agreed to the fee provision in the Settlement Agreement. In fact, the record shows Lawyers Rice and Maher were correct: the PTA did agree to a reasonable fee to be determined through arbitration.[10]

No one ever advised the Governor or the Attorney General of any objections to the proposed fee provision. (App. 63 at 120-123; 164-170; Supp. App. 7). Lawyer Montgomery, for example, has admitted not advising his client, the Governor, of his alleged objections, or of Kerrigan's purported filing of a charging lien.

SUMMARY OF ARGUMENT

The trial court has no authority to disburse the State's settlement funds, and for

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September 1997 charging lien expressly claiming "25% of $11.3 billion" — or $2.8 billion.(App. 55).

[10]Rice and Maher, as the designated representatives of the PTA, had the legal authority to bind the PTA joint venture to a fee provision. See Kislak v. Kreedian, 95 So.2d 510, 515 (Fla. 1957); Chase Manhattan Mortg. Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A., 694 So.2d 827, 831 (Fla. 4th DCA 1997); Aetna Cas. Sur. Co. v. Buck, 594 So.2d 280, 284 (Fla. 1992).

all the reasons set out herein and in the State's initial brief, the certified question should be answered in the negative, and the three Appealed Orders should be reversed.

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

A. The Settlement Funds Are State Funds, Whether Or Not "In The State Treasury," And Can Be Disbursed Only Through Legislative Appropriation.

The Lawyers acknowledge that the certified question turns on whether or not the settlement funds are "State funds." [11] If the State's settlement funds are "state funds," there is no dispute that they must be appropriated by the Legislature, and cannot be disbursed by the trial court.[12] See Article II, Section 3; Article III, Section 1; Article VII, Section 1(c) and 10; Article V, Section 14, Fla. Const.; Chiles v. Children A-F, 589 So.2d 260 (Fla. 1991). The Lawyers have thus argued that the settlement funds are not State funds, because they were not in the State treasury at the time certain of them filed their liens. This argument is without merit.

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[11]Some Lawyers have argued the applicable standard for reviewing these Orders is "abuse of discretion." But the trial court had no discretion to enter the Appealed Orders. The issue here is whether the trial court's actions violate organic state law, including separation of powers and sovereign immunity.

[12]The Lawyers do not dispute that if the settlement funds are "State funds," they cannot be disbursed by the trial court to pay their attorneys' fees. See i.e., State Dept. Of Children v. Birchfield, 23 Fla. L.Wkly. D1662 (Fla. 4th DCA August 21, 1998); Department of Health & Rehabilitative Services v. Brooke, 573 So.2d 363 (Fla. 1st DCA 1991).

The settlement funds are State funds, and were not merely "funds held in custodia legis". The fact that certain of these settlement funds were in a temporary escrow account for the benefit of the State does not in any way diminish their characterization as "State funds."[13] Once "final approval" of the Settlement Agreement occurred, all escrowed funds were to be released, and all further settlement payments were then to be paid directly to the State, without escrow.[14]

The trial court was correct in observing that: "The whole point and purpose of this lawsuit was to recover Florida taxpayer dollars." (App. 46 at pg. 5). The complaint, the identity of the parties, and the claims made under the Medicaid Third Party Liability Act (Sections 409.910, Fla. Stat.) all confirm that purpose.[15] The settlement funds represent funds raised in the name of the State plaintiffs, pursuant to

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[13]The Lawyers misstate the law. It is well established that funds held in escrow for the benefit of any entity are owned by and titled in the name of that entity. The depositor loses legal title to the funds once deposited, subject to fulfillment of the conditions of the escrow. (See State's Initial Br. at 23-26).

[14]While Settling Defendants continue to dispute when "final approval" occurred, they do not dispute that it has occurred, and that under the terms of the Settlement Agreement, all further settlement payments are to be paid directly to the State. (App. 56, Section II.B, pgs. 8-11).

