IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2010-CA-00881

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

VS.

JIM HOOD, ATTORNEY GENERAL *ex rel.*
STATE OF MISSISSIPPI and
MICROSOFT CORPORATION — APPELLEES/
CROSS-APPELLANT

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

BRIEF OF APPELLEE/CROSS-APPELLANT JIM HOOD, ATTORNEY GENERAL *ex rel.* THE STATE OF MISSISSIPPI

ORAL ARGUMENT REQUESTED

JIM HOOD, ATTORNEY GENERAL

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CERTIFICATE OF INTERESTED PERSONS

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

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

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

Jim Hood, Attorney General *ex rel.* the State of Mississippi, appellee/cross-appellant.

Brent Hazzard, Hazzard Law, LLC, Precious T. Martin, Martin & Associates, PLLC, James T. Southwick, Harry P. Susman, Susman Godfrey, LLP, David A. Barrett, William A. Issacson, Robert M. Cooper, Boies, Schiller & Flexner, LLP, John L. Gadow, Blake A. Tyler, Pond, Gadow & Tyler, PA, Richard Schwartz, David G. Gaylon, Schwartz & Associates, PA, attorneys for appellee/cross-appellant Jim Hood, Attorney General *ex rel.* the State of Mississippi.

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

Microsoft Corporation, appellee.

David W. Clark, Bradley Arant Boult Cummings, LLP, attorney for appellee Microsoft Corporation.

SO CERTIFIED, this the 21st day of January, 2011.

Jim Hood, Attorney General

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REASONS TO GRANT ORAL ARGUMENT

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

STATEMENT OF ISSUES

Auditor's Direct Appeal.

1. Whether Microsoft's payment of attorneys' fees earned by retained counsel was consistent with Section 75-24-19(b) the Mississippi Consumer Protection Act.

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

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

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

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

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

The State's Cross-appeal.

1. Whether the Auditor's intervention in this matter was improvidently granted under Miss. R. Civ. P. 24(a)(2).

STATEMENT OF THE CASE

Microsoft Corporation ("Microsoft") is a public multinational corporation that earns tens of billions of dollars annually. In August 2004, Attorney General Jim Hood executed a Retention Agreement with Hazzard Law LLC as Special Assistant Attorney General to prosecute claims against Microsoft based upon the company's history of anti-competitive and unlawful monopolization of the market for personal computer operating systems and software, and related harm, to the people

of the State of Mississippi.

The Retention Agreement required that a contingent fee be paid to Special Assistant Attorney General Hazzard if and when money was recovered from the suit against Microsoft. The Retention Agreement also stated that Hazzard "may associate other attorneys at its own expense." Hazzard associated other local counsel. In turn, Hazzard and his Mississippi co-counsel also determined they should associate the firms of Boies, Schiller & Flexner and Susman Godfrey because those firms are leading national antitrust practitioners and had represented the United States Government and various private parties in other antitrust litigation against Microsoft. These counsel were approved by the Attorney General and are hereinafter collectively referred to as the Attorney General's "retained counsel."

The compensation due retained counsel on a contingency basis was specifically spelled out in the Retention Agreement. [*See* Retention Agreement at Attachment B, C.P. 69-74].[1] The sliding scale contingency percentages in the standard form Retention Agreement result from the Attorney General's commendable efforts to control fees and avoid attorney windfalls. Based on the scale, the more money obtained by retained counsel for the State the lesser their percentage of recovery. For example, a case resolved between $200 million and $500 million is subject to a lesser contingency fee schedule than a case resolved for less than $25 million. The agreement also accounts for the amount of work performed by retained counsel. The earlier a case is resolved, the lower the percentage due to retained counsel. [*See Id.* at Attachments A & B].

An original complaint against Microsoft was filed in Chancery Court in 2004 asserting a claim by the Attorney General, as *parens patriae*, for damages pursuant to the Mississippi Antitrust

[1] Although the Retention Agreement has been publicly available on the Attorney General's web site for years, the Auditor never challenged any aspect of the Retention Agreement until this appeal.

Act, and another claim for civil penalties under the Mississippi Consumer Protection Act ("MCPA"). In April 2008, the Chancery Court dismissed the Attorney General's *parens patriae* claims under the Antitrust Act, but retained the claims for civil penalties under the MCPA.

In June 2009 – nearly five years after the case was filed – the Attorney General and his retained counsel attended mediation with Microsoft in Jackson and settled all the MCPA claims remaining in the case. The resulting Settlement Agreement required Microsoft to pay the State $40 million as an initial cash payment, to make additional vouchers worth $60 million available to Mississippians who had purchased certain Microsoft products, and to pay retained counsel a total of $10 million dollars in attorneys' fees and expenses ($8.3 million in fees and $1.7 million in expenses) incurred over a five year period. [Settlement Agreement, C.P. 6-36 & Appellant's R.E. 2].[2] The negotiated figure ultimately provided retained counsel approximately ten percent of the value of the settlement benefits to the State, and less than what they were contractually entitled to receive under the Retention Agreement. [*See* Retention Agreement at Attachment B, C.P. 69-74 (potentially requiring contingency fee of 14% of the settlement value as fees, plus expenses)]. The Settlement Agreement specified that no payments were due from Microsoft until the Chancellor approved the Settlement Agreement and all appeals had been exhausted. [Settlement Agreement, C.P. 6-36 & Appellant's R.E. 2].

On June 11, 2009, the Chancery Court issued an order approving the Settlement Agreement. [Order Approving Settlement Agreement, C.P. 1-36 & Appellant R.E. 2].

[2] The State ultimately collected $57.5 million in cash. This cash settlement was over seven times greater than any other State's cash recovery. The Auditor references that only $2 million of the vouchers were claimed by the citizens of the State, however, the Auditor fails to mention that both parties recognized this possibility and established that half of the unclaimed vouchers would be paid directly to the State in cash to ensure at least fifty percent of their value would be utilized.

Appellant, the State Auditor ("Auditor"), did not file any objection to the Chancery Court's June 11th order. The Auditor did not seek to intervene to challenge the settlement or for any other purpose. The Auditor did not seek to appeal the Chancery Court's June 11th order. By failing to object, intervene, or appeal the Chancery Court's June 11, 2009 order, the Auditor waived his right to object to the terms of the Settlement Agreement.

In July 2009, the time to object to or appeal the June 11th order expired and Microsoft subsequently paid the monies owed under the Settlement Agreement. As required by the Settlement Agreement, Microsoft's payment for attorneys' fees and expenses was wired to Susman Godfrey's trust account. [*Id.*].

