IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CA-00362

STACEY PICKERING, in his capacity
as Auditor for THE STATE OF MISSISSIPPI — APPELLANT

VS.

THE LANGSTON LAW FIRM, PA,
JOSEPH C. LANGSTON, TIMOTHY R.
BALDUCCI, LUNDY & DAVIS, LLP, AYLSTOCK,
WITKIN, KREIS & OVERHOLTZ and
THE STATE OF MISSISSIPPI — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF
HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE
THE STATE OF MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

Stacey Pickering, in his capacity as Auditor for the State of Mississippi, appellant.

Arthur F. Jernigan, Jr., Samuel Ernest Linton Anderson, Craig M. Geno, Harris Jernigan & Geno, PLLC, attorneys for appellant.

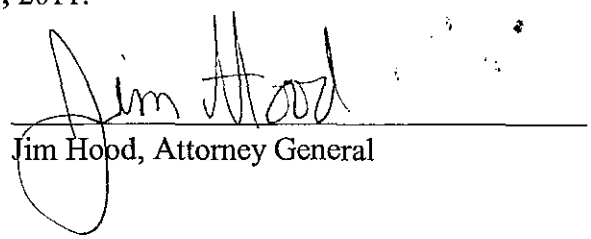
State of Mississippi, appellee.

Attorney General Jim Hood and Geoffrey C. Morgan, Harold E. Pizzetta, III, Justin L. Matheny, Office of the Attorney General, attorneys for appellee State of Mississippi.

Langston Law Firm, PA, Joseph C. Langston, Lundy & Davis, LLP, Aylstock, Witkin, Kreis & Overholtz, Timothy R. Balducci, appellees.

Fred Krutz, III, C. York Craig, III, Forman Perry Watkins Krutz & Tardy, LLP, attorneys for appellees Langston Law Firm, PA, Joseph C. Langston, Lundy & Davis LLP, and Aylstock, Witkin, Kreis & Overholtz.

SO CERTIFIED, this the 1st day of February, 2011.



Jim Hood, Attorney General

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REASONS TO GRANT ORAL ARGUMENT

This appeal merits oral argument because it raises important issues relating to the ability of the Attorney General to manage and control the State's civil litigation, as well as to apply and carry out the laws with which his office is charged. The Auditor seeks to impair that authority by enabling the Legislature to re-write the Attorney General's contracts and make them subject to legislative appropriations and a gubernatorial veto. The Auditor's proposition runs the risks of imposing an undue burden upon the contractual rights of all attorneys and clients in Mississippi, the discretion of agencies and other departments of the government functioning within their prescribed duties, and costing Mississippi millions of dollars. The facts of this case and well-established law should control here. Oral argument will ensure that these weighty issues are fully addressed by the parties and considered by the Court.

STATEMENT OF ISSUES

1. Whether the Auditor is authorized to seize money that is not "public funds" by definition, and is subject to the paramount attorneys' lien afforded retained counsel under Mississippi law.

2. Whether, in light of the Attorney General's long-recognized constitutional and common law duties and authority, Miss. Code Ann. §§ 7-5-5 and -7 unambiguously permit him to enter into and honor contingency fee agreements without resort to post-settlement legislative modification.

3. Alternatively, if the statutes mentioned above are ambiguous or silent with respect to their application here, whether the Attorney General permissibly construed and applied those laws consistent with the heightened deference afforded him.

4. Whether the Auditor has waived or is otherwise barred from contesting MCI's payment of contingency fees earned by retained counsel.

5. Whether the Auditor's challenge should be rejected because constitutional and Mississippi contract law is inconsistent with his proposed remedy.

STATEMENT OF THE CASE

Background Facts.

In 2004, Attorney General Jim Hood retained the Langston Law Firm, PA to assist the Office of the Attorney General with litigation against MCI/WorldCom ("MCI") over certain tax deficiency claims on behalf of the State of Mississippi. Attorney General Hood entered into a standard Retention Agreement with the Langston firm that provided its attorneys' fees would be paid on a contingency fee basis in the event of a recovery. [Affidavit of Jim Hood at ¶ 2, C.P. 1304-07]. Consistent with the Retention Agreement, the Langston firm associated the law firm of Lundy & Davis, LLP to assist with the State's litigation against MCI. Joey Langston of the Langston firm and Billy Quin of Lundy & Davis were the lawyers primarily involved in pursuing the State's tax deficiency claims against MCI in the company's bankruptcy proceedings in New York. [*Id.*]. The

attorneys retained pursuant to the Retention Agreement are hereinafter collectively referred to as the Attorney General's "retained counsel."

Among other provisions, the Retention Agreement specifically provided that the Attorney General retained complete control over the litigation and the representation of the State and its interests. [Retention Agreement at p. 2, C.P. 188-93 & Appellant R.E. 1]. The Retention Agreement also stipulated that the Langston firm would carry all of the financial risk of litigation. [*Id.* at pp. 3-4]. It plainly said "[i]n the event that no recovery is realized, the Law Firm shall receive no compensation or reimbursement." [*Id.* at p. 4].

The compensation due retained counsel under the contract on a contingency basis was specifically spelled out. [*Id.* at Attachments A & B]. The sliding scale contingency percentages in the standard form agreement result from the Attorney General's commendable efforts to control fees and avoid attorney windfalls. Based on the scale, the more money obtained for the State by retained counsel the lesser their percentage of recovery. For example, a case resolved between $200 million and $500 million is subject to a lesser contingency fee schedule than a case resolved for less than $25 million. The agreement also accounts for the amount of work performed by retained counsel. The earlier a case is resolved, the lower the percentage due to retained counsel. [*Id.*].

Retained counsel, on behalf of the State, originally filed a tax claim against MCI in its bankruptcy proceedings for $1 billion. That amount represented the potential tax liability of MCI pursuant to one legal theory among several competing theories conceived by Billy Quin. [Amended Answer and Counterclaim at ¶¶ 3-9, 13-18, C.P. 814-1038]. Further research by retained counsel revealed that MCI's complicated tax liability to the State centered on the dividends paid from an MCI corporate subsidiary to the corporate parent (a pure transfer of money that involved no fair

exchange of value). [Affidavit of Jim Hood at ¶ 3, C.P. 1304-07]. Pursuant to state law, Mississippi was only entitled to recover taxes for dividends paid in 1998, with state law excluding taxation for the years 1999-2002, and therefore it was determined MCI's outstanding tax liability was ultimately less than the original $1 billion filed claim. [*Id.* at ¶¶ 3-4]. Specifically, because $1.9 billion was paid in 1998 by MCI subsidiaries to the MCI parent company (which was, at the time, Mississippi-based Worldcom), retained counsel concluded that MCI's income tax liability to the State was reasonably valued at $95 million, such sum being based on the applicable 5% state corporate income tax rate at the time. [*Id.* at ¶ 3].

Attorney General Hood agreed with retained counsel's valuation of the State's claim against MCI as presented, and he advised retained counsel that he wanted to try to recoup at least $100 million plus interest for the State. [*Id.* at ¶ 5]. On April 7, 2005, representatives from MCI met with the Attorney General at his office. Also present were former Attorney General Mike Moore, counsel for MCI, who facilitated the settlement discussions, Joey Langston and Billy Quin. [*Id.* at ¶¶ 6-7]. At the outset of the meeting, the Attorney General demanded a settlement from MCI of $100 million in the case plus MCI's Clinton, Mississippi, headquarters. [*Id.* at ¶ 7].

After MCI's representatives discussed the demand among themselves and with Moore, MCI agreed to pay $100 million in cash and offered its downtown Jackson, Mississippi, properties instead of its Clinton headquarters, which were too entangled in MCI's bankruptcy proceedings. [*Id.* at ¶¶ 7-8]. The Attorney General accepted the counteroffer, finding that the $100 million in cash plus the downtown property, valued at approximately $7 million, fully satisfied MCI's tax liability, plus interest. [*Id.* at ¶ 8].

The settlement concluded, and the Attorney General then asked Langston and Quin if they

would be willing to negotiate their fee directly with MCI so that the State would receive the full value of the settlement agreement. Although the Attorney General expressed the State's obligation to honor the Retention Agreement, Langston and Quin agreed to negotiate their fee directly with MCI. [*Id.* at ¶ 9]. As a result of the separate fee negotiations, MCI agreed to pay $14 million in attorneys' fees and to make a charitable contribution to the Children's Justice Center as a good-will gesture to the people of Mississippi who had lost money on WorldCom stock. The $14 million in attorneys' fees negotiated by Langston and Quin was less than they would have been entitled to under the Retention Agreement. [*Id.* at ¶ 10; Retention Agreement at Attachment B, C.P. 188-93]. Consequently, the State benefitted by expending no money on attorneys' fees and by being able to retain the full value of the State's settlement with MCI.

