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

SUPPLEMENTAL BRIEF OF APPELLEE THE STATE OF MISSISSIPPI

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INTRODUCTION

Attorney General Jim Hood files this Supplemental Brief to address two specific issues on which the Court has requested additional briefing in this matter. *First*, this Brief answers why the "proper treasury" clause contained in Article 4, Section 100 of the Mississippi Constitution has no application to this case. Section 100 only applies to a narrow class of "obligations" or "liabilities." This Court has specifically held that actions to recover unliquidated and disputed tax claims are not within the narrow scope of Section 100. Applying this settled law to the matter at hand, the Worldcom Settlement Agreement involving unliquidated tax liability and premised on disputed facts did not extinguish any claim to which Section 100 is applicable. Since there was no Section 100 "obligation" or "liability" involved in the underlying action against Worldcom, then Section 100 did not require "such liability or obligation be extinguished except upon payment thereof into the proper treasury."

Second, even if Section 100 could apply to the Worldcom settlement, retained counsel's attorneys' fees were paid to the "proper treasury." The Auditor's argument that Section 100's "proper treasury" clause requires attorneys' fees first be paid into the Legislature's general fund, and thus become subject to an appropriation, is not supported by the language of Section 100. That interpretation is also contrary to over one hundred years of practice authorized by the Legislature and approved by this Court. Such a requirement would also be wholly inconsistent with the holdings of courts in other jurisdictions that have faced the same issue. Additionally, any suggestion that Worldcom's payment to retained counsel should have been routed through the Attorney General's contingent fund does not compel reversal of the Circuit Court's judgment.

Finally, this Court should decline to adopt the Auditor's interpretation of Section 100 because

judicially altering the statutorily-authorized method and manner in which the Attorney General hires and pays contingent fee counsel would inappropriately encroach upon a solely legislative function. As the Auditor argued to the trial court and to this Court, as the supreme courts of other states have concluded, and as this Court has recognized, the Attorney General's authority to contract with and compensate private counsel is a matter governed by the Attorney General's common law authority limited only by express statutory restrictions. Having failed to secure the support of a majority within the Legislature to limit the Attorney General's common law authority, an attempt to end-run the legislative process by an appeal to this Court should be rejected. This matter is within the constitutional discretion of the Legislature and no party or court has ever argued or found otherwise. *Compare* MISS. CODE ANN. § 7-5-7 ("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.*") (emphasis supplied) *with* MISS. CODE ANN. §§ 7-5-5, 7-5-7 (containing no requirement that the Attorney General compensate private counsel through "the action of the legislature"). Conjuring a constitutional basis to prohibit this longstanding practice would deprive future attorney generals and legislatures of the ability to set this important state policy.

ARGUMENT

I. Section 100 Has No Application to the Worldcom Settlement.

More than two months following oral argument of this case in June 2011, the Court issued a *sua sponte* order inviting the parties to submit supplemental briefing on whether Worldcom's payment of fees directly to retained counsel violated Section 100 of the Mississippi Constitution. That Section says:

> [n]o obligation or liability of any person, association, or corporation held or owned

> by this state, or levee board, or any county, city, or town thereof, shall ever be remitted, released or postponed, or in any way diminished by the Legislature, nor shall such liability or obligation be extinguished except by payment thereof into the proper treasury; nor shall such liability or obligation be exchanged or transferred except upon payment of its face value; but this shall not be construed to prevent the Legislature from providing by general law for the compromise of doubtful claims.

MISS. CONST., art. 4, § 100. Specifically, the Court directed the parties to submit supplemental briefs, assuming the attorneys' fees Worldcom paid to retained counsel were public funds (contrary to the trial court's holding in this matter), addressing: (1) whether Section 100's "proper treasury" clause applies to this case; and (2) if so, what was the "proper treasury."[1] There are several reasons why the "proper treasury" clause does not apply here, and, even if it does, Worldcom's payment of retained counsel's attorneys' fees was made to the "proper treasury." As explained below, and in the Attorney General's previous briefing in this matter, the trial court's judgment should be affirmed.[2]

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[1] These supplemental briefing issues are identical to those posed by the Court in the Auditor's separate appeal in *Pickering v. Microsoft Corporation*, Cause No. 2010-CA-00881. As discussed below, the facts pertaining to the underlying lawsuits and the respective trial court proceedings in each appeal are distinct. However, the appeals are similar in that the trial courts reached the correct result in each of them, and, with respect to the issues presented for supplemental briefing, Section 100 has no application to either case.

[2] At the outset, it should be noted that arguments regarding Section 100 are procedurally barred. The only constitutional argument ever raised by the Auditor in this litigation pertained to the separation of powers doctrine contained in Sections 1 and 2. Nobody presented any issue regarding Section 100 to the Circuit Court. The issue was not raised on appeal in any of the briefs submitted by the parties. The issue was not raised prior to oral argument in June 2011. The issue was only raised by the Court in connection with the oral argument in the *Microsoft* appeal in August 2011, and then subsequently by the Court's *sua sponte* order for supplemental briefing. It is well-settled that a new issue – especially a constitutional issue – cannot be raised for the first time on appeal because a trial court cannot have committed an error by failing to adopt an argument that was never raised. *See Hemba v. Miss. Dept. of Corrections*, 998 So. 2d 1003, 1008-09 (Miss. 2009). Further, it is the plaintiff's, and not the Court's, responsibility to frame and advance his claims. This Court has consistently held that even courts may not raise a "constitutional issue *sue sponte*" and that "[t]he issues are framed, formed and bounded by the pleadings of the litigants. The Court is limited to the issues raised in the pleadings and proof contained in the record." *Martin v. Lowery*, 912 So. 2d 461, 465 (Miss. 2005)(quoting *City of Jackson v. Lakeland Lounge of Jackson, Inc.*, 688 So.2d 742, 749 (Miss.1996)). It would be quite odd, for example, for this Court to reject a civil plaintiff's single claim consisting of breach of contract but to notify the plaintiff on appeal that his better

A. Section 100's "proper treasury" clause was not triggered because the case against Worldcom did not involve a Section 100 "obligation" or "liability".

The "proper treasury" clause of Section 100 first does not apply to this case as a matter of simple constitutional construction. A payment must have been made to satisfy an "obligation" or "liability" as those terms are used in Section 100 before the "proper treasury" clause or any other part of the Section has any application. In the underlying bankruptcy litigation against Worldcom, no Section 100 "obligation" or "liability" was ever at issue. Accordingly, since no "obligation" or "liability" was involved, no part of Section 100 – including its "proper treasury" clause – governed how retained counsel's earned attorneys' fees must be paid.

The phrase "obligation or liability" has been examined numerous times in the past by this Court. Almost contemporaneously with the adoption of Section 100, this Court held that the scope of the terms "obligation" or "liability" are extremely narrow. *Adams v. Frangiacomo*, 71 Miss. 417, 15 So. 798, 800 (1893). In *Adams*, this Court explained that the word "liability" could have been construed broadly to cover liabilities for violations of statutes and the common law, but that was not its meaning in Section 100:

> [l]iability for violation of statute or common law; liability to fine, penalty, or forfeiture; liability in tort, and by contract, express or implied; liability for acts willfully, negligently, or unintentionally done, and for omitting to act when action is made a duty; liability for the civil, and, in some instances, for the criminal, act of an agent or servant,- all come within the literal meaning of the language used. But it is *entirely certain that no such purpose was within the contemplation* of the convention which framed and put in force our organic law.

Id. (emphasis added). This Court further noted that Section 100's application is very limited, if not inappropriate, in the context of litigation settlements. According to *Adams*, to hold otherwise, the

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claim sounded in tort and award plaintiff relief based on that previously unidentified tort theory. Any Section 100 argument is barred because the Auditor failed to raise any such claim in the trial court.

State, and its levee boards, counties, and municipalities,

> would be precluded from conducting its suit with that freedom of action which is often thought to be invaluable in the progress of litigation. No agreement of counsel, however honestly made, no concession, no compromise, the effect of which would be to diminish or postpone the demand asserted, would be conclusive, and therefore none would ever be accepted. From a consequence such as this the mind shrinks and retreats.

