

**IN THE SUPREME COURT OF MISSISSIPPI  
2010-CA-00881**

**STACEY PICKERING in his capacity  
as Auditor for the State of Mississippi**

**APPELLANT**

**v.**

**JIM HOOD, ATTORNEY GENERAL, *ex rel*  
STATE OF MISSISSIPPI and MICROSOFT CORPORATION**

**APPELLEES**

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

**BRIEF OF APPELLANT**

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STATE OF MISSISSIPPI and MICROSOFT CORPORATION**

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**CERTIFICATE OF INTERESTED PARTIES**

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This the \_\_\_\_ day of October, 2010

Respectfully submitted,

By: \_\_\_\_\_  
Arthur F. Jernigan, Jr.

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## STATEMENT OF ISSUES

- 1) Whether the payment of funds directly to special counsel for the Attorney General from the opposing party in a settlement with the taxpayers of the State of Mississippi was illegal under Mississippi Code Ann. § 7-5-7?
- 2) Whether the payment of funds to special counsel for the Attorney General directly from the opposing party in a settlement with the taxpayers of the State of Mississippi was a violation of the Mississippi Constitution and the separation of powers doctrine?
- 3) Whether the case of *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002) prohibited the diversion of funds directly to these special assistant attorney generals from the opposing party during the settlement with the State of Mississippi?
- 4) Whether special counsel's receipt of funds directly from the opposing party in a settlement with the State of Mississippi violated their applicable retention agreement with the Attorney General?
- 5) Whether special counsel were permitted to negotiate directly with an opposing party during settlement discussions on their own personal behalf regarding the amount of their own attorneys' fees and costs to be received as a result of the settlement?
- 6) Whether the Attorney General's authority regarding the source of payment for his special assistants has been limited by Miss. Code Ann. § 7-5-7?
- 7) Whether the payments from Microsoft were tendered as the result of a judgment of liability for civil penalties?

- 8) Whether there are provisions within the Microsoft Settlement Agreement and/or applicable Retention Agreements that are illegal under Miss. Code Ann. §§ 7-5-1 *et al.*, and therefore, void as a matter of public policy?
- 9) Whether the reasonableness of the fees paid to special counsel is an inherent issue to be determined by the Mississippi Legislature during the appropriations process mandated by Miss. Code Ann. § 7-5-7?

### **STATEMENT OF CASE AND FACTS**

This case concerns the legality of private outside counsel's receipt of a portion of state settlement funds from an opposing party while representing the State of Mississippi. On June 11, 2009, the State of Mississippi entered into a "Settlement Agreement" with Microsoft Corporation (hereinafter "Microsoft Settlement Agreement"), to resolve a cause of action concerning the sale of certain software products in Mississippi. (C.P. 1-31) As part of the Microsoft Settlement Agreement, private attorneys hired as special counsel by the Attorney General negotiated for the transfer of \$10,000,000.00 from the settlement proceeds into their private trust account. (C.P. 12) As set forth below, Miss. Code Ann. § 7-5-7 precludes outside counsel from negotiating and receiving their fees in such a manner when they are employed by the State of Mississippi.

The issues here originate from another lawsuit now pending before the Mississippi Supreme Court - *The State of Mississippi and Stacey Pickering in his capacity as Auditor for the State of Mississippi v. The Langston Law Firm, P.A., Joseph C. Langston, and Timothy R. Balducci*, No. 2010-CA-00362 (hereinafter "*Langston*"). (C.P. 147-53) On December 20, 2007, the State Auditor had instituted *Langston* seeking the return of attorneys' fees negotiated and paid by Worldcom to

private counsel during the settlement of unpaid state taxes.<sup>1</sup> On December 4, 2008, the Attorney General had entered his appearance in *Langston* and submitted his own motion for summary judgment for resolution therein of the same issues now pending before this Court in both causes of action. (C.P. 245-59, 260-61, 284)