None of the parties involved considered the payment of the attorneys' fees to be part of the State's recovery. The Attorney General settled the State's claim against MCI prior to the negotiation of fees between special counsel and MCI. MCI paid the fees directly to retained counsel. None of said attorneys' fees were deposited into or transferred out of the State Treasury or any other State-held account. [Affidavit of Jim Hood at ¶ 11, C.P. 1304-07]. On May 6, 2005, the parties memorialized the Settlement Agreement between the State and MCI and it was later approved by the court where MCI's bankruptcy was pending. [Settlement Agreement, C.P. 194-222 & Appellant R.E. 2].

Subsequently, political motivations drove the Auditor's Office to review the settlement. On June 28, 2005, then-Auditor Phil Bryant received a letter from then-State Representative Joey Fillingane on behalf of the Mississippi Legislative Conservative Coalition requesting Bryant to conduct a Performance Review of the MCI settlement and directing nine areas of inquiry. [June 28,

2005 Letter, C.P. 1343]. Bryant obliged the Coalition and forwarded Fillingane's letter to Langston for comment, which he provided to Bryant in a detailed letter dated July 28, 2005. [July 28, 2005 Letter, C.P. 891-96].

On October 5, 2005, Bryant issued his initial performance audit draft report, followed on November 2, 2005, by his second performance audit draft report. [October 5, 2005 Draft Report, C.P. 1344-56; November 2, 2005 Draft Report, C.P. 1357-67]. Each draft was circulated to the Attorney General and retained counsel for comment. Retained counsel responded via letters, pointing out the various deficiencies in the draft reports. [*See* Response Letters, C.P. 921-23 & C.P. 924-35].

Many months passed. Then, on June 5, 2006, Governor Haley Barbour, at the request of Joey Fillingane and the Conservative Coalition, wrote a letter to Auditor Bryant requesting a performance review of the MCI settlement. [June 5, 2006 Letter, C.P. 1368]. On June 12, 2006, Bryant wrote a letter to the Attorney General informing of Governor Barbour's request that the Auditor "complete the performance review of the MCI tax settlement." [June 12, 2006 Letter, C.P. 1369]. The third performance audit draft report was circulated on September 18, 2006, over eleven months after the first draft report, and, coincidentally, after Bryant had announced his intention to run for Lieutenant Governor. The third draft report was significantly different from the first two. For the first time, Bryant attacked the legality of the Settlement Agreement and demanded the disgorgement of the attorneys' fees paid by MCI based upon misinterpretations of the law. [September 18, 2006 Draft Report, C.P. 1370-83].

On October 16, 2006, the Attorney General responded to Bryant's draft by letter explaining the third report's deficiencies and pointing out the impropriety in its political motivations. [October

16, 2006 Letter, C.P. 1384-87]. Among other reasons the report was unjustified, the Attorney General specifically observed that

> [t]he Legislature has killed several bills over the past few years attempting to take away the authority of the attorney general to enter into contingency fee agreements and to require appropriation for contingent fees. Your "report" adopts a version of the law which the Legislature has repeatedly rejected.

[*Id.* at p. 2]. Nevertheless, Bryant finalized the third draft report and issued the Performance Audit of the MCI Settlement Agreement on October 19, 2006. [Performance Audit, C.P. 1388-1402]. It came approximately 18 months after the settlement had been reached.

Course of Proceedings and Disposition Below.

More than a year after the October 19, 2006 Performance Audit, and two and a half years after the settlement, on December 20, 2007, Bryant initiated this lawsuit in the Circuit Court of Hinds County against the Langston firm seeking to void the portion of the Settlement Agreement providing that MCI would pay the attorneys' fees directly to retained counsel, and to disgorge the fees so paid. [Complaint, C.P. 6-12].

On January 22, 2008, a First Amended Complaint was filed substituting the current State Auditor, Stacey Pickering ("Auditor"), for Phil Bryant. [Amended Complaint, C.P. 13-19]. The Langston firm removed the case to federal court based on bankruptcy jurisdiction. Following remand due to lack of bankruptcy jurisdiction, on August 5, 2008, the Auditor filed a Motion for Summary Judgment. [Motion for Summary Judgment, C.P. 167-224]. On September 8, 2008, the Langston firm filed a Cross-Motion for Summary Judgment. [Cross-Motion for Summary Judgment, C.P. 269-376]. Subsequently, on October 13, 2008, the Langston firm filed an Amended Answer and Counterclaim against the Auditor and the State of Mississippi asserting set-off and entitlement

to fees under the Retention Agreement greater than those paid directly by MCI. [Amended Answer and Counterclaim, C.P. 814-1038].

The State answered the counterclaim and, on January 15, 2009, moved for re-alignment of the parties to reflect that the Auditor's interests were counter to those of the State. [Motion to Re-Align Parties, C.P. 1166-72]. Re-alignment was granted on April 16, 2009. [April 16, 2009 Order, C.P. 1285]. On March 24, 2009, the State filed its Motion for Summary Judgment. [Motion for Summary Judgment, C.P. 1289-1574].

On February 11, 2010, the trial court granted the State's Motion for Summary Judgment and denied the Auditor's competing Motion. [Order Granting Summary Judgment, C.P. 1712-15 & Appellant R.E. 7; Order Denying Summary Judgment, C.P. 1711 & Appellant R.E. 6]. The trial court found there were no undisputed facts and held the attorneys' fees paid by MCI to retained counsel pursuant to the Settlement Agreement were not "public funds." [Order Granting Summary Judgment at pp. 2-3, C.P. 1712-15 & Appellant R.E. 7]. Furthermore, since the Auditor had not filed any challenge to the settlement in 2005, or any point prior to December 2007, the court held that there was a waiver finding that "[h]aving relaxed, and in essence, agreed to the settlement, the State Auditor cannot now raise any objections." [*Id.* at pp. 3-4]. Subsequently, on February 25, 2010, the trial court granted the Langston firm's Motion for Summary Judgment for the same reasons. [Order Granting Summary Judgment, C.P. 1716 & Appellant R.E. 8]. On February 26, 2010, the Auditor filed a Notice of Appeal. [Notice of Appeal, C.P. 1717-18].[1]

[1] Subsequently, on May 24, 2010, the Auditor filed a Notice of Appeal in a similar, but separate, lawsuit now pending before the Court in *Pickering v. Hood ex rel. State of Mississippi and Microsoft Corporation*, No. 2010-CA-00881. The Microsoft appeal also involves an attempt by the Auditor to restrict the Attorney General's authority to enter into and honor State contracts with contingency fee attorneys. Although that appeal involves different facts and procedural history, it raises some of the same issues raised by the Auditor here.

SUMMARY OF THE ARGUMENT

The Attorney General is a constitutional officer of the State of Mississippi. His authority to enter into and honor contingency fee contracts with attorneys under his direction, and without subsequent alteration by the Legislature, is well-established by the Constitution, common law, state statutes, decisional law of the Court. It is likewise consistent with decisions from courts across the United States. In the court below, the Auditor mistakenly argued that the Attorney General's authority should now be restricted based on his own misinterpretation of a single sentence of a state statute. That argument was correctly dismissed by way of summary judgment.

The Court here should likewise reject the manufactured meaning the Auditor attributes to our laws and affirm the judgment of the trial court on the legal issues presented in this appeal.

There are many reasons the Attorney General's established authority should not be disturbed. Any of them are grounds to affirm the trial court. First, as the trial court rightly found, the Auditor is only authorized to capture "public funds," a term specifically defined by statute. MISS. CODE ANN. §§ 7-7-1(4); 7-7-211(g). The money paid directly by MCI to retained counsel was never "public funds." Further, that money is subject to a paramount attorneys' lien that is well-established under Mississippi law. *Halsell v. Turner*, 36 So. 531 (Miss. 1904). Adopting the Auditor's position would impair those lien rights and damage attorneys and clients in Mississippi.

Second, it undeniably has been established that the Attorney General has the right and authority to enter into contingency fee agreements on behalf of the State and at his sole discretion. That authority may only be altered by an *express* enactment. The Constitution and the common law do not curb this authority, they confirm it. So do the statutes codifying this core authority. MISS. CODE ANN. §§ 7-5-5 and -7. The statutes do not restrict the Attorney General's authority to enter

into and honor contingency fee agreements. Their plain meaning does not allow legislative modification of such contracts.

Moreover, a single provision in a single sentence of Section 7-5-7 should not be read by itself to restrict the Attorney General's authority. It does not have the impact which the Auditor ascribes to it. But, even if improperly read in isolation, the sentence does not expressly prohibit the contractual arrangement at issue.

Third, at the very least, the Attorney General's interpretation and application of his authority is entitled to heightened deference. *Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008). The Auditor's personal stretch on the letter of the law must yield to the Attorney General's construction. The Attorney General, not the Auditor, is charged with interpreting and applying his authority and any permissible interpretation should be upheld.