Id. at 801. Consequently, this Court determined that a civil penalty is not an "obligation" or "liability" within the meaning of the Section. *Id.* Subsequently, this Court similarly held that Section 100 also does not apply to "an unliquidated claim growing out of tort," or claims premised "upon doubtful facts." *See Gully v. Stewart*, 178 Miss. 758, 764, 174 So. 559 (1937); *Board of Levee Com'rs v. Parker*, 193 So. 346, 348 (Miss. 1940).[3] Thus, according to this Court, it has been entirely certain since 1940 that claims for civil penalties, unliquidated amounts, tort liabilities, and actions based on disputed facts are not within the scope of Section 100.[4]

With respect to this appeal, disputed and unliquidated tax claims – such as those asserted against Worldcom in the underlying bankruptcy litigation – are likewise outside the scope of Section 100. Section 100 applies to tax claims where the claim involves a fixed amount. *Daniels v. Sones*,

[3] This Court's view that Section 100 is extremely limited in scope is consistent with holdings from other jurisdictions as well. Courts in other states which have the same or similar constitutional restrictions recognize those respective provisions do not apply to disputed and unliquidated claims. *See, e.g., State ex rel. Public Employees Ret. Ass'n v. Longacre*, 59 P.3d 500, 505 (N.M. 2002) (explaining plain language of similar constitutional provision using terms such as "owned" and "held" indicates "...an intent that the constitutional provision apply only to fixed, rather than contingent or uncertain, obligations or liabilities owed to the state."); *Gutierrez v. Gutierrez*, 657 P.2d 1182, 1184 (N.M. 1983) (reasoning similar constitutional provision applies to undisputed legal obligation while indicating provision does not apply to claims involving good faith dispute as to the amount of indebtedness or liability); *Alabama Education Ass'n v. Grayson*, 382 So. 2d 501, 504 (Ala. 1980) (holding tax claim in amount that has not become fixed does not qualify as "obligation" or "liability" under similar constitutional provision). Interpretations of similar state constitutional provisions made by courts in other jurisdictions are persuasive in this Court. *See Mississippi School for Blind v. Armstrong*, 62 So. 2d 369, 370 (Miss. 1953).

[4] As explained in the Attorney General's supplemental brief filed in *Microsoft*, the claims at issue in that case involved unliquidated tort claims and civil penalties on facts which Microsoft disputed. For those reasons, Section 100 does not apply to *Microsoft*.

245 Miss. 461, 470, 174 So. 2d 626 (1962). However, only such tax claims that are "liquidated," *i.e.* for a fixed, certain amount, fall within the scope of Section 100. *See Pan American Petroleum Corp. v. Gully*, 179 Miss. 847, 863-64, 175 So. 185 (1937); *Robertson v. H. Weston Lumber Co.*, 124 Miss. 606, 626, 87 So. 120 (1921).[5] The Worldcom bankruptcy proceedings involved an unliquidated and disputed tax claim. Therefore, settlement of the case simply did not involve an "obligation" or "liability" to which the Section applies.

Indeed, the Auditor has never contended that the Worldcom settlement did not involve an unliquidated and disputed tax claim. Rightfully so, because the record evidence conclusively establishes that fact. A tax claim is unliquidated when the amount of the claim is disputed, has not been fixed and/or it is doubtful that it can be collected. *See, e.g., Carmichael*, 41 So. 2d at 285. The unliquidated tax claim asserted in bankruptcy court against Worldcom was disputed, not fixed *and* there was doubt that it could be collected.

Specifically, the claim required the bankruptcy court to resolve a legal dispute over the income characterization of approximately $20 billion in payments made by Worldcom subsidiaries to their Mississippi-based corporate parent in 1998-2002. There were at least three alternative potential characterizations of the payments:

> (1) Royalties. Worldcom contended the payments should be characterized as royalty payments made by its subsidiaries in exchange for the parent company's "management foresight." Royalty characterization would enable the parent company to avoid tax on all subsidiary payments that were not considered income earned in Mississippi. In turn, the subsidiaries would deduct the payments as "usual and

[5] The highest courts in other states (with similar constitutional provisions as Section 100) have similarly concluded their constitutional provisions do not apply to their attorney generals' settlement of unliquidated and disputed tax claims. *See, e.g., State ex rel. Wilson v. Young*, 7 P.2d 216, 221-23 (Wyo. 1932); *State v. State Inv. Co.*, 239 P. 741, 745-46 (N.M. 1925). It is also particularly worthy of note that the Alabama Supreme Court has held its Section 100 does not apply to an unliquidated tax claim and specifically relied upon the *H. Weston Lumber* case, and other cases decided by this Court, in reaching that correct conclusion. *State ex rel. Carmichael v. Jones*, 41 So. 2d 280, 285-86 (Ala. 1949).

necessary business expenses." The ultimate consequence would be substantial avoidance of income taxes in Mississippi and several other states where subsidiaries were located;

(2) Service Fees. The State argued that the parent company's "management foresight" could be treated as a service fee for Mississippi income tax purposes. The characterization would be akin to treatment of the fees of an attorney in Mississippi who renders advice to a client in Louisiana. The consequence of such treatment would be that all of the fees for those services would potentially qualify as $20 billion in taxable income in Mississippi, or, if only a portion of the payments were characterized as service fees and/or the amount was recalculated resulting in a lesser valuation for the services, then the consequence would be a reduced amount of taxable income; and/or

(3) Constructive Dividends. The State alternatively argued that the payments were constructive dividends, *i.e.*, payments made by a corporate subsidiary to its corporate parent for which there was no fair exchange of value or simply an uphill distribution of profits. With respect to Mississippi income tax, dividend characterization would result in the payments being subject to the 5% corporate tax rate. However, the total amount recoverable under a constructive dividend characterization was limited. Effective for 1999-2002, the Mississippi Legislature excluded corporate dividends from gross income (as a result of intense lobbying efforts by Worldcom). Therefore, constructive dividend characterization for subsidiaries payments would only capture them for purposes of calculating gross income for tax year 1998.

Worldcom steadfastly disputed application of any payment characterization other than royalties, as well as the corresponding measure of its taxable income tied to each characterization. The disputed and unliquidated nature of the claim was also highlighted by the fact that the Mississippi Tax Commission had never asserted any income tax claim based upon any subsidiary payments prior to the bankruptcy proceedings.[6] Thus, the State was forced to litigate the characterization issue, and related calculation issues, in the bankruptcy court.

[6] The original proof of claim filed by the Tax Commission was for $3 million, only encompassed a separate issue regarding *franchise taxes*, and would not have allowed for recovery of any income taxes regardless of how the characterization at issue was resolved in the bankruptcy court. Subsequently, after retained counsel became involved, an amended proof of claim for *income taxes* was filed just prior to the claim bar date. The amended proof of claim served as a placeholder for the amount of approximately $1 billion in income taxes that potentially could be owed. Claiming less than the maximum possible amount before any determinations by the court might have prejudiced the claims by giving Worldcom a basis to assert a judicial estoppel argument at some point later in the litigation.

Following contentious litigation and rulings in the bankruptcy court, it became evident that the court was not likely to characterize the full $20 billion in subsidiary payments as service fees. Rather, it was extremely likely that, in order to protect the bankruptcy estate and other reasons, the payment characterization and related calculation issues would be resolved in favor of the royalty or constructive dividend characterizations. By the time the parties met to discuss settlement in April 2005, it was apparent that, at best, the bankruptcy court would characterize the subsidiary payments as constructive dividends. The Attorney General therefore agreed to a settlement that accounted for a recovery of 1998-only income tax for approximately $1.9 billion in income, taxed at the corporate tax rate of 5%, and yielding a maximum total income tax of $95 million.[7] Meanwhile – and most relevant to any analysis regarding Section 100 here – these events plainly demonstrate that the State's tax claim against Worldcom was always disputed, unliquidated, and doubtful of collection. The claim was never within the purview of Section 100.