On June 18, 2009, while *Langston* was pending review in the Circuit Court of Hinds County, Mississippi, the State Auditor learned of the Microsoft Settlement Agreement. Consistent with *Langston*, the State Auditor made formal demand from outside counsel representing the State for return of the Microsoft settlement funds. (C.P. 262-63) On January 12, 2010, the State Auditor received a courtesy copy of a Petition to Approve Fees and Overrule Quasi Objection. (C.P. 37- 68) On February 5, 2010, the State Auditor filed a Motion to Intervene since the petition sought immediate disbursement of the funds from the private trust account. (C.P. 140-264) The request for intervention was based on Mississippi Code Ann. § 7-7-211(g), which requires the State Auditor to investigate the management of Mississippi public funds and, in the event such public funds have been improperly withheld, misappropriated and/or otherwise illegally spent by a public officer, to commence civil action for the recovery of misspent public funds. (C.P. 140-264) On April 13, 2010, the chancery court granted the Motion to Intervene, finding that the State Auditor had asserted an interest in this cause of action. (C.P. 336-40)

On March 23, 2010, the State Auditor had already 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. (C.P. 265-303) On April 28, 2010, the chancery court entered its Order and Opinion, denying the State Auditor's request for disbursement of the funds to the State of Mississippi and ordering that the disputed settlement funds be distributed directly to outside

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<sup>1</sup> The taxes were pursued in bankruptcy court in the case styled *In re Worldcom, Inc., et al.*, Case No. 02-13533 (AJG), in the United States Bankruptcy Court for the Southern District of New York.

counsel representing the State of Mississippi. (C.P. 341-47) On May 24, 2010, the State Auditor filed his Notice of Appeal to this Court. (C.P. 348-50)

### **SUMMARY OF THE ARGUMENT**

Mississippi Code Ann. § 7-5-7 provides that private attorneys hired as special counsel to the Attorney General “shall be paid out of the attorney general’s contingent fund, or out of any other funds appropriated to the attorney general’s office.” There is no dispute in this case that special counsel hired to assist the State of Mississippi with claims against Microsoft Corporation were not paid from the attorney general’s contingent fund or other legislative appropriation. Special counsel in this case instead arranged for the deposit of \$10 million of the State’s settlement funds into a private trust account in Houston, Texas for their own compensation. Strict interpretation of Mississippi Code Ann. § 7-5-7 prohibited their conversion of these funds without legislative oversight or appropriation.

The chancery court’s reliance on Miss. Code Ann. § 7-5-5 as support for outside counsel’s receipt of these funds was misplaced. The discretion afforded the Attorney General therein as to compensation of his staff concerns attorneys working on a full-time basis in the Attorney General’s Office. There is no dispute here that outside counsel were hired pursuant to Miss. Code. § 7-5-7 which provides for specific sources of compensation. This case concerns outside counsel from private law firms with separate ongoing practices hired on a part-time basis by the Attorney General solely for the purpose of handling the case against Microsoft Corporation. They must be paid from the attorney general’s contingent fund, or out of any other funds appropriated to the attorney general’s office.

Special counsel’s personal trust account in Houston, Texas is not the “contingent fund” referenced in Miss. Code Ann. § 7-5-7. Pursuant to its definition alone, a “contingent fund” is not the same thing as the “contingency fee” argued as the basis for special counsel’s deposit of funds into

a private trust account. Miss. Code Ann. § 7-5-61 “requires the Attorney General to maintain financial records ‘from whatever source, including appropriations by the Legislature, the contingent fund, and other funds,’” and “shall deposit all funds received by his office in a state depository in his name as attorney general of the state of Mississippi . . .” Based on this statute, the Attorney General is required by law to have record of an actual “contingent fund” residing in a state depository in his name. The Attorney General produced no financial records and certainly no evidence that these attorneys were paid from that state “contingent fund” identified by statute or any other legislative appropriation.

The Mississippi Consumer Protection Act provides no basis for the transfer of \$10 million from the settlement funds into a private trust account. The disputed funds were not civil penalties but instead settlement funds paid to the State of Mississippi without any admission of liability by Microsoft.