Fourth, the Auditor waived any right he may have had to challenge the contracts at issue by waiting to file this lawsuit more than two and a half years. In 2005-06, his office did not act on any of the issues it manufactured, but instead, waffled back and forth over its position on the Settlement Agreement in its draft Performance Audits. There was no challenge to the contracts until his office believed the political winds were favorable in late 2007. Indeed, despite knowledge of the Settlement Agreement for years, the Auditor's office never objected to its conferral of more than $100 million in benefits to the State and its citizens. The Settlement Agreement was approved in bankruptcy court. The Legislature appropriately and gratefully spent the money on many public needs and the State put MCI's downtown Jackson property to use. It is too late for the Auditor to complain now.

Fifth, longstanding constitutional and contract law bars the Auditor's proposed remedy of

allowing post-agreement modification through the legislative appropriations process. There are no provisions in the contracts that are voidable. The State cannot constitutionally breach its contract by paying less than it owes by contract. *Franklin v. Ellis*, 130 Miss. 164, 39 So. 738 (1920). Furthermore, the Auditor inappropriately ignores retained counsel's counterclaim that may result in their recovery of an additional $2.89 million, on top of the original $14 million attorneys' fee paid to them, if the Auditor were to prevail.

In short, for any, and all of these reasons, the trial court's summary judgment should be affirmed.

ARGUMENT

I. Standard of Review.

The court below analyzed and applied the statute relating to the scope of "public funds," authorities and statutes regarding core powers and duties of the Attorney General, and ruled on issues of law.

The standard of review is *de novo*. A *de novo* standard is applied to an appeal from the grant or denial of a motion for summary judgment. *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992). The same standard also applies to a trial court's determinations on questions of law. *Bank of Mississippi v. Southern Memorial Park, Inc.*, 677 So. 2d 186, 191 (Miss. 1996).

Statutory interpretation likewise presents a question of law entitled to *de novo* review. *Horace Mann Life Ins. Co. v. Nunaley*, 960 So. 2d 455, 458-59 (Miss. 2007). When a statute is not ambiguous, the Court applies its plain meaning and need not resort to principles of statutory construction. *Miss. Ins. Guar. Ass'n v. Cole*, 954 So. 2d 407, 412-13 (Miss. 2007). But, if there is

ambiguity, the interpretation by the Attorney General must be upheld if it is "based on a permissible construction of the statute." *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 241 (Miss. 2008) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Stated differently, the Court affords considerable weight and deference to the construction given a statutory scheme by the constitutional officer entrusted to administer it. *Id.*

II. The Auditor Has No Legal Right to Seize MCI's Payment to Retained Counsel.

A. The Fee MCI Paid Retained Counsel Is Not "Public Funds" Subject to the Auditor's Narrow Authority.

The trial court correctly determined that MCI's payment to retained counsel was not subject to an attack by the Auditor. The Auditor is charged with specific duties and empowered with certain authority to act pursuant to 7-7-211 of the Mississippi Code. None of those enumerated duties and rights include the ability to take non-State money from private citizens.[2]

On point, according to Section 7-7-211(g), the Auditor may only institute a lawsuit to recover misspent "public funds." What constitutes "public funds" is specifically defined and means "all funds which are received, collected by, or available for the support of or expenditure by any state department, institution or agency." MISS. CODE ANN. § 7-7-1(4). The attorneys' fees paid by MCI directly to retained counsel are not "public funds" which the Auditor may rightfully recover.

MCI's payment to retained counsel does not even meet the definition of "public funds" contained in the Auditor's statute. The money was not "received by, collected by, or available for

[2] The Auditor correctly admits the Attorney General obtained an appropriate settlement for the State. He does not challenge the propriety of MCI's payment made to the State under the Settlement Agreement, which are the only "public funds" involved here. [*See* Auditor's Motion for Summary Judgment at p. 8, C.P. 167-224 ("The Auditor does not seek in any manner to contest the agreement of MCI/Worldcom and the Tax Commission to accept $118,200,000.00 for settlement of the tax claims.") & Appellant's Brief at p. 11].

the support of or expenditure by" the State or its entities. MISS. CODE ANN. § 7-7-1(4). MCI paid the fees to retained counsel. They were not "received by" or "collected by" the State. Rather, the fees were "collected by" retained counsel, not the State, and were not deposited into or transferred out of the State Treasury or any other State-held account. [Affidavit of Jim Hood at ¶ 11, C.P. 1304-07].

Likewise, the fees were not "available for the support of or expenditure by" the State. The record is undisputed and unchallenged on this point. Retained counsel's fees were negotiated after the settlement between MCI and the State was complete. [*Id.* at ¶ 9]. MCI and retained counsel negotiated the fees without involvement of the State. [*Id.*]. MCI paid the attorneys' fees directly to retained counsel pursuant to the Settlement Agreement they negotiated. [*Id.* at ¶ 11]. The accepted fee was less than they were entitled to under the Retention Agreement. [*Id.* at ¶ 10; Retention Agreement at Attachment B, C.P. 188-93 & Appellant R.E. 1]. As a matter of undisputed fact, the money the Auditor seeks to disgorge is not – and never has been – "public funds" which he is authorized to pursue. The Auditor's arguments to the contrary, such as labeling MCI's Settlement Agreement with retained counsel "an elusive shell game," is not persuasive, does not change these undisputed facts, and does not create "public funds" where none existed.

Even if one were to ignore the facts, as the Auditor would have it, the law does not support his argument either. Courts applying Mississippi law have never addressed the issue of whether direct payments to counsel retained by the State are public money. But the majority of courts from other states squarely say that contingency attorneys' fees are not state funds. *See, e.g., People v. Phillip Morris, Inc.*, 759 N.E. 2d 906, 913-14 (Ill. 2001) (reasoning settlement funds which have not been transferred to the State were not "state funds" until after payment of counsel's attorneys' fees);

Conant v. Robins, Kaplan, Miller & Ciresi, LLP, 603 N.W. 2d 143, 148-49 (Minn. Ct. App. 1999) (finding fees and costs due special assistant attorneys general not required to be deposited in state treasury); *Phillip Morris Inc. v. Glendening*, 709 A.2d 1230, 1240-44 (Md. 1998) (explaining gross recovery in settlement was not "State" or "public" money, rather only the State's net recovery – the settlement amount less the attorneys' contingency fees – constituted public funds which could be appropriated by the legislature); *Button's Estate v. Anderson*, 28 A.2d 404, 410 (Vt. 1942) (holding funds subject to equitable attorneys' lien did not constitute public funds of the State).

Finally, the Auditor's arguments citing *Hood ex rel. State Tobacco Litigation* as authority for the proposition that the attorneys' fees in this case constitute "public funds" are misplaced. 958 So. 2d 790 (Miss. 2007). The very different facts and holding of *Hood* are of no moment here for at least three reasons. First, attorneys' fees were not at issue in *Hood*. Second, that case involved the future disposition of funds after they had already been allocated to the State's Health Care Trust Fund. Third, the payment procedure under attack in *Hood* was not established by any settlement agreement. Rather, a court order subsequent to the settlement agreement, which could be modified, was at stake. Unlike this case, in *Hood*, the State's money was actually involved.

In short, neither the facts nor the law support the Auditor's argument. In this case, there are no "public funds" for the Auditor to recover; therefore, summary judgment was properly entered against him.

B. Retained Counsel's Fee Is Subject to an Attorneys' Lien.

Another, and related, reason the attorneys' fees at issue do not belong to the State (and thus likewise cannot be recovered by the Auditor) is that under Mississippi law, contingency fees are the property of the attorney, not the client, by virtue of the attorney's lien attaching to the client's

recovery.

More than 100 years ago the Mississippi Supreme Court held that "[t]he rule in this state has always been that an attorney has a lien on the funds of his client for the services rendered in the proceeding by which the money was collected." *Halsell v. Turner*, 36 So. 531 (Miss. 1904). Indeed, "the law of this state has long been settled that an attorney has a prime and paramount lien on the funds which his services as an attorney ha[ve] produced for his client, and that this lien applies alike to exempt as well as nonexempt funds." *Abernathy v. Savage*, 141 So. 329, 330 (Miss. 1932) (recognizing attorney's lien applied to case prosecuted on a contingency fee basis).

In other words, an attorney's lien expressly applies to funds held by an attorney on behalf of the client. *Collins v. Schneider*, 192 So. 20, 22 (Miss. 1939) (explaining the attorney's lien "exists upon the money, papers and writings of the client in the attorney's hands..."). The attorney's lien *is paramount to any other claims* on the proceeds of a settlement. *Halsell*, 36 So. at 531 ("[t]his lien applies so long as the attorney has the funds in his possession, and is paramount to any other claim"). *See also Poole v. Gwin*, 792 So. 2d 987, 990 (Miss. 2001) (holding contingency fee contract affords attorney an equitable assignment of prospective settlement from outset of the case).

In this case, retained counsel have always possessed the funds. They controlled the funds for purposes of satisfying their lien. The funds were distributed to retained counsel and thereby placed in their custody from the moment MCI paid them. Whether viewed as an equitable lien or assignment, under Mississippi law, retained counsel own a paramount stake in their money and the Auditor may not take away the property of retained counsel.

