

**IN THE SUPREME COURT FOR 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,
STATE OF MISSISSIPPI, LUNDY & DAVIS, LLP
and AYLSTOCK, WITKIN, KREIS & OVERHOLTZ**

APPELLEES

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

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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This the 10 day of November, 2010

Respectfully submitted,

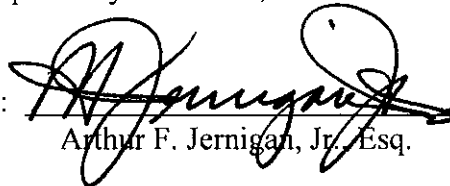
By: 
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STATEMENT OF ISSUES

- 1) Whether the Attorney General's authority regarding the source of payment for special counsel hired by his office has been expressly limited by Miss. Code Ann. § 7-5-7?
- 2) Whether the Langston Firm's negotiation and receipt of \$14 million in the MCI/Worldcom Settlement Agreement was illegal under Miss. Code Ann. § 7-5-7, and therefore, void as a matter of public policy?
- 3) Whether the Retention Agreement with the Langston Firm was illegal for failure to include any mechanism for legislative approval of the compensation provided therein?
- 4) Whether the case of *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002) prohibited the diversion of funds directly to special counsel to the Attorney General from the opposing party during a settlement with the State of Mississippi?
- 5) Whether the \$14 million obtained by the Langston Firm as a result of the State of Mississippi's settlement with MCI/Worldcom constituted public funds?
- 6) Whether outside special counsel may negotiate directly with an opposing party during settlement discussions with the State of Mississippi in order to bypass the requirements of Miss. Code Ann. § 7-5-7?
- 7) Whether the State Auditor has the right and obligation to seek the return of misspent public funds pursuant to Miss. Code Ann. § 7-7-211(g)?
- 8) Whether the State Auditor waived any right to seek the return of public funds obtained by the Langston firm in a cause of action in bankruptcy court in New York to which the State Auditor was not made a party?
- 9) Whether the payment of funds to special counsel to the Attorney General directly from the opposing party in a settlement with the taxpayers of the State of Mississippi was a violation of the Mississippi Constitution and the separation of powers doctrine?
- 10) Whether the reasonableness of the fees paid to special counsel is an inherent issue to be determined by the Mississippi Legislature during the appropriations process mandated by Miss. Code Ann. § 7-5-7?

STATEMENT OF CASE AND FACTS

On July 21, 2002, Worldcom, Inc. and its related entities (hereinafter collectively “MCI/Worldcom”), filed voluntary petitions pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. The Mississippi State Tax Commission (hereinafter “the State Tax Commission”) filed proofs of claim seeking more than \$1 billion in unpaid taxes, penalties and interest from MCI/Worldcom. (C.P. 7-8)

On September 29, 2004, the Attorney General for the State of Mississippi, Jim Hood, retained the Langston Firm, Joseph C. Langston and Timothy R. Balducci (hereinafter collectively “the Langston Firm”), as special counsel to assist with the proof of claim on behalf of the State Tax Commission. (R.E. 1, C.P. 188)¹ On May 6, 2005, after filing the proof of claim, the Langston Firm and the Attorney General settled the State Tax Commission’s \$1 billion claim without trial, entering into a Settlement Agreement and Release (hereinafter “the Settlement Agreement”). (R.E. 2, C.P. 194) Pursuant to the Settlement Agreement, MCI/Worldcom agreed to pay the State of Mississippi a total of \$118,200,000.00 and relinquish some of its real property in downtown Jackson, Mississippi for the release and satisfaction of all tax claims. As to payment of these funds, the Settlement Agreement provided that MCI/Worldcom would transfer \$100,000,000.00 to the State of Mississippi, \$14,000,000.00 directly to the Langston Firm, and \$4,200,000.00 to the Children’s Justice Center of Mississippi. (C.P. 206)

On November 20, 2006 and March 12, 2007, pursuant to Mississippi Code Ann. § 7-7-211(g), the State Auditor made demand on the Langston Firm for return of the \$14,000,000.00 transferred directly to it for violating Mississippi law requiring special counsel to be paid from funds

¹ Record Excerpts are cited as “R.E. _”. The Clerk’s Papers are cited as “C.P. _”.

appropriated by the Mississippi Legislature. (C.P. 223) Consistent with this position, on October 19, 2006, the State Auditor made demand on the Justice Center for return of public funds to the State of Mississippi. On January 26, 2007, the Justice Center complied with the Auditor's demand and returned the funds received by it to the State general fund for appropriation by the Legislature.

The Langston Firm responded to the State Auditor's demand by instituting a separate cause of action in the Bankruptcy Court in New York (hereinafter "the Adversary Proceeding"), seeking a declaratory judgment that the State Auditor was precluded by principles of estoppel and waiver from challenging the court approved settlement or from proceeding with this cause of action. Thus, the State Auditor was forced by the Langston Firm to hire counsel and make an appearance in the Adversary Proceeding in New York.

On December 21, 2007, the State Auditor moved for abstention (the "Abstention Motion") in the Adversary Proceeding, requesting that the dispute be resolved through the current proceeding. On April 2, 2008, the United States Bankruptcy Court for the Southern District of New York granted the State Auditor's Abstention Motion, holding that the particular issues raised and disputed over the allocation of attorneys fees and legislative appropriation under state law were not part of the settlement process in the New York Bankruptcy Court, and therefore, needed to be resolved in this lawsuit in Mississippi. (R.E. 3, C.P. 736-44)

On November 17, 2008, the United States District Court for the Southern District of New York affirmed the Abstention Order on appeal, agreeing that the dispute over the funds obtained by the Langston Firm from the State's settlement should be resolved in the present cause of action in Mississippi. (R.E. 4, C.P. 1116-26)

While the Adversary Proceeding in New York was being resolved, the Langston Firm removed the current cause of action to the United States District Court for the Southern District of Mississippi. On July 8, 2008, the District Court remanded this cause of action, concluding that this cause of action was purely a state law dispute that did not affect the prior bankruptcy resolution, resolution of the State's claim against MCI/Worldcom or any other bankruptcy matters. (R.E. 5, C.P. 147)

On August 5, 2008, the State Auditor filed his Motion for Summary Judgment in the current cause of action. (C.P. 167) On September 8, 2008, the Langston Firm responded with its own Cross-Motion for Summary Judgment. (C.P. 269) On December 4, 2008, the Attorney General filed an Entry of Appearance in this cause. (C.P. 1147) On January 15, 2009, the Attorney General filed a Motion to Realign the Parties, arguing that the State of Mississippi was not represented and was a separate entity from the State Auditor. (C.P. 1166) On April 16, 2009, the circuit court realigned the parties, finding that the State of Mississippi was a separate entity and should be joined as a party defendant in this cause. (C.P. 1285)

On April 9, 2009, a hearing on the State Auditor's Motion for Summary Judgment was held in circuit court. (Tr. 15-72)² On April 24, 2009, the Attorney General submitted his own Motion for Summary Judgment in this cause, without any hearing subsequently held on that motion. (C.P. 1289) On February 11, 2010, the Circuit Court of Hinds County, Mississippi granted the Attorney General's Motion for Summary Judgment and Langston Firm's Cross-Motion for Summary Judgment and denied the State Auditor's Motion for Summary Judgment. (R.E. 6, 7, 8; C.P. 1711,

² References to the hearing transcript are cited as "Tr. __" The transcript may be found at Volume 13 of the Clerk's Papers.

1712, 1716) In its ruling, the Circuit Court held that the funds negotiated by the Langston Firm during the State's settlement discussions were not public funds and that the State Auditor had waived any right to seek return of the funds obtained by the Langston Firm through the MCI/Worldcom bankruptcy proceeding. (C.P. 1712-15)

On February 26, 2010, the State Auditor filed his Notice of Appeal. (C.P. 1717) As will be demonstrated herein, all \$118,200,000.00 of the settlement funds obtained as the result of the State of Mississippi's settlement with MCI/Worldcom were public funds, including the \$14,000,000.00 transferred to the Langston Firm, and should have been tendered to the State of Mississippi which was the real party litigant in the MCI/Worldcom proceeding. Pursuant to Miss. Code Ann. § 7-5-7, special counsel appointed by the Attorney General must be subsequently paid from funds appropriated by the Legislature. Accordingly, the decision of the Circuit Court of Hinds County, Mississippi should be REVERSED and RENDERED.

SUMMARY OF THE ARGUMENT

Mississippi Code Ann. § 7-5-7 provides that private attorneys hired as special counsel to the Attorney General "shall be paid out of the attorney general's contingent fund, or out of any other funds appropriated to the attorney general's office." There is no dispute in this case that special counsel hired to assist the State Tax Commission with claims against MCI/Worldcom were not paid from the attorney general's contingent fund or other legislative appropriation. The Langston Firm instead arranged for the transfer of \$14 million of the State's settlement funds directly to itself during settlement negotiations. Strict interpretation of Mississippi Code Ann. § 7-5-7 prohibited their diversion of these funds without legislative oversight or appropriation.

Illegal provisions of a contract cannot be enforced as a matter of public policy. The provision of the Settlement Agreement directing that \$14 million of settlement funds be transferred directly to the Langston Firm was prohibited by Miss. Code Ann. § 7-5-7, and therefore, void as a matter of public policy. In this same respect, the Retention Agreement's failure to require that compensation of special outside counsel be from legislative appropriation is fatal to it as well.

The Mississippi Supreme Court already resolved this issue in favor of the State Auditor's position in *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002). In reaching that decision, the Mississippi Supreme Court relied upon the sworn testimony of the Attorney General who explained that the proper legal procedure for compensating private special counsel requires that all settlement funds negotiated for and on behalf of the State of Mississippi be tendered to the State followed by special counsel's application to the Legislature for appropriation of fees. Special counsel in *Pursue Energy* expressly modified their retention agreements to provide for legislative review so as to pass the scrutiny of the Mississippi Supreme Court under Miss. Code. Ann. § 7-5-7.

The lower court expressly agreed to the interpretation of Miss. Code Ann. § 7-5-7 asserted by the State Auditor, but concluded that the disputed funds obtained by the Langston Firm were not public since they were negotiated and transferred directly from the opposing party. Despite the mechanics of the settlement payments, all funds were tendered as the result of the settlement of delinquent taxes owed to the State of Mississippi. The means by which the State of Mississippi's attorneys arranged for their compensation was merely an elusive shell game designed to bypass the legislative safeguards of Miss. Code Ann. § 7-5-7.

There was no waiver of claims by the State Auditor who has the independent statutory authority and duty to seek return of misspent public funds pursuant to Miss. Code Ann. § 7-7-211(g). The United States Bankruptcy Court for the Southern District of New York which approved the settlement, the United States District Court for the Southern District Court of New York which affirmed, and the United States District Court for the Southern District of Mississippi which remanded this cause of action back to state court all held that the State Auditor did not waive his ability to litigate the issues raised in this lawsuit. The circuit court also held in its realignment of the parties that the State Auditor was a separate entity from the State of Mississippi. Accordingly, the State Auditor did not waive his authority to contest the legality of the disputed payments under Miss. Code Ann. § 7-7-211(g).

Strict interpretation of Miss. Code Ann. § 7-5-7 is consistent with the constitutional right and duty of the legislative branch of government to control the public treasury. The reasonableness of fees paid to special counsel is an inherent issue to be determined by the Mississippi Legislature during the appropriations process mandated by Miss. Code Ann. § 7-5-7. Accordingly, the decision of the Circuit Court of Hinds County, Mississippi should be REVERSED and RENDERED.

ARGUMENT

Standard of Review

Judicial review of the applicability and effect of statutory law first requires a determination of whether the statute in question is ambiguous. *Mississippi Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss. 1979). Where the language used by the legislature in a statute is plain and unambiguous and conveys a clear directive, there is no occasion to resort to rules of statutory construction. *Miss Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss. 1979); *Forman v. Carter*, 269 So.2d 865 (Miss.

1972); *State v. Heard*, 246 Miss. 774, 151 So.2d 417 (1963); *Harrison County School District v. Long Beach School District* 700 So. 2d 286, 288-89 (Miss. 1997). Whether or not there is ambiguity, the ultimate guiding factor in the interpretation of a statute is to discern and give effect to legislative intent. *Anderson v. Lambert*, 494 So. 2d 270, 372 (Miss. 1986). It is a fundamental rule of statutory construction in Mississippi that use of the word “shall” establishes an absolute requirement under the applicable statute. *Division of Medicaid v. Mississippi Independent Pharmacies Ass’n*, 20 So. 3d 1236, 1239 (Miss. 2009). Statutory interpretation and other questions of law are reviewed *de novo* by the Mississippi Supreme Court. *Powe v. Byrd*, 892 So.2d 223, 227 (Miss. 2004); *Arceo v. Tolliver*, 19 So. 3d 67, 70 (Miss. 2009); *Sheppard v. Miss. State Highway Patrol*, 693 So.2d 1326, 1328 (Miss. 1997).

I. Strict interpretation of Miss. Code Ann. § 7-5-7 prohibited the diversion of \$14 million to the Langston Firm from the State of Mississippi’s settlement with MCI/Worldcom without legislative approval.

Mississippi Code Ann. § 7-5-7 provides the following with regard to the employment and payment of special counsel by the Attorney General:

§ 7-5-7. Special counsel and investigators.

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.

The 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 or before any federal commission or agency in which the state is a party or has an interest.

The 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.

The attorney general may also employ special investigators on a per diem or salary basis, to be agreed upon at the time of employment, for the purpose of interviewing witnesses, ascertaining facts, or rendering any other services that may be needed by the attorney general in the preparation for and prosecution of suits by or against the state of Mississippi, or in suits in which the attorney general is participating on account of same being of statewide interest.

The attorney general may pay travel and other expenses of employees and appointees made hereunder in the same manner and amount as authorized by law for the payment of travel and expenses of state employees and officials.

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.***

(emphasis added).

The 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. In its negotiation of the Settlement Agreement between MCI/Worldcom and the Tax Commission, the Langston Firm arranged for its receipt of \$14,000,000.00 directly from MCI/WorldCom, instead of seeking payment of its legal fees from the Attorney General's contingent fund or any other funds appropriated or approved by the Mississippi legislature. (C.P. 206) It remains undisputed that the \$14,000,000.00 ultimately obtained by the Langston Firm for its legal work was not from the Attorney General's contingent fund nor from any funds appropriated by the Legislature to the Attorney General's office.

It is a fundamental and constitutional principal of law that while the Attorney General's Office has general authority to pursue litigation of behalf of the State of Mississippi, it must yield to any express statutory limitations on that authority. *Frazier v. State ex rel. Pittman*, 504 So. 2d 675, 687-90 (Miss. 1987) ("all public officers, including the Attorney General, are subordinate to the

laws of this State”); *State v. Warren*, 180 So. 2d 293, 300 (Miss. 1965)(Attorney General clothed with common law powers “except insofar as they have been restricted or modified by *statute* or the State Constitution”). Here, the Attorney General’s authority regarding the final compensation of outside counsel is one of those aspects that has been expressly limited by statute. Any other holding ignores an entire section of Miss. Code Ann. § 7-5-7. *See Davis v. Miller*, 32 So. 2d 871 (Miss. 1940)(court cannot ascribe meaning to statute that renders part of statute meaningless).

Where the language used by the legislature in a statute is plain and unambiguous and conveys a clear directive, it must be strictly construed. *Miss Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss. 1979); *Forman v. Carter*, 269 So.2d 865 (Miss. 1972); *State v. Heard*, 246 Miss. 774, 151 So.2d 417 (1963); *Harrison County School District v. Long Beach School District* 700 So. 2d 286, 288-89 (Miss. 1997). Pursuant to the plain and unambiguous terms of Mississippi Code Ann. § 7-5-7, compensation of these special assistants “shall” be paid directly from the attorney general’s contingent fund or out of funds appropriated to his office. It is a fundamental rule of statutory interpretation in Mississippi that “shall” means absolutely mandatory. *Franklin v. Franklin*, 858 So. 2d 110, 115 (Miss. 2003). Accordingly, strict interpretation of Miss. Code Ann. § 7-5-7 requires reversal of the circuit court decision and the return of these funds to the State of Mississippi for appropriation.

II. Illegal contract provisions contained in the MCI/Worldcom Settlement Agreement and Retention Agreement are void as a matter of public policy.

Illegal provisions of a contract cannot be enforced as a matter of public policy. It is a principal of public policy that no court will lend its aid to a litigant who bases his cause on an illegal act. *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 484 (Miss. 2006); *Morrissey v. Balogna*, 123 So. 2d 537 (Miss. 1960)(court will not aid litigant whose actions are in violation of statute); *Lowenberg*

v. *Klein*, 87 So. 653, 654-55 (1921)(contract provisions in violation of state or federal statute will not be enforced). As to portions of a contract that violate state or federal statute, courts will not enforce those provisions “but will leave the parties where found, -insofar as any illegal items or portions are concerned.” *Chas. Weaver & Co. v. Phares*, 188 So. 12, 13 (Miss. 1939); see *Attaché v. Golden*, 133 A.D. 2d 596, 519 N.Y.S.2d 702 (2nd Dept. 1987)(Where agreement consists in part of unlawful objective and in part of lawful objectives, court may sever illegal aspects and enforce legal ones, so long as illegal aspects are incidental and not main objective of agreement); *Kidder Peabody v. IAN International*, 28 F. Supp. 2d 126, 139 (S.D.N.Y. 1998)(conclusion that portion of contract is illegal does not preclude enforcement of legitimate provisions of agreement).

Because the Langston Firm’s receipt of \$14,000,000.00 directly from MCI/Worldcom was illegal in violation of Miss. Code Ann. § 7-5-7, this particular provision of the Settlement Agreement is void as a matter of public policy. (C.P. 206) The State Auditor has never sought to contest the agreement of the State Tax Commission to accept \$118,200,000.00 for settlement of the tax claims. In fact, Paragraph 19 of the Settlement Agreement renders the settlement expressly severable as to any provisions determined to be unenforceable:

19. Partial Invalidity. Each provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law. If any provision of this Agreement or the application of such provision to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement; or the application of such provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected by such invalidity or unenforceability, unless such provision or such application of such provision is essential to this Agreement.

(C.P. 211)

Pursuant to the well established law of this State prohibiting illegal contracts, this Court has the duty to sever and declare void as a matter of public policy the provisions of the MCI/Worldcom

Settlement Agreement that diverted \$14,000,000.00 of the settlement proceeds directly to the Langston Firm. In this same respect, the Retention Agreement's failure to provide the additional requirement that the request for payment by attorneys be presented to the Legislature for review is fatal to it as well. (C.P. 188-93) Accordingly, the disputed funds held by the Langston Firm should be returned to the State of Mississippi's general fund for appropriation by the Legislature.

III. The Mississippi Supreme Court resolved this issue in *Pursue Energy Corp.*

Although not addressed by the circuit court, the Mississippi Supreme Court's decision in *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002) was a primary basis for the State Auditor's cause of action. *Pursue Energy Corp.* held that a retention agreement by special assistants to the Attorney General was acceptable because payment of the attorneys' fees came from legislative appropriation as required by Miss. Code Ann. § 7-5-7.

Pursue Energy Corp. involved the settlement of a tax claim brought by the State Tax Commission and the payment of outside special assistants to the Attorney General hired specifically to handle that case. The Mississippi Supreme Court upheld the contingency agreement for the following reason:

It was understood by all that Blair [the attorney] would not be paid out of any tax monies recovered. Instead, it was contemplated that if recovery was had, the Attorney General would apply to the Legislature for an appropriation to pay the firm an amount to be measured by the terms of the retention agreement. The Legislature could in its discretion appropriate all, part, or none of the Attorney General's recommendation for attorneys' fees, but in no event were they to be paid directly out of any tax monies recovered.

Pursue Energy Corp., 816 So. 2d at 387; see *Thomas v. McDonald*, 667 So. 2d 594, 597 (Miss. 1995)(appellate court interpretation of a statute subsequently retained by the Legislature without amendment is binding precedent).

In reaching its decision in *Pursue Energy Corp.*, the Mississippi Supreme Court relied upon the sworn testimony of former Attorney General Mike Moore regarding the legal procedure that must be followed for compensating private special assistants under a contingency fee retention agreement.

The Attorney General's sworn testimony in *Pursue Energy Corp.* was as follows:

If any severance and/or income tax monies are ultimately recovered by the State due to the legal efforts of Mr. Blair, attorneys fees for Mr. Blair will not be paid out of the tax monies so recovered. This fact was understood by all, including the firm of McDaniel and Blair, P. A. Instead, it was contemplated that if recovery was had the Attorney General would apply to the Legislature for an appropriation to this Office to pay the McDaniel and Blair firm an amount to be measured by the terms of the Retention Agreement. The Legislature could in its discretion appropriate all, part, or none, of the Attorney General's recommendation for attorneys fees. This office will work to see that compensation is appropriated. However, in no event are attorneys fees for Blair to be directly paid out of any tax monies recovered.

(C.P. 1641-45)

By its decision, the Mississippi Supreme Court also affirmed the ruling of the trial court (Rankin County Chancellor John Grant) which had likewise held the following:

Considering all the foregoing, the Court finds, as a matter of law, that the attorney general has the statutory authority to enter the referenced contract with special assistant attorney general Blair, but not the authority to pay the special assistant attorney general, except through appropriated funds available through the attorney general's budget or through appropriation by the Mississippi legislature. Only the Mississippi legislature maintains legislative power over the state's finances. Only the Mississippi legislature can authorize payment to Blair over and above fees available through the budgeted funds of the attorney general's office.

As set out in this opinion, there is no genuine issue of any material fact and Defendants are entitled to Judgment as a matter of law.

(C.P. 1653) As confirmed by the proceedings, witnesses and decision in *Pursue Energy Corp.*, the entire amount of any public settlement should be disbursed to the State of Mississippi. Upon receipt, the Mississippi Legislature may then make an appropriation based upon the Attorney General's recommendation and the terms of any fee agreements. In no event were special assistant attorney

generals to negotiate for direct payment of their fees by the opposing party under Miss. Code Ann. § 7-5-7 during the settlement process. The Mississippi Supreme Court has resolved the issues presented herein in favor of the State Auditor's position in this cause.

IV. Special counsel in *Pursue Energy Corp.* knew how to make their fees pass the scrutiny of the Mississippi Supreme Court under Miss. Code. Ann. § 7-5-7.

In their efforts to obtain affirmation of their retention agreement in *Pursue Energy Corp.*, special counsel argued as follows to the Mississippi Supreme Court:

When this whole thing was started, we got together with the State Tax Commission. The Attorney General's Office sat down and discussed this, and it was very clear from the initial beginnings – and it may not be clear in the retention agreement, and that's my problem, it's not the Court's, that we're not to be paid unless the legislature appropriates funds. We have actually collected taxes for the state that went into the state treasury. They got 100 percent of it, and then went over to the legislature the next year and got an appropriation and paid us. That's happened.

(C.P. 303, 1655) Special counsel and the Attorney General were keenly aware of the procedure that must be followed for compensation of outside counsel. The present Attorney General subsequently presented the Legislature with the request for appropriation of attorneys' fees in *Pursue Energy Corp.* (C.P. 1656-1657) As established by all participants and the Court in *Pursue Energy Corp.*, the procedure for payment of outside special counsel requires that the entire amount of the settlement funds be paid to the State of Mississippi. Upon receipt, the Mississippi Legislature may then make an appropriation based upon the Attorney General's recommendation. In no event was special counsel to negotiate receipt of their fees directly from the opposing party.

V. All funds obtained through the Settlement Agreement with the State of Mississippi were public funds.

In its ruling, the circuit court agreed as follows to the interpretation of Miss. Code Ann. § 7-5-7 asserted by the State Auditor:

There 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.

However, the circuit court subsequently concluded that the funds obtained by the Langston Firm were not “public” since the Langston Firm negotiated and obtained them directly from the opposition. (C.P. 1714-15) Despite the mechanics of the transfer to the Langston Firm, the Settlement Agreement specifically provided that all of the settlement proceeds paid by MCI/Worldcom, including those diverted to the Langston Firm, were in consideration for the release of all MCI/Worldcom’s tax liability to the State. The Settlement Agreement provided that “[i]n exchange for the cash payments and property transfer, the State agrees to compromise and fully release [MCI’s] obligation to pay all taxes, interests and penalties.” (C.P. 207) MCI/Worldcom tendered the settlement proceeds and the payments were expressly tendered “as payments of tax and interest, to or on behalf of the State.” (C.P. 206) Accordingly, all of the funds were “public” funds despite the manner that MCI/Worldcom transferred the settlement funds.

Understanding the mandates of Miss. Code Ann. § 7-5-7 through the experiences of *Pursue Energy Corp.*, the Attorney General’s office essentially resorted to an elusive shell game solely designed to bypass the Legislature and taxpayers of this State with the MCI/Worldcom settlement agreement. In *Nixon v. American Tobacco Co.*, 34 S.W.3d 122, 135 (Mo. 2001), special counsel to the Missouri Attorney General similarly sought to avoid judicial review by suggesting that direct

compensation from the opponent did not constitute “public” money. In recognizing the shallowness of this argument, the Court concluded as follows:

[W]e find Respondents’ argument unpersuasive, as it relies on an elusive shell game that misdirects the nature of the attorney fees. While it is true that these funds do not originate in the state treasury, our analysis does not end there. Instead, we look to the method by which parties settle disputes. When considering whether to make an offer to settle, a litigant establishes a monetary amount that reflects, among numerous other factors, both his potential loss should he continue litigation and the risk that he may not succeed on the merits. This adjusted figure represents that litigant’s maximum settlement price. Once the litigant has negotiated a settlement amount he finds favorable, it is of absolutely no consequence to him how the settlement is divided among various parties.

We view with suspicion Respondents’ contention that these attorneys fees are not state funds for purposes of justiciability. We find that to characterize these funds as wholly private funds places form before substance, as it is these parties that negotiated the funds in this manner. . . for purposes of justiciability, it suffices to point out that the tobacco companies would owe Strong nothing if he were not representing the State of Missouri as to the merits of the controversy between the State and the tobacco defendants. For this reason, justiciability is established and we address the merits.

Id. at 135.

Here, the circuit court placed form over substance in its holding that the mandates of Miss. Code Ann. § 7-5-7 may be avoided solely by the chosen procedure for transferring the settlement funds. The fact remains that there would have been no settlement funds or transfers to anyone but for the claims of the State of Mississippi, the real party litigant against MCI/Worldcom.

The legislative appropriation mandated by Miss. Code Ann. § 7-5-7 is obviously intended to prevent outside counsel from placing their own interests before the party litigants.³ The ultimate guiding factor in the interpretation of a statute is to discern and give effect to legislative intent.

³ Miss. Code Ann. § 7-5-7 expressly limits compensation to that which is reasonable and not greater than recognized bar rates - another reason for the requirement of legislative review and appropriation under this statute.

Anderson v. Lambert, 494 So. 2d 270, 372 (Miss. 1986). As expressly recognized by the *Nixon* Court,

There is a potential danger in an agreement where a plaintiff's attorney's fee is to be paid by defendants. The danger is that the lawyer's own interest will prevail over the client's- or to put it another way, that the lawyer might be unduly influenced by an oversized fee to recommend an inadequate settlement for the client.

Nixon, 34S.W.3d at 135.

The Langston Firm essentially elevated itself to the position of a party litigant during the MCI/Worldcom settlement discussions. This is confirmed by the Affidavit of Jim Hood filed in this cause of action wherein he has admitted allowing the Langston Firm to negotiate directly with MCI/Worldcom on their own behalf. (C.P. 1306) The Attorney General's claim now that a Settlement Agreement would have been subsequently signed between the State of Mississippi and MCI/Worldcom regardless of the fee that the Langston Firm was able to negotiate is disingenuous. An opposing litigant simply would not have agreed to settle its claims with the State of Mississippi without knowing the total cash requirements. Because the mechanism for transferring the funds directly to the Langston Firm was designed solely to bypass Miss. Code. Ann. § 7-5-7 and its legislative safeguards concerning special counsel working for the taxpayers of this State, the decision of the court below requires reversal.

VI. There was no waiver by the State Auditor who has the independent statutory authority and duty to seek return of misspent public funds.

Mississippi Code Ann. § 7-7-211(g) grants the State Auditor the following authority:

To make written demand, when necessary, for the recovery of any amounts representing public funds improperly withheld, misappropriated and/or otherwise illegally expended by an officer, employee or administrative body of any state, county or other public office, and/or for the recovery of the value of any public property disposed of in an unlawful manner by a public officer, employee or administrative body, such demands to be made (I) upon the person or persons liable for such

amounts and upon the surety on official bond thereof, and/or (ii) upon any individual, partnership, corporation or association to whom the illegal expenditure was made or with whom the unlawful disposition of public property was made, if such individual, partnership, corporation or association knew or had reason to know through the exercising of reasonable diligence that the expenditure was illegal or the disposition unlawful. . . .

In the event, however, such person or persons or such surety shall refuse, neglect or otherwise fail to pay the amount demanded and the interest due thereon within the allotted thirty (30) days, the State Auditor shall have the authority and it shall be his duty to institute suit, and the Attorney General shall prosecute the same in any court of the state to the end that there shall be recovered the total of such amounts from the person or persons and surety on official bond named therein; and the amounts so recovered shall be paid into the proper treasury of the state, county or other public body through the State Auditor. . . .

Pursuant to this statute, the State Auditor has the express authority and responsibility to seek return of funds that are misappropriated or illegally expended. It was conceded by the Attorney General that the State Auditor had authority to bring the current cause of action on his own behalf. (Tr. 3-6)

Despite State Auditor's authority under Mississippi Code Ann. § 7-7-211(g) to seek the return of misspent public funds pursue the current cause of action, the circuit court held that the State Auditor waived this right. (C.P. 1714-1715) The circuit court's ruling is contrary to all decisions that came before it, including the Court that presided over the cause of action wherein the Settlement Agreement was entered.

The United States Bankruptcy Court for the Southern District of New York held the following in the Adversary Proceeding initiated by the Langston Firm against the State Auditor:

The Debtors [MCI/Worldcom] fully complied with the payment provisions of the Settlement Agreement and the Debtors' liability to the State is therefore concluded. The Langston firm asserts that in attempting to recover the \$14 million payment the Auditor is collaterally attacking the Settlement Order. The Court disagrees. The Auditor's dispute over whether the former Attorney General exceeded his authority in designating and allocating the settlement proceed payments made on behalf of the

State is not an attack on the Settlement Order. These issues were not before the Court in connection with approving the settlement of the Debtors' tax obligations to the State no could they have been raised. These issued are unique to Mississippi, non-debtor parties and are unrelated to the Debtors' settlement with the State. Had the Auditor raised this dispute in connection with the Court's approval of the Settlement Agreement, the Auditor would have lacked standing for it was the Attorney General that represented the interests of the State before the Court. Any dispute raised regarding the Attorney General's authority may have postponed the Court's consideration of the Settlement Agreement to await a resolution of the matter in a Mississippi court or, some other action may have been taken to allow the settlement to proceed without such resolution. However, in either case, the Court would not have had jurisdiction over the dispute. Therefore, regardless of one's view as to the breadth of the Settlement Order's retention of jurisdiction provision (Settlement Order 2), the Court could not have retained jurisdiction over issues it never had jurisdiction over in the first instance. The auditor's pursuit of the \$14 million paid to the Langston Firm, therefore, is not a collateral attack of the Settlement Order implicating res judicata, estoppel or waiver.

(C.P. 1661-62) Similarly, the United States District Court for the Southern District of Mississippi remanded this matter back to circuit court holding as follows:

The instant case, removed here by [the Langston Firm] defendants from the Circuit Court for the first Judicial District of Hinds County, Mississippi, is not based on any right created by the federal bankruptcy law. The State Auditor specifically refers to his obligations and duties under state law. Moreover, this suit is not a proceeding that could arise only in the content of a bankruptcy. It is, simply stated, an action to determine the authority of the Attorney General for the State of Mississippi under Mississippi law to enter into contracts with his choice of designated Special Assistant Attorneys General, where said contracts permit these designated Special Assistants to receive attorney fees from successful litigation, as would a private attorney for a non-governmental client, directly from the litigation, and not from funds held by the Attorney General and not pursuant to any action of the Mississippi Legislature. Thus, were there no action in bankruptcy, this case still could proceed in state court based on issues wholly within the province of state law.

So, the essential issue in the state court proceeding is whether the defendants are liable under state law to repay the \$14 million dollars they received as Special Assistant Attorneys General. The lawsuit does not affect such matters as discharge ability, allowance of a claim, or any other bankruptcy matters. The \$14 million fee, at this point, has no connection to the New York Bankruptcy. The Bankruptcy Court approved the settlement and payment of these funds on May 13, 2005, over two years before the defendants in this case filed their Adversary Proceeding. Nothing that

happens to the \$14 million affects MCI or the Bankruptcy Estate in any way. The State of Mississippi, in seeking this \$14 million dollars, is making no claim against MCI or any of its successors in interest.

As noted by counsel for the State Auditor, what remains before the Bankruptcy Court in New York is administration under Chapter 11 which may be ongoing. Counsel for the State Auditor also suggests that a Plan of Reorganization already has been accepted by the Court. This court is not duly apprised on the record of the whole status of MCI's bankruptcy, but this is of no moment here. If the New York Bankruptcy Court were to exercise adjudicatory jurisdiction as to any of the claims of the State Auditor, this court is persuaded that the dictates of *Marathon* would be violated, especially when the State Auditor's claims implicate no rights and powers of bankruptcy, do not depend upon the bankruptcy laws for their existence, and are claims that could proceed in state court even in the absence of bankruptcy. All the State Auditor's claims relate to state-created law. Indeed, the state court proceeding will not just be affected by state law, it will be dictated by the state court's interpretation of that law. This will have no effect upon the Order of the Bankruptcy Court in New York.

(C.P. 1678)

Here, the circuit court's decision of waiver is inconsistent with these prior rulings. The State Auditor, as in all various agencies and offices of state government, is an entirely separate entity from the "State of Mississippi." Implicitly recognizing this fact, the circuit court realigned the State of Mississippi as a separate party defendant against the State Auditor in this cause of action. (C.P. 1285) As a separate party, the State Auditor was never a part of the bankruptcy proceedings, and the issues being litigated now were never litigated therein. Accordingly, the State Auditor has never waived his express authority to bring this cause of action under state law pursuant to Miss. Code Ann. § 7-7-211(g).

VII. Strict interpretation of Miss. Code Ann. § 7-5-7 is consistent with the constitutional right and duty of the legislative branch of government to control the public treasury.

The Mississippi Legislature has the exclusive authority to control the expenditure of state funds. The Mississippi Supreme Court has explained the following in this regard:

Under all constitutional governments recognizing three distinct and independent magistracies, the control of the purse strings of government is a legislative function; indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, and not to be surrendered or abridged, save by the constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement is firmly and inexpugnably established in our political system.

In re Hood v. State of Mississippi, 958 So. 2d 790, 812 (Miss. 2007); *see Belmont v. Miss. State Tax Commission*, 860 So.2d 289, 306-07 (Miss. 2003); *see also Myers v. City of McComb*, 943 So.2d. 1, 4 (Miss. 2006)(emphasizing the importance of separation of powers doctrine and holding that “legislative department alone has access to the pockets of the people” and “judicial branch cannot perform a clearly legislative branch function”); *see also King's Daughter Medical Center, et al. v. Haley Barbour, et al.*, Cause No. G-2006-1621, Chancery Court of Hinds County, Mississippi, First Judicial District (July 10, 2008)(declaring Division of Medicaid assessment void as matter of law in violation of Miss. Code Ann. § 43-13-11(18)(b) since it usurped legislative authority to control purse strings of State).

In the case of *In re Hood v. State of Mississippi*, 958 So. 2d 790 (Miss. 2007), the State of Mississippi had asserted a civil action against the tobacco industry which ultimately resulted in a settlement whereby hundreds of millions of dollars were to paid by the tobacco industry “for the benefit of the State of Mississippi.” The settlement agreement in that case also provided for the creation of a pilot program aimed at reducing the use of tobacco products by children. After approval of the original settlement by the Chancery Court, the Mississippi Legislature created the Mississippi Health Care Trust Fund (“HCTF”) and directed that a portion of the tobacco settlement proceeds be deposited into the HCTF to be further appropriated by the Legislature. From 1998 to

outside law firm. By invalidating the direct payment from the opposing party, this Court will merely place the issue of the proper amount of appropriation before the Mississippi Legislature as intended by the Mississippi Constitution and Miss. Code Ann. § 7-5-7.

CONCLUSION

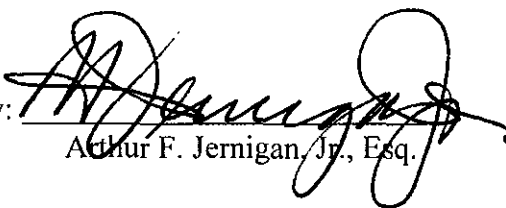
Pursuant to Miss. Code Ann. § 7-5-7, settlement funds negotiated for and on behalf of the State of Mississippi should be deposited into the general fund for appropriation by the Legislature. The Mississippi Supreme Court already resolved this issue in *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002). Special counsel's receipt of \$14 million of state settlement funds from MCI/Worldcom was a violation of Miss. Code Ann. § 7-5-7.

Any contract provisions in the Settlement Agreement or Retention Agreement allowing such were illegal and cannot be enforced as a matter of public policy. The disputed funds were public funds since they originated from a settlement with the State of Mississippi, and the State Auditor did not waive his authority under Miss. Code Ann. § 7-7-211(g) to seek their return. Strict interpretation of Miss. Code Ann. § 7-5-7 is consistent with the constitutional right and duty of the legislative branch of government to control the public treasury.

WHEREFORE, the judgment of the Circuit Court of Hinds County should be REVERSED and RENDERED.

Respectfully submitted the 10 day of November, 2010.

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

By: 
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CERTIFICATE OF SERVICE

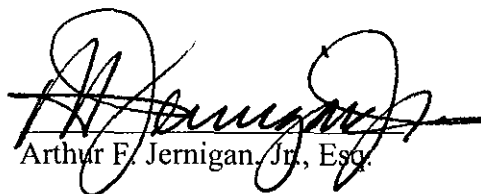
I, Arthur F. Jernigan, Jr. do hereby certify that I have caused to be served this date, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing instrument to the following counsel of record:

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THIS, the 10 day of November, 2010.


Arthur F. Jernigan, Jr., Esq.