Illegal provisions of a contract cannot be enforced as a matter of public policy. The provision of the Microsoft Settlement Agreement directing that \$10 million from the settlement funds be deposited into a private trust account was prohibited by Miss. Code Ann. § 7-5-7, and therefore, void as a matter of public policy. In this same respect, the Retention Agreement’s failure to require that any compensation of outside counsel be from legislative appropriation is fatal to it as well.

The Mississippi Supreme Court already resolved this issue in favor of the State Auditor’s position in *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002). In reaching that decision, the Mississippi Supreme Court relied upon the sworn testimony of the Attorney General who explained that the proper legal procedure for compensating private special counsel requires that all settlement funds negotiated for and on behalf of the State of Mississippi be tendered to the State of Mississippi followed by private counsel’s application to the legislature for appropriation of fees. Private counsel in *Pursue Energy* expressly modified their

retention agreements to provide for legislative review so as to pass the scrutiny of the Mississippi Supreme Court under Miss. Code. Ann. § 7-5-7. Strict interpretation of Miss. Code Ann. § 7-5-7 is consistent with the constitutional right and duty of the legislative branch of government to control the public treasury. Accordingly, the decision of the Chancery Court of Hinds County, Mississippi should be REVERSED and RENDERED.

## **ARGUMENT**

### **Standard of Review**

Judicial review of the applicability and effect of statutory law first requires a determination of whether the statute in question is ambiguous. *Mississippi Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss. 1979). Where the language used by the legislature in a statute is plain and unambiguous and conveys a clear directive, there is no occasion to resort to rules of statutory construction. *Miss Power Co. v. Jones*, 369 So. 2d 1381, 1388 (Miss. 1979); *Forman v. Carter*, 269 So.2d 865 (Miss. 1972); *State v. Heard*, 246 Miss. 774, 151 So.2d 417 (1963); *Harrison County School District v. Long Beach School District* 700 So. 2d 286, 288-89 (Miss. 1997). Whether or not there is ambiguity, the ultimate guiding factor in the interpretation of a statute is to discern and give effect to legislative intent. *Anderson v. Lambert*, 494 So. 2d 270, 372 (Miss. 1986). It is a fundamental rule of statutory construction in Mississippi that use of the word “shall” establishes an absolute requirement under the applicable statute. *Division of Medicaid v. Mississippi Independent Pharmacies Ass’n*, 20 So. 3d 1236, 1239 (Miss. 2009). Statutory interpretation and other questions of law are reviewed *de novo* by the Mississippi Supreme Court. *Powe v. Byrd*, 892 So.2d 223, 227 (Miss. 2004); *Arceo v. Tolliver*, 19 So. 3d 67, 70 (Miss. 2009); *Sheppard v. Miss. State Highway Patrol*, 693 So.2d 1326, 1328 (Miss. 1997).

**I. Strict interpretation of Miss. Code Ann. § 7-5-7 prohibited the diversion of \$10 million from the State's settlement with Microsoft without legislative appropriation.**

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

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

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

The attorney general is hereby authorized and empowered to appoint and employ special counsel, on a fee or salary basis, to assist the attorney general in the preparation for, prosecution, or defense of any litigation in the state or federal courts or before any federal commission or agency in which the state is a party or has an interest.

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

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

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

The compensation of appointees and employees made hereunder ***shall be paid out of the attorney general's contingent fund, or out of any other funds appropriated to the attorney general's office.***

(emphasis added).

The Attorney General hired outside counsel to assist with the prosecution of claims against Microsoft Corporation. In their negotiation of the Microsoft Settlement Agreement, it is undisputed that outside counsel arranged for the deposit of \$10,000,000.00 of the settlement funds into a private trust account, instead of seeking payment of its legal fees from the Attorney General's contingent

fund or any other funds appropriated or approved by the Mississippi Legislature as required by Miss.

Code Ann. § 7-5-7. The Microsoft Settlement Agreement provided the following:

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 nonrefundable 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;<sup>2</sup>

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, TX77002, ABA #021000021, Account #00103347069.

(C.P. 12)(emphasis added).<sup>3</sup>

It is clear from these payment provisions that all of the initial \$50,000,000.00 paid by Microsoft for release of liability constituted public funds to be paid “to the State of Mississippi.”