Logically, since the underlying tax claims against Worldcom's bankruptcy estate were unliquidated and disputed, and thus not within the limited confines of Section 100, the Section's "proper treasury" clause does not apply. The plain language of Section 100 supports that conclusion. Each of the first three clauses of Section 100 (the "no diminishment by the legislature" clause, the "proper treasury" clause, and the "face value" clause) begins with, and pertains to, those same terms:

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[7] The nature of the complex dispute in the bankruptcy court, the litigation over the tax characterization and valuation issues presented to the bankruptcy court, and the basis for the claim valuation at the time of settlement are all further and extensively documented in the record in this matter. [*See, e.g.*, Affidavit of Jim Hood, C.P. 1304-07; Memorandum Regarding Worldcom Tax Claim, C.P. 844-52; November 30, 2005 Letter to Office of the State Auditor, C.P. 924-34]. Furthermore, the factual record on these issues also demonstrates why statements regarding the settlement value by the Auditor's counsel at oral argument, and in the Auditor's briefing in this case, are completely mistaken. The State did not have a $1 billion claim that was compromised for $95 million. Rather, consistent with the course of the bankruptcy litigation and as a result of Worldcom's lobbying efforts at the Legislature to modify the definition of gross income for the 1999-2002 tax years, the State had a $95 million claim on which it fully recovered. Every illusion the Auditor has expressed to the contrary has no factual basis.

"liability" or "obligation." The terms "liability" and "obligation" retain the same meanings throughout Section 100, so that none of the clauses apply to an unliquidated, unfixed, and doubtful claim. *Adams*, 15 So. at 800 ("Such 'liability or obligation' means, of course, the 'obligation or liability' referred to in the first clause of the statute"). *See also Jones v. Burns*, 138 Mont. 268, 295, 357 P.2d 22 (1960) (interpreting identical language contained in article V, section 39 of Montana's Constitution in effect at that time and explaining "obligation or liability" in the first "no diminishment by the legislature" clause has the same meaning in the "proper treasury" clause).

In order to apply the "proper treasury" clause to the Worldcom settlement, the Court would have to conclude the phrase "obligation or liability" has different meanings within the same Section of the Constitution. Such an improper conclusion would violate the most basic rules of constitutional construction. "One of the rules for construing a Constitution or statute is 'that the same meaning attaches to a given word wherever it occurs' therein, unless it clearly appears that in some instances it was used with a different meaning." *State Teachers' College v. Morris*, 165 Miss. 758, 766, 144 So. 374 (1932) (quoting 12 C.J. 706). "Obligation" and "liability" as used in Section 100 fit neatly within this rule.

The same terms "obligation" and "liability" are used in all three clauses in Section 100. Meanwhile, the Section does not clearly intend for the terms to have different meanings in the various clauses. Quite the opposite intention is manifest in the language. "Obligation or liability" is used in the first "diminishment by the Legislature" clause. Then, in the "proper treasury" clause, the word "*such*" used to modify "liability or obligation" makes clear that the framers were referring to the same limited type of "obligation" or "liability" as in the first clause. The framers did the same thing in the third "face value" clause. It likewise only applies to the same "such liability or obligation" as used in the first instance.

Every clause in Section 100 – including the "proper treasury" clause – depends entirely upon existence of an "obligation" or "liability" within the meaning of the Section. Therefore, if a Section 100 "obligation or liability" is not at issue, then the "proper treasury" clause is not at issue. The Court does not need to go any further. Section 100 does not apply and there is no need to examine the meaning of the term "proper treasury" or have any other concern regarding the Section.

B. The Attorney General Opinions cited by the Auditor do not support Section 100's application here.

The Auditor has not identified any Section 100 cases decided by this Court or elsewhere to support his argument that it applies to the disputed and unliquidated tax claims against Worldcom. Instead, after the Court first raised the issue of Section 100 in the *Microsoft* appeal, the Auditor has argued that four Attorney General opinions support the theory that Section 100 applies to the Worldcom and Microsoft settlements. The Auditor's counsel specifically mentioned the Attorney General opinions at oral argument in *Microsoft*, later submitted them as supplemental citations to the Court in *Microsoft* in a Rule 28(j) letter dated August 9, 2011, and included them in his supplemental briefs filed in *Microsoft* and on this appeal. *See* Murdock, 2009 WL 3332547 (Miss.A.G. Sept. 4, 2009); Joiner, 2007 WL 3356850 (Miss.A.G. Sept. 14, 2007); Herring, 2007 WL 852280 (Miss.A.G. Jan. 12, 2007); and, Trapp, 2003 WL 23018360 (Miss.A.G. Nov. 14, 2003). As explained in the Attorney General's supplemental brief in *Microsoft*, none of the opinions identified by the Auditor apply factually or legally to the question before the Court now.

Furthermore, the Auditor's string citation fails to acknowledge numerous other Attorney General opinions providing that local governments and state agencies are authorized to hire attorneys on a contingent fee basis. *See* Norris, 1997 WL 611876 (Miss.A.G. Sept. 26, 1997)(county may hire attorney on contingency basis to collect damages from U.S. Forest Service); Taylor, 1995 WL

461631 (Miss.A.G. July 27, 1995) (DHS has authority to hire contingent fee attorneys to collect unliquidated and/or doubtful claims); Nunn, 1990 WL 548097 (Miss.A.G. Oct. 18, 1990)(county may contract on contingency basis with attorney to pursue malpractice claim); Weeks, 1989 WL 503285 (Miss.A.G. July 19, 1989)(town may hire attorney on contingency basis to collect damages for contamination of water supply); McRae, 1989 WL 503245 (Miss.A.G. June 19, 1989) (school board may contract with attorney on contingency fee basis to sue contractor for damages for poor work on school building). This Court should recognize the import of these opinions instead of being misled by the Auditor's citations to irrelevant scenarios not involving unliquidated and "doubtful claims."

C. The claims against Worldcom, and those involved in the *Microsoft* appeal, did not become liquidated by virtue of the settlement agreement establishing the amount the defendants would pay to the State or the amount they would pay directly to retained counsel.

Since he cannot produce any authority holding that an unliquidated and disputed claim falls within Section 100, or any similar constitutional provisions in other jurisdictions, the Auditor argues that the Worldcom and Microsoft claims became liquidated taken when the parties agreed upon the fixed amount to be paid in the settlements. At oral argument in the *Microsoft* appeal, and again at page 8 of his supplemental briefs filed in both cases, the Auditor proposed that the act of agreeing upon the fixed amount to be paid in each settlement transformed the unliquidated claims into liquidated claims, and the claims therefore became subject to Section 100. There are at least three related reasons why the Auditor's proposition is wrong.

First, Mississippi law looks no further than the time a claim is made to determine whether it is a liquidated or unliquidated claim. The character of the claim never changes, that is to say, an unliquidated claim does not become liquidated merely because the amount owed eventually becomes

established. In order to qualify as a liquidated claim, the amount must be fixed at the time *when the claim is originally made. U.S. Fidelity & Guar. Co. v. Estate of Francis ex rel. Francis*, 825 So. 2d 38, 49 (Miss. 2002). On the other hand, the amount due on an unliquidated claim may become fixed through a subsequent event, such as a judgment or otherwise, but that claim is not treated as a liquidated claim simply by the happening of that event. *See Moeller v. American Guar. and Liab. Ins. Co.*, 812 So. 2d 953, 958 (Miss. 2002) (quoting BLACK'S LAW DICTIONARY 395-97 (7th ed. 1999) and explaining distinction between liquidated and unliquidated claims). Both this case and the *Microsoft* case strictly involved claims that were unliquidated when they were made. As a matter of law, those unliquidated claims should not be treated as liquidated just because the parties subsequently settled the cases.

Second, common sense dictates that if the Auditor's erroneous proposition is accepted, then Section 100 has no limits and all of this Court's prior interpretations of it would be nullified. The amount of every claim to which the State holds legal title – whether it is for a fixed and certain amount from its inception, established upon a settlement agreement during litigation, established after a judgment is entered after trial, or by the happening of some other event – becomes fixed at some time. But only those claims that are fixed at an amount certain from their inception are liquidated and can qualify as an "obligation" or "liability" under Section 100. If claims automatically become subject to Section 100 merely by an event (after the claim is made) which fixes their amount, then no case would have ever held that a claim to which the State holds legal title is outside the scope of Section 100. Plainly, that has never been true in the 120-plus years since Section 100 was adopted. *See, e.g., Adams*, 15 So. at 800; *H. Weston Lumber Co.*, 124 Miss. at 626; *Pan American Petroleum Corp.*, 179 Miss. at 863-64; *Stewart*, 178 Miss. at 764; *Parker*, 193 So. at 348.

Third, the Auditor's contention that the settlement agreements liquidated the amount of the unliquidated and disputed claims involved in this case, and in *Microsoft*, is internally inconsistent. On one hand, the Auditor says that the amount of the claim is liquidated because it was conclusively established by the settlement agreements. Meanwhile, on the other hand, he ignores the fact that the agreements expressly call for payment of retained counsel's attorneys' fees to retained counsel, and not the State. The Auditor cannot have it both ways. He is not entitled to pick-and-choose what parts of the settlement agreements should be relied upon and what parts to ignore. The parties never agreed that the attorneys' fees payments were owed to the State. Therefore, it would be inappropriate to ignore those parts of the agreements and thereby bring the underlying claims within the ambit of Section 100.

In summary, the claims against Worldcom in the bankruptcy litigation were not an "obligation" or "liability" under Section 100. The claims were for disputed and unliquidated taxes and always beyond the scope of Section 100 according to this Court's prior interpretations of the Constitution. That dispositive fact distinguishes all of the inapplicable Attorney General opinions cited by the Auditor. That fact also demonstrates why the Auditor's "liquidated-at-the-time-of-settlement" theory is inapplicable. For these reasons, the Court does not need to go any further than the test for "obligation" or "liability" to determine Section 100 has no application to this matter. But, even if Section 100 did apply, as explained below, Worldcom's payment was made to the "proper treasury" in any event.

II. Alternatively, Assuming Section 100 Could Apply, Worldcom Paid Retained Counsel's Fees to a "Proper Treasury."

A. Worldcom's payment of earned fees to retained counsel constituted payment to a "proper treasury."

As to the second issue posed by this Court, even if this case implicated an "obligation" or

"liability" covered by Section 100, Worldcom paid the settlement money into a "proper treasury." The term "proper treasury" simply means that the funds were remitted to a proper recipient. Nothing more is directed by the plain language nor intended. Such an interpretation is consistent with the purpose behind the enactment of Section 100 as discussed by this Court in *Adams v. Fragiacomo*, *supra.* Section 100 was designed to stop the Legislature from passing special bills that forgave debts otherwise due and payable to the State. *Adams*, 15 So. at 800. Consistent with that purpose, the "proper treasury" language mandates that an "obligation" or "liability" can only be extinguished by a full and proper payment.

The suggestion that the "proper treasury" clause requires that all payments must be made initially into a specific public fund, such as the State's general fund, is unsupported both by the language itself and by historical practice that has existed for many decades and been approved repeatedly by this Court. The language merely requires payment into a "*proper*" treasury; it does not require payment into a "*public*" treasury (*e.g.*, an account in the name of the State). Most certainly, the language does not require payment of all funds collected to be paid into the general fund, as suggested by the Auditor. Indeed, to hold otherwise would be to declare unconstitutional numerous other statutes, including the very statute defining "public funds" relied upon by the Auditor. *See* MISS. CODE ANN. § 7-7-1(4) (defining "public funds" in the Auditor's authorizing statutes and providing that "such funds may not be required by law to be deposited in the State Treasury.").

The term "proper" is a term of general reference and was defined by the 1910 edition of *Black's Law Dictionary* as "that which is fit, suitable, adapted, and correct." BLACK'S LAW DICTIONARY 955 (2nd ed. 1910) (copy affixed hereto as Appx. 1). By use of the broad and unspecified term "proper," the Constitution recognizes that there may be multiple "proper" funds

into which specific monies may be deposited, as well as many "improper" funds into which those monies should not be deposited.[8] The fund that is "fit" or "suitable" for the receipt of funds connected with a settlement depends on the use for those funds. In this matter, a fit, and suitable fund to which Worldcom could pay retained counsel's earned fees, included, but was not limited to, payment to retained counsel directly or to accounts referenced in Section 7-5-7. *See* MISS. CODE ANN. § 7-5-7 ("The 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."). *See also* MISS. CODE ANN. § 7-5-61 (indicating that the Attorney General's contingent fund is not exclusively an appropriated fund by the use of the phrase "from whatever source, including appropriations by the legislature, the contingent fund, and other funds").[9]

In any event, the Auditor ignores decades of history in suggesting that the payment of contingent fees directly to lawyers is an illicit practice used by the Attorney General in recent years. On the contrary, the historic practice from the earliest days of Section 100 has been to permit the deduction of contingent fees from recoveries **before** payment of the balance over to the State.[10] In

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[8] Indeed, the term "proper" is similarly used broadly in many other instances throughout the Constitution. *See, e.g.*, MISS. CONST., art. 4, § 81 ("proper authority"); MISS. CONST., art. 5, § 121 (adjournment of legislature until time thought "proper"); MISS. CONST., art. 5, § 125 (appointment of "proper persons"); MISS. CONST., art. 10, § 224 ("proper officers"); MISS. CONST., art. 11, § 229 ("proper board or boards").

[9] The laundry list of statutes cited by the Auditor on page 14 of his supplemental briefs in both the *Microsoft* appeal and this case supports this very conclusion. When the Legislature intends for a particular manner of collection and payment to apply, it knows how to say so. With respect to the Attorney General, by providing a broad range of sources of compensation in Section 7-5-7, the obvious implication is that the Legislature has never intended to require the Attorney General's contingency fee counsel to be constrained in the manner suggested by the Auditor, *i.e.*, that all settlement funds obtained from the State's litigation must go to the general fund.

[10] Mississippi Rule of Professional Conduct 1.5 specifically states that a contingent fee agreement "shall accrue to the lawyer in the event of settlement, trial or appeal...." The Rules further recognize a lawyer may take a proprietary interest in a client's cause of action for a contingency fee in a civil action. MISS. R. PROF. CONDUCT 1.8(j).

1892, only two years after the adoption of Section 100, the Legislature passed a law authorizing the State Revenue Agent to retain a twenty percent contingent fee for all taxes collected. *See* CODES, 1892, § 4199 (copy affixed hereto as Appx. 2).[11] Surely the Legislature at that time was familiar with Section 100 and did not enact an unconstitutional law. In fact, in the *Pan American Petroleum* and *H. Weston Lumber* cases, discussed above, this Court referenced this statutorily authorized practice in the context of a Section 100 challenge and did not, *sua sponte* or otherwise, question the constitutionality of the matter. *See Pan American Petroleum Corp.*, 179 Miss. 847, 175 So. 185 (1927); *H. Weston Lumber Co.*, 124 Miss. 606, 87 So. 120 (1921).

Moreover, as this Court explained in 1926, the State Revenue Agent often hired private attorneys and paid those private attorneys a contingent fee out directly of the recovered funds. *Miller v. Johnson*, 144 Miss. 201, 221-23, 109 So. 716 (1926) (holding that the then-current Revenue Agent had to honor a private attorney's contingent fee contract made by the former Revenue Agent). In another case, also decided in 1926, this Court explained that the Revenue Agent would collect the tax, deduct twenty percent, and then pay the balance over to the State. *Robertson v. Miller*, 144 Miss. 614, 619, 109 So. 900 (1926), *rev'd on other grounds*, 276 U.S. 174 (1928).[12] Specifically, this Court recognized that "[t]he twenty per cent commission for the fees due the state revenue agent

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[11] It should also be noted that, unlike the Attorney General, the State Revenue Agent was not a constitutional officer and possessed no common law authority. As a creature of statute, the State Revenue Agent's authority must be explicitly granted by statute. In contrast, the Attorney General is a constitutional officer who retains common law authority unless otherwise explicitly limited by statute. *See State v. Warren*, 180 So. 2d 293, 300 (Miss. 1965).

[12] On appeal, the United States Supreme Court did not address the procedure by which the State Revenue Agent deducted his twenty percent before remitting the balance to the State. Instead, on a matter that may be of concern in this case as well, the Supreme Court held that the Mississippi Legislature could not alter the State Revenue Agent's compensation for services rendered by subsequent statute without violating the contracts clause of the United States Constitution. 276 U.S. at 179. Similarly, with respect to the Worldcom case, if the Auditor or the Legislature inappropriately attempts to alter retained counsel's compensation after the performance of the contract, then a violation of the contracts clause would be an issue.

for making such collections were deducted by him *before* said taxes were paid into the *proper treasury*." *Id.* (emphasis added). This Court's statement in *Miller* that, even when the notion of "proper treasury" is relevant, contingent fees are deducted "before said taxes were paid into the proper treasury" is clearly relevant to the matter at hand.