To hold otherwise would damage attorneys and clients in Mississippi and our state's law of contracts. No doubt, on a daily basis, attorneys and clients contractually enter into contingency fee

agreements in Mississippi as permitted by Mississippi Rule of Professional Conduct 1.8(j). If attorneys cannot rely on those contracts for the compensation they rightfully earn, and clients cannot rely on their contracts for what is owed, then it would inappropriately diminish the ability of attorneys to take cases, and for clients to obtain relief in the courts of Mississippi.

In sum, based on longstanding Mississippi law and sound principles, in this case, nobody – including the public-at-large, the Legislature, the Attorney General, or the Auditor – has a valid claim to the fees MCI paid to the attorneys who earned them. The attorney's lien on the funds is another valid reason their fees have never been "public funds" that the Auditor may recover, or the Legislature may appropriate.

III. The Attorney General's Authority to Enter Into and Honor Contingency Fee Agreements Is Not Subject to Back End Modification.

The Auditor has no authority to claim attorneys' fees that were never "public funds." In addition to the trial court's holding on that point, its judgment may be affirmed on any grounds argued by the Appellee on appeal and sufficient to sustain the judgment below. *See Cucos, Inc. v. McDaniel*, 938 So. 2d 238, 247 (Miss. 2006); *Ferguson v. Watkins*, 448 So. 2d 626, 635 (Miss. 1987). Even assuming the Auditor has a right to pursue retained counsel's fees, the Auditor's arguments still must fail. The Attorney General's authority to retain and honor State contracts with contingent fee lawyers is another and independent reason the Auditor is wrong. The Attorney General correctly and permissibly interpreted and applied his authority in this instance.[3]

[3] The Court should ignore the Auditor's twisted claim that the trial court agreed with his interpretation of MISS. CODE ANN. § 7-5-7 by stating in its summary judgment order that "[t]here is no question that if the attorneys fees are paid by the State, then such fees must be paid in accordance with the clear dictates of MISS. CODE ANN. § 7-5-7." [*See* Appellant's Brief at p. 15]. The trial court did not approve of the Auditor's misconstruction of Section 7-5-7, it simply said the "clear dictates" of the statute must be followed without saying what those dictates are. As explained below, that statute, and the other statutes and authorities that must be considered in conjunction with it, clearly dictate the Attorney General's

A. The Attorney General Has Constitutional and Common Law Authority to Enter Into and Honor Contingency Fee Agreements.

The Attorney General's common law duties and powers include the authority to negotiate and enter into contingency fee agreements with retained counsel for civil litigation on behalf of the State. These duties and powers cannot be modified implicitly as the Auditor wrongly suggests.

The Attorney General's office was created by Article 6, Section 173 of the Mississippi Constitution. As this Court confirmed long ago, "the creation of the office of Attorney General by the constitution vested him with these common law duties, which he had previously exercised as chief law officer of the realm." *Kennington-Saenger Theaters v. State ex rel. Dist. Atty.*, 18 So.2d 483, 486 (Miss. 1944). Indeed, "[t]he creation of the office therefore by the Constitution without prescribing his powers, by implication adopted his common-law powers, none of which can be taken away from him by the Legislature." *Dunn Const. Co. v. Craig*, 2 So. 2d 166, 175 (Miss. 1941) (Anderson, J. concurring). These common law powers of the Attorney General include management of all of the State's litigation.[4]

The Attorney General had the right to pursue MCI on behalf of Mississippians and decide to settle the case. "Paramount to all of his duties, of course, is his duty to protect the interest of the general public." *State ex rel. Allain v. Mississippi Public Serv. Comm'n*, 418 So. 2d 779, 782 (Miss.

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construction of the laws should prevail.

[4] *See State v. Warren*, 180 So.2d 293, 299 (Miss. 1965) ("At common law the duties of the attorney general, as chief law officer of a realm, were numerous and varied. He was chief legal adviser of the crown, was entrusted with the management of all legal affairs, and prosecution of all suits, criminal and civil, in which the crown was interested."); *Gandy v. Reserve Life Ins. Co.*, 279 So.2d 648, 649 (Miss.1973) ("The Attorney General is a constitutional officer possessed of all the power and authority inherited from the common law as well as that specifically conferred upon him by statute. This includes the right to institute, conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and the protection of public rights.").

1982). The Attorney General has the sole authority to determine what matters are of statewide interest. *See, e.g., Dunn Const.*, 2 So. 2d at 174. Furthermore, "the Attorney General alone has the right to represent the state." *Capitol Stages, Inc. v. State ex rel. Hewitt*, 128 So. 759, 764 (Miss. 1930).

In addition to his common law and constitutional authority, the Attorney General possesses all authority conferred upon him by statute. *See, e.g., Warren*, 180 So. 2d at 299. As chief legal officer of the State, the Attorney General's broad constitutional, common law and statutory authority may only be "expressly restricted or modified by statute or the state constitution." *Id.* at 300. In other words, the Attorney General's statutory authority may be restricted by statute, while his common law authority can only be restricted by constitutional amendment. *Id.*; *Dunn Const.*, 2 So. 2d at 175 (Anderson, J. concurring). Either way, the Attorney General's authority must be interpreted broadly and can only be restricted by express prohibition or modification. *Warren*, 180 So. 2d at 300. *See also State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270 (5th Cir. 1976) ("The exercise of such discretion is in its nature a judicial act, from which there is no appeal, and over which the courts have no control.").

Courts in other jurisdictions have similarly recognized the common law authority of their Attorneys General and held that these broad common law powers to hire and pay special counsel contingent fees cannot be limited absent an explicit prohibition. *See, e.g., North Dakota v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998) ("In view of this long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistant attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute."); *Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d

122, 136 (Mo. 2001) ("In the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type [contingent fee] arrangement with his special assistant attorneys general.").[5]

Statutes which authorize hiring of counsel on the condition that payment comes from appropriated funds do not restrict the Attorney General's common law power. Such statutes do not expressly limit any power; rather, they provide a statutory authorization in addition to the common law power. For example, North Dakota had a statute authorizing the employment of special assistants but providing that the Attorney General "*shall* pay . . . within the limits of legislative appropriations" and "the compensation *must* be paid out of the funds appropriated thereof." *Hagerty*, 580 N.W.2d, at 146 n. 1 (quoting N.D.C.C. § 54-12-08) (emphasis added). The North Dakota Supreme Court held this language meant money appropriated for other purposes could not be used to pay counsel, but did not exclude payment from case recoveries. *Id.* ("We construe the provision . . . to mean that funds appropriated for another purpose cannot be used to pay the salaries.").

Similarly, Missouri had a statute authorizing its Attorney General to hire special assistant attorneys general that said he "*shall* fix the compensation of such assistants within the limits of the

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[5] Conspicuously, the Auditor relies heavily on the Missouri Supreme Court's decision in *Nixon* without mentioning its ultimate holding. As discussed below, that case ultimately upheld the attorney general's power to hire contingent fee lawyers. Moreover, the Auditor's argument regarding *Nixon*'s reasoning that "[t]here is a potential danger in an agreement where a plaintiff's attorney's fee is to be paid by defendants...that the lawyer might be unduly influenced by an oversized fee to recommend an inadequate settlement for the client" (*Nixon*, 34 S.W.3d at 135) is irrelevant here. In this case, it is undisputed the Attorney General maintained control over all aspects of the litigation, participated personally in the mediation and settlement decision-making, and made the call on the final settlement paid to the State. There is further no room to argue that the fee negotiated with retained counsel was the product of attorney overreaching. In fact, MCI paid, and retained counsel accepted, less than what was owed under the Retention Agreement - which is significantly less than what is generally accepted statewide for contingent cases.

amount appropriated by the general assembly." *Nixon*, 34 S.W.3d at 136 (citing MO. REV. STAT. § 27.020) (emphasis added). But the statute notwithstanding, the Missouri Supreme Court in *Nixon* held: "[t]he statute allows for the attorney general to hire assistants and to pay them from appropriations does not prohibit the attorney general in the exercise of his common law power from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the State to pay attorney fees directly to the State's outside counsel." *Id.*

In addition, a leading treatise aptly summarizes the law with regard to an Attorney General's authority to enter into contingency agreements with counsel representing the State:

> [a] statute that allows the attorney general to hire assistants and to pay them from appropriations **does not prohibit the attorney general** in the exercise of his or her common-law power **from entering into contingency fee arrangements or agreements that otherwise provide for civil defendants sued by the state to pay attorney fees directly to the state's outside counsel.** Stated differently, a statute which allows the attorney general to employ special counsel on a fee or salary basis places no restrictions upon the type of fee the Attorney General can negotiate.

2 Am. Jur. *State Attorney General* § 5 (2008) (emphasis added). In addition to the cases cited in the text, courts from almost every jurisdiction to consider this issue in various contexts have upheld the Attorney General's power to enter into contingent fee contracts.[6]

Under Mississippi law and persuasive authority from every pertinent American jurisdiction that has addressed the issue, the Attorney General has the constitutional and common law authority

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[6] *See, e.g.*, *Conant*, 603 N.W.2d at 148-49 (Minnesota statutes did not prohibit defendant's direct payment of contingency fees to specially retained counsel); *Glendening*, 709 A.2d at 1240-44 (Maryland statutory scheme allows contingent fee contract); *Philip Morris Inc. v. Graham*, Case No. 960904948 (D. Ct. Utah Feb. 13, 1997) (Utah statutory scheme allows contingent fee contract); *Philip Morris Inc. v. State of New Jersey*, Nos. L 11480-96, C 254-96 (N.J.Super. Ct March 4, 1997) (New Jersey statutory scheme allows contingent fee contract). The only jurisdiction that has rejected a contingent fee agreement is Louisiana, but that holding is limited to environmental cases under a specific statute and, moreover, Louisiana does not follow common law as does every other state. *Meredith v. Ieyoub*, 700 So.2d 478 (La. 1997).

to enter into contingency fee agreements with outside counsel representing the State, just as he did in this case. That authority encompasses the ability to have a defendant pay those contingency fees directly.

B. Miss. Code Ann. §§ 7-5-5 and 7-5-7 Do Not Restrict the Attorney General's Authority to Enter Into and Honor Contingency Fee Agreements.

The Mississippi Code codifies and supplements the Attorney General's constitutional and common law authority. It expressly authorizes the Attorney General to negotiate and enter into contingency fee agreements with outside counsel for civil litigation on behalf of the State.

The Code reaffirms that the Attorney General "shall have the powers of the Attorney General at common law" and "shall be the chief legal officer and advisor for the state, both civil and criminal, and is charged with managing all litigation on behalf of the state." MISS. CODE ANN. § 7-5-1. A critical part of managing such litigation includes the hiring of counsel to represent the State in civil litigation and determining the basis on which to compensate them. Mississippi's codification of the Attorney General's common law power to employ outside lawyers grants the Attorney General full authority to hire and pay private counsel on a contingent fee basis without the need for any approval or appropriation by the Legislature. That is the proper construction of Sections 7-5-5 and 7-5-7.

First, Section 7-5-5 empowers the Attorney General to retain special assistant attorneys general on a fee or contract basis and establishes the Attorney General as the sole judge of compensation for such assistants:

> [t]o further prosecute and ensure such purposes, the **attorney general is further expressly authorized, empowered, and directed to employ such additional special counsel as special assistants attorneys general** as may be necessary or advisable, **on a fee or contract basis**; and the attorney general shall be the **sole judge of the compensation** in such cases.

MISS. CODE ANN. § 7-5-5 (emphasis added).

Second, Section 7-5-7 also expressly empowers the Attorney General to retain special assistants on a fee or salary basis, without any limitation on the nature of the fee agreement and without requiring any further approval by the Legislature to retain such counsel:

> [t]he attorney general is hereby authorized and empowered to appoint and employ special counsel, **on a fee or salary basis**, to assist the attorney general in the preparation for, prosecution, or defense of any litigation in the state or federal courts . . ..

MISS. CODE ANN. § 7-5-7 (emphasis added). The statute also authorizes the Attorney General to enter into agreements with lawyers, designate them as special assistant attorneys general, and to pay them reasonable compensation without any mention of legislative involvement or approval:

> [t]he attorney general may designate such special counsel as special assistant attorney general, and **may pay such special counsel reasonable compensation to be agreed upon by the attorney general and such special counsel**, in no event to exceed recognized bar rates for similar services.

Id. (emphasis added).

The only mention of appropriated funds anywhere in the statutes is in the last paragraph of Section 7-5-7:

> [t]he compensation of appointees and employees made hereunder shall be paid out of the attorney general's contingent fund, or out of any other funds appropriated to the attorney general's office.

Id. As explained below, this last (and only) paragraph – upon which all of the Auditor's arguments rely – is not grounds to undo the MCI Settlement Agreement or the contingency fee agreement that were validly executed and performed here.

1. The Plain Meaning of Miss. Code Ann. §§ 7-5-5 and 7-5-7 Permits Implementation of Contingency Fee Retention Agreements Without Legislative Action.

The plain meaning rule provides that if a statute is not ambiguous, then the Court must apply the statute according to its terms. *City of Natchez v. Sullivan*, 612 So. 2d 1087, 1089 (Miss. 1992). Sections 7-5-5 and 7-5-7 are straightforward. Their plain meaning is that the execution and fulfillment of the Attorney General's contingency fee and settlement agreements do not permit legislative alteration.

The Attorney General possesses the common law authority to hire special counsel to assist in civil litigation. The Legislature specifically confirmed this authority in Sections 7-5-5 and -7. The first statute says that the Attorney General is authorized "to employ such additional counsel as special assistant attorneys general as may be necessary or advisable, on a fee or contract basis; and the attorney general shall be the sole judge of compensation in such cases." MISS. CODE ANN. § 7-5-5. Furthermore, the second statute explains he is authorized "to appoint and employ special counsel on a fee or salary basis...may designate such special counsel as special assistant attorney general, and may pay such special counsel reasonable compensation to be agreed upon by the attorney general and such special counsel...." MISS. CODE ANN. § 7-5-7.

Section 7-5-5 makes the Attorney General the "sole judge of the compensation" for special assistant attorneys general, such as retained counsel in this case. The plain meaning of the phrase "sole judge" is that the Attorney General, and no one else, has a say in the compensation. If the Legislature intended to create a right to second-guess the payment of such contingent fees, the Attorney General would no longer be the "sole judge" of such compensation.

Realizing this fatal problem, the Auditor argues that Section 7-5-5 is inapplicable to hiring

outside private counsel because it applies only to full-time employees of the Attorney General's office. The Auditor further asserts that "[t]he Attorney General hired the Langston Firm as special counsel pursuant to MISS. CODE ANN. § 7-5-7 to assist with the prosecution of claims against MCI/Worldcom for unpaid taxes." [Appellant's Brief at p. 9]. The Auditor is wrong on both counts. First Section 7-5-5 authorizes employment of nine "assistant attorneys general" and additional "special assistant attorneys general." The statute clearly distinguishes between the two. The plain language of Section 7-5-5 says that the full-time work requirement only applies to "assistant attorneys general," not "special assistants."

Second, the Auditor's assertion that retained counsel were hired as "special counsel" only under Section 7-5-7 is unsupported. The Retention Agreement does not mention the phrase "special counsel" or Section 7-5-7. To the contrary, the agreement expressly states that retained counsel "are hereby designated as Special Assistants Attorney General." [Retention Agreement at ¶ 1, C.P. 188-93 & Appellant R.E. 1]. And, Section 7-5-5 applies explicitly to the employment of "special assistant attorneys general."

Like Section 7-5-5, Section 7-5-7 also authorizes employment of special assistant attorneys general such as retained counsel in this case, and specifically explains that they may be employed on a fee basis, and the Attorney General may pay reasonable compensation agreed upon by him and such counsel. The statute makes no mention of Legislative involvement in setting the terms or the rate of pay. That is reserved only for the Attorney General. All of this is consistent with the authority imparted upon the Attorney General by the Constitution, and at common law, as explained above. In short, the plain meaning of Sections 7-5-5 and -7 is that the Attorney General is empowered to negotiate and enter into contingency fee agreements with outside counsel for civil

litigation on behalf of the State and pay them without legislative modification.

2. Miss. Code Ann. § 7-5-7 Should Not be Read in Isolation.

The Auditor erroneously urges the Court – as he did in the court below – to read the last sentence of the last paragraph of Section 7-5-7 in complete isolation and give it a manufactured meaning. That inappropriately ignores the Constitution, the common law, and a plain reading of the statutes together. This argument should be rejected.

Regardless of whether a statute's meaning is plain or ambiguous, the Court's ultimate goal is to determine and give effect to the Legislature's intent. *Miss. Dep't of Transp. v. Allred*, 928 So. 2d 152, 154 (Miss. 2006). The text of a statute is the best evidence of its legislative intent. *Pegram v. Bailey*, 708 So. 2d 1307, 1314 (Miss. 1997). Most important here, "[t]he Legislature's intention must be determined by the total language of the statute and not from a segment considered apart from the remainder...." *Brady v. John Hancock Mut. Life Ins. Co.*, 342 So. 2d 295, 298 (Miss. 1977).

The last sentence of Section 7-5-7, read all by itself, says:

> [t]he compensation of appointees and employees made hereunder shall be paid out of the attorney general's contingent fund, or out of any other funds appropriated to the attorney general's office.

MISS. CODE ANN. § 7-5-7. Based solely on that single provision, the Auditor incorrectly reasons that the agreements here can be modified through the legislative appropriation process. But this argument fails to read the statutes as a whole. It inappropriately considers only a segment apart from the remainder of Section 7-5-7 and wholly disregards Section 7-5-5. The Auditor's flawed interpretation does not accurately reflect the Legislature's intent.

The statutes' meaning must account for Section 7-5-5 which confirms the Attorney General's authority to retain special assistant attorneys general on a fee or contract basis. That section also

affirms the Attorney General's authority and right to be the sole judge of such compensation. Further, Section 7-5-7 acknowledges the Attorney General may hire special assistant attorneys general on a fee basis and agree upon the rate and terms. Those provisions must be read together with the single sentence trumpeted by the Auditor. Read together, the statutes do not contemplate legislative alteration of the Attorney General's contingency fee arrangements, or settlement agreements he makes on behalf of the State.

Most telling, the statutes – when read as a whole – also demonstrate that the Legislature knew how to reserve a role for itself in the process of retaining outside counsel. Any doubt in this regard is resolved by the first paragraph of Section 7-5-7, which the Auditor, of course, ignores. The first paragraph empowers the Governor to engage special counsel, but the Legislature there expressly reserved to itself the power to approve and set compensation:

> The governor may engage counsel to assist the attorney general in cases to which the state is a party when, in his opinion, the interest of the state requires it, **subject to the action of the legislature in providing compensation for such services.**

MISS CODE ANN. § 7-5-7. But the Legislature specifically chose not to reserve such a role for itself when the Attorney General hires special assistant attorneys general. *See Sullivan*, 612 So. 2d at 1089 ("[T]he omission of language from a similar provision on a similar subject indicates that the legislature had a different intent in enacting the provisions, which it manifested by omission of the language.").

In other words, if the Legislature had intended to empower itself to re-write the Attorney General's contingency fee agreements with retained counsel, then it would have done so by stating that his agreements – like those of the Governor – are "subject to the action of the legislature in

providing compensation for such services." But it did not. The Auditor's misconstruction of the statutes based upon the last sentence in the last paragraph of Section 7-5-7 should not be accepted.

3. The Last Sentence of Miss. Code Ann. § 7-5-7 Does Not Prohibit MCI's Direct Payment of Retained Counsel's Earned Fee.

The last sentence of Section 7-5-7, even when improperly read in isolation by the Auditor, does not expressly *prohibit* the Attorney General from negotiating, entering into contingency fee agreements with outside counsel for civil litigation on behalf of the State, or making payment of the fees and costs due under such an agreement. In the Settlement Agreement here, MCI specifically agreed that it would pay attorneys' fees directly to retained counsel. [Settlement Agreement at p. 13, C.P. 194-222 & Appellant R.E. 2]. Nothing in Section 7-5-7 bars such an arrangement.

As explained above, a restriction on the power of the Attorney General must be expressly set forth. *See Warren*, 180 So. 2d at 300 ("[t]he attorney general is clothed with all the common law powers of the office, except insofar as they have been expressly restricted or modified by statute or the state constitution[.]"). Restrictions cannot be loosely inferred or implied. Section 7-5-7 offers no express prohibition or restriction on the Attorney General's common law and constitutional authority to retain counsel and to have a private party pay them attorneys' fees or expenses.

This Court has already determined as much. In *Pursue Energy v. Mississippi State Tax Commission*, the Court held that Sections 7-5-5 and 7-5-7 do not put any "restrictions upon the type of fee the Attorney General can negotiate, even though the Legislature could have restricted the use of contingency fees if it so desired." 816 So. 2d 385, 391 (Miss. 2002). In that case, an oil and gas company challenged the authority of the Attorney General to enter into a contingency fee agreement with outside counsel. The company argued that the agreement was invalid (in order to derail an

investigation into its affairs) because the Attorney General's counsel "was to be paid a percentage and his expenses reimbursed out of the gross taxes collected." *Id.* at 390.

The Court first determined that outside counsel could be appointed by the Attorney General to investigate the company. *Id.* at 388-90. Next, the Court reviewed the express language of Sections 7-5-5 and -7 and the contingency fee arrangement at issue. *Id.* at 390-91. Then the Court turned to the company's argument that the agreement was void pursuant to *State ex rel. Brown v. Poplarville Sawmill Company*, 81 So. 124 (Miss. 1919). *Id.* at 391. The Court explained that in *Poplarville* "we voided the contract purporting to pay a private attorney to prosecute suits concerning public lands a percentage of the recovery as a fee." *Id.* As recounted by the Court, the statutes at issue in *Poplarville* provided that the land commissioner could prosecute suits concerning public lands "through the attorney general...or some attorney at law employed by him for that purpose, with the consent of the governor." *Id.*

But, the Governor's consent and authority to hire and compensate outside counsel had a specific statutory limitation: "[t]he Governor may engage counsel to assist the Attorney General in cases to which the state is a party, when, in his opinion, the interest of the state requires it, subject to the Legislature in providing compensation for such services." *Id.* (emphasis added) (quoting Section 2382, Code of 1906). The *Pursue Energy* Court restated its holding in *Poplarville* and explained the basis for its application to the facts then before the court:

> [w]e rejected the argument that the statute giving the land commissioner power to employ counsel, with the consent of the Governor, carries with it **the right to fix compensation**, finding that neither the land commissioner nor the Governor had authority under the statute to pay a private attorney a percentage of the State's property or to reimburse fees for bringing suit. **The underlying principles applied in *Poplarville*, however, do not apply here.** ... Section 2382 of the Code of 1906 is the precursor of Miss. Code Ann. § 7-5-7 which allows the Attorney General to

> employ special counsel "on a fee or salary basis" which is "reasonable compensation" and "in no event to exceed recognized bar rates for similar services." Miss. Code Ann. § 7-5-7.

Id. (emphasis added). Finally, the Court specifically held that "[t]he statute places no restrictions upon the type of fee the Attorney General can negotiate, even though the Legislature could have restricted the use of contingency fees if it so desired." *Id.* (emphasis added).[7]

Pursue Energy looked to the statutory language at issue in *Poplarville*, where it had rejected the Governor's authority to fix compensation of outside counsel, and compared it to present-day Section 7-5-7, where it found no restrictions on compensation to counsel hired by the Attorney General pursuant to Sections 7-5-5 or 7-5-7. *Pursue Energy* recognized that there are no such restrictions mandated by those statutes. Accordingly, the opinion confirms that the contracts here, *i.e.*, the Retention Agreement (whereby the Attorney General and retained counsel agreed on the fee and expense terms at the outset) and the Settlement Agreement (whereby MCI later agreed to pay retained counsel's contingency fees and expenses), are valid and not prohibited by Sections 7-5-5 or 7-5-7.

In sum, based on the Constitution, common law, case law, and state statute, the Attorney General's authority to retain contingent fee lawyers and honor State contracts without legislative action is well-established. The Auditor's attempts to change that authority based on his narrow

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[7] In his brief, as in the court below, the Auditor diverts attention from the actual holding of *Pursue Energy* by improperly (1) focusing on the opinion's further discussion distinguishing it from the facts in *Poplarville* and (2) pointing out that the parties involved in *Pursue Energy* agreed the Legislature would appropriate a payment to the special assistant attorney general retained in that instance. The Court is not bound by such dicta here. *See, e.g., Owens v. Mai*, 891 So. 2d 220, 222 (Miss. 2005) (declining to establish dicta as a principle of law). Furthermore, the fact that the *Pursue Energy* parties, subsequent to the original Retention Agreement, opted for a separate and new agreement that the Legislature would pay the legal fees and expenses in that particular case, is likewise irrelevant here because the Legislature is constitutionally and legally bound to honor State contracts.

reading of one sentence in Section 7-5-7 should not be accepted. Contrary to the Auditor's claim, the Attorney General correctly, and permissibly, interpreted and applied his authority in this case.

IV. At a Minimum, the Attorney General's Interpretation and Application of His Authority Must be Accorded Heightened Deference.

As explained above, Sections 7-5-1, -5 and -7 confirm that the Attorney General has the authority to manage all of the State's litigation and settle lawsuits, such as this one. He is furthermore empowered to enter into and honor contingency fee agreements with retained counsel of his choosing, such as the agreement with retained counsel in this case. The statutes are not ambiguous and establish that legislative appropriation of contingency fee payments is not required.

But even assuming that the statutes allow room for a different interpretation, the Auditor's challenge still must fail. If the legislative mandate in statutes is ambiguous or silent, the Attorney General's decisions and actions under the statutes are entitled to heightened deference. *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 243 (Miss. 2008). The Court need only find that the Attorney General acted based upon a permissible construction of the laws.

In *Barbour*, the Court examined the Governor's construction of an election statute in setting a date for a special senatorial election. On December 20, 2007, the Governor issued a Writ of Election establishing that November 4, 2008 would be the date for the special senatorial election to fill the vacancy created by Senator Trent Lott's resignation which left an unexpired term of more than twelve months. *Id.* at 234. The Governor's action was based on his reading of Section 23-15-855(1) of the Mississippi Code which says

> provided the unexpired term is more than twelve (12) months...the election shall be held within ninety (90) days from the time the proclamation is issued...*unless* the vacancy *shall occur* in a *year* that there *shall be held a general state or congressional election*, in which event the Governor's proclamation shall designate the *general*

> *election day* as the time for electing a Senator, and the vacancy shall be filled by appointment as hereinafter provided.