[15]Section 410.910(1) also made clear the Legislature's intent that no lien attach to the State's recovery. The recitation of the Medicaid Third Party Liability Act in the brief of Montgomery, et al. is simply wrong. (See Mont. Br. at 3). Section 409.910 was part of the 1990 Act, not added in 1994. It wasn't changed in 1994. The insertion of "RICO" in brackets after "under s.772.73" is also wrong.

a specific State recovery statute of State-paid funds, and have all the attributes of State ownership. The Settlement Agreement itself made clear that all the settlement payments are State funds, paid by the Settling Defendants "for the benefit of the State of Florida." (App. 56, Section II.B., pgs. 8-11).[16]

As a matter of common sense, State funds are those funds to which the State has a legal right. It does not matter whether the right is based on a tax or on recovery of damages. Thus, while the State may have to go to court to establish its rights, once it does, the recovered funds are State funds. As Florida law makes clear, physical receipt of money in the State's treasury is not a condition for determining "State funds." See State ex rel. Kurz v. Lee, 121 Fla. 360, 384, 163 So. 859, 868 (1935). For example, taxes imposed by Florida law "become state funds at the moment of collection"; and "any person...who, with intent to unlawfully deprive or defraud the state of its moneys or the use or benefit thereof, fails to remit taxes collected...is guilty of theft of state funds." See Section 212.15, Fla. Stat. Thus, here, in a case whose purpose was to recover taxpayer dollars already spent and to be spent, the State's recovery must by law, common sense and definition, be State funds. Certainly, when this Court upheld

[16]Lawyer Yerrid argues the Settling Defendants' interpleader motion and resulting escrow changed the State's ownership of its settlement funds. But neither the Settling Defendants' motion nor the subsequent escrow had any effect on the State's ownership of its settlement funds. These were State funds going into the escrow, were State funds going out of the escrow, and were State funds in the interim.

the relevant provisions of the Third Party Liability Act, it never contemplated recovery of such funds would be anything other than State funds. Agency for Health Care Admin. v. Associated Industries of Florida, Inc., 678 So.2d 1239 (Fla. 1996).

The Lawyers have cited no applicable Florida law in support of their proposition, and rely primarily upon Philip Morris, Inc. v. Glendening, 709 A.2d 1230 (Md. App. 1998). But Glendening was decided under Maryland law, and Maryland law has no equivalent to Section 409.910(15)(b), Fla. Stat. Section 409.910(15)(b) specifically limits any fee paid for the recovery of Medicaid monies to "the lesser of a percentage determined to be commercially reasonable or 30 percent of the amount **actually collected and reimbursed to the department** as a result of the efforts of the person under contract." This language is not ambiguous. The State must be reimbursed the full amount recovered, and not until then is it obligated to pay a percentage of the amounts recovered, and then only to the extent those amounts represent "medical assistance paid by Medicaid." Section 409.910(15)(b) dovetails with the Medicaid Provider Contract at Paragraph 7, which required the PTA to transfer all monies collected directly and immediately to the State. (See App. 58).

The Lawyers' reliance on Glendening is thus misplaced. There was no Maryland statute comparable to Section 409.910(15)(b) at issue, and therefore the Maryland Attorney General was able to enter a contract with private attorneys that

treated the recovered amounts differently. As the Maryland court of appeals found:

> **According to the Contract, recovered funds will not be "collected" by the State until outside counsel receives his contingency fee and is compensated his expenses from the gross recovery** * * * * Thus, the gross recovery is not "State" or "public money" subject to legislative appropriation until the State has fulfilled its obligation under the Contract, **collected the recovery, net of the contingency fee and litigation expenses,** and deposited the funds in the State Treasury.

709 A.2d at 1240-1241. The Glendening decision is no authority for enforcing a charging lien because the state's property there was defined to include only the net recovery. Florida law and the PTA's Medicaid Provider Contract with the State differ from Maryland's, and both are clear: here, all monies recovered from the Settling Defendants are State funds, except those fees paid by Settling Defendants "separately and apart" from the settlement funds and directly to the PTA as a "reasonable attorneys' fee" to be determined through arbitration.

B. The Constitutionality Of SB 1270 Is Not An Issue Here.

In an attempt to justify the court's Judicial Appropriation Order, the Lawyers argue that SB 1270 is unconstitutional. But, the constitutionality of SB 1270 is neither relevant nor properly before this Court -- nor was it before the trial court. Moreover, there is no need for this Court to determine the constitutionality of SB 1270 because: (1) it was not so challenged below; (2) no suit was ever filed by the Comptroller; (3) there was no litigation in which the Lawyers were denied intervention; and (4) the

Legislature's declaration that the payments are "State funds" was correct.[17] SB 1270 is relevant only to reflect the Legislature's view that the settlement funds are State money.

The Lawyers have missed the only real legal issue here -- that the trial court erred by failing to presume SB 1270 to be constitutional, as it was required to do as a matter of fundamental law, and by then freezing over $200 million of the State's funds and transferring these funds into the court's registry for the purpose of securing the Lawyers' charging liens. (State's Initial Br. at 18; see Supp. App. 1).