The Auditor's only action during this time period came on June 18, 2009, when he wrote a letter to retained counsel disputing the lawyers' right to their fee. [June 18, 2009 Letter, C.P. 137-39]. The Auditor's letter attempted to raise a potential ethical issue for retained counsel, because Mississippi Rule of Professional Conduct 1.15(c) requires "[w]hen in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests . . . the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

On January 11, 2010, retained counsel filed a petition with the Chancery Court to resolve the alleged ethical issue raised by the Auditor's letter. [Petition to Approve Fees, C.P. 37-139]. Subsequently, on February 5, 2010, the Auditor injected himself into the case. He moved to intervene, opposed retained counsel's petition, and moved that the fees they earned be disbursed to the Legislature. [Auditor's Motion to Intervene, C.P. 140-264]. On April 13, 2010, the Chancery Court granted the Auditor's Motion to Intervene. [Order Granting Intervention, C.P. 336-40 & Appellant R.E. 3]. On March 23, 2010, the Auditor filed a Motion for Disbursement of Settlement

Funds to the State of Mississippi and Response in Opposition to Petition to Approve Fees and Overrule Quasi-Objection. [Auditor's Motion for Disbursement of Funds, C.P. 265-303].

On April 28, 2010, the Chancery Court granted retained counsel's petition, resolving the dispute as to the attorney fees in the Auditor's June 18th letter, and denied the Auditor's motion, ruling that:

1. The monies recovered through the settlement were based on the claims for civil fines under the MCPA;
2. The MCPA does not require that funds recovered by the Attorney General be paid to the state general fund and expressly permits the Attorney General to use the funds to pay attorneys' fees; and
3. The funds recovered by the Attorney General through the Settlement Agreement are properly considered part of the Attorney General's contingent fund referenced by §7-5-7.

[Order Approving Fees, C.P. 341-47 & Appellant R.E. 4]. In addition, the Chancery Court reviewed the fee based on the factors outlined in *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982) and consistent with the MCPA. [*Id.* at pp. 5-7]. After considering all of the relevant factors, the Chancery Court concluded that the $10 million payment to retained counsel, representing $8.3 million in attorney fees and $1.7 million in expert and other expenses, was reasonable and fair. [*Id.*].

On May 25, 2010, the Auditor filed his Notice of Appeal as to the Chancery Court's April 28, 2010 Order granting retained counsel's fee request. [Notice of Appeal, C.P. 348-50]. On June

9, 2010, the State filed its Notice of Cross-appeal as to the Chancery Court's April 13, 2010 intervention Order. [Notice of Cross-appeal, C.P. 360-62].[3]

The Auditor's motives are clear. He did not challenge the Settlement Agreement in court in June 2009 because that would have risked the recovery of $100 million in cash and vouchers for the State and its citizens. Instead, the Auditor appeals only the Chancery Court's April 28th order resolving the ethical issue he himself attempted to create, thus hoping to keep the money recovered by the State but deny retained counsel any fee earned for their work. The world envisioned by the Auditor is one where no attorneys retained on contingency basis by the Attorney General are paid without it being subjected to the appropriations process and a gubernatorial veto. His viewpoint is neither supported in law nor reason, as explained below.

SUMMARY OF THE ARGUMENT

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

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

[3] Previously, on February 26, 2010, the Auditor filed a Notice of Appeal in a separate lawsuit now pending before the Court in *Pickering v. Langston Law Firm, PA, et al.*, No. 2010-CA-00362. The *Langston* appeal also involves an attempt by the Auditor to restrict the Attorney General's authority to enter into and honor State contracts with contingency fee attorneys. Although that appeal involves different facts and procedural history, it raises some of the same issues raised by the Auditor here.

There are many reasons the Attorney General's established authority should not be disturbed. Any one of them are grounds to affirm the trial court. First, as the trial court rightly found, Microsoft's payment of contingency fees and expenses was authorized under the MCPA. *See* MISS. CODE ANN. § 75-24-19(1)(b). The Attorney General is not required to litigate every MCPA case until the bitter end before the remedies provision becomes relevant and operative. In negotiating terms of a settlement of MCPA claims, the parties are not prohibited from agreeing to payments which are consistent with the remedies authorized by the Act, as was the case here.

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

Moreover, a single provision in the last sentence of Section 7-5-7 should not be read by itself to restrict the Attorney General's authority. It does not have the impact which the Auditor ascribes to it. But, even if improperly read in isolation, the sentence does not expressly prohibit the contractual arrangement at issue. Additionally, as the trial court correctly recognized, the "contingent fund" contemplated by Section 7-5-7 is separate and apart from any legislatively appropriated funds. Microsoft's payment here was made to retained counsel's trust account which could reasonably be construed as the "contingent fund" contemplated by the statute, which is another reason the Auditor's relief was appropriately denied.

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

Fourth, the trial court also should be affirmed because the Auditor has no legal right to seize Microsoft's payment to retained counsel. The Auditor is only authorized to capture "public funds," a term specifically defined by statute. MISS. CODE ANN. §§ 7-7-1(4), 7-7-211(g). The money paid directly by Microsoft to retained counsel was never "public funds." Further, that money is subject to a paramount attorneys' lien that is well-established under Mississippi law. *Halsell v. Turner*, 36 So. 531 (1904). Adopting the Auditor's position would impair those lien rights and damage attorneys and clients in Mississippi.

Fifth, the Auditor also waived any right he may have had to challenge the contracts at issue by waiting too long to intervene in this case. Despite knowledge of it, the Auditor never objected to the Settlement Agreement's conferral of tens of millions of dollars in benefits to the State and its citizens. The Chancery Court approved the settlement. The Legislature appropriately and gratefully spent the settlement money on many public needs. It is too late for the Auditor to complain now.

Sixth, longstanding constitutional and contract law bars the Auditor's proposed remedy of allowing post-agreement modification through the legislative appropriations process. There are no provisions in the contracts that are voidable. The State cannot constitutionally breach its contract by paying retained counsel less than it is contractually bound. *Franklin v. Ellis*, 130 Miss. 164, 39 So. 738 (1920). Furthermore, the Auditor's proposal would undo the entire Settlement Agreement

and cost the State millions of dollars. All the settlement money, not just the attorneys' fees and expenses, would have to be refunded if the Auditor were to prevail.

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

Alternatively, on cross-appeal, the trial court incorrectly determined the Auditor should be allowed to intervene here in the first place. Rule 24(a)(2) requires that four elements be met before intervention is proper. The trial court below only examined one of the factors. The Auditor's intervention was untimely under a full analysis of all four elements required by the rule. If the Court determines that the trial court's final judgment should not be affirmed, then, alternatively, and at a minimum, the trial court's order permitting the Auditor to intervene should be reversed and rendered. Either way, the Auditor's arguments should be overruled and the State should prevail on this appeal.

ARGUMENT

DIRECT APPEAL

I. Standard of Review.

The court below analyzed and applied statutes relating to the core powers and duties of the Attorney General generally, as well as pursuant to the MCPA.

The standard of review is *de novo.* A *de novo* standard is applied to a trial court's determinations on questions of law. *Bank of Mississippi v. Southern Memorial Park, Inc.*, 677 So. 2d 186, 191 (Miss. 1996).

Statutory interpretation is a question of law entitled to the same *de novo* review. *Horace Mann Life Ins. Co. v. Nunaley*, 960 So. 2d 455, 458-59 (Miss. 2007). When a statute is not ambiguous, the Court applies its plain meaning and need not resort to principles of statutory

construction. *Miss. Ins. Guar. Ass'n v. Cole*, 954 So. 2d 407, 412-13 (Miss. 2007). But, if there is ambiguity, the interpretation by the Attorney General must be upheld if it is "based on a permissible construction of the statute." *Barbour v. State ex rel. Hood*, 974 So. 2d 232, 241 (Miss. 2008) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Stated differently, the Court affords considerable weight and deference to the construction given a statutory scheme by the constitutional officer entrusted to administer it. *Id.*

II. Microsoft's Payment of Contingency Fees and Expenses Was Authorized By the MCPA.

The Auditor's appeal first has no merit because the MCPA specifically provides for the attorneys' fees and costs Microsoft paid to the Attorney General's retained counsel. At the time of settlement, the MCPA was the sole remaining authority for the claims against Microsoft in the court below. The trial court correctly held that the MCPA permitted recovery of the attorneys' fees and costs that did not have to be diverted through the Legislature.

There is no room for the Auditor to argue that the settlement below was based upon anything other than the MCPA. The case was originally filed against Microsoft for damages based upon violation of the Mississippi Antitrust and Consumer Protection laws. However, in April 2008, the trial court dismissed the Antitrust claims, leaving only the Consumer Protection claims brought pursuant to Section 75-24-9 of the Mississippi Code. The Consumer Protection claims were all that remained when the parties settled the case in June 2009. In other words, civil penalties, attorneys' fees and expenses were the only things for which Microsoft could be liable by the time the parties decided to settle. As a result, the Chancery Court held that settlement proceeds were "based on civil penalties under the Mississippi Consumer Protection Act" because there was "no other source of

recovery." [Order Approving Fees at p. 4, C.P. 341-47 & Appellant R.E. 4]. *See* MISS. CODE ANN. § 75-24-19(1)(b) (authorizing award of civil penalties). *See also Bank of Mississippi*, 677 So. 2d at 191 ("A chancellor's ruling on findings of fact will not be disturbed unless manifestly wrong or clearly erroneous.")

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

These remedies provided by the MCPA – which governed the only remaining claims – plainly include attorneys' fees and expenses payable to the Attorney General in addition to other potential recovery:

> [i]n any action brought under Section 75-24-9, if the court finds from clear and convincing evidence, that a person knowingly and willfully used any unfair or deceptive trade practice, method or act prohibited by Section 75-24-5, the Attorney General, upon petition to the court, may recover on behalf of the state a civil penalty in a sum not to exceed Ten Thousand Dollars ($10,000.00) per violation. One-half (1/2) of said penalty shall be payable to the Office of Consumer Protection to be deposited into the Attorney General's special fund. All monies collected under this section shall be used by the Attorney General for consumer fraud education and investigative and enforcement operations of the Office of Consumer Protection. The other one-half (1/2) shall be payable to the General Fund of the State of Mississippi. **The Attorney General may also recover, in addition to any other relief that may be provided in this section, investigative costs and a reasonable attorney's fee.**

MISS. CODE ANN. § 75-24-19(1)(b) (emphasis added). The trial court correctly relied on this statutory remedy scheme in approving the distribution of attorneys' fees and expenses below. In its order rejecting the Auditor's arguments to the contrary, the trial court found that

> [t]he action before the Court was brought under the Mississippi Antitrust laws and the Mississippi Consumer Protection laws. This Court dismissed the Attorney General's claims under the antitrust law, and claims of harm to the state's economy due to alleged increase of prices for it, its citizens and entities, leaving only the claims under the Consumer Protection Act. The Mississippi Consumer Protection Act provides that funds recovered as penalties shall be paid to the office of Consumer Protection of the Attorney General's office and to the general fund of the State of Mississippi. **This section also provides for recovery by the Attorney General of investigative costs and "a reasonable attorneys' fee." There is no requirement that the reasonable attorneys' fee be payable to the general fund of the State of Mississippi as is required to be done with one-half of the civil penalties recovered.**

[Order Approving Fees at pp. 3-4, C.P. 341-47 & Appellant R.E. 4]. (emphasis added)]. The trial court further determined the amount of Microsoft's payment was reasonable. [*Id.* at pp. 5-7]. Microsoft permissibly bought its peace from the requirement of paying attorneys' fees and costs had the case proceeded to a judgment.

Payment by way of a settlement instead of a judgment does not render the MCPA inapplicable. Yet, the Auditor's argument mistakenly claims the exact opposite. He incorrectly asserts the statute only allows for an award of attorneys' fees if civil penalties are awarded in the underlying cause of action. [Appellant's Brief at p. 14]. In other words, according to the Auditor, every consumer protection case must be litigated until the bitter end before the attorneys' fee remedy in Section 75-24-19(1)(b) is relevant.

To the contrary, the statutory language says that the Attorney General "may recover" penalties and authorizes him to use "monies *collected* under this section." MISS. CODE ANN. § 75-

24-19(1)(b) (emphasis added). The statutory language does not require that the money be "recovered" or "collected" by enforcement of a judgment rather than by settlement. A judgment for civil fines is not required. *Cf. Aqua-Culture Technologies, Ltd. v. Holly*, 677 So.2d 171, 185 (Miss.1996) (explaining while attorney's fees may be awarded where punitive damages are justified, "an actual awarding of punitive damages is not a prerequisite for the awarding of attorney fees" so long as punitive damages could have been awarded based on the facts). The statute itself imposes no restriction that a reasonable attorneys' fee and investigative costs may only be recovered in the event of a judgment. Nor does it say that such a recovery cannot be paid directly to retained counsel if negotiated by the Attorney General.

Furthermore, it is patently unreasonable to believe that the statute means consumer claims must be litigated to judgment in order to recover the value of the reasonable attorneys' fee or costs. Mississippi law favors settlements on terms agreed upon by the parties. *Chantey Music Pub., Inc. v. Malaco, Inc.*, 915 So. 2d 1052, 1055 (Miss. 2005). Microsoft and the Attorney General agreed to the terms and payments in the Settlement Agreement instead of dragging out the lawsuit any longer. Microsoft agreed to pay off its fee and cost liability directly. A holding that it could not do so would discourage settlements, diminish the MCPA, impose an undue burden on the State, and impede judicial economy.

In sum, Section 75-24-19 is dispositive of this matter. The trial court correctly held the statute authorizes attorneys' fees and investigative costs as a remedy and Microsoft validly settled by paying those fees and costs to retained counsel directly. This Court does not need to go any further, and the trial court's decision should be affirmed on this ground.

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

Even if the MCPA is not dispositive of the Auditor's appeal, the Attorney General's established authority to retain contingent fee lawyers, and honor his contracts with them, is another and independent reason the trial court was correct. The Attorney General correctly and permissibly interpreted and applied his authority.

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

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

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

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

The Attorney General had the right to pursue Microsoft on behalf of Mississippians and decide to settle the case. "Paramount to all of his duties, of course, is his duty to protect the interest of the general public." *State ex rel. Allain v. Mississippi Public Serv. Comm'n*, 418 So. 2d 779, 782 (Miss. 1982). The Attorney General has the sole authority to determine what matters are of statewide interest. *See, e.g., Dunn Const.*, 2 So. 2d at 174. Furthermore, "the Attorney General alone has the right to represent the state." *Capitol Stages, Inc. v. State ex rel. Hewitt*, 128 So. 759, 764 (Miss. 1930).

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

Courts in other jurisdictions have similarly recognized the common law authority of their Attorneys General and held that these broad common law powers to hire and pay special counsel contingent fees cannot be limited absent an explicit prohibition. *See, e.g., North Dakota v. Hagerty*,

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of order and the protection of public rights.").

580 N.W.2d 139, 148 (N.D. 1998) ("In view of this long-standing acceptance of contingent fee arrangements and in view of the historical authority of the Attorney General, we believe she has the authority to employ special assistant attorneys general on a contingent fee agreement unless such agreements are specifically prohibited by statute."); *Nixon v. American Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2001) ("In the absence of a statute to the contrary, we conclude that the attorney general does have the power to enter into this type [contingent fee] arrangement with his special assistant attorneys general.").[5]

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

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

provision . . . to mean that funds appropriated for another purpose cannot be used to pay the salaries.").

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

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

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

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

[6] *See, e.g., Conant. v. Robins, Kaplan, Miller & Ciresi, LLP*, 603 N.W.2d 143, 148-49 (Minn. Ct. App. 1999) (Minnesota statutes did not prohibit defendant's direct payment of contingency fees to specially retained counsel); *Phillip Morris Inc. v. Glendening*, 709 A.2d 1230, 1240-44 (Md. 1998) (Maryland statutory scheme allows contingent fee contract); *Philip Morris Inc. v. Graham*, Case No. 960904948 (D. Ct. Utah Feb. 13, 1997) (Utah statutory scheme allows contingent fee contract); *Philip Morris Inc. v. State of New Jersey*, Nos. L 11480-96, C 254-96 (N.J.Super. Ct March 4, 1997) (New Jersey statutory scheme allows contingent fee contract). The only jurisdiction that has rejected a contingent fee agreement is

Under Mississippi law and persuasive authority from every pertinent American jurisdiction that has addressed the issue, the Attorney General has the constitutional and common law authority to enter into contingency fee agreements with outside counsel representing the State, just as he did in this case. That authority encompasses the ability to have a defendant pay those contingency fees directly.

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

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

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

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

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Louisiana, but that holding is limited to environmental cases under a specific statute and, moreover, Louisiana does not follow common law as does every other state. *Meredith v. Ieyoub*, 700 So.2d 478 (La. 1997).

compensation for such assistants:

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

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

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

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

Section 7-5-5 makes the Attorney General the "sole judge of the compensation" for special assistant attorneys general, such as retained counsel in this case. The plain meaning of the phrase "sole judge" is that the Attorney General, and no one else, has a say in the compensation. If the

Legislature intended to create a right to second-guess the payment of such contingent fees, the Attorney General would no longer be the "sole judge" of such compensation.

Realizing this fatal problem, the Auditor argues that Section 7-5-5 is inapplicable to hiring outside private counsel because it applies only to full-time employees of the Attorney General's office. The Auditor further asserts that "there is no dispute that outside counsel...were hired as 'special counsel' pursuant to MISS. CODE ANN. § 7-5-7." [Appellant's Brief at p. 12]. The Auditor is wrong on both counts. First Section 7-5-5 authorizes employment of nine "assistant attorneys general" and additional "special assistant attorneys general." The statute clearly distinguishes between the two. The plain language of Section 7-5-5 says that the full-time work requirement only applies to "assistant attorneys general," not "special assistants."

Second, the Auditor's assertion that retained counsel were hired as "special counsel" only under Section 7-5-7 is unsupported. The Retention Agreement does not mention the phrase "special counsel" or Section 7-5-7. To the contrary, the agreement expressly states that retained counsel "are hereby designated as Special Assistants Attorney General." [Retention Agreement at ¶ 1, C.P. 69-74]. And, Section 7-5-5 applies explicitly to the employment of "special assistant attorneys general."

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

empowered to negotiate and enter into contingency fee agreements with outside counsel for civil litigation on behalf of the State and pay them without legislative modification.

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

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

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

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

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

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

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

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

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

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

In other words, if the Legislature had intended to empower itself to re-write the Attorney General's contingency fee agreements with retained counsel, then it would have done so by stating

that his agreements – like those of the Governor – are "subject to the action of the legislature in providing compensation for such services." But it did not. The Auditor's misconstruction of the statutes based upon the last sentence in the last paragraph of Section 7-5-7 should not be accepted.

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

The last sentence of Section 7-5-7, even when improperly read in isolation by the Auditor, does not expressly *prohibit* the Attorney General from negotiating, entering into contingency fee agreements with outside counsel for civil litigation on behalf of the State, or making payment of the fees and costs due under such an agreement. In the Settlement Agreement here, Microsoft specifically agreed that it would pay attorneys' fees directly to retained counsel. [Settlement Agreement at p. 7, C.P. 6-36 & Appellant R.E. 4]. Nothing in Section 7-5-7 bars such an arrangement.

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

This Court has already determined as much. In *Pursue Energy v. Mississippi State Tax Commission*, the Court held that Sections 7-5-5 and 7-5-7 do not put any "restrictions upon the type of fee the Attorney General can negotiate, even though the Legislature could have restricted the use of contingency fees if it so desired." 816 So. 2d 385, 391 (Miss. 2002). In that case, an oil and gas

company challenged the authority of the Attorney General to enter into a contingency fee agreement with outside counsel. The company argued that the agreement was invalid (in order to derail an investigation into its affairs) because the Attorney General's counsel "was to be paid a percentage and his expenses reimbursed out of the gross taxes collected." *Id.* at 390.

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

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

> [w]e rejected the argument that the statute giving the land commissioner power to employ counsel, with the consent of the Governor, carries with it **the right to fix compensation**, finding that neither the land commissioner nor the Governor had

> authority under the statute to pay a private attorney a percentage of the State's property or to reimburse fees for bringing suit. **The underlying principles applied in *Poplarville*, however, do not apply here.** ... Section 2382 of the Code of 1906 is the precursor of Miss. Code Ann. § 7-5-7 which allows the Attorney General to employ special counsel "on a fee or salary basis" which is "reasonable compensation" and "in no event to exceed recognized bar rates for similar services." Miss. Code Ann. § 7-5-7.

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

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

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

4. The "Contingent Fund" Contemplated by Miss. Code Ann. § 7-5-7 Does Not Have to Be Funded by the Legislature.

Finally, and in addition to the foregoing, and as found by the trial court, the language of Section 7-5-7 contemplates that fees paid to retained attorneys may be paid from a "contingent fund" not made up of money appropriated by the Legislature. It says payments shall be "paid out of the attorney general's *contingent fund*, or out of any other funds appropriated to the Attorney General's office." MISS. CODE ANN. § 7-5-7 (emphasis added).

"Contingent fund" is not specifically defined anywhere in the statutes. No procedure is established for funding the "contingent fund." But it is obvious that the Legislature contemplated the "contingent fund" to consist of non-appropriated money. Later in the same chapter, the Legislature spoke of the contingent fund as separate from any appropriated funds when addressing the requirements for the Attorney General to maintain financial records from "whatever source, including appropriations by the Legislature, the contingent fund, and other funds." MISS. CODE ANN. § 7-5-61. *See also* MISS. CODE ANN. § 7-5-9 (Attorney General may hire other professionals and pay out of the "contingent fund, or out of funds especially appropriated for such purposes"). Elsewhere in the Code, such as in the MCPA, the Legislature prescribed that a portion of money collected by the Attorney General is to be paid into a special fund he maintains. *See* MISS. CODE ANN. § 75-24-19(1)(b). The rational conclusion is that the Attorney General is authorized to maintain separate funds which include: (1) legislatively appropriated funds; (2) a "contingent fund;" and (3) other funds, such as the special fund contemplated by Section 75-24-19(1)(b). These distinctions would not appear in the Code if the Legislature believed that the Attorney General's contingent fund or a special fund must be financed with appropriated money.

As a consequence, the trial court reasonably viewed the funds held by retained counsel in trust as a "contingent fund" that is separate and apart from any money appropriated to the Attorney General by the Legislature. This is still another reason the Attorney General's actions were appropriate and the Auditor's arguments should not prevail.

In sum, based on the Constitution, common law, case law, and state statute, the Attorney General's authority to retain contingent fee lawyers and honor State contracts without legislative action is well-established. The Auditor's attempts to change that authority based on his narrow reading of one sentence in Section 7-5-7 should not be accepted. Contrary to the Auditor's claim, the Attorney General correctly, and permissibly, interpreted and applied his authority in this case.

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

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

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

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

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

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

be disturbed. *Id. See also Rayner v. Barbour*, 47 So. 3d 128, 131-32 (Miss. 2010) (acknowledging review of decision of Board of Election Commissioners in interpretation of statutory scheme limited to whether such interpretation was permissible).

In this case, the same reasoning applies to any question of Sections 7-5-5's and 7-5-7's meaning.[8] The Attorney General interpreted Sections 7-5-5 and -7 to mean that he is the "sole judge" of compensation to be paid retained counsel. Counsel can be retained on a fee basis agreed upon between the Attorney General and retained counsel, without legislative involvement. At a very minimum, the Court should find that this *permissible* interpretation by the Attorney General – the constitutional officer charged with carrying out the duties prescribed by the statutes – trumps any other motivations or argument by the Auditor to the contrary. *See Rayner*, 47 So. 3d at 135 (Randolph, J. concurring) (explaining "...our standard of review does not allow reversal of an administrative decision simply based upon whether we agree or disagree with the branch or agency empowered to make the decision.").

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

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

V. The Auditor Has No Legal Right to Seize Microsoft's Payment to Retained Counsel.

The trial court may be affirmed on any grounds argued on appeal by the Appellee and sufficient to sustain the judgment below. *See Cucos, Inc. v. McDaniel*, 938 So. 2d 238, 247 (Miss. 2006); *Ferguson v. Watkins*, 448 So. 2d 271, 275 (Miss. 1984). In addition to all of the above reasons that the Settlement Agreement should not be disturbed, there are at least four other reasons that the Auditor's appeal is unfounded.

A. The Fee Microsoft Paid Retained Counsel is not "Public Funds" Subject to the Auditor's Narrow Authority.

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

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

Microsoft's payment to retained counsel does not even meet the definition of "public funds" contained in the Auditor's statute. The money was not "received by, collected by, or available for the support of or expenditure by" the State or its entities. MISS. CODE ANN. § 7-7-1(4). Microsoft paid the fees and expenses to retained counsel. They were not "received by" or "collected by" the

State. Rather, the fees were "collected by" retained counsel, not the State, and were not deposited into or transferred out of the State Treasury.