Id. at 241 (quoting MISS. CODE ANN. § 23-15-855(1) (emphasis included)). The Governor's rationale was that the term "year" used in the statute could be construed to mean a 365-day year, and Senator Lott's resignation came less than 365 days prior to the November 4, 2008 general election. *Id.* at 241-42. As a result, the statute's "unless" provision was triggered and allowed the Governor to set the general election day as the date for a vote to fill the senatorial vacancy. *Id.* at 242. His reasoning was the opposite of reading "year" in the statute to mean the same calendar year, which would not trigger the "unless" provision and would require an election in ninety days or less. *Id.* To resolve the dispute, the Court explained that since the legislative mandate in the statute was ambiguous or silent, then it need only determine whether the constitutional officer's construction of the statutes was permissible. *Id.* at 240-42. The Governor's interpretation of the statute was entitled to heightened deference and ultimately upheld. *Id.* at 243. The Court confirmed that a permissible interpretation of the statute by the constitutional officer charged with administrating it should not be disturbed. *Id. See also Rayner v. Barbour*, 47 So. 3d 128, 131-32 (Miss. 2010) (acknowledging review of decision of Board of Election Commissioners in interpretation of statutory scheme limited to whether such interpretation was permissible).

In this case, the same reasoning applies to any question of Sections 7-5-5's and 7-5-7's meaning.[8] The Attorney General interpreted Sections 7-5-5 and -7 to mean that he is the "sole

[8] *Barbour*'s reasoning should apply to the Attorney General with full force. The Attorney General is a constitutional officer. MISS. CONST., art. 6, § 173. He is the "chief legal officer and advisor for the state, both civil and criminal, and is charged with managing all litigation on behalf of the state" and vested with the "powers of the Attorney General at common law." MISS. CODE ANN. § 7-5-1.

judge" of compensation to be paid retained counsel. Counsel can be retained on a fee basis agreed upon between the Attorney General and retained counsel, without legislative involvement. At a very minimum, the Court should find that this *permissible* interpretation by the Attorney General – the constitutional officer charged with carrying out the duties prescribed by the statutes – trumps any other motivations or argument by the Auditor to the contrary. *See Rayner*, 47 So. 3d at 135 (Randolph, J. concurring) (explaining "...our standard of review does not allow reversal of an administrative decision simply based upon whether we agree or disagree with the branch or agency empowered to make the decision.").

In sum, the Attorney General construed his common law and statutory authority to allow retained counsel's contingency fees to be paid by MCI. The deference required by *Barbour* is another reason that neither that determination by the Attorney General, nor the trial court's judgment, should be disturbed.

V. The Auditor Waived Any Right to Challenge the Settlement Agreement or the Retention Agreement.

In addition to the foregoing reasons that summary judgment was proper, the trial court also correctly held that the Auditor waived his right to challenge the Settlement Agreement. "Waiver is a voluntary relinquishment of some known right, benefit or advantage." *Sentinel Indus. Contracting Corp. v. Kimmins Indus. Serv. Corp.*, 743 So. 2d 954, 964 (Miss. 1999). It can be established by a pattern of conduct. *Eastline Corp. v. Marion Apartments, Ltd.*, 524 So. 2d 582, 584 (Miss. 1988); *Mariana v. Hennington*, 90 So. 2d 356, 361-63 (Miss. 1956). *See also Turner v. Wakefield*, 481 So. 2d 846, 848-49 (Miss. 1985). The trial court accurately applied this rule to the undisputed facts of the case.

The undisputed facts prove the Auditor waived any right he ever may have had to challenge the MCI settlement. The Retention Agreement was executed in 2004 and in the public record. The Settlement Agreement was finalized in May 2005 and well-publicized. By June 2005, his office was well aware of the actual Settlement Agreement. On June 28, 2005, Joey Fillingane sent the Auditor's office a letter asking for a review of the settlement. [June 28, 2005 Letter, C.P. 1343]. In October and November 2005, the Auditor's office produced draft reports and received comments. [*See* October 5, 2005 Draft Report, C.P. 1344-56; November 2, 2005 Draft Report, C.P. 1357-67]. These documents show that, in 2005, the Auditor's office was well aware of the Settlement Agreement, retained counsel's contingency agreement, and all pertinent facts related to those contracts. Further, the Legislature received all of its money from MCI and spent it in 2005 and 2006. Yet, it was not until December 2007 that the Auditor instituted this lawsuit. If the Auditor ever had any right to challenge the Settlement Agreement or the Retention Agreement, then he gave that up by waiting too long to challenge them.

It is also worthy of note that, during his thirty month delay, the Auditor issued draft reports revealing this case is driven by politics instead of a correct interpretation of the law. In October 2005, the Auditor said that Miss. Code Ann. § 7-5-7 did not have the meaning he ascribes to it today. His first report explained:

> **Finding 1:** While it appears the Attorney General has the authority under Section 7-5-7, of the MS Code of 1972, as amended, to retain Special Assistant Attorneys General, it is unclear whether the Attorney General has specific legal authority to establish a contingency fee scale for private attorneys retained as Special Assistant Attorneys General.
>
> **Recommendation 1:** The Mississippi Legislature should clarify the Attorney General's authority for contingency fees for private attorneys retained by the Attorney General.

[October 5, 2005 Draft Report at p. 12, C.P. 1344-56]. His second report made a very similar finding and recommendation and only changed a few words. [November 2, 2005 Draft Report at p. 11, C.P. 1357-67]. Finally, by October 2006, the third report came out and omitted both of the earlier findings and recommendations. [October 19, 2006 Performance Audit, C.P. 1388-1402].

Interestingly, none of the facts changed in 2005, 2006, 2007, or since then.[9] The Auditor has never come forward with any relevant facts that were not available to him when his first draft came out. The law did not change either. Section 7-5-7 is the same today as it was in 1972. That did stop the Auditor from contradicting his own previous pronouncements of its meaning. Now that he is litigating the issue, and in the face of his earlier reports, the Auditor claims Section 7-5-7 is "plain and unambiguous and conveys a clear directive, it must be strictly construed." [Appellant's Brief at p. 10]. Stated differently, there has been no change in the statute, but there has been a change in how the Auditor interprets it. His waffling and fumbling around on the subject is no excuse for his lengthy delay in filing suit. Rather, it supports the trial court's finding of waiver below and yet another reason the Court should affirm the trial court now.

In sum, the State received MCI's settlement money and the Legislature spent it, with no objection from the Auditor's office. That all occurred nearly two and a half years before the Auditor filed his suit in Hinds County Circuit Court. Nothing prevented the Auditor's office from challenging the contracts sooner. Assuming the Auditor ever had any right to challenge the settlement, he slept on that right. The trial court properly entered summary judgment on the alternative ground of waiver.

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[9] Indeed, the time line of events contained in all three Auditor reports basically set forth all the same facts.

Additionally, on the point of waiver, the Auditor's brief provides another distraction from the real issue at hand. The Auditor erroneously posits that findings by the New York Bankruptcy Court, the United States District Court for Southern District of New York, and the United States District Court for the Southern District of Mississippi established an excuse for his delay. According to him, all of those courts ruled that he did not waive his claims. But that is not what any of the courts determined.

Instead, the three courts – at various points in time *after* the Auditor filed this lawsuit – simply held that they would not hear the dispute. [*See* April 2, 2008 Order on Auditor's Motion to Abstain, C.P. 736-44 & Appellant R.E. 3 (holding "the Court grants the Defendants' Abstention Motion *and does not address any other matter*") (emphasis added); November 17, 2008 Memorandum and Order, C.P. 1116-1126 & Appellant R.E. 4 (affirming Bankruptcy Court Order); and June 11, 2008 Order on Remand, C.P. 147-159 and Appellant R.E. 5 (remanding cause to Hinds County Circuit Court)]. In 2008, the New York Bankruptcy Court abstained from hearing his dispute, and that decision was affirmed in the United States District Court for the Southern District of New York. In 2009, the United States District Court for the Southern District of Mississippi held that it did not have bankruptcy jurisdiction over the dispute. All these events were subsequent to the belated filing of this lawsuit.

Moreover, none of these federal court rulings in any way validate the Auditor's right to bring suit or prove he timely filed it. A decision to abstain is simply a decision that the court will not hear the dispute. *See, e.g., Lee v. Miller*, 263 B.R. 757, 763 (S.D. Miss. 2001) (federal court abstaining from bankruptcy jurisdiction over dispute and remanding). Likewise, remand of a removed action

is just a finding that the court does not have jurisdiction to hear the lawsuit. *See, e.g., Anderson v. First Family Financial Services, Inc.*, 2001 WL 34403087, at *2 (S.D. Miss. May 25, 2001) (federal court remand after determining bankruptcy jurisdiction was lacking, rendering it powerless to rule on the merits). Neither scenario was a decision on the merits that the Auditor's claim was not waived. The federal court orders cited by the Auditor do not save his claims from waiver here.