C. The State Is Not Like "Any Other Mere Private Litigant".

(1) Imposing Liens Upon The Sovereign State Would Violate The Florida Constitution And Abrogate Fundamental Florida Law.

The Lawyers acknowledge that but for their charging liens, there would be no pending certified question. They also acknowledge, albeit begrudgingly, that no Florida court has ever imposed a charging lien against the State. Likewise, there is no case that holds a court can employ its equitable powers to circumvent sovereign immunity and force the State to pay money damages, as to do so would violate the separation of powers doctrine. Only the Legislature can waive the State's immunity.

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[17]The Legislature's enactment of SB 1270 and its command to the comptroller are indicative of the concern that the Legislature had over the disposition of State funds at the hands of the trial court and the PTA Lawyers.

The Lawyers' briefs uniformly ignore these fundamental principles. Their only legal defense of their liens is based upon their premise that the State "is no different than any other mere litigant," and by analogy "should" be treated as "any other private litigant." They assert because courts can impose charging liens against private litigants, then courts "should be able to likewise" impose charging liens against the State here. Their argument falls with their premise, for the State is not like any other "mere litigant" or "private litigant" – it is the "sovereign," the democratic representative of the people. If certain Lawyers believe they have a "contract claim" against the State, their legal remedy is like that of any other person – the Lawyers are entitled to no greater rights. Indeed, the Lawyers' assumption is contrary to the Florida Constitution, over 100 years of fundamental Florida law, and just plain common sense.

(2) The State's Execution Of The Medicaid Provider Contract Did Not Constitute A Waiver Of The State's Immunity To Liens.

The Lawyers assert that the State's execution of the Medicaid Provider Contract constituted a waiver of any immunity to the enforcement of their charging liens. (Mont. Br. at 53). They further argue this "waiver" was approved by the Attorney General's "approval" of the Contract. The Lawyers are wrong.

First, the terms of the Medicaid Provider Contract were never "approved" by the Attorney General. Neither he nor the Department of Legal Affairs (although a plaintiff in the case below) is a party to the Contract. The only involvement of the

Attorney General's Office in the Medicaid Provider Contract was in giving approval, pursuant to Section 287.059(1), Fla. Stat., for AHCA to retain outside counsel.

Second, the State's execution of the Contract did not constitute a waiver of its immunity to the enforcement of the Lawyers' charging liens. Florida law is clear that in entering into a written contract authorized by law, the State's waiver of sovereign immunity extends only to the express limits of that Contract. See Pan-Am Tobacco Corp. v. Dept. of Corrections, 471 So.2d 4 (Fla. 1984); County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997). There is no such express, written waiver of the immunity to charging liens, and thus the State's immunity to such liens stands. In fact, the Medicaid Provider Contract (¶7 of Attachment 1) required the prompt transmittal to the State of all recovered monies. (App. 58).

The Pan-Am decision does not support the Lawyers' waiver argument. That case recognized only an implied waiver of sovereign immunity to suits brought on express written contracts that agencies had statutory authority to enter. 471 So.2d at 5-6. Pan-Am did not hold, nor has any subsequent case held or implied, that the Legislature has waived the State's immunity to enforcement of charging liens against State property. To the contrary, statutory law explicitly prohibits such liens. See Section 11.066 (3) and (4), Fla. Stat.

Only the Legislature may waive the sovereign immunity of the State. See

Article X, Section 13, Florida Constitution. The Legislature has not only refused to recognize charging liens, it has affirmatively prohibited the enforcement of any judgment by means of common law remedies directed at property of the State.[18] This being so, the Lawyers' charging liens are invalid as a matter of law.

(3) Section 409.910 Does Not Authorize Charging Liens And Does Not Constitute An Appropriation Of The Lawyers' Fees.

Certain PTA Lawyers argue that no further appropriation of their fees is necessary because (they argue) Section 409.910(15), Fla. Stat., constitutes a "continuing appropriation" entitling them to up to 30% of the State's recovery and thus authorizing such charging liens. Of course, these arguments clearly contradict the Lawyers' arguments that the State's settlement funds are not State funds. As the Legislature can only appropriate State money, if Section 409.910 is an "appropriation," then the settlement funds must be State funds.

Section 409.910 (15) does not, however, constitute an appropriation. Nor does it authorize charging liens or overrule Section 216.311, Fla. Stat. Rather, Section

[18]The Lawyers' reliance on County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997), is unavailing. That case recognized no right to enforce a judgment against State property and, further, expressly declined to hold that equitable doctrines such as waiver and estoppel could not be applied to defeat express contract terms. Nor is there any authority for the contention that equitable doctrines could trump Article X, Section 13, Fla. Const. or Section 11.066, Fla. Stat.

409.910(15) merely authorizes the permissible terms of fee contracts with outside lawyers -- it does no more. It does not fund the fee contracts; it does not set apart any money for the fee contracts; and it does not create a fund for one fee contract or for a class of such contracts. Unlike the statute at issue in Republican Party v. Smith, 638 So.2d 26 (Fla. 1994), here Section 410.910 does not "adequately specify, control and limit" the allegedly "appropriated funds." Thus, it does not -- and can not-- constitute an appropriation, any more than the Lawyers' deletion of the appropriations language from the Contract could abrogate this fundamental legal requirement.[19]

(4) The Lawyers Have No "Constitutional Right" To A Charging Lien.

The Lawyers have no "constitutional right" to their charging liens. Moreover, even if they could establish some "property" interest under the Medicaid Provider Contract, which they cannot, that "right" would still be subject to Legislative appropriation. See State of Florida v. Florida Police Benevolent Association, 613 So.2d 415 (Fla. 1992) (holding public employees' collective bargaining rights under

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[19]Payments of attorneys' fees based upon a Section 409.910 recovery have always required an appropriation. In fact, as recently as February 1998, AHCA paid attorneys' fees from a Section 409.910 recovery by paying an appropriated amount that required processing through the State Comptroller. (See Appendix filed with this brief, at 1). This filing also shows the standard AHCA Medicaid Provider Contract, with the appropriations language in it. The Lawyers removed this language from their Medicaid Provider Contract – but this deletion is of no legal effect. None of the signatories to the Contract had the power or right to waive sovereign immunity or to circumvent the Legislature's exclusive appropriations power.

the Florida Constitution were subject to the Legislature's exclusive appropriations power); Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993).

D. The Court Had No Authority To Amend The Settlement Agreement.

The only answer brief seeking an affirmance of the MFN and Disbursement Orders is that of Lawyers Gentry, Hogan, and Fonvielle (the "Gentry Brief"). All other ten Appellees -- the five Settling Defendants; and Lawyers Montgomery, Kerrigan, Schlesinger, Howard and Nance — have agreed the trial court had no authority to amend the Settlement Agreement over the objections of all the settling parties, and have agreed with the State that these Orders must be reversed.[20]

The Gentry Brief suggests that Gentry, as an "officer of the court", properly determined what was "in the best interests of the State," and that his clients -- the Governor, the State, and the Attorney General -- were acting contrary to the "real" public interest. But neither Lawyer Gentry nor the trial court had such authority. Both improperly intruded into the Legislature's exclusive domain by their attempts to "mandate" what they had determined to be in the State's best interest. See Coalition for Adequacy and Fairness in School Funding v. Chiles, 680 So.2d 400 (Fla. 1996). Just as "it is up to the lawmakers and the citizens of this State to determine how much

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[20]Lawyer Yerrid argues the Orders should be affirmed "irrespective" of the trial court's "misinterpretation" of its authority and insofar as the Orders give the Lawyers $50 million and require all settlement funds to be placed under the court's control.

to appropriate for education," id. at 407, so, too, is it up to the lawmakers and the executive branch as elected by the citizens to determine "political questions" like appropriations and payment controversies with the PTA Lawyers.

CONCLUSION

Some PTA Lawyers have argued this Court should "remand for further proceedings" on their charging liens. But no such "further proceedings" are necessary for this Court to declare the charging liens invalid under the Florida Constitution and as a matter of fundamental Florida law. See State of Florida v. Kerrigan, Estess, Rankin & McCleod, Case No. 93,633 (pending, in which the State has shown, as we have here, that the lower court lacks jurisdiction to enforce the liens). The legal issues before this Court require a careful, clear and concisely drafted opinion, for certain Lawyers will look to this Court's opinion for any language supporting their view that "charging liens equal to 25% of the State's settlement funds" were somehow previously "perfected" or "validated" either by the trial court, the Fourth District or this Court.

For the reasons set forth herein, and in the State's Initial Brief, 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 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, through an appropriate legal action, and not by individual lawyers or law firms, with any such resulting claim 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 September 1, 1998, to those on the attached Service List.

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