Likewise, the fees and expenses earned were not "available for the support of or expenditure by" the State. The record is undisputed and unchallenged on this point. Retained counsel's fees and expenses were never paid into a State account. The Chancery Court approved the Settlement Agreement which provided retained counsel's money would be paid into retained counsel's trust account. [Order Approving Settlement Agreement and Settlement Agreement, C.P. 1-36 & Appellant R.E. 2]. The accepted fee was less than retained counsel were entitled to under the Retention Agreement. [*Id.*; Retention Agreement at Attachment B, C.P. 69-74]. As a matter of undisputed fact, the money the Auditor seeks to disgorge is not – and never has been – "public funds" which he is authorized to pursue. The Auditor's arguments to the contrary, such as labeling the terms of Microsoft's Settlement Agreement "an elusive shell game," is not persuasive, does not change these indisputable facts, and does not create "public funds" where none existed.

Even if one were to ignore the facts, as the Auditor would have it, the law does not support his argument either. Courts applying Mississippi law have never addressed the issue of whether direct payments to counsel retained by the State are public money. But the majority of courts from other states squarely say that contingency attorneys' fees are not state funds. *See, e.g., People v. Phillip Morris, Inc.*, 759 N.E. 2d 906, 913-14 (Ill. 2001) (reasoning settlement funds which have not been transferred to the State were not "state funds" until after payment of counsel's attorneys' fees); *Conant*, 603 N.W. 2d at 148-49 (finding fees and costs due special assistant attorneys general not required to be deposited in state treasury); *Glendening*, 709 A.2d at 1240-44 (explaining gross recovery in settlement was not "State" or "public" money, rather only the State's net recovery – the

settlement amount less the attorneys' contingency fees – constituted public funds which could be appropriated by the legislature); *Button's Estate v. Anderson*, 28 A.2d 404, 410 (Vt. 1942) (holding funds subject to equitable attorneys' lien did not constitute public funds of the State).

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

In short, neither the facts nor the law support the Auditor's argument. In this case, there are no "public funds" for the Auditor to recover; therefore, judgment was properly entered against him.[9]

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

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

[9] Additionally, the Auditor cannot and has not claimed that the $60 million voucher program created for the restitution of private citizens under Section 75-24-11 of the Mississippi Code are "public funds" since he has made no demand for these vouchers to be appropriated through the Legislature. Thus, as an alternative ground, the trial court, through its powers of equity, was also justified to approve retained counsel's fees based on the common fund doctrine. *See Boeing v. VanGemert*, 444 U.S. 472, 478 (1980) (explaining that "[t]he common fund doctrine reflects the traditional practice in courts of equity.").

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

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

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

To hold otherwise would damage attorneys and clients in Mississippi and our state's law of contracts. No doubt, on a daily basis, attorneys and clients contractually enter into contingency fee agreements in Mississippi as permitted by Mississippi Rule of Professional Conduct 1.8(j). If

attorneys cannot rely on those contracts for the compensation they rightfully earn, and clients cannot rely on their contracts for what is owed, then it would inappropriately diminish the ability of attorneys to take cases, and for clients to obtain relief in the courts of Mississippi.

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

C. The Auditor Waived any Right to Challenge the Settlement Agreement or the Retention Agreement.

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

In order to avoid waiver, if the Auditor believed the settlement agreement was improper, then he should have challenged the agreement when it was before the Chancery Court for approval on June 11, 2009. He did not. The Auditor was on notice of the pending settlement. Instead of challenging it, the Auditor simply wrote a letter to counsel. [June 18, 2009 Letter, C.P. 137-39]. The Settlement Agreement was approved on June 11, 2009. [Order Approving Settlement

Agreement, C.P. 1-36 & Appellant R.E. 2]. The Auditor has even acknowledged to the Court that he learned of the final Settlement Agreement no later June 18, 2009. [Appellant's Brief at p. 3]. Indeed, his June 18, 2009 letter to retained counsel explained "...the Office of the State Auditor has recently been made aware of the settlement negotiated between Microsoft Corporation and the State of Mississippi. A copy of the executed 'Settlement Agreement' between the parties has been reviewed by this Office." [June 18, 2009 Letter, C.P. 137-39]. By the time the Auditor sought to intervene in the case nearly seven months later, on February 5, 2010, it was too late. [Motion to Intervene, C.P. 140-264]. As such, he has waived any right to challenge the settlement agreement.

Furthermore, as for the Retention Agreement between the Attorney General and retained counsel, the Auditor did not make any argument in the court below that it is somehow void. [*See* Auditor's Motion for Disbursement of Funds, C.P. 265-303]. Accordingly, he is barred from raising the issue for the first time on this appeal. *See, e.g., Crosswhite v. Golman*, 939 So. 2d 831, 833 (Miss. Ct. App. 2006) (appellant barred from raising issue on appeal not raised below).

Even assuming that the issue could be raised here, the Auditor has been aware of the Retention Agreement even longer than the Settlement Agreement. The Retention Agreement was executed in 2004 and has been posted on the Attorney General's website for years. By failing to challenge the Retention Agreement, the Auditor has waived any right to do so for the same reasons he should not be permitted to challenge the Settlement Agreement. *See Sentinel Indus.*, 743 So. 2d at 964.[10]

[10] Additionally, because the Auditor is seeking relief from the Chancery Court's judgment approving the Settlement Agreement, that judgment may only be modified under Miss. R. Civ. P. 60(b). Subsections (1)-(3) do not apply because the Auditor did not challenge the judgment within six months. None of the other subsections apply here either. There are no valid reasons to deem the judgment void under subsection (4), subsection (5) does not apply according to its terms, and this case does not present "extraordinary or compelling"circumstances under subsection (6). Accordingly, there is no available procedural basis on which the Auditor can challenge the Chancery Court's judgment and his action should

D. The Auditor has no Remedy under Constitutional or Mississippi Contract Law.

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

1. No Contract Provisions are Void.

It is true that courts may void provisions of a contract that are illegal or contrary to public policy. But that general proposition should not be used to create the result the Auditor seeks in this case for at least two reasons. The Auditor's argument that "no court will lend its aid to a litigant who bases his cause on an illegal act" is misleading. [Appellant's Brief at p. 15]. First, the authorities he cites are not on point. *See Price v. Purdue Pharma Co.*, 920 So. 2d 479, 484 (Miss. 2006) (holding plaintiff could not maintain action for damages based on addiction to controlled substance he illegally obtained); *Morrissey v. Bologna*, 123 So. 2d 537, 542-43 (Miss. 1960) (holding securities for debt based upon sales of illegal liquor void); and *Lowenberg v. Klein*, 87 So. 653, 654-55 (Miss. 1921) (holding party could not sue for debt based upon illegal liquor transaction). The instant case does not involve criminal statutes relating to illegal drugs, or illegal (at those times) liquor sales

be dismissed for this reason as well.

where the statutes at issue specifically voided such sales. There was no "illegal" act committed by retained counsel or the Attorney General.

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

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

On appeal, a unanimous Court reversed and rendered the trial court's judgment. *Id.* at 1148. As to the plaintiffs' voidability argument, the Court reasoned the deeds were "valid and enforceable so long as the ordinances they are alleged to violate regulate actions which are merely malum in prohibitum." *Id.* at 1146. As long as the seller's acts were not "inherently evil," the deal was valid. *Id.*

In this case, the parties' actions were consistent with – at the very least – a permissible construction of the Attorney General's authority under Mississippi law. There certainly was not anything "inherently evil" in obtaining millions of dollars for the State or Microsoft's agreement to

pay retained counsel's attorneys' fees. As such, there are no valid grounds to void the Settlement Agreement or the Retention Agreement based on "illegality."

2. The Auditor's Proposed Relief Would Violate Constitutional and Contract Law.

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

This is so because the Constitution prevents the State from breaching its contracts without recourse. In *Franklin v. Ellis*, the trial court enjoined commissioners of the Yazoo-Mississippi Delta levee district from paying the salaries of employees of the levee board. 130 Miss. 164, 39 So. 738 (1920). The salaries were to be paid under two-year contracts entered into by the board. *Id.* at 183. Subsequently, the Legislature changed the number of, and salaries to be paid to, board employees. *Id.* The trial court's injunction blocked payments to the employees in the amounts contracted for prior to the Legislature's action. *Id.* at 184. On appeal, the trial court's ruling was reversed and rendered because the Legislature could not validly force a breach of the employees' contracts without violating the Constitutional bar to impairment of contracts. *Id.* at 188. *See also* U.S. CONST., art. I, § 10; MISS. CONST., art. 3, § 5; *Hall v. Wisconsin*, 103 U.S. 5, 7, 25 L.Ed. 302 (1880) (holding

legislative act nullifying contract for services between private party and government produced unconstitutional result); *Tucker Printing Co. v. Attala County Bd. of Supervisors*, 171 Miss. 608, 158 So. 336 (1934) (reasoning that subsequent legislative action could not undo contract and relieve board of supervisors of obligation to pay for materials previously purchased by it).

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

Additionally, the Auditor's challenge to the agreements, if allowed, would cost the State 40 to 50 million dollars. With respect to the Settlement Agreement, the Auditor claims that the contract's provision for Microsoft to pay outside counsel's contingency fees and expenses is void. According to the Auditor, he would re-claim that money – and only that money – and deliver it to the Legislature to be disbursed. But that is not what the Settlement Agreement says will happen if any of its terms are undone.

Under the terms of the Settlement Agreement, if the trial court's approval of the settlement is "modified, reversed, or set aside," then the entire agreement is a nullity. Specifically, the agreement states that

> Effect of Disapproval: If the Court for any reason (1) determines not to approve this Settlement Agreement; (2) does not enter the Order Approving Settlement and Release and Entering Final Judgment substantially in the form of Appendix B hereto;

> or (3) if the Court's approval or judgment is modified, reversed, or set aside on appeal, then the Settlement Agreement terminates and becomes null and void except as otherwise provided herein.

[Settlement Agreement at p.5, C.P. 6-36 & Appellant R.E. 2]. If the Auditor voids Microsoft's agreement to pay retained counsel directly under the Settlement Agreement or retained counsel's right to retain those funds under the Retention Agreement, then it would also nullify all other aspects of the settlement by the very terms of the Settlement Agreement. Putting aside any other potential consequences, Microsoft would get all the money back, *i.e.*, in excess of $60 million.

CROSS-APPEAL

As an alternative ground to reach the correct result at the end of the day, the Attorney General cross-appeals from the trial court's order improperly allowing the Auditor to intervene in the trial court. [Order Granting Intervention, C.P. 336-40 & Appellant R.E. 3].

I. The Auditor's Intervention was Untimely.

For the reasons that follow, the trial court erred when it allowed the Auditor to intervene in this action. The trial court allowed the Auditor to intervene pursuant to Rule of Civil Procedure 24(a)(2), Intervention of Right, and explained

> "that (1) [t]he would be intervenor must make a timely application; (2) [h]e must have an interest in the subject matter of the action; (3) [h]e must be situated that disposition of the action may 'as a practical matter' impair or impede his ability to protect his interest; and (4) [h]is interests must not already be adequately represented by existing parties."

[*Id.* at p. 2 (citing *Guaranty National Ins. v. Pittman*, 501 So.2d 377, 381 (Miss. 1987))]. However, the trial court only addressed and relied upon the first prong of Rule 24(a)(2). It did not articulate any findings under the other factors. Upon a complete Rule 24(a)(2) analysis, the Auditor's motion for intervention should have been denied.

II. The Auditor Should Have Known of his Interest.

The relevant length of time to intervene is measured from the point at which "the would-be intervenor actually knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene. The language [of the rule] is clear that actual knowledge is not required." *Hood*, 958 So.2d at 807-8. In this case, the Auditor knew or reasonably should have known, about his purported interest in this case for more than five years (when the case against Microsoft was filed) before he requested permission to intervene. The Attorney General's filing of the complaint, in August 2004, was a matter of public record and the Retention Agreement was on the Attorney General's website. The Retention Agreement sets out a standard contingent fee arrangement in which retained counsel is paid out of the ultimate recovery, if any, achieved in the lawsuit. The Retention Agreement does not require a special legislative appropriation to pay counsel. The Auditor knew or should have known of the alleged interest he now seeks to protect no later than when the original complaint was filed in August 2004. The Auditor's delay of over five years to attempt to protect his purported interest is inexcusable and his attempted intervention was untimely.

Equally inexcusable is the Auditor's failure to timely challenge the Settlement Agreement itself. The Settlement Agreement was approved by order of the trial court on June 11, 2009. The Auditor's June 18, 2009 letter to retained counsel, Brent Hazzard, acknowledged that the Auditor knew the terms of the Settlement Agreement.[11] The letter said: "the Office of the State Auditor has

[11] The Settlement Agreement provided the following with respect to Microsoft's payments:

> B. Initial Cash Payments. Within ten (10) days after the End of the Appeal Period, Microsoft shall:
>
> 1. pay to the State of Mississippi $28 million in cash, which amount shall not be affected by the total amount of vouchers claimed by Eligible Purchasers; and
>
> 2. pay to the State of Mississippi an additional $22 million in cash as a non-

recently been made aware of the settlement negotiated between Microsoft Corporation and the State of Mississippi. A copy of the executed "'Settlement Agreement' between the parties has been reviewed by this Office." [June 18, 2009 Letter, C.P. 137-39]. Moreover, the Auditor also knew of his putative interest, that interest which he claimed to vindicate, long before he sought to intervene. His June 18, 2009 letter revealed he believed any payment to lawyers must be made through special legislative appropriation and that "was clearly not accomplished by the Microsoft Settlement Agreement." [*Id.*].

The Settlement Agreement itself included a mechanism for anyone to come to court and challenge its terms. Indeed, the agreement required that no money would be paid to the State or its lawyers by Microsoft until after the time to challenge the trial court's June 11th order had run or, if challenges were filed, until after those challenges were decided, appealed, and finally resolved by the courts. [Settlement Agreement at pp. 2-3, 7, C.P. 6-36 & Appellant R.E. 2].

Notwithstanding this explicit mechanism to challenge the Settlement Agreement, the Auditor let the time to challenge and appeal the Settlement Agreement pass without filing anything with the trial court. The Auditor has no viable excuse for not intervening during the prescribed appeal period and his belated request to intervene, seven months after the fact, was untimely.

> refundable credit against the Reversion to be paid in accordance with Section IV.D below; in the event the total value of the Reversion as determined in accordance with Section IV.C.7 below is less than $22 million, the State shall not be required to refund any portion of the $22 million credit described in this Section IV.B.2;
>
> 3. the payments described in this Section IV.B shall be distributed by Microsoft as follows: (a) $40 million shall be paid into an account designated by Plaintiff and controlled by the State of Mississippi; and (b) $10 million shall be paid to Susman Godfrey LLP – Multi-Client Account, JPMorgan Chase Bank of Texas, 712 Main, 2nd Floor East, Houston TX 77002, ABA #021000021, Account #00103347069.

[Settlement Agreement at p. 7, C.P. 6-36 & Appellant R.E. 2].

III. The Attorney General Suffered Great Prejudice.

The prejudice to the Attorney General attributable to the Auditor's intervention was apparent when he sought to intervene in the trial court below. First, due to the Auditor's selective challenges to only high profile settlements involving the Attorney General's contingency contracts, *i.e.* MCI and Microsoft, his actions impacted settlement negotiations of other ongoing litigation and hindered future litigation. The Attorney General and his counsel validly retained on other matters had no way to know if the Auditor would arbitrarily attack the fee agreements in those matters as well. Second, if the Auditor successfully defeats the Settlement Agreement here, then Microsoft's obligation to pay would be unwound pursuant to the terms of the Settlement Agreement.

IV. The Auditor Has Suffered No Prejudice.

In contrast to the prejudice that untimely intervention would foreseeably (and did) cause the Attorney General, the Auditor would not suffer any prejudice by denial of intervention.

The Auditor's June 18, 2009 letter to Mr. Hazzard stated that "the State Auditor does not contest the fair and reasonable compensation of private counsel for the State of Mississippi in the Microsoft matter, but . . . . simply require[s] that these same attorneys make application to the Legislature for approval of its fees and payment through legislative appropriation." [June 18, 2009 Letter, C.P. 137-39]. The Auditor's objection was not that the fee established by the Settlement Agreement is unfair or unreasonable, or that the work performed did not justify the fee, but only that this reasonable fee amount should be paid through a different mechanism. Therefore, denying the Auditor's untimely request to intervene would have not prejudiced his position.

V. The Auditor's Interest Was Already Represented.

Finally, there is no dispute that the Attorney General took possession of the State's proceeds from the Microsoft settlement and deposited them in the State's General Fund. He fulfilled the State's interest. The State had no further interest for the Auditor to protect.

Based on all four prongs of a proper Rule 24(a)(2) analysis, the Auditor's motion to intervene was not timely and should not have been granted. The trial court's only error was in not examining all four prongs under the Rule, and thereby allowing the Auditor's challenge to get off the ground in the first place.

In sum, if the Court does not see fit to affirm the trial court's judgment rejecting the Auditor's claims on their merits and resolving this matter in favor of the State, then, alternatively, the trial court's intervention order should be reversed and rendered on the State's cross-appeal. Either outcome would preserve the only legally correct and just result in this matter.

CONCLUSION

In summary, the trial court should be affirmed because it correctly found that Microsoft's payment of contingency fees and expenses was authorized under the MCPA. It was also correct because the Attorney General has the right and authority to enter into contingency fee agreements on behalf of the State and at his sole discretion. Sections 7-5-5 and -7 do not restrict the Attorney General's authority to enter into and carry out the payment terms of contingency fee agreements. The trial court properly construed and applied the statutes to the facts of this case. Its judgment was especially correct given that the Attorney General's interpretation and application of his authority is entitled to heightened deference. *Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008).

Additionally, the trial court should be affirmed because the Auditor has no right to interfere with retained counsel's property, validly and legally earned pursuant to the agreement with the State. Retained counsel's money was not "public funds." It was subject to an attorneys' lien, and belongs to those attorneys. Furthermore, the Auditor, by his untimely intervention, legally waived any rights he may ever have had to challenge the Settlement Agreement. Finally, application of the Auditor's proposed construction of the Attorney General's authority would violate our Constitutions and Mississippi contract law. It would also set aside the Settlement Agreement and cost the State of Mississippi over $47 million in cash and create a quagmire in having to undo countless redeemed vouchers.

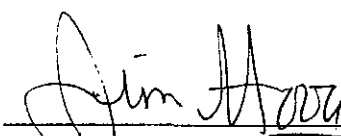
Alternatively, on cross-appeal, the trial court's order permitting the Auditor's intervention should be reversed and rendered because the elements of Rule 24(a)(2) have never been met.

For any, and all of these reasons, the Court should hold for the Attorney General and the State of Mississippi and reject the Auditor's appeal.

This the 21st day of January, 2011.

Respectfully submitted,

By: JIM HOOD, ATTORNEY GENERAL

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee/Cross-Appellant, Jim Hood, Attorney General *ex rel.* the State of Mississippi, has been served via U.S. Mail, properly addressed and postage prepaid, to the following persons:

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THIS the 21st day of January, 2011.

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