In sum, the trial court's holding that the Auditor waived any rights he may have had is another reason it correctly granted summary judgment below, and should be affirmed here.

VI. The Auditor Has no Remedy under Constitutional or Mississippi Contract Law.

Summary judgment was also properly entered against the Auditor because – in addition to all the reasons discussed above that his arguments are meritless – the relief sought is unsupported by general Mississippi contract law and would violate the constitutional prohibition on impairment of contracts. As such, the Auditor has no viable remedy. Again, the trial court may be affirmed on any grounds offered by the Appellee and sufficient to sustain the judgment below. *See McDaniel*, 938 So. 2d at 247; *Ferguson*, 448 So. 2d at 275. No provisions of the Settlement Agreement or Retention Agreement may properly be voided. Furthermore, it would violate retained counsel's constitutional rights to pay them less than the parties agreed or divest them of fees that are their property.

A. No Contract Provisions are Void.

It is true that courts may void provisions of a contract that are illegal or contrary to public policy. But that general proposition should not be used to create the result the Auditor seeks in this case for at least two reasons. The Auditor's argument that "no court will lend its aid to a litigant who bases his cause on an illegal act" is misleading. [Appellant's Brief at p. 10]. First, the authorities he

cites are not on point. *See Price v. Purdue Pharma Co.*, 920 So. 2d 479, 484 (Miss. 2006) (holding plaintiff could not maintain action for damages based on addiction to controlled substance he illegally obtained); *Morrissey v. Bologna*, 123 So. 2d 537, 542-43 (Miss. 1960) (holding securities for debt based upon sales of illegal liquor void); and *Lowenberg v. Klein*, 87 So. 653, 654-55 (Miss. 1921) (holding party could not sue for debt based upon illegal liquor transaction). The instant case does not involve criminal statutes relating to illegal drugs, or illegal (at those times) liquor sales where the statutes at issue specifically voided such sales. There was no "illegal" act committed by retained counsel or the Attorney General.

Furthermore, in all of the Mississippi authority cited by the Auditor, the alleged wrongdoer was seeking to *enforce* a contract or assert a legal right. Voidability was a defense to the action, not a right of action to be asserted by a stranger to a contract. None of the parties to the contracts here are seeking to void any of their provisions.

Second, if there is room for the Auditor to argue that any contract provisions should be voided, the applicable principle is that contracts which merely conflict with statutory procedural requirements are not void. *Seymour v. Evans*, 608 So. 2d 1141, 1145-46 (Miss. 1992). In *Seymour*, several plaintiffs bought properties and later attempted to make improvements on their parcels. *Id.* at 1142. They were denied a permit because the land had not be subdivided consistent with county ordinances. *Id.* Plaintiffs sued the seller and others claiming the conveyances were void due to the seller's violation of the ordinances. *Id.* The trial court granted relief and voided the transactions. *Id.*

On appeal, a unanimous Court reversed and rendered the trial court's judgment. *Id.* at 1148. As to the plaintiff's voidability argument, the Court reasoned the deeds were "valid and enforceable

so long as the ordinances they are alleged to violate regulate actions which are merely malum in prohibitum." *Id.* at 1146. As long as the seller's acts were not "inherently evil," the deal was valid. *Id.*

In this case, the parties' actions were consistent with – at the very least – a permissible construction of the Attorney General's authority under Mississippi law. There certainly was not anything "inherently evil" in obtaining over a $100 million for the State or MCI's separate deal to pay retained counsel's attorneys' fees. As such, there are no valid grounds to void the Settlement Agreement or the Retention Agreement based on "illegality."

B. The Auditor's Proposed Relief Would Violate the Constitution, Contract Law, and Cost the State Millions.

The Auditor's complaints are also entirely misplaced, and his proposed remedy would cause the State severe monetary damage, for the following reason. If the contingency fee funds are taken by the Auditor and handed to the Legislature, then the Legislature must turn right back around and pay *all* the money back to retained counsel. There can be no discretion in the matter; neither the Auditor nor the Legislature are authorized to breach the contingency fee contract or any other contract. To the extent the Auditor intends that retained counsel be paid less than what was contracted after "running it by" the Legislature and a Governor's veto,[10] that would violate retained counsel's constitutional property rights.

[10] The Auditor does not effectively argue that the amount of retained counsel's contingency fee recovery was unreasonable. He cannot credibly do so. The percentage recovery contracted for by retained counsel in this case (less than seventeen percent) is far less than other percentage fees approved by this Court – in far less complicated legal matters. *See, e.g., In re Guardianship of Savell*, 876 So. 2d 308, 315 (Miss. 2004) (holding that chancery court's reduction of contingency recovery from contracted rate of forty percent to thirty-three and one-third percent in personal injury matter was abuse of discretion).

This is so because the Constitution prevents the State from breaching its contracts without recourse. In *Franklin v. Ellis*, the trial court enjoined commissioners of the Yazoo-Mississippi Delta levee district from paying the salaries of employees of the levee board. 130 Miss. 164, 39 So. 738 (1920). The salaries were to be paid under two-year contracts entered into by the board. *Id.* at 183. Subsequently, the Legislature changed the number of, and salaries to be paid to, board employees. *Id.* The trial court's injunction blocked payments to the employees in the amounts contracted for prior to the Legislature's action. *Id.* at 184. On appeal, the trial court's ruling was reversed and rendered because the contracts could not be annulled by a subsequent act of the Legislature due to the Constitutional bar on impairment of contracts. *Id.* at 188. *See also* U.S. CONST., art. I, § 10; MISS. CONST., art. 3, § 5; *Hall v. Wisconsin*, 103 U.S. 5, 7, 25 L.Ed. 302 (1880) (holding legislative act nullifying contract for services between private party and government produced unconstitutional result); *Tucker Printing Co. v. Attala County Bd. of Supervisors*, 171 Miss. 608, 158 So. 336 (1934) (reasoning that subsequent legislative action could not undo contract and relieve board of supervisors of obligation to pay for materials previously purchased by it).

Here, if retained counsel's money is diverted to the Legislature, then the State could suffer more protracted litigation and the same problem presented in *Franklin*. The State could not renege on the contract by failing to appropriate the money or passing some other law. In short, if the Auditor could somehow reclaim the money paid to retained counsel by MCI, then the Legislature would simply have to repay every penny of it, and likely more, to retained counsel. Any other reaction would violate constitutional law. Thus, the Auditor's proposed remedy is as empty as the reasoning it is founded upon.

Additionally, undoing the deal between MCI and retained counsel for the attorneys' fees would force retained counsel to press its counterclaim against the State. MCI paid retained counsel $14 million. By retained counsel's calculation under the Retention Agreement and based on what the State recovered from MCI, they were due $16,890,575.73 when the State and MCI settled the claims. Retained counsel filed a contingent counterclaim to that effect in the court below. [*See* Amended Answer and Counterclaim, C.P. 814-1038]. The counterclaim was moot when the trial court correctly threw out the Auditor's claims. But, if the Auditor's claims are now found by this Court to have any merit, ironically, it may come with a bill of at least $2,890,575.73 to the State instead of being a $14 million windfall obtained by the Auditor. The Court should not permit the Auditor to shoot the State in the foot.

CONCLUSION

In summary, the trial court should be affirmed because it correctly found that the Auditor has no right to interfere with retained counsel's property, validly and legally earned pursuant to the agreement with the Sate. Retained counsel's money was not "public funds." It was subject to an attorneys' lien, and belongs to those attorneys. The trial court was also correct because the Attorney General has the right and authority to enter into contingency fee agreements on behalf of the State and at his sole discretion. Sections 7-5-5 an -7 do not restrict the Attorney General's authority to enter into and carry out the payment terms of contingency fee agreements. Furthermore, the trial court's summary judgment ruling was especially correct given that the Attorney General's interpretation and application of his authority is entitled to heightened deference. *Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008).

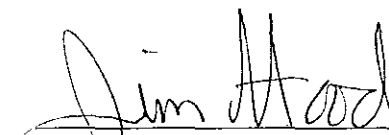
Additionally, the Auditor waived any right he may have had to attack the contracts. His claims are likewise barred because the contracts cannot be voided, and his proposed relief would violate Constitutional and contractual law.

For any and all of these reasons, the Court should affirm the summary judgment granted in favor of the State of Mississippi below.

This the 1st day of February, 2011.

Respectfully submitted,

By: JIM HOOD, ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee, The State of Mississippi, has been served via U.S. Mail, properly addressed and postage prepaid, to the following persons:

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THIS the 1st day of February, 2011.

Jim Hood, Attorney General