(C.P. 12) Without stating that any of this \$50 million were attorneys’ fees, the agreement simply directed that \$10 million of these settlement funds be deposited into a private trust account controlled by outside counsel. Mississippi Code Ann. § 7-5-7 does not permit outside counsel for

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<sup>2</sup> It is understood that from the \$60 million in vouchers made available to the public under this agreement, approximately \$2.5 million was actually paid by Microsoft before the time for redemption had expired.

<sup>3</sup> It is noted that Microsoft also considered all such payments to be for and on behalf of the State of Mississippi since the Microsoft Settlement Agreement expressly provided that “Microsoft played no part in negotiating the fees and expenses to be paid to plaintiff’s counsel and takes no position as to whether those fees and expenses are reasonable or appropriate.” (C.P. 92)



the State of Mississippi to retain settlement funds for their own personal use.<sup>4</sup> The diversion of funds in this manner violated the clear and unambiguous terms of Mississippi Code Ann. § 7-5-7 and all the legislative safeguards intended by this statute.

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

All of the funds paid by Microsoft were paid as the result of a lawsuit and settlement with the State of Mississippi. In *Nixon v. American Tobacco Co.*, 34 S.W.3d 122 (Mo. 2001), special counsel to the Missouri Attorney General sought to avoid judicial review by suggesting that compensation from settlement funds did not constitute public money. In recognizing the shallowness of this argument, the Court concluded as follows:

[W]e find Respondents’ argument unpersuasive, as it relies on an elusive shell game that misdirects the nature of the attorney fees. While it is true that these funds do not originate in the state treasury, our analysis does not end there. Instead, we look to the method by which parties settle disputes. When considering whether to make an offer to settle, a litigant establishes a monetary amount that reflects, among numerous

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<sup>4</sup> Although reasonableness of the fees is an issue for the Legislature to resolve during the appropriations process required by Miss. Code Ann. § 7-5-7, it is noted that the Retention Agreement provides for different percentages based on the amounts of recovery. (C.P. 69-74)

other factors, both his potential loss should he continue litigation and the risk that he may not succeed on the merits. This adjusted figure represents that litigant's maximum settlement price. Once the litigant has negotiated a settlement amount he finds favorable, it is of absolutely no consequence to him how the settlement is divided among various parties.

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

As also expressly recognized by the *Nixon* Court,

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

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

Requiring legislative review of the attorney fee through the legislative appropriation mandated by Miss. Code Ann. § 7-5-7 ensures that all such dangers and potential violations are properly addressed before payment of outside counsel.<sup>5</sup> That was obviously the intent of this statute. The ultimate guiding factor in the interpretation of a statute is to discern and give effect to legislative intent. *Anderson v. Lambert*, 494 So. 2d 270, 372 (Miss. 1986).

It is a fundamental and constitutional principal of law that while the Attorney General's Office has general authority to pursue litigation of behalf of the State of Mississippi, it must yield to any express statutory limitations on that authority. *Frazier v. State ex rel. Pittman*, 504 So. 2d 675, 687-90 (Miss. 1987)(“all public officers, including the Attorney General, are subordinate to the laws of this State”); *State v. Warren*, 180 So. 2d 293, 300 (Miss. 1965)(Attorney General clothed

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

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

All special counsel here were representing the State of Mississippi. While the State Auditor does not oppose nor seek to undo the Microsoft Settlement Agreement, the \$10,000,000.00 now held in outside counsel’s private trust account was payable to the State of Mississippi. Pursuant to Mississippi Code Ann. § 7-5-7, special counsel may obtain payment of their fees through the legislative appropriation process, a process followed by all other branches and agencies of government. These special assistants were not party litigants to the Microsoft lawsuit despite their attempts to interject themselves as such and negotiate payment on their own behalf during settlement discussions. Having taken an oath to serve as special counsel for the State of Mississippi, all settlement funds obtained for the State of Mississippi constitute public funds subject to the provisions of Mississippi Code Ann. § 7-5-7. Accordingly, the funds should be returned to the State of Mississippi to which they were expressly payable under the Microsoft Settlement Agreement and special counsel required to make application for their fees through legislative appropriation.

## **II. Miss. Code Ann. § 7-5-5 is not applicable to this case.**

The chancery court relied upon Miss. Code Ann. § 7-5-5 as support for allowing special counsel to deposit \$10 million of the settlement funds into their own accounts. Miss. Code Ann. § 7-5-5 allows the Attorney General “to retain and compensate Special Assistant Attorney Generals” and under this statute, “the Attorney General shall be the sole judge of the compensation in such cases.” (C.P. 343) Despite the fact that Miss. Code Ann. § 7-5-5 fails to address the source of the

funds,<sup>6</sup> that statute instead concerns attorneys that “devote their entire time and attention to the duties pertaining to the department of justice under the control and supervision of the attorney general.” The State Auditor does not dispute the fact that the Attorney General may be the sole judge of the levels of compensation of his full time employees in his state office.

Here, we are instead dealing with private lawyers and private law firms with separate ongoing practices hired on a part-time basis by the Attorney General solely for the purpose of handling this single case. There is no dispute that outside counsel representing the State against Microsoft were hired as “special counsel” pursuant to Miss. Code. § 7-5-7. As discussed above, that statute expressly provides that the “compensation of appointees and employees made hereunder *shall be paid out of the attorney general’s contingent fund, or out of any other funds appropriated to the attorney general’s office.*” (emphasis added) Whether they were paid out of the attorney general’s contingent fund or other appropriation under Miss. Code Ann. § 7-5-7 is the sole issue in this case.

**III. Special counsel’s trust account does not constitute the “contingent fund” referenced by Miss. Code Ann. § 7-5-7.**

The Microsoft Settlement Agreement established that Microsoft was to “pay to the State of Mississippi” a total of \$50 million (*ie.* \$28 million cash plus \$22 million non-refundable credit against vouchers). (C.P. 12) Of these amounts, \$10 million was diverted to private counsel’s trust account. Without argument from either party on the subject, the chancery court concluded that outside counsel’s private trust account in Houston, Texas constituted the “contingent fund” referenced in Miss. Code Ann. § 7-5-7. (C.P. 343) Despite the similarity between the words “contingency agreement” and “contingent fund,” there is no basis under the most fundamental understanding of these terms to conclude they are one and the same.

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<sup>6</sup> It is noted that the funds utilized to compensate these full time employees are also from amounts appropriated by the Mississippi Legislature.

A “contingent fund” is an account “set up by a municipality to pay expense items which will necessarily arise during the year but cannot appropriately be classified under any of the specific purposes for which other taxes are levied.” BLACK’S LAW DICTIONARY Sixth ed. (*citing First Nat. Bank of Norman v. City of Norman*, 182 Okl. 7, 75 P.2d 1109, 1110). The legal definition also alludes to the term “contingency reserve” which is defined as a “fund created in anticipation of incidental or unforeseen expenditures.” In other words, contingent funds are established by the legislative or other appropriating body and specifically assigned to certain departments or areas of government to be utilized for unforeseen expenses that arise during the fiscal year.

A “contingency fee” is an altogether different creature. Notwithstanding the fact that these private attorneys negotiated directly with the opposing party for direct payment by the opposing party, a “contingency contract” is “used to refer to fee arrangement with attorney who agrees to accept his fee on the contingency of a successful outcome.” BLACK’S LAW DICTIONARY, Sixth ed. Thus, a “contingent fund” and a “contingency fee” are two entirely different matters, despite having a similar ring. No party ever made such an analogy in the court below, and there was simply no basis for drawing such a conclusion now.

The plain language of Miss. Code Ann. § 7-5-7 accounts for the true meaning of a “contingent fund.” It expressly states that “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’s use of the word “other” is instructive. If the “contingent fund” referenced in this statute were not a fund appropriated by the Legislature to the Attorney General for the use of unforeseen expenses, then there would not be any reason to include the word “other” in the statute when referring to legislative appropriations. It would instead read “out of the attorney general’s contingent fund, or out of any funds appropriated to the attorney general’s office.” However, the statute does not read that way. It is contemplated that

both of the funds referenced in this statute as sources for payment of these special outside counsel are to be appropriated by the Legislature. This strict interpretation is consistent with the black letter law definition of “contingent fund.”

