

**Joint Legislative Committee on Performance  
Evaluation and Expenditure Review (PEER)**

Report to  
the Mississippi Legislature



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## **A Review of the Legality of the Chancery Court Order Directing Annual Payments of Twenty Million Dollars in Perpetuity to the Partnership for a Healthy Mississippi**

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On October 17, 1997, the tobacco companies finalized a settlement agreement with the State of Mississippi. As part of the settlement, the tobacco companies agreed to make annual payments to the state according to a specified formula that takes into account inflation and the volume of domestic tobacco product sales. The payments are to be made to the state “in perpetuity” (i.e., until the tobacco companies cease to exist or in the event the settlement is modified). Subsequent to the settlement agreement, the Legislature created the Health Care Trust Fund to receive funds from the settlement agreement.

The agreement included a supplemental provision for a separate \$61.8 million to support and fund a youth tobacco cessation pilot program. In June 1998, the Jackson County Chancery Court approved the pilot program and delegated its administration to the Partnership for a Healthy Mississippi, a non-profit corporation primarily concerned with smoking cessation programs. In December 2000, the Jackson County Chancery Court ordered continued annual funding for the partnership, directing \$20 million from tobacco settlement payments each year.

After reviewing the December 2000 court order, PEER concluded that the order is not in compliance with state law. Although state law provided that cessation programs could be funded by legislative appropriation of trust fund monies, the court order directs funds to the partnership rather than through the legislative appropriation process. Thus \$20 million deposited annually to the partnership’s credit will generally not be subject to the controls and oversight placed on all other funds that are received by the state and its agencies and subdivisions.

Also, the portion of the court order funding substance abuse programs is not in compliance with the statute because MISS. CODE ANN. Section 43-13-405 (1972) does not specifically provide that trust fund monies may be used to fund substance abuse programs.

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November 6, 2003

Honorable Ronnie Musgrove, Governor  
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Honorable Tim Ford, Speaker of the House  
Members of the Mississippi State Legislature

On November 6, 2003, the PEER Committee authorized release of the report entitled **A Review of the Legality of the Chancery Court Order Directing Annual Payments of Twenty Million Dollars in Perpetuity to the Partnership for a Healthy Mississippi.**

A handwritten signature in cursive script that reads "Mary Ann Stevens".

Representative Mary Ann Stevens, Chair

**This report does not recommend increased funding or additional staff.**



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# **A Review of the Legality of the Chancery Court Order Directing Annual Payments of Twenty Million Dollars in Perpetuity to the Partnership for a Healthy Mississippi**

## **Executive Summary**

### **Introduction**

PEER reviewed the legality of a December 22, 2000, Jackson County Chancery Court order directing that \$20 million in tobacco settlement funds be deposited to the credit of the Partnership for a Healthy Mississippi, a not-for-profit corporation organized under the laws of the State of Mississippi.

### **Background**

On October 17, 1997, the tobacco companies finalized a settlement agreement with the State of Mississippi. As part of the settlement, the tobacco companies agreed to make annual payments to the state according to a specified formula that takes into account inflation and the volume of domestic tobacco product sales. The payments are to be made to the state “in perpetuity” (i.e., until the tobacco companies cease to exist or in the event the settlement is modified). Subsequent to the settlement agreement, the Legislature created the Health Care Trust Fund to receive funds from the settlement agreement.

The agreement included a supplemental provision for a separate \$61.8 million to support and fund a youth tobacco cessation pilot program. In June 1998, the Jackson County Chancery Court approved the pilot program and delegated its administration to the Partnership for a Healthy Mississippi, a non-profit corporation. In December 2000, the Jackson County Chancery Court ordered continued annual funding for the partnership, directing \$20 million from tobacco settlement payments each year.

### **Court Action to Continue Funding the Partnership for a Healthy Mississippi**

**The December 2000 court order’s directing of \$20 million of tobacco settlement funds annually into the Partnership for a Healthy Mississippi is not in compliance with state law.**

Although state law provided that cessation programs could be funded by legislative appropriation of trust fund monies, the

Attorney General submitted a proposal to the court to provide continued funding by issuance of a court order to direct funds to the partnership rather than by legislative appropriation.

