

Tobacco settlement, payment of attorneys' fees

Number: INFORMAL

Date: August 13, 1998

The Honorable Lawton Chiles
Governor
The Capitol PL 05
Tallahassee, Florida 32399-0001

Dear Governor Chiles:

You ask for clarification regarding the applicability of Chapter 98-63, Laws of Florida, if: 1) the Settling Defendants directly pay the attorneys' fees in *State of Florida v. American Tobacco Company*;^[1] 2) the state pays the attorneys' fees pursuant to the contract between the state and the attorneys from funds it has received under the terms of the settlement agreement; or 3) the state pays the attorneys' fees pursuant to an order of the court from funds it received under the Settlement Agreement.

Based upon the following discussion, I am of the opinion that Chapter 98-63, Laws of Florida, would not apply if the Settling Defendants directly pay the attorneys' fees in *State of Florida v. American Tobacco Company*, either under the Settlement Agreement in that case dated August 25, 1997, or as provided in the proposed Florida Fee Payment Agreement. However, Chapter 98-63, Laws of Florida, would be applicable if the state pays the attorneys' fees pursuant to the contract between the state and its attorneys or pursuant to a court order from funds it has received under the terms of the Settlement Agreement.

This office recently stated that the provisions of Chapter 98-63, Laws of Florida, would not apply to the payment of attorneys' fees by the Settling Defendants in *State of Florida v. American Tobacco Company*, *supra*, as provided in the Settlement Agreement or the proposed Florida Fee Payment Agreement.^[2] Under the Settlement Agreement and the proposed agreement, the Settling Defendants would pay reasonable attorneys' fees directly to the state's private counsel in an amount set by arbitration subject to an annual cap. This office specifically considered the language contained in section (3) of the act, stating that "all subsequent payments made by the Settling Defendants in [*State of Florida v. American Tobacco Company*] are funds of the State of Florida and are hereby appropriated to [the Tobacco Settlement Trust Fund], or if such trust fund is not created by law, to the General Revenue Fund."

It is a fundamental rule of statutory construction that in interpreting a statute, the entire statute must be considered in determining legislative intent and effect must be given to every part of the statute as a whole.^[3] Nothing in the act indicates an intent that it controls monies which are not owed or due to the state but are paid by the Settling Defendants directly to the private attorneys. Rather, after examining the act as a whole, this office concluded that the provisions characterizing subsequent payments by the Settling Defendants as state funds subject to appropriation refers to those payments which are to be made to the state under the terms of the August 25, 1997 Settlement Agreement.

As this office noted in its earlier advisory opinion, however, any payments made by the state to the private attorneys under the terms of the contract would be subject to legislative appropriation. Because all state monies are subject to the appropriation power of the Legislature,[4] all contracts requiring the state to spend monies are also subject to the appropriations power of the Legislature.[5] In recognition thereof, section 287.0582, Florida Statutes, specifically requires that contracts for services in excess of one fiscal year must contain language that payment under the contract is contingent upon an annual appropriation by the Legislature. Similarly, section 287.059(11), Florida Statutes, while authorizing the state to enter into multi-year contracts for private attorneys' services, requires that such contracts be subject to annual appropriation.

The fact that a contract for legal services does not specifically contain such language does not avoid the requirement that such contract is subject to appropriation. The courts have recognized that contract claims may be raised only on those express written contracts into which an agency has statutory authority to enter.[6] State agencies do not have the authority to alter or waive the requirements of state law by contract, and to the extent that a contract is violative of state law, it is void and unenforceable.[7]

As discussed *supra*, an examination of Chapter 98-63, Laws of Florida, makes it clear that the Legislature sought to assert its control over all funds paid to the state under the terms of the Settlement Agreement in *Florida v. American Tobacco Company, supra*. Thus, if the attorneys' fees are paid by the state under the terms of the contract, such funds are subject to the appropriations authority of the Legislature as recognized in Chapter 98-63, Laws of Florida.

The provisions of Chapter 98-63, Laws of Florida, would likewise apply if the state pays attorneys' fees pursuant to a court order. As noted above, the legislation makes it clear that it applies to *all* funds paid or payable to the state under the terms of the Settlement Agreements. Moreover, the legislation clearly brings within its terms not only any future payments to the state but also those payments which have already been received by the state pursuant to the Settlement Agreement.[8]

Accordingly, I am of the opinion that Chapter 98-63, Laws of Florida, applies if the State of Florida pays the attorneys' fees pursuant to the contract between the state and its attorneys from funds it has received under the terms of the Settlement Agreement, or if the state pays such fees pursuant to an order of the court allegedly enforcing that contract.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tgk

[1] Case No. 95-1466 AH (15th Judicial Circuit, Palm Beach County).

[2] Informal Opinion to the Honorable Lawton Chiles, dated July 24, 1998.

[3] See, e.g., *T.R. v. State*, 677 So. 2d 270 (Fla. 1996) (all parts of a statute must be read together in order to achieve a consistent whole); *State v. Rodriguez*, 365 So. 2d 157 (Fla. 1978); *Florida Jai Alai, Inc. v. Lake Howell Water and Reclamation District*, 274 So. 2d 522 (Fla. 1973).

[4] See, e.g., *State ex rel. Kurz v. Lee*, 163 So. 859 (Fla. 1935).

[5] See s. 216.311, Florida Statutes, prohibiting any agency or branch of state government from contracting to spend any money in excess of the money appropriated to such agency. And see *Florida Department of Health & Rehabilitative Services v. Southern Energy, Ltd.*, 493 So. 2d 1082, 1083 (Fla. 1st DCA 1986), review denied, 501 So. 2d 1283 (Fla. 1986); *United Faculty of Florida v. Board of Regents*, 365 So. 2d 1073 (Fla. 1st DCA 1979); *State v. Florida Police Benevolent Association, Inc.*, 613 So. 2d 415 (Fla. 1992).

[6] See, e.g., *Pan-Am Tobacco Corporation v. Department of Corrections*, 471 So. 2d 4 (Fla. 1984).

[7] See *Local No. 234 v. Henley & Beckwith, Inc.*, 66 So. 2d 818 (Fla. 1953); *City of Leesburg v. Ware*, 153 So. 87 (Fla. 1934). Cf. *Bayview Buick-GMC Truck, Inc. v. General Motors Corporation*, 597 So. 2d 887 (Fla. 1st DCA 1992) (party cannot evade or circumvent statutory provision by exercise of contract when provision in contract conflicted with statute).

[8] See, e.g., s. 3, Ch. 98-63, Laws of Florida, providing that funds on deposit pursuant to the escrow agreement in the case of *State of Florida v. American Tobacco Company, supra*, "are funds of the State of Florida and are hereby appropriated to the General Revenue Fund"