The chancery court noted that Miss. Code Ann. § 7-5-61 “requires the Attorney General to maintain financial records ‘from whatever source, including appropriations by the Legislature, the contingent fund, and other funds,’” and concluded that by “clear implication, therefore, the “Contingent Fund” is separate from appropriations by the Legislature.” (C.P. 343) However, Miss. Code Ann. § 7-5-61 requires that the Attorney General “shall deposit all funds received by his office in a state depository in his name as attorney general of the state of Mississippi . . . “ If that is the case, then there is obviously a “contingent fund” in his name somewhere in a state depository. Special counsel should have been paid from this contingent fund referenced by this statute. The Attorney General produced no financial records of the state “contingent fund” in the court below and certainly no evidence that these outside attorneys were paid from that “contingent fund” identified by this statute. That is because outside counsel instead diverted \$10 million of the settlement proceeds expressly payable to the State of Mississippi to a private bank account in Houston, Texas. Accordingly, these funds should be returned to the State of Mississippi for proper allocation by the Legislature pursuant to Miss. Code Ann. § 7-5-7.

**IV. The funds were not civil penalties but instead paid as a Settlement Agreement without any admission of liability by Microsoft.**

Special counsel argued in the chancery court that the Attorney General was permitted to divert attorneys’ fees from the settlement funds under Miss. Code Ann. § 75-24-19. Miss. Code Ann. § 75-24-19 allows for an award of attorneys’ fees counsel if civil penalties are awarded in the underlying cause of action. This argument is misplaced since there were no civil penalties issued or fees awarded in this cause. The disputed funds were paid as the result of a mutual settlement agreement between civil litigants, wherein Microsoft expressly “denies each and every one of

Plaintiff's allegations of unlawful conduct, damages and other injuries." There is simply no support in the Mississippi Consumer Protection Act for the diversion of settlement funds to special counsel.

**V. Illegal contract provisions contained in the Microsoft Settlement Agreement and Retention Agreement are void as a matter of public policy.**

Illegal provisions of a contract cannot be enforced as a matter of public policy. It is a principal of public policy that no court will lend its aid to a litigant who bases his cause on an illegal act. *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 484 (Miss. 2006); *Morrissey v. Balogna*, 123 So. 2d 537 (Miss. 1960)(court will not aid litigant whose actions are in violation of statute); *Lowenberg v. Klein*, 87 So. 653, 654-55 (1921)(contract provisions in violation of state or federal statute will not be enforced). As to portions of a contract that violate state or federal statute, courts will not enforce those provisions "but will leave the parties where found, -insofar as any illegal items or portions are concerned." *Chas. Weaver & Co. v. Phares*, 188 So. 12, 13 (Miss. 1939); see *Attaché v. Golden*, 133 A.D. 2d 596, 519 N.Y.S.2d 702 (2nd Dept. 1987)(Where agreement consists in part of unlawful objective and in part of lawful objectives, court may sever illegal aspects and enforce legal ones, so long as illegal aspects are incidental and not main objective of agreement); *Kidder Peabody v. IAN International*, 28 F. Supp. 2d 126, 139 (S.D.N.Y. 1998)(conclusion that portion of contract is illegal does not preclude enforcement of legitimate provisions of agreement).

Because special counsel's receipt of \$10 million from the \$50 million in settlement funds payable to the State of Mississippi was illegal in violation of Miss. Code Ann. § 7-5-7, this provision of the Microsoft Settlement Agreement is void as a matter of public policy. In this same respect, the Retention Agreement's failure to provide the additional requirement that payment of outside counsel be through legislative appropriation is fatal to it as well.<sup>7</sup> Pursuant to the well established law of this

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<sup>7</sup> As will be explained in detail in the following two sections of this Appellant's Brief, former Attorney General Mike Moore modified a similar Retention Agreement to include Legislative review of the attorneys' fees so as to pass the scrutiny of this Court and prevent its similar demise under Miss. Code Ann. § 7-5-7.