Additionally, in 1927, Section 9125 was added to the Mississippi Code. *See* HEMINGWAY'S CODE 1927, § 9125 (copy affixed hereto as Appx. 3). It provided that the Revenue Agent could use his twenty percent commission to pay expenses and "attorneys' fees," and retain $5000 for his annual salary as well as $5000 for any deputy, and "the balance of such commissions he shall pay into the state treasury." *Id.* Never once since then has this Court suggested that the practice of paying private attorneys' fees out of a recovery and then remitting the balance to the State violated the "proper treasury" limitation of Section 100.

Last, but not least, this Court's reasoning and holding in *Pursue Energy v. Mississippi State Tax Commission*, also supports the conclusion that Worldcom's payment of retained counsel's fees was made to a "proper treasury." 816 So. 2d 385 (Miss. 2002). Like this case, *Pursue Energy* involved complex unliquidated and disputed tax claims.[13] Also, just as the Auditor is claiming in this case, the plaintiff (Pursue Energy) sought to invalidate a retention agreement between the Attorney General and retained counsel. *Id.* at 390. This Court rejected that argument and expressly held that Miss. Code Ann. § 7-5-7 "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.* at 391. Presumably due to the nature of the tax claims and the clear meaning of

[13] In his supplemental briefs at page 12, the Auditor admits *Pursue Energy* involved disputed and unliquidated claims. That fact is also confirmed by published federal court decisions describing the nature of the disputed tax claims at issue in the case. *See Pursue Energy Corp. v. Miss. State Tax Comm'n*, 338 B.R. 283, 285-86 (S.D. Miss. 2005); *In re Pursue Energy Corp.*, 379 B.R. 100, 101-05 (S.D. Miss. 2006).

Sections 7-5-5 and 7-5-7 discussed by the Court, and rightfully so, the opinion did not discuss Section 100 or a "proper treasury" required for payments collected in that case.

Pursue Energy did not hold that Section 100 applied to the tax claims in that case, and did not hold that a legislative appropriation is required in every instance where the Attorney General retains contingency fee attorneys. Nevertheless, in this case, the Auditor has persistently contended that every contingency fee case requires a legislative appropriation because the attorneys in *Pursue Energy* had an agreement with the Attorney General to seek an appropriation for their attorneys' fees rather than having the fees paid from tax monies they recovered. *Id.* at 387. That argument grossly misconstrues the reasons why *Pursue Energy* rejected the same contentions the Auditor has made in this case. The purpose of the *Pursue Energy* appropriation agreement was to ensure that the State received full value for the tax claims asserted, that is, retained counsel were not to be "paid out of any tax monies recovered." *Id.* The undisputed facts in this case prove the Worldcom settlement also achieved that same goal. Retained counsel negotiated their fee with Worldcom after the company agreed to pay the State all the tax money due, plus interest. [*See* Affidavit of Jim Hood at ¶¶ 7-9, C.P. 1304-07]. If retained counsel had been compensated otherwise, that would have directly or indirectly come out of the State's recovery. Retained counsel's arrangement, while different from the one employed in *Pursue Energy*, achieved the same result. Meanwhile, it did not offend Section 100, or Sections 7-5-5 and 7-5-7, and the State received the full benefit to which it was entitled from Worldcom.

B. Other jurisdictions have consistently held that contingent fee counsel are entitled to their fees without legislative appropriations.

If this Court determines that Section 100 applies to the Worldcom settlement, then the consistent holdings of other courts around the country addressing the same issues presented here are

another reason Worldcom's payment of fees to retained counsel was made to a "proper treasury." The sole premise of the Auditor's newfound "proper treasury" argument is that the State's general fund is the only "proper treasury" because the Legislature "holds the purse strings." That is just another way of making the same "appropriations-only" argument that did not persuade the courts in other jurisdictions to find contingency fee payments must be appropriated in similar cases. That argument should not persuade this Court to find in favor of the Auditor in this case either. This Court should not become the only court in the nation to adopt the illogical basis and prejudicial results of such an argument.

While the Auditor has consistently avoided discussion of the reasoned and insightful opinions and actual holdings of our sister courts, they are relevant to any Section 100 "proper treasury" inquiry for at least two reasons. First, there is no doubt that the law of every state requires funds recovered by an attorney general to be deposited into a "proper treasury" as opposed to an "improper treasury." As the cases cited in the Attorney General's response brief explain, the contingency fees due to retained counsel are properly and lawfully paid *prior* to depositing the net recovery into the state's treasury and do not require legislative appropriation. Second, these sister courts also have explicitly addressed portions of their state law which are materially indistinguishable from Section 100. For example, in *State v. Hagerty*, 580 N.W. 2d 139 (N.D. 1988), an asbestos manufacturer challenged the North Dakota Attorney General's retention of outside lawyers under a contingency fee arrangement. The manufacturer contended the arrangement violated North Dakota's constitutional requirement that public funds must be paid into the state treasury and could only be disbursed by legislative appropriation. *Id.* at 143. The North Dakota Supreme Court rejected that argument, and all of the other statutory and constitutional grounds urged by the manufacturer. *Id.*

at 144-45. Contingent fee counsel had an equitable right to their contingency fee payments. *Id.*[14] Therefore, counsel were properly paid out of funds recovered without those funds first being deposited in the state treasury.

As another example, in *State v. Lead Industries Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008), the Rhode Island Supreme Court considered and rejected the precise argument advanced by the Auditor in this case. Lead paint defendants contended that a battery of statutes providing state revenues must be paid to the general treasury required the Rhode Island Attorney General to pay all settlement money into the State's General Treasury before contingent fee counsel could be compensated. *Id.* at 477. Specifically, the defendants complained that

> ...contingent fee agreements would permit the Attorney General to circumvent the statutory requirement of payment to the General Treasury because such agreements would provide that a percentage of any damages would have to be paid to outside counsel before the balance would be passed on to the General Treasury. As defendants phrased their argument, officers of the state, including the Attorney General, "are not permitted to decide for themselves to divert the State's receipts...."

Id. at 478. The Rhode Island Supreme Court found the defendants' argument to be "overly myopic." *Id.* The court held that, due to the equitable right held by contingent fee counsel to their fees, "[a]fter the appropriate fee has been paid to contingent fee counsel, the net amount would constitute what defendants characterize as 'the State's receipts' – and that amount would be payable to the General Treasury." *Id.* Furthermore, the result was justified because – just as is the case here in Mississippi – deference was due the Attorney General on account of his status as a constitutional officer:

> [t]he fact that, in Rhode Island, the Attorney General is a constitutional officer

[14] Mississippi law likewise recognizes attorneys retained on a contingency basis retain an equitable right to settlement proceeds from the outset of the case. *See Poole v. Gwin*, 792 So. 2d 987, 990 (Miss. 2001). With regard to the fees Worldcom paid to retained counsel, just as the court found dispositive in *Hagerty*, the attorneys had (and continue to have) an equitable right to those proceeds under Mississippi law. For that reason, the Auditor's argument on pages 3-4 of his supplemental brief contending that the State had the exclusive right to all the money paid by Worldcom to settle the case is misplaced.

> militates against any suggestion that, in a contingent fee situation, the gross amount of damages recovered must be deposited in the General Treasury with the proper contingent fee to be paid only thereafter upon a vote of appropriation in the General Assembly. Such a regime would accord insufficient respect to the Attorney General's status as a constitutional officer.

Id. at n. 56. *See also People v. Phillip Morris, Inc.*, 759 N.E. 2d 906, 913-14 (Ill. 2001) (settlement funds do not become "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) (fees and costs due special assistant attorneys general not required to be deposited into state treasury); *Philip Morris Inc. v. Glendening*, 709 A.2d 1230, 1240-41 (Md. 1998) (gross recovery is not state money until contingency fees and expenses deducted).

Indeed, even the case relied heavily upon by the Auditor, *Nixon v. American Tobacco Company, Incorporated*, rejected the claim that it was improper for contingent fee counsel to be paid directly rather than through a legislative appropriation. The *Nixon* court concluded that the

> statute that 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. In the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type of fee arrangement with his special assistant attorneys general.

34 S.W. 3d 122, 136 (Mo. 2000) (emphasis added).[15] Just like every other case squarely addressing

[15] During oral argument in the *Microsoft* appeal, the Auditor's counsel misspoke in the heat of his rebuttal when claiming that the *Nixon* court held that all funds recovered belonged to the state and that the attorneys fees could only be paid by appropriation. His counsel was also mistaken when he stated that *Nixon* required legislative approval of a previously performed contingency fee contract or that the fees in *Nixon* had already been paid. In actuality, the court concluded:

> [i]n the absence of prior legislative provisions to the contrary, an agreement by the attorney general on behalf of the State for compensation of special assistant attorneys general ordinarily would not be subject to legislative restrictions or change after it has been entered and after the services have begun. But in this unusual case, the parties themselves, and the special assistant attorney general, have left open the possibility that the provisions could be changed. The attorneys have in fact introduced a new attorney's

the issue, *Nixon* held settlement money due outside counsel did not have to be routed through the state's treasury. At a very minimum, if Section 100 applies and there is any concern over what was the "proper treasury" for retained counsel's payment, then this Court's ultimate holding should be made consistent with the other jurisdictions that have faced the same issue. Payment was properly made to retained counsel without the need for distribution through the state's general fund.

C. The suggestion that Worldcom's payment to retained counsel should have been routed differently is not grounds for reversal.

During oral argument in the *Microsoft* appeal, an alternative suggestion was made that Microsoft's payment to retained counsel should have passed through the Attorney General's trust account as the "proper treasury." Although the Attorney General does not believe the alternative position is correct or applicable to *Microsoft* or this case, even if so, it should not be grounds for reversal of either case.

This Court raised questions regarding transparency of the agreements in *Microsoft* and the agreements at issue in this case by implication. To that end, it should be recognized that the Attorney General is deeply committed to ensuring transparency and oversight. Just like in *Microsoft*, every aspect of the Worldcom matter was open to public scrutiny. The Attorney General's original Retention Agreement with retained counsel was posted on the Attorney General's website many years ago. Additionally, the Settlement Agreement, with its provision for direct payment to retained counsel was: (1) announced in a press release by the Attorney General; (2) publicly filed in the

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> fee arrangement as part of the settlement. The parties also negotiated a deadline of December 31, 2001, for achieving state specific finality. We adopt the parties' deadline as the deadline for the legislature to take action upon this fee arrangement. If the General Assembly does not enact legislation by December 31, 2001, the settlement provisions as to attorneys fees as currently embodied in the MSA will be deemed final.

Nixon, 34 S.W. 3d at 139.

bankruptcy court; (3) approved by the bankruptcy court in all respects; and (4) reviewed by the Auditor three times. [*See* October 5, 2005 Draft report, C.P. 1344-56; November 2, 2005 Draft Report, C.P. 1357-67; October 19, 2006 Performance Audit, C.P. 1388-1402].

While the Attorney General strenuously maintains that there was no procedural flaw in Worldcom's allocation of attorneys' fees and expenses directly to retained counsel (as expressly approved by the bankruptcy court, and, as found by the trial court), if there was any flaw, it was harmless. *See, e.g., Century 21 Deep South Properties, Ltd. v. Keys*, 652 So. 2d 707, 716 (Miss.1995) (explaining "[t]here is no reversible error flowing from this issue because there is no harm to undo."); *Phillips v. Illinois Cent. R. Co.* 797 So. 2d 231, 238 (Miss. Ct. App. 2000) (explaining error may be found harmless if it did not affect the ultimate judgment of the court). Furthermore, at least one court from another jurisdiction squarely addressing the attorney general's payment of contingency fees to outside counsel has explained: "[i]t is all a matter of bookkeeping, and an honest creditor is not to be denied, simply because the payment of his claim may somewhat upset the treasurer's books." *Lead Industries, Ass'n, Inc.*, 951 A.2d at 479.

There is no "harm to undo" in this case because the fees were approved in the bankruptcy court, and were paid to the proper attorneys pursuant to a lawful and statutorily authorized contract. If the funds at issue should have been paid by Worldcom to the Attorney General's trust account and then to the retained counsel, that procedure will be employed in future settlements. Meanwhile, for purposes of this suit and the climate in which it is brought, it should be not forgotten that nobody disputes that the fees were reasonable, nor is there any dispute that the attorneys' fees were paid to attorneys that the Attorney General contracted with pursuant to statutory authority and lawfully appointed as Special Assistant Attorneys General. Accordingly, this Court should not disturb the decision of the court below rejecting the Auditor's attack on the payment and distribution of

attorneys' fees to retained counsel.

D. The Auditor's interpretation of Section 100 would require the Court to encroach upon a purely legislative function.

Additionally, a final reason this Court should not stretch Section 100 to reach the Auditor's desired short-term result is that it would have the long-term ramification of forever redefining and freezing state policy on a matter properly entrusted by the Constitution to the Legislature and the Attorney General.

If a newfound interpretation of Section 100 is inappropriately employed to strike down the Worldcom settlement, this Court would be declaring that – as a matter of constitutional law for all time, and contrary to Sections 7-5-5 and 7-5-7 – the Attorney General does not have authority to hire and pay private counsel on a contingent fee basis without the need for approval or appropriation by the Legislature. In effect, the Auditor's desired result would forever prohibit the Legislature from implicitly or explicitly permitting the current use of private counsel on a contingency fee basis.

Indeed, the judiciary's use of the Constitution to redefine acts of the legislative branch has the immediate impact of overturning the will of its co-equal and representative body. Not only would the Auditor's proposed result re-write Sections 7-5-5 and 7-5-7, this Court would be doing precisely what the Legislature has declined to do on numerous occasions in the past several years. Minority factions in the Legislature have time-and-time-again attempted to alter Sections 7-5-5 and 7-5-7 to provide a different procedure by which the Attorney General hires and pays outside counsel. Each time, any fundamental change in how the Attorney General handles outside counsel litigation has failed to garner sufficient legislative support.[16]

[16] No such bills providing a different procedure have passed both houses of the Legislature. *See, e.g.*, S.B. 2005, 2011 Regular Session; S.B. 2618, 2011 Regular Session; H.B. 235, 2011 Regular Session; S.B. 2342, 2010 Regular Session; S.B. 3059, 2010 Regular Session; H.B. 276, 2010 Regular Session; S.B. 2718, 2009 Regular Session; H.B. 216, 2009 Regular Session; H.B. 786, Regular Session 2008. The

If the law applying to the Attorney General's retention and payment of outside counsel should change, that decision should be made by the Legislature. In contrast to matters of pure legislative concern, a judicial decision that constitutionally alters operation of a particular statute is likely to be final for all time and forever prohibit the legislature from revisiting the matter. To declare, as the Auditor suggests, that Section 100 of the Constitution forbids the Legislature from prescribing the manner in which the Attorney General hires and pays outside counsel would tie the Legislature's hands and prevent any further consideration of the matter. In short, constitutional pronouncements remove, for practical purposes, an issue from the political and representative field of government. This Court should not usurp the Legislature in this instance under the guise of re-interpreting Section 100.

CONCLUSION

For the reasons stated above, and those explained previously by the Attorney General in his briefs and at oral argument of this matter, the Attorney General respectfully submits the Court should find for the Attorney General in this matter by finding the Circuit Court's ruling that the manner in which retained counsel were compensated under their contingency fee contract was proper and affirming the Circuit Court's judgment below.

THIS the 26th day of September, 2011.

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record of the Office of Audit's efforts and findings in reviewing the Worldcom settlement further underscores the point that this is a political issue requiring resolution, if necessary, by the Legislature. The first two Auditor reports on the Worldcom settlement concluded that the Legislature needed to clarify the Attorney General's authority with respect to contingency fee agreements. [October 5, 2005 Draft Report, C.P. 1344-56; November 2, 2005 Draft Report, C.P. 1357-67]. Many months later, only after the Legislature declined to pass a bill on the subject, after then-Auditor Phil Bryant decided to run for Lieutenant Governor, and even though no new facts had been developed, the Auditor's Office all-of-a-sudden took the position that Section 7-5-7 barred Worldcom's direct payment of retained counsel's earned fees. [October 19, 2006 Performance Audit, C.P. 1388-1402].

Respectfully submitted,

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PRONOTARY. First notary. See PROTHONOTARY.

PRONOUNCE. To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to "pronounce" judgment or a sentence. See Ex parte Crawford, 36 Tex. Cr. R. 180, 36 S. W. 92.

PRONUNCIATION. L. Fr. A sentence or decree. Kelham.

PRONURUS. Lat. In the civil [illegible] The wife of a grandson or great-grandson. Dig. 38, 10, 4, 6.

PROOF. Proof, in civil process, is a sufficient reason for the truth of a juridical proposition by which a party seeks either to maintain his own claim or to defeat the claim of another. Whart. Ev. § 1.

Proof is the effect of evidence; the establishment of a fact by evidence. Code Civ. Proc. Cal. § 1824. And see Nevling v. Com., 98 Pa. 328; Tift v. Jones, 77 Ga. 181, 3 S. E. 399; Powell v. State, 101 Ga. 9, 29 S. E. 309, 65 Am. St. Rep. 277; Jastrzembski v. Marxhausen, 120 Mich. 677, 79 N. W. 935.

Ayliffe defines "judicial proof" to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner by fit and proper arguments, and likewise by all other legal methods—*First*, by fit and proper arguments, such as conjectures, presumptions, *indicia*, and other adminicular ways and means; *secondly*, by legal methods, or methods according to law, such as witnesses, public instruments, and the like. Ayl. Par. 442.

For the distinction between "proof," "evidence," "belief," and "testimony," see EVIDENCE.

—**Burden of proof.** See that title.—**Full proof.** See FULL.—**Half proof.** See HALF.—**Preliminary proof.** See PRELIMINARY.—**Positive proof.** Direct or affirmative proof; that which directly establishes the fact in question; as opposed to *negative* proof, which establishes the fact by showing that its opposite is not or cannot be true. Niles v. Rhodes, 7 Mich. 378; Falkner v. Behr, 75 Ga. 674; Schrack v. McKnight, 84 Pa. 30.—**Proof of debt.** The formal establishment by a creditor of his debt or claim, in some prescribed manner, (as, by his affidavit or otherwise,) as a preliminary to its allowance, along with others, against an estate or property to be divided, such as the estate of a bankrupt or insolvent, a deceased person, or a firm or company in liquidation.—**Proof of will.** A term having the same meaning as "probate," (*q. v.*,) and used interchangeably with it.

PROPATRUUS. Lat. In the civil law. A great-grandfather's brother. Inst. 3, 6, 3; Bract. fol. 68b.

—**Propatruus magnus.** In the civil law. A great-great-uncle.

PROPER. That which is fit, suitable, adapted, and correct. See Knox v. Lee, 12 Wall. 457, 20 L. Ed. 287; Griswold v. Hepburn, 2 Duv. (Ky.) 20; Westfield v. Warren, 8 N. J. Law, 251.

Peculiar; naturally or essentially belonging to a person or thing; not common; appropriate; one's own.

—**Proper feuds.** In feudal law, the original and genuine feuds held by purely military service.—**Proper parties.** A proper party, as distinguished from a necessary party, is one who has an interest in the subject-matter of the litigation, which may be conveniently settled therein; one without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude the rights of all the persons who have any interest in the subject of the litigation. See Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14; Tatum v. Roberts, 59 Minn. 52, 60 N. W. 848.

PROPERTY. Rightful dominion over external objects; ownership; the unrestricted and exclusive right to a thing; the right to dispose of the substance of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it. Mackeld. Rom. Law, § 265.

Property is the highest right a man can have to anything; being used for that right which one has to lands or tenements, goods or chattels, which noway depends on another man's courtesy. Jackson ex dem. Pearson v. Housel, 17 Johns. 281, 283.

A right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition, *from* himself and his successors *per universitatem*, and from all other persons who have a *spes successionis* under any existing concession or disposition, in favor of such person or series of persons as he may choose, with the like capacities and powers as he had himself, and under such conditions as the municipal or particular law allows to be annexed to the dispositions of private persons. Aust. Jur. (Campbell's Ed.) § 1103.

The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. It consists in the free use, enjoyment, and disposal of all a person's acquisitions, without any control or diminution save only by the laws of the land. 1 Bl. Comm. 138; 2 Bl. Comm. 2, 15.

The word is also commonly used to denote any external object over which the right of property is exercised. In this sense it is a very wide term, and includes every class of acquisitions which a man can own or have an interest in. See Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; Lawrence v. Hennessey, 165 Mo. 659, 65 S. W. 717; Boston & L. R. Corp. v. Salem & L. R. Co., 2 Gray (Mass.), 35; National Tel. News Co. v. Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Hamilton v. Rathbone, 175 U. S. 414, 20 Sup. Ct. 155, 44 L. Ed. 219; Stanton v. Lewis, 26 Conn. 449; Wilson v. Ward Lumber Co. (C. C.) 67 Fed. 674.

—**Absolute property.** In respect to chattels personal property is said to be "absolute" where a man has, solely and exclusively, the right and also the occupation of any movable chattels, so

THE ANNOTATED CODE

—OF THE—

GENERAL STATUTE LAWS

—OF—

THE STATE OF MISSISSIPPI,

—PREPARED BY—

R. H. THOMPSON, GEORGE G. DILLARD,
and R. B. CAMPBELL,

—AND—

Reported to and amended and adopted by the Legislature at its Regular Session in 1892.

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CHAPTER 126.

STATE REVENUE AGENT.

4187. Election; term of office.—There shall be a state revenue agent, who shall be elected at the general election in 1895 in the same manner as other state officers, and whose term of office shall be four years and until his successor be appointed and qualified. The present incumbent shall hold office for the term of his appointment.

4188. Temporary appointments.—The governor, upon the expiration of the term of office of the present incumbent, shall appoint a successor, who shall hold his office until a state revenue agent shall be elected and qualified; and in case of vacancy before the election in 1895, the governor shall fill the same by appointment.

4189. Oath and bond.—The state revenue agent shall give bond, with sufficient sureties, to be approved by the governor, in the sum of fifteen thousand dollars, conditioned to faithfully perform the duties of his office and to promptly pay over to the proper parties all moneys collected by him; and he shall take the oath of office prescribed by section two hundred and sixty-eight of the constitution. The bond and oath shall be deposited in the office of the secretary of state. The powers and duties created and imposed by this chapter are vested in the present incumbent.

4190. Powers, etc.—After the expiration of the fiscal year in which the taxes become due and payable, and that, too, whether the taxes were assessed or properly assessed or not, the revenue agent may assess and collect all past-due taxes, whether the same be caused by default of the assessor, tax-collector, or tax-payer; but if the revenue agent institute suit against any person or corporation who has been correctly assessed, and the taxes so assessed paid, he shall be liable on his bond to such person or corporation for all costs and expenses incurred in defending such suits, if the judge will certify that the suit was frivolous, or that there was no ground for the action.

4191. Duties.—It is the duty of the state revenue agent to investigate the books, accounts, and vouchers of all fiscal officers of the state, and of every county, municipality, and levee-board, and to sue for, collect, and pay over all revenue improperly withheld from either; and he has power, and it is his duty, to proceed against all such officers and their sureties by action to recover any such revenue, and it is his duty to proceed, by suit, in the proper court, against all officers, persons, corporations, companies, and associations of persons, for all past-due and unpaid taxes owing to the state, counties, municipalities, and levee boards, whether ad valorem, privilege, license, poll, or other, and whether assessed or properly assessed or not, if the fiscal year in which the same ought to have been paid have expired; and his duty to proceed by suit for the collection of any such taxes arisen whether the failure to pay the taxes originated from the neglect or failure of any officer or board to perform his or its official duty, or from the failure of any person or corporation to fully give in his or its property to the assessor, or at a sufficient valuation, or otherwise. But his right and duty to collect money from a fiscal officer where the delinquency appears by correct open account on the books of the

proper accounting officer, shall only arise after he have given thirty days' notice to the officer to pay over the amount, and his failure to do so.

4192. The same; to make additional assessments.—It is the duty of the state revenue agent, when any person, corporation, property, business, occupation, or calling liable to an ad valorem or privilege tax has escaped or shall escape taxation by reason of not being assessed or of not being demanded, or otherwise, to assess the same as the tax-collector is authorized to do, and to collect and pay over the taxes thereon in like cases. He shall report all additional assessments, in writing, to the tax-collector, whose duty it will be to enter the same on the assessment-roll, in case of an assessment by him, only he shall note that the assessment is made by the state revenue agent. The taxes on all such additional assessments may be recovered by the state revenue agent by action, if not paid within ten days after notice to the party assessed, if he be a resident of the state, or, if a non-resident, within ten days after the date of the assessments; and the proceedings may be against the person or property assessed, or both.

4193. Limitation; notice of assessments, etc.—The state revenue agent shall not assess taxes accruing prior to the year 1886; and in all cases the burden of proof shall be on the agent to show that the property or person was not assessed or properly assessed; and the person assessed or re-assessed shall have ten days' notice, in writing, before bringing suit. But when the revenue agent shall think property which has been assessed and approved by the board of supervisors has been improperly assessed, he shall notify the board of supervisors, and summon the party assessed to appear before it for a rehearing. The board shall hear both parties, and decide the matter of difference, from which either party may appeal.

4194. Suits by.—All suits by the state revenue agent shall be in his own name for the use of the state, county, municipality or levee board interested; and he shall not be liable for costs, and may appeal without bond. Such suits may be tried at any return-term, and shall take precedence of other suits.

4195. Power to examine books.—Full power and authority is given to the state revenue agent to examine and investigate the books, records, papers, and vouchers of all fiscal officers.

4196. To give information of embezzlements.—When the state revenue agent shall have reason to believe that a public officer has embezzled any public funds, he shall notify the governor and the proper district attorney, and shall attend the trial as witness for the state, if necessary.

4197. To bid off land in certain cases.—When land is sold under a judgment or decree in favor of the state revenue agent, and a fair price be not bid for it, he may buy the land for the state at a price not exceeding its assessed value and not more than the amount of the judgment or decree. The agent shall render a full description of the land to the land-commissioner, and the same shall be registered in the land-office and sold as other state lands; and, when sold, the proceeds shall be paid over to the auditor of public accounts, and he shall pay the same over to the parties entitled thereto. The governor, land-commissioner, and attorney-general shall fix the price at which the land shall be sold.

4198. To settle monthly.—The state revenue agent shall settle monthly with the proper officers, and pay over all moneys collected by him; and he shall make a

report to the auditor of public accounts at the end of each fiscal year, giving a full account of all collections by him, and of whom and on whose account collected. For a failure to settle monthly and pay over collections made by him, he shall be removed from office by the governor.

4199. Compensation.—Neither the state nor any county, municipality, or levee board shall be chargeable with any fees or expenses on account of any investigation or suit made or instituted by the state revenue agent; and he shall not receive any salary; but he shall be entitled to retain, as full compensation for his services and expenses, twenty per centum on all amounts collected and paid over by him, and of the purchase-money of all lands bid in for the state by him and sold by the land-commissioner.

4200. Parties to suits by.—In all suits against delinquent tax-payers, the assessor and tax-collector shall be made parties; and if it shall appear that the failure of the tax-payer to properly pay his taxes was caused by any willful default or negligence of the assessor or tax-collector, judgment shall be rendered against the defaulter or defaulters for the amount of compensation of the revenue agent.

4201. Deliver documents to his successor.—The state revenue agent, at the expiration of his term of office, shall deliver to his successor all books, papers, and documents pertaining to the office. The successor shall allow all suits commenced to be conducted in his name; but the person who commenced the suit shall pay all attorney's fees and expenses thereof, and receive the commissions.

CHAPTER 127.

STATE TREASURER.

4202 (237). **Bond.**—The state treasurer shall give bond, payable to the state, in the penalty of one hundred thousand dollars, with three or more sufficient freehold sureties, to be approved by the governor, conditioned according to law, and, when approved, it shall be filed and recorded in the office of the secretary of state.

4203 (238). **Office-hours, book-keeper, clerk, etc.**—The state treasurer shall keep his office at the seat of government, and shall keep the same open on each business day from nine to twelve o'clock in the forenoon and from two to five o'clock in the afternoon in the summer time, and to four o'clock during the remainder of the year; and shall be entitled to a book-keeper and a general clerk to assist him in the discharge of the duties of his office.

4204. Unlawful to enter the treasury at night; time-lock.—It is not lawful for the treasurer or any other person to enter or be in the treasury apartment between sunset and sunrise, except in case of fire or other like urgent necessity; and at five o'clock or sooner in the afternoon in the summer time, and at four o'clock during the remainder of the year, the vaults shall be closed with the time-lock set to open at nine o'clock in the forenoon of the next day, unless it be a Sunday, or other dies non, when it shall be set, if possible, to open at that hour on the next

ANNOTATED MISSISSIPPI CODE

CONTAINING

ALL GENERAL STATUTES OF MISSISSIPPI IN FORCE JANUARY 1, 1927

AND THE

CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF MISSISSIPPI

ALL COMPLETELY ANNOTATED

BY

WILLIAM HEMINGWAY
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IN TWO VOLUMES

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monthly and pay over all collections made by him, he shall be removed from office by the governor. (Laws 1926, ch. 286. In effect March 12, 1926.)

Code 1906, § 4747.

9125. (7066) **Revenue agent and deputies to receive salary of $5,000.00 per annum.**—1. Neither the state nor any county, municipality, drainage district, levee board or other administrative body shall be chargeable with any fees or expenses on account of any investigation or suit made or instituted by the state revenue agent. The revenue agent shall retain twenty per centum of all amounts collected and paid over by him and of the purchase-money of all lands bid in for the state by him and sold by the land commissioner. Out of the twenty per cent. commission allowed by law, to such revenue agent, he shall pay all the expenses incident to the discharge of the duties of his office, and all attorneys' fees, and retain the sum of five thousand dollars ($5,000.00) per annum for his salary, but the compensation of any deputy shall only be paid out of the amounts collected as a result of the services of the said deputy and the said compensation of the deputy shall be at the rate not to exceed $5,000.00 per annum and the balance of such commissions he shall pay into the state treasury and shall make detailed itemized report to each session of the legislature as to the said account. (Laws 1924, ch. 330. In effect April 12, 1924.)

9126. (7066) **Suits and demands made prior to this act not controlled by.**—2. All suits brought and all investigations or demands made by the revenue agent prior to the passage of this act may be prosecuted to final determination, and all expenses incurred in the filing and prosecution of said suits, or in making any such investigation or demand shall be paid by the revenue agent, and all fees and commissions allowed by law at the time of the passage of this act, on account of any such investigations, demands or suits shall be retained by, and as the compensation of the revenue agent in any such proceedings, and any and all such fees or commissions are hereby especially excepted from the operation of section 1 of this act.

All contracts made by and between the revenue agent and his attorneys, agents and employees in and about such pending investigations, demands or suits shall be valid and binding, and are hereby exempted from the operation of section 1 of this act. (Laws 1924, ch. 330. In effect April 12, 1924.)

Code 1906, § 4748.

Code 1892

Where a judgment is obtained by the revenue agent for money and costs and a sum is realized on execution less than the whole, the officers may retain their costs out of the amount collected. This section does not, nor does Code 1906, § 4743 (Hemingway's Code 1927, § 9120), authorize the revenue agent to demand the collection leaving costs unpaid. Adams v. Evans, 74 Miss. 886, 21 So. 921.

The revenue agent is entitled, under this section and Laws 1894, p. 29, to the compensation therein provided where he investigates a defaulting tax collector's accounts and the money is paid to him or some officer entitled to receive it, although no suit is brought by him and although the defalcation is manifested by correct records kept by the defaulter. Adams v. Bolivar County, 75 Miss. 154, 21 So. 608.

Under Laws 1894, p. 29, the state revenue agent is entitled to the compensation therein provided where he makes investigations in consequence of which money is paid over by a defaulting tax collector, whether suit is brought or not and though the defalcation was evidenced by correct accounts on the official records kept by the defaulter. Adams v. Bolivar County, 75 Miss. 154, 21 So. 608.