The Legislature had created the Mississippi Health Care Trust Fund to define the ends to which Mississippi's tobacco settlement funds could be directed. According to MISS. CODE ANN. Section 43-13-405 (1972), the trust fund was to receive annual tobacco settlement funds and remain inviolate. The portion of the court order related to the funding of tobacco cessation programs is not in compliance with the statute because the law specifically provides that funds from the trust may be legislatively appropriated to recoup any funds that may have been lost as a result of a court-ordered smoking cessation program.

## **Expansion of the Partnership's Mission**

**The court, in the December 2000 order, also authorized the continuation and expansion of the partnership's mission from youth tobacco use to include other substance abuse. This portion of the order is also not in compliance with state law.**

In addition to authorizing continued funding for the tobacco cessation program, the court in its December 2000 order broadened the program's mission to address other substance abuse by youths. In addition to tobacco cessation, the partnership plans to expand activities to effect behavioral change in the fields of alcohol and other drug prevention.

The portion of the court order funding substance abuse programs is not in compliance with the statute because CODE Section 43-13-405 does not specifically provide that trust fund monies may be used to fund substance abuse programs.

## **Recommendation**

The Attorney General should seek dissolution of the December 2000 chancery court order that directed annual payments of \$20 million to the Partnership for a Healthy Mississippi. In the event that the Attorney General does not seek dissolution of the order, the Legislature should direct the Health Care Trust Fund to employ counsel as necessary to pursue any civil action necessary to either set aside the order or proceed against any person or persons who may have violated their fiduciary duty to the trust by advocating the order directing the payment of twenty million dollars to the Partnership for a Healthy Mississippi.



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# A Review of the Legality of the Chancery Court Order Directing Annual Payments of Twenty Million Dollars in Perpetuity to the Partnership for a Healthy Mississippi

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## Introduction

### Authority

The PEER Committee conducted a legal analysis of a chancery court order that mandated that twenty million dollars that would ordinarily be deposited to the Health Care Trust Fund be annually deposited to the credit of the Partnership for a Healthy Mississippi, a not-for-profit organization primarily concerned with smoking cessation programs. The Committee acted in accordance with MISS. CODE ANN. Section 5-3-57 (1972).

### Scope and Purpose

PEER conducted this review to determine if there were legal infirmities respecting the Jackson County Chancery Court's order dated December 22, 2000, in Cause No. 94-1429. The order mandated the above-described annual transfer of funds to the Partnership for a Healthy Mississippi, a not-for-profit corporation chartered under the laws of the state of Mississippi. If infirmities existed, PEER was also to offer recommendations on corrective action.

This report does not opine as to the worth or merit of the efforts of the Partnership for a Healthy Mississippi or whether that organization should continue to exist.

### Method

During this project, PEER reviewed:

- the Jackson County Chancery Court's order of December 22, 2000, in Cause No. 94-1429;

- provisions of the MISSISSIPPI CODE OF 1972 relative to the Health Care Trust Fund;
- the MISSISSIPPI CONSTITUTION OF 1890 and pertinent decisional law addressing the prerogatives of the judiciary with respect to decisions regarding the appropriation of funds; and,
- pertinent common-law doctrines related to the oversight and management of trust funds.

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# Background

## Creation of the Health Care Trust Fund

In 1997, Mississippi entered into a settlement agreement with several tobacco companies to provide payments necessary to compensate the state for Medicaid and health insurance expenditures paid for smoking-related illnesses. Following the settlement, the Legislature enacted Chapter 493, *Laws of 1999*, creating a Health Care Trust Fund into which settlement payments were to be made. In creating the trust, the Legislature declared:

*It is declared by the Legislature that the funds received by the State of Mississippi from tobacco companies in settlement of a certain lawsuit brought against those companies by the State of Mississippi, or as a result of the settlement of any lawsuit brought against tobacco companies by another state, should be applied toward improving the health and health care of the citizens and residents of the state. It is the intent of the Legislature by this article to provide the manner and means necessary to carry out those purposes.*

This legislation further provided that the trust was to be inviolate and payments owing to the state under the settlement were to be made to the trust. While the enabling legislation provided for disbursements of trust income for various health-related reasons, the corpus of the trust was not to be diminished in any manner.

## Creation of the Partnership for a Healthy Mississippi

In addition to authorizing payments to the state, the 1997 settlement also provided for payment of \$61,818,000 to the state for pilot programs aimed at reducing smoking by persons under the age of eighteen. Following approval of the pilot program, the Attorney General met with an association of interested persons throughout the state regarding the appropriate administration of the pilot program funds. This association of concerned persons voted to create a not-for-profit corporation, the Partnership for a Healthy Mississippi, to administer the pilot program. In June 1998, the Chancery Court for Jackson County approved the Partnership for a Healthy Mississippi's administration of the pilot program and the funds associated with it. The program was to have a twenty-four-month duration.

The Partnership for a Healthy Mississippi was chartered in June 1998. Members of its board are:

Attorney General Mike Moore

Dr. Hursey Davis-Sullivan

Dr. George Abraham

Sheriff George Payne

Mr. John McCullough

Dr. Ed Thompson, Centers for Disease Control, Atlanta, GA

Dr. Wallace Conerly, former Vice Chancellor, University of Mississippi School of Medicine

After receiving the pilot program funds, the Partnership for a Healthy Mississippi carried out numerous programs related to smoking cessation. The partnership also developed planning documents regarding the future development of substance abuse programs. After two years of operation, the partnership obtained additional funding through an order of the Chancery Court of Jackson County. On December 22, 2000, Mississippi's Attorney General obtained an order from the Chancery Court of Jackson County that directed that twenty million dollars from tobacco settlement payments be deposited annually to the Partnership for a Healthy Mississippi, rather than the Health Care Trust Fund. The transfer is to be made annually in perpetuity. This means that the funds shall be deposited to the credit of the partnership for so long as the order remains unchanged and there is a partnership to receive the funds. Thus \$20 million deposited annually to the partnership's credit will fall outside the legislative appropriations process and generally not be subject to the controls and oversight placed on all other funds that are received by the state and its agencies and subdivisions.

It is this court order that is the subject of this report. This report does not opine as to the worth or merit of the efforts of the Partnership for a Healthy Mississippi or whether that organization should continue to exist and compete for funds available for the reduction of smoking by Mississippians. As of this writing, the Partnership for a Healthy Mississippi is still a corporation in good standing with the Secretary of State.

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# Legal Analysis of the Health Care Trust Fund and the Chancery Court Order

After reviewing the chancery court order directing payments to the partnership, PEER concluded that the order is not in conformity with law. Essentially, the chancery court directs that certain funds be paid for programs that are either not authorized by the Health Care Trust Fund statute or that constitute a judicial abrogation of the Legislature's authority to make decisions regarding the appropriation of funds. The following is an analysis of the court's decision and a rebuttal of likely arguments in support of the order.

## Argument

The following addresses the issue of whether it was statutorily and constitutionally permissible for the Chancery Court of Jackson County to direct that twenty million dollars in funds be directed from a stream of payments to be made to the Health Care Trust Fund to the Partnership for a Healthy Mississippi.

**The Chancery Court of Jackson County lacked the statutory and constitutional power to direct that twenty million dollars that should be paid to the Health Care Trust Fund be deposited annually, in perpetuity, to the credit of the Partnership for a Healthy Mississippi.**

***The Legislature created the Mississippi Health Care Trust Fund to define the ends to which Mississippi's tobacco settlement funds could be directed.***

**The Legislature established the Mississippi Health Care Trust Fund for the deposit of all tobacco settlement funds.**

In 1999, the Legislature, acting in accordance with its constitutional power to make laws, established a trust fund in the treasury that was to receive tobacco settlements. In creating the trust fund, the Legislature declared in MISS. CODE ANN. Section 43-13-401 (1972):

*It is declared by the Legislature that the funds received by the State of Mississippi from tobacco companies in settlement of a certain lawsuit brought against those companies by the State of Mississippi, or as a result of the settlement of any lawsuit brought against tobacco companies by another state, should be applied toward improving the health and health care of the citizens and residents of the state. It is the intent of the Legislature by this article to provide the manner and means necessary to carry out those purposes.*

Through this enactment, the Legislature established a trust fund into which all settlement funds were to be deposited.

***Under law, the trust fund was to receive to receive annual tobacco settlement funds and remain inviolate.***

CODE Section 43-13-405 established that the trust fund was to remain inviolate and was to be the recipient of annual tobacco settlement payments. Specifically, this section provides:

*(1) In accordance with the purposes of this article, there is established in the State Treasury the Health Care Trust Fund, into which shall be deposited Two Hundred Eighty Million Dollars (\$280,000,000.00) of the funds received by the State of Mississippi as a result of the tobacco settlement as of the end of fiscal year 1999, **and all tobacco settlement installment payments made in subsequent years for which the use or purpose for expenditure is not restricted by the terms of the settlement,** except as otherwise provided in Section 43-13-407 (2) and (3). All income from the investment of the funds in the Health Care Trust Fund shall be credited to the account of the Health Care Trust Fund. The funds in the Health Care Trust Fund at the end of a fiscal year shall not lapse into the State General Fund.*

*(2) **The Health Care Trust Fund shall remain inviolate and shall never be expended, except as provided in this article.** The Legislature shall appropriate from the Health Care Trust Fund such sums as are necessary to recoup any funds lost as a result of any of the following actions:*

*(a) The federal Centers for Medicare and Medicaid Services, or other agency of the federal government, is successful in recouping tobacco settlement funds from the State of Mississippi;*

*(b) The federal share of funds for the support of the Mississippi Medicaid Program is reduced directly or indirectly as a result of the tobacco settlement;*

*(c) Federal funding for any other program is reduced as a result of the tobacco settlement; or*

*(d) Tobacco cessation programs are mandated by the federal government or court order.*

**[Emphasis added]**

By the plain language of the section, the Legislature established both a fund to receive settlement funds and limited the conditions under



which funds deposited to the trust could be directed from the trust or directed to any entity other than the Health Care Trust Fund.

***The December 2000 court order directing twenty million dollars from the settlement to the partnership is not in compliance with law.***

On December, 22, 2000, the Chancery Court of Jackson County entered an order in Cause No. 94-1429 that reviewed pilot programs of the Partnership for a Healthy Mississippi. Following a review of the partnership's programs, the court entered an order upon the motion of the Attorney General that concluded:

*The Court therefore finds and orders that to insure that Mississippi's tobacco cessation programs continue, and the settlement proceeds are not endangered, that the Partnership for a Healthy Mississippi shall continue its work in reduction of tobacco use and other substance abuse where feasible among Mississippi's youth. Such programs shall be funded as anticipated in H. B. 519 by court-ordered payments from the tobacco companies. Such payments shall be in the amount of twenty-million dollars each year taken from the settlement payments due from the tobacco companies beginning with the December 31, 2000 and January 2, 2001 payments and each year thereafter. Settling defendants are hereby ordered to pay their pro-rata share of twenty-million dollars to an account, established at the Hancock Bank entitled, the Partnership for a Healthy Mississippi, Inc.*

*The portion of the order related to the funding of tobacco cessation programs is not in compliance with the statute.*

**The court makes a leap in reasoning that it is vested with the authority under H. B. 519 to anticipate the level of funding that should be given to court-ordered smoking cessation programs.**

While the order correctly states that H. B. 519, the bill under which the Health Care Trust Fund is created (codified as MISS. CODE ANN. Section 43-13-401 et seq.) allows funding of court-ordered smoking cessation programs, the court makes a leap in reasoning that it is vested with the authority under H. B. 519 to anticipate the level of funding that should be given to court-ordered smoking cessation programs. While CODE Section 43-13-405 (Section 3 of H. B. 519, Regular Session 1999) makes clear that court-ordered smoking cessation programs are programs that can be supported from the corpus of the trust, the law specifically provides that funds from the trust may be legislatively appropriated to recoup any funds that may have been lost as a result of a court-ordered smoking cessation program.

PEER finds that the court lacks any authority under the statute to order funds that should be deposited to the trust to support tobacco cessation programs. The court could order such programs, but ultimately the Legislature would be the statutory and constitutionally responsible entity for making an appropriation of

funds to support such a program and would, through the appropriations process, be responsible for deciding which public entity would be responsible for administering these programs.

*The portion of the order funding substance abuse programs is not in compliance with the statute.*

**The effect of this portion of the chancery court's order expands the purpose of the tobacco settlement to include purposes that were not originally contemplated when the settlement occurred.**

The trust fund statute does not authorize the portion of the court order directing the expenditure of tobacco settlement funds for substance abuse programs. MISS. CODE ANN. Section 43-13-405 (1972) does not specifically provide that trust fund monies may be used to fund substance abuse programs. The court's expansive reading of the Health Care Trust Fund statute constitutes an attempt to legislate by a court. Generally, courts may not amend a statute by judicial construction and must apply the law as written (see *State v. Heard*, 151 So 2d. 417 [Miss, 1963]; *Bowen v. Williams*, 117 So 2d. 710 [Miss, 1960]).

The effect of this portion of the chancery court's order expands the purpose of the tobacco settlement to include purposes that were not originally contemplated when the settlement occurred and were not included in the specific terms of the statutory Health Care Trust Fund's enabling legislation.

***While the statute explicitly provides that the trust is to receive all tobacco settlement installment payments made in subsequent years for which the use or purpose for expenditure is not restricted by the terms of the settlement, PEER does not read the settlement restriction clause as authorizing the court to direct \$20 million from the stream of payments to the trust.***

**It is a well-understood principle in Mississippi constitutional law that the Legislature appropriates funds and that this power is exclusive to the Legislature.**

While the provisions of law creating and empowering the Health Care Trust Fund mention restrictions made by the court, PEER believes that these restrictions do not extend the court's authority to objects that are constitutionally within the exclusive domain of the Legislature. It is a well-understood principle in Mississippi constitutional law that the Legislature appropriates funds and that this power is exclusive to the Legislature. In *Colbert v. State*, 39 So. 65 (Miss, 1905), the Legislature's exclusive power over the appropriation of funds was discussed at length by the Mississippi Supreme Court. The court stated:

*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 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 will be expended, to dictate the time, the manner, and the means both of their collection and disbursement is firmly and inexpugnably established in our political system.*

**With few exceptions, the courts have remained faithful to the positions that legislative bodies and not courts have the unfettered discretion to make decisions on the ends to which funds will be expended and the means necessary to achieve those ends.**

Through the chancery court's order, the court has taken an expansive view of the judiciary's authority over the ends to which public funds may be expended that is contrary to a long line of cases regarding court involvement in the field of making appropriation decisions. Courts have consistently exercised restraint in cases where petitioners have asked them to substitute their judgment for that of a legislative body respecting the decision to spend money on a particular object. Except in those instances in which the court has concluded that a failure to spend money has impaired the courts in carrying out their judicial functions, or in a recent case where the court concluded that a county may sue the state for failing to fund a public defender system adequately, the courts have remained faithful to the positions that legislative bodies and not courts have the unfettered discretion to make decisions on the ends to which funds will be expended and the means necessary to achieve those ends. (See *State v. Quitman County*, 807 So 2d. 401 [Miss, 2002]; *Hosford v. State*, 525 So 2d. 789 [Miss, 1988]; *Board of Supervisors of George County v. Bailey*, 236 So 2d. 420 [Miss, 1970].)

In the matter at hand, as there was no showing that the court was acting to ensure that it could operate effectively or acting to protect a constitutional right of an individual, the court's action was without sound grounding in constitutional law.

**In light of the fact that the power to make laws and appropriations is vested in the Legislature and is not delegable, Section 43-13-405 could not be construed as authorizing the court to make decisions on the programs to be supported by directed funds or the amounts to be expended on them.**

Further, no reasonable reading of the statute could result in a conclusion that the Legislature intended for the court to make discretionary decisions regarding the expenditure of funds for these programs. It is a well-established principle of law in Mississippi that the Legislature may not delegate its authority to make laws to the executive or judicial branches of government. (See *Clark v. State*, 152 So 820 [Miss, 1934]). In light of the fact that the power to make laws and appropriations is vested in the Legislature and is not delegable, Section 43-13-405 could not be construed as authorizing the court to make decisions on the programs to be supported by directed funds or the amounts to be expended on them. Any such decisions to expend funds on smoking cessation programs must be made through legislative appropriation.

As to the proper construction of the restrictions clause in the Health Care Trust Fund law, PEER believes that this could be construed so as to prevent expenditures on purposes that were not health-related expenditures contemplated at the time of the settlement.

## Reasons Offered by Proponents of the Court Order in Support of the Decision to Direct Payments to the Partnership for a Healthy Mississippi

In discussions with persons involved in the management of the partnership, PEER has learned of several justifications put forth for the court's mandate. These include:

- **“Future payments are not trust funds until deposited into the Health Care Trust Fund.”** A proponent of this theory would contend that to be funds subject to the appropriation authority of the Legislature, the funds must be deposited to the Health Care Trust Fund and that funds that have not been paid into the trust are not to be considered trust funds. Proponents might argue that prior to their deposit into the Health Care Trust Fund, the tobacco settlement payments may be directed to whatever use a court may order.
- **“The December 2000 court order was necessary to protect Mississippi's settlement from possible federal recoupment actions.”** A proponent of this theory would assert that several states could suffer loss of their settlement funds because they have been profligate in the expenditure of these funds. Some states have abandoned spending of settlement funds on health-related programs and have used settlement funds for road repair. The Attorney General asserts that the December 2000 order will help protect the settlement from possible federal recoupment action by ensuring that the proceeds will be expended on smoking cessation programs.
- **“The proper venue for challenging the December 2000 order is in the courts.”** Some have noted that objections to the December 2000 order should have been raised in the Chancery Court of Jackson County. Proponents of this concept state that as no objection to the court's action was raised in the court, it would be improper to object to the court's action in a legislative forum.

After considering these positions, PEER offers the following rebuttal of the arguments.

- **Funds that have not been deposited to the Trust Fund are not trust funds.** While in the strictest sense, this is correct, a time-honored principle of the law of trusts is that trustees of a trust must act so as to insure that funds owing to a trust fund are properly collected. A trustee must use the skill and diligence of a reasonably prudent creditor to collect claims after their maturity. (See *Bogert*, Trusts Section 97, p 354, 6th ed. 1997.) PEER notes that as the Attorney General is represented on the Health Care Trust Fund Board as a trustee of the trust, his office is under a duty to act in a diligent manner to protect the stream of payments inuring to the Health Care Trust Fund and not participate in any act directing these funds to entities other than the Health Care Trust Fund. Because the stream of payments constitutes an asset to which the trust is entitled, PEER does not find compelling the argument that funds which have not been deposited into the trust may be treated as assets which may be

directed to purposes other than those specifically mandated by statute. Participation in such an effort to direct funds to a recipient other than the one legislatively established to receive tobacco settlement funds could possibly constitute a breach of fiduciary duty by any person who was a trustee and participated in directing the funds to the partnership.

- **The settlement must be protected.** While PEER lauds those concerned that tobacco settlement funds be spent on health-related programs, PEER knows of no plan eminent for diverting the corpus of the trust funds for use on programs that were not health-related. PEER would also note that so long as the Health Care Trust Fund remains inviolate as provided for in law, the corpus of the trust will be protected from imprudent, non-health-care-related uses and the income will be available for expenditure on health-related programs only. This makes the concern over the protection of the trust seem excessive.
- **Court action as the proper venue.** Generally, the proper method of attacking judgments of a court is through timely motion filed in court. In asserting this as a bar to criticism of the actions of the court, proponents of this position are mistaking procedural requirements for ensuring that claims are litigated timely as a bar against legislative oversight of public programs and activities. While it is certainly unusual for the Legislature to be critical of court action, the Legislature and its committees are always mindful of the possibility that its oversight mission could require it to raise concerns or criticism of a court decision and request the Attorney General, or other interested parties, to file proper motions to modify or set aside a judgment or decision.

PEER notes that the above-discussed chancery court order had not been modified as of October 20, 2003, and is still in effect.

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## Recommendation

The Attorney General should seek dissolution of the December 2000 chancery court order that directed annual payments of \$20 million to the Partnership for a Healthy Mississippi. In the event that the Attorney General does not seek dissolution of the order, the Legislature should direct the Health Care Trust Fund to employ counsel as necessary to pursue any civil action necessary to either set aside the order or proceed against any person or persons who may have violated their fiduciary duty to the trust by advocating the order directing the payment of twenty million dollars to the Partnership for a Healthy Mississippi.

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