State prohibiting illegal contract provisions, this Court has the duty to declare void as a matter of public policy any provisions of these contracts that are illegal. Accordingly, the disputed funds should be returned to the general fund for legislative review and allocation.

**VI. The Mississippi Supreme Court already resolved this issue in *Pursue Energy*.**

The chancery court did not address the Mississippi Supreme Court's decision in *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002). There was no acknowledgment, discussion or comparison of any matter contained therein despite it being a primary basis for the State Auditor's position. Regardless of the lower court's reasoning for such, it is submitted that *Pursue Energy Corp.* requires the opposite outcome now.

*Pursue Energy Corp.* held that a contingency agreement by special counsel to the Attorney General was acceptable -- if the payment of fees came from legislative appropriation as required by Miss. Code Ann. § 7-5-7. *Pursue Energy Corp.* involved the settlement of a tax claim brought by the State Tax Commission and the payment of outside special assistants to the Attorney General hired specifically to handle that case. The Mississippi Supreme Court upheld the contingency agreement for the following reason:

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

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

In reaching its decision in *Pursue Energy Corp.*, the Mississippi Supreme Court relied upon the sworn testimony of former Attorney General Mike Moore regarding the legal procedure that must



be followed for compensating special counsel under a contingency fee retention agreement. The Attorney General's sworn testimony in *Pursue Energy Corp.* was as follows:

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

(C.P. 289-93)

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

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

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

(C.P. 294-302). Accordingly, the Mississippi Supreme Court has already resolved the issues presented herein in favor of the State Auditor's position in this cause.

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

Special counsel in *Pursue Energy Corp.* argued to the Mississippi Supreme Court as follows in seeking affirmation of their contingency/retention agreement:

When this whole thing was started, we got together with the State Tax Commission. The Attorney General's Office sat down and discussed this, and it was very clear from the initial beginnings – and it may not be clear in the retention agreement, and that's my problem, it's not the Court's, that we're not to be paid unless the legislature

appropriates funds. We have actually collected taxes for the state that went into the state treasury. They got 100 percent of it, and then went over to the legislature the next year and got an appropriation and paid us. That's happened.

(C.P. 303) Accordingly, special counsel and the former Attorney General already affirmed the proper procedure that must be followed for compensation of outside counsel.

The present Attorney General also knew the proper procedure for compensating special counsel before the Microsoft case- his office subsequently presented the Legislature with the request for appropriation of attorneys' fees paid in *Pursue Energy Corp.* As established by all participants and the Court in *Pursue Energy Corp.*, the procedure for payment of outside special counsel requires that the entire amount of the settlement funds be paid to the State of Mississippi. Upon receipt, the Mississippi Legislature may then make an appropriation based upon the Attorney General's recommendation and the terms of any fee agreements. In no event was special counsel to negotiate receipt of their fees directly from the opposing party under Miss. Code Ann. § 7-5-7.

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

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

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

*In re Hood v. State of Mississippi*, 958 So. 2d 790, 812 (Miss. 2007); see *Belmont v. Miss. State Tax Commission*, 860 So.2d 289, 306-07 (Miss. 2003); see also *Myers v. City of McComb*, 943 So.2d. 1, 4 (Miss. 2006)(emphasizing the importance of separation of powers doctrine and holding that

“legislative department alone has access to the pockets of the people” and “judicial branch cannot perform a clearly legislative branch function”); *see also King's Daughter Medical Center, et al. v. Haley Barbour, et al.*, Cause No. G-2006-1621, Chancery Court of Hinds County, Mississippi, First Judicial District (July 10, 2008)(declaring Division of Medicaid assessment void as matter of law in violation of Miss. Code Ann. § 43-13-11(18)(b) since it usurped legislative authority to control purse strings of State).

In the case of *In re Hood v. State of Mississippi*, 958 So. 2d 790 (Miss. 2007), the State of Mississippi had asserted a civil action against the tobacco industry which ultimately resulted in a settlement whereby hundreds of millions of dollars were to paid by the tobacco industry “for the benefit of the State of Mississippi.” The settlement agreement in that case also provided for the creation of a pilot program aimed at reducing the use of tobacco products by children. After approval of the original settlement by the Chancery Court, the Mississippi Legislature created the Mississippi Health Care Trust Fund (“HCTF”) and directed that a portion of the tobacco settlement proceeds be deposited into the HCTF to be further appropriated by the Legislature. From 1998 to 2000, all proceeds from the tobacco settlement were deposited into the HCTF as required by the Legislature. *In re Hood*, 958 So. 2d at 795.

In December 2000, upon application by the Attorney General, the Chancery Court entered an order (“Dec. 2000 Order”) directing that \$20 million per year was to be taken from the tobacco settlement payments and deposited with the Partnership for a Healthy Mississippi (the “Partnership”), a private non-profit entity created to carry out the Pilot Program. In July 2003, a committee of the Mississippi Legislature issued a report concluding that the Dec. 2000 Order obtained by the Attorney General violated Mississippi law, and that the Chancery Court lacked statutory and constitutional power to direct payment to the Partnership since “[i]t is a well-

understood principle in Mississippi constitutional law that the Legislature appropriates funds and that this power is exclusive to the Legislature.” *In re Hood*, 958 So. 2d. at 798.

Agreeing with the Mississippi Legislature, the Governor of Mississippi filed a motion to intervene and for an order vacating the Dec. 2000 Order. The motion was granted and the Chancery Court vacated the Dec. 2000 Order, finding that “this is outside the scope of this Court’s authority and falls within the province of the legislative branch of government.” On appeal by the Partnership, the Mississippi Supreme Court ruled that the motion to intervene was properly granted and that the Dec. 2000 Order was properly vacated. *In re Hood*, 958 So. 2d. at 809, 818.

The same situation presents itself here. The Mississippi Legislature has provided through Mississippi Code Ann. § 7-5-7 that outside counsel must be paid only from the attorney general’s contingent fund, or out of any other funds appropriated to the attorney general’s office. Just like the Attorney General had no authority to divert a portion of the tobacco proceeds to the Partnership, the Attorney General did not have authority to divert a portion of the settlement proceeds to a private trust account. By invalidating the direct payment from the opposing party, this Court will merely place the issue of the proper amount of appropriation before the Mississippi Legislature as intended by the Mississippi Constitution and Miss. Code Ann. § 7-5-7.

### **CONCLUSION**

Pursuant to Miss. Code Ann. § 7-5-7, settlement funds negotiated for and on behalf of the State of Mississippi should be deposited into the general fund for appropriation by the Legislature. Strict interpretation of Miss. Code Ann. § 7-5-7 is consistent with the constitutional right and duty of the legislative branch of government to control the public treasury. The Mississippi Supreme Court already resolved this issue in *Pursue Energy Corporation v. Mississippi State Tax Commission*, 816 So.2d 385 (Miss. 2002). Special counsel’s deposit of \$10 million of state settlement funds from Microsoft into a private trust account was a violation of Miss. Code Ann. §

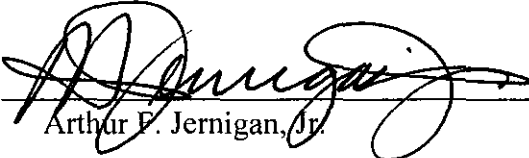
7-5-7. Any contract provisions in the Microsoft Settlement Agreement or Retention Agreement allowing such were illegal and cannot be enforced as a matter of public policy.

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

THIS the 20<sup>th</sup> day of October, 2010.

STACEY PICKERING in his official capacity as  
Auditor for the State of Mississippi

By:

  
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### CERTIFICATE OF SERVICE

I hereby certify that I have this day delivered via U.S. Mail a true and correct copy of the attached and foregoing document to the following persons:

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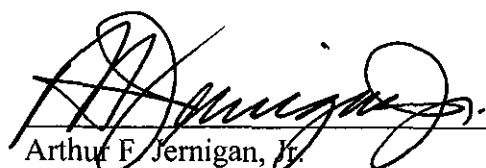
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THIS the 20<sup>th</sup> day of October, 2010.

  
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