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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2011-2012

1101337

Carol M. Perdue, individually and as next friend and guardian of Anna K. Perdue

v.

Lisa Nix Green et al.

1101506

William D. Motlow, Jr., and Shane Sears

v.

Lisa Nix Green et al.

Appeals from Montgomery Circuit Court
(CV-10-900013)

PER CURIAM.

In these consolidated appeals, Carol M. Perdue, individually and as next friend and guardian of her daughter, Anna K. Perdue; William D. Motlow, Jr.; and Shane Sears (hereinafter collectively referred to as "the objectors"), all of whom are objecting class members in class-action litigation related to the Alabama Prepaid Affordable College Tuition ("PACT") Trust Fund a/k/a The Wallace-Folsom Prepaid College Tuition Trust Fund, appeal the trial court's judgment approving a class-action settlement concluding the litigation.[1] We vacate the trial court's judgment and remand the case.

Facts and Procedural History

This Court, in Ex parte Callan Associates, Inc., [Ms. 1081683, Sept. 9, 2011] ___ So. 3d ___ (Ala. 2011), explained the pertinent history of the PACT program, as it led to the underlying class-action litigation and to other litigation, as follows:

> "In 1990, the Alabama Legislature established the Alabama Prepaid Affordable College Tuition ('PACT') program as part of the Wallace-Folsom College Savings Investment Plan, see §§ 16-33C-1 to

[1]Perdue's daughter, Anna, is the designated beneficiary of the PACT contract purchased by Perdue.

-8, Ala. Code 1975. As explained by the Court of Civil Appeals in Johnson v. Taylor, 770 So. 2d 1103 (Ala. Civ. App. 1999), the purpose of the PACT program is

> "'to assist payment of college tuition costs by allowing a person to purchase PACT contracts in advance of a child's attending college. The PACT program obligates the state to pay tuition in accordance with the contract if the minor child attends a state college or university. § 16-33C-1. The purchase price of a PACT contract is determined actuarially. § 16-33C-6(f). Payments received become public funds, which the state invests to generate assets to fund the child's education. § 16-33C-6(d).'

"770 So. 2d at 1104.

"Pursuant to the statutory scheme, the PACT program is overseen by a 'PACT board,' which serves as both '[t]he board of directors and trustees of the PACT Trust Fund.' § 16-33C-3(14), Ala. Code 1975. Also pursuant to statute, the members of the PACT board are specifically empowered '[t]o invest as [the board] deems appropriate any funds in the PACT Trust Fund ....' § 16-33C-5(3), Ala. Code 1975. In fulfilling that responsibility, including decisions relating to 'acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property of the PACT Trust Fund,' both 'the PACT board and any person or investment manager to whom the PACT board delegates any of its investment authority' is charged with 'exercis[ing] the judgment and care under the circumstances then prevailing which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but to permanent disposition of funds, considering the probable income as well as the safety of their capital.' § 16-33C-6(d), Ala. Code 1975.

> "....
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> "On February 27, 2009, Kay Ivey, then state treasurer and, by virtue of that office, chairman of the PACT board, issued a letter to the purchasers (holders) of PACT contracts informing them that a downturn in the stock market had negatively impacted the assets of the PACT Trust Fund but indicating that the PACT board remained committed to honoring the PACT contracts and that the PACT board was investigating options and exploring opportunities that would 'allow PACT benefits to be consistently paid.'"

___ So. 3d at ___ (footnote omitted).

In response to then State Treasurer Ivey's disclosure, several lawsuits were filed against the PACT board, including a class-action complaint filed in March 2009 in the Montgomery Circuit Court (case no. CV-09-900351) by Lisa Nix Green, individually and as next friend of Brent A. Green and Blake A. Green. In that action, Green, purporting to represent a class consisting of those who had purchased a PACT contract before 1995, alleged breach of contract and a violation of 42 U.S.C. § 1983. The action sought a judgment declaring that the PACT board was liable to PACT contract holders for the sums guaranteed in their respective contracts. In September 2009, Green's complaint was dismissed on the ground that the stated claims were not ripe because, the trial court concluded, no PACT beneficiary had yet been denied contractual benefits and,

therefore, no PACT beneficiary had suffered a loss. Green subsequently filed a motion to alter, amend, or vacate the trial court's judgment.

The action underlying these appeals (case no. CV-10-900013) was instituted by a separate complaint filed in January 2010 -- while Green's postjudgment motion in the first action, case no. CV-09-900351[2] remained pending -- against the PACT board in the Montgomery Circuit Court by Lisa Nix Green; Brent A. Green; Blake Green; Eldridge M. Franklin;[3] Eason L. Franklin; and Kimberly H. Franklin, individually and as next friend of John Stephen Franklin, all of whom were PACT contract holders and/or PACT beneficiaries, who purported to represent "a class of persons who purchased a [PACT] contract prior to May 9, 2001," and the designated beneficiaries of each such PACT contract. That same pleading also included as

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[2]Green submitted a proposed consent order in case no. CV-09-900351 providing for both an amendment of the trial court's initial order of dismissal to reflect that Green's previous complaint was "dismissed without prejudice" and consenting to the denial of Green's postjudgment motion and the dismissal of the accompanying amended complaint. The trial court adopted that proposed consent order by a judgment entered on March 5, 2010.

[3]Eldridge M. Franklin later withdrew his request to serve as a class representative.

plaintiffs Brian A. McVeigh, individually and as next friend of Sarah K. McVeigh; Allen R. Hudson, individually and as next friend of Emma L. Hathaway; and Nina McGinnis, individually and as next friend of Stevie A. Graves, who purported to represent "a class of persons who purchased a [PACT] contract [on or] after May 9, 2001," and the designated beneficiaries of each such PACT contract. The underlying class action was assigned to a different judge in the Montgomery Circuit Court than the judge who presided over Green's separate action.[4]

In their complaint in the underlying action, which included claims virtually identical to those asserted by Green in her initial action, the above-named plaintiffs alleged that

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[4]Perdue contends both that Green's duplicative filings demonstrate "obvious efforts at judge shopping" and that the underlying action is due to be dismissed pursuant to Alabama's abatement statute, § 6-5-440, Ala. Code 1975, which provides that "[n]o plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party." The prohibition in § 6-5-440, however, is "'an affirmative defense, and if that defense is not raised by the defendant in a motion to dismiss, ... it is waived." Regions Bank v. Reed, 60 So. 3d 868, 884 (Ala. 2010) (quoting Veteto v. Yocum, 793 So. 2d 814, 815 n. 1 (Ala. Civ. App. 2001)). See also First Tennessee Bank, N.A. v. Snell, 718 So. 2d 20, 27 (Ala. 1998) ("[A] defendant must raise the first-filed action as a defense in a motion to dismiss."). The PACT board did not challenge the action on the basis of abatement. Further, any issue as to abatement vanished at the conclusion of Green's initial action.

their claims were typical of and consistent with the claims of all class members, whose numbers allegedly made joinder impractical, and sought to be named representatives for their respective classes. Acting under the premise that the PACT program was created to allow the designated beneficiary of a PACT contract to attend college without being required to pay tuition or mandatory fees, regardless of the financial health of the PACT Trust Fund and/or the ability of the PACT program to pay, the plaintiffs alleged that the PACT board had indicated its inability to fulfill outstanding PACT contracts. The complaint also alleged, in a claim not included in Green's initial action, that, at the time of filing, "not all of the tuition and fees covered by PACT contracts [were] being paid by the [PACT board]."[5] The plaintiffs requested a declaratory judgment construing the respective rights and obligations of the individual classes under the PACT contracts and the controlling statutes so they could decide whether to remain in the PACT program or to cancel their existing contracts and

[5]It appears that the plaintiffs' allegation that the PACT program had failed to pay certain non-tuition-related "mandatory fees" incurred by then matriculating PACT beneficiaries was added in order to clear the ripeness hurdle that had defeated Green's earlier filed action.

seek a refund (less any applicable tax penalty). They also stated a claim under 42 U.S.C. § 1983, alleging violations of rights guaranteed by various provisions of the United States Constitution.

The PACT board answered and filed a counterclaim. In its "counterclaim for declaratory relief," the PACT board alleged that, based upon actuarial projections, the PACT Trust Fund lacked sufficient assets to continue payment of full tuition expenses past the year 2015. The PACT board further noted that it had "adopted proposed amendments to its existing rules and regulations," which, though specifically aimed at remitting payment for mandatory fees and expenses to all PACT contract holders, might result in payment of "an amount less than the full tuition and fees charged by the respective college or university" in direct conflict with the plaintiffs' interpretation of their contract rights. Thus, the PACT board requested, pursuant to Ala. Code 1975, § 6-6-220 et seq.[6] and § 19-3B-101 et seq.,[7] the trial court's assistance in

[6]Alabama's "Declaratory Judgment Act."

[7]The stated chapter is entitled "Alabama Uniform Trust Code." Section 19-3B-201(c), which was specifically referenced in the PACT board's counterclaim, provides that a court may entertain a "judicial proceeding ... relat[ing] to any matter

construing the PACT board's powers and responsibilities under the statutes establishing the PACT program; a determination as to whether the proposed changes to its rules and regulations violated the statutory, constitutional, or contractual rights of the PACT contract holders and/or the PACT contract beneficiaries; and a determination as to whether the PACT board could liquidate the PACT Trust Fund and distribute the remaining assets.

The plaintiffs thereafter moved for class certification of the two proposed classes pursuant to Rule 23(b)(1) and (b)(2), Ala. R. Civ. P.

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involving the trust's administration, including a request for instructions and an action to declare rights." Additionally, subsection (d) further provides that, in addition to a request for instructions, a judicial proceeding arising from the administration of a trust may also be instituted to

> "determine the existence or nonexistence of any immunity, power, privilege, duty or right;
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> "... approve a nonjudicial settlement;
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> "....
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> "... review the actions or approve the proposed actions of a trustee, including the exercise of a discretionary power;
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> "....
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> "... [and] modify or terminate a trust ...."

While this case was pending, the legislature enacted Act No. 2010-725, Ala. Acts 2010, which was effective April 30, 2010, and which, among other things, amended the statutory provisions relating to the PACT program to provide annual appropriations to the PACT Trust Fund beginning in 2015 and continuing through 2027.[8] See Ala. Code 1975, § 16-33C-1 et seq. According to § 16-33C-16, the stated annual appropriations "will make the PACT Program 100 percent fully funded, according to the actuarial professional retained by the PACT board." Additionally, with regard to the tuition and mandatory-fee rates for all PACT contract holders, the 2010 amendment provides that, with the exception of "institutions of higher education under the oversight of the boards of trustees established in Section 264 and Section 266 of the Constitution of Alabama of 1901, now appearing as Sections 264 and 266 of the Official Recompilation of the Constitution of Alabama of 1901,"[9]

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[8]The record reflects that the PACT board closed the PACT program to new applicants in 2009 but that, based upon the ages of the beneficiaries of the PACT contracts, the contractual obligations of the PACT Trust Fund are projected to continue until at least 2029.

[9]This exception refers to the University of Alabama ("Alabama") and to Auburn University ("Auburn"). According to

> "no public institution of higher education shall charge the PACT plan or a PACT plan contract owner mandatory fees or tuition per credit hour in an amount exceeding the cost of mandatory fees or tuition per credit hour as of September 30, 2009 ...."

§ 16-33C-17(a), Ala. Code 1975.

The 2010 amendment further provides that

> "the amounts paid by the PACT Program to public institutions of higher education in accordance with this section shall be considered full payment of mandatory fees or tuition per credit hour on behalf of the beneficiary of the PACT contract, and neither the beneficiary of the PACT contract nor the PACT contract holder shall be required to remit to the public institution of higher education an additional amount for mandatory fees or tuition per credit hour."

§ 16-33C-17(c), Ala. Code 1975.

Finally, the legislature in Act No. 2010-725

> "strongly encourage[d] the PACT board to make any financially beneficial changes to PACT rules, procedures, or policies, to the extent that the PACT board is authorized or permitted to make such changes and to the extent that such changes would not violate the contractual relationship existing between a PACT contract holder and the PACT board."

§ 16-33C-19, Ala. Code 1975 (emphasis added).

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the testimony presented during a hearing, 53 percent of students attending college on a PACT contract, representing 64 percent of the PACT Trust Fund's cash flow, attend Alabama and Auburn.

In response to the passage of Act No. 2010-725, the PACT board filed a motion seeking to dismiss the plaintiffs' claims on the ground "that recent legislation [had] rendered [the] Plaintiffs' claims moot." More specifically, the PACT board argued in support of its motion that the plaintiffs' claims were based upon the premise that the PACT program would, at some future date, be unable to fulfill all outstanding obligations and that Act No. 2010-725 resolved all such concerns; therefore, it contended, the legislation had rendered any controversy moot and thereby had deprived the trial court of jurisdiction. After a hearing, the trial court denied the PACT board's motion without explanation.

Following the PACT board's filing of a stipulation evidencing its qualified, general agreement that class-based relief was proper, the trial court in December 2010 entered an order of class certification. Specifically, the trial court found that the underlying action was "an appropriate case for class certification for the Plaintiffs under Rule 23(b)(2), [Ala. R. Civ. P.,] and for the [PACT board] on [its] Counterclaim under Rule 23(b)(1)(A)(B) [sic] [, Ala. R. Civ.

P.]," and certified several classes and subclasses.[10] In its certification order the trial court further found that, with regard to its counterclaim, the PACT board was entitled to the requested declaratory relief and/or "to guidance, instructions and, if necessary, modification of the [the PACT] Trust pursuant to the Alabama [Uniform] Trust Code[, Ala. Code 1975, § 19-3B-101 et seq.]." The trial court's order included a notice to be mailed to class members and posted on the Internet Web site for the PACT program informing class members that the trial court "ha[d] certified that the case shall proceed as a class action" and that copies of the pleadings and the trial court's order were available on the Internet Web site of the State Treasurer.[11]

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[10]There is no dispute that Perdue, Motlow, and Sears are all members of a class or subclass certified by the trial court, and there is no dispute as to the content of the PACT contracts of each class or subclass.

[11]In the trial court, the PACT board did not oppose class certification; it stipulated to such certification. At the fairness hearing that occurred after the classes were certified, some of the objecting class members offered arguments as to the propriety of the class certification, but those challenges were only minimally addressed or developed. On appeal, Motlow and Sears offer general arguments and authority attacking the class certification; however, their arguments appear to be a variation of their arguments attacking the fairness of the settlement. Given our resolution of the propriety of the settlement, we see no need

Subsequent to the entry of the trial court's certification order, some of the plaintiffs filed a motion seeking to compel mediation of the parties' respective claims. The matter thereafter proceeded to mediation upon consent of the parties.

On May 5, 2011, the parties submitted a joint motion, along with a proposed settlement agreement, requesting that the trial court approve the proposed class-action settlement agreement, the professed purpose of which was "to provide Class Members with the maximum amount of benefits from the available assets." In order to effect that stated purpose, the proposed settlement agreement purported to modify the terms of the outstanding PACT contracts. The proposed modification was accompanied by a purported waiver by the class members of the application of Ala. Code 1975, § 16-33C-1 et seq., and the terms of their individual PACT contracts to the extent the provisions in either the statutes or the PACT contracts were inconsistent with the terms of the settlement agreement.

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to address that issue.

Additionally, the proposed settlement agreement set tuition and fee payments at tuition and fee rates applicable for fall 2010; provided that class members waived the provisions of § 16-33C-17, as set out above; and required class members to be personally responsible for payment of any tuition and fees not covered by the PACT program payments. Class members were also afforded, as an alternative remedy, the right to cancel their PACT contracts and to receive refunds less any applicable taxes or penalties.

The settlement agreement also included, as part of its terms, an award of attorney fees to class members' counsel in the amount of $4,950,000 and an award for litigation-related expenses in the amount of $15,000. The settlement agreement also contained a release of class members' potential claims against the PACT board ("and all other related persons and entities"), including the following:

> "[A]ny and all matters, demands, liabilities, actions, lawsuits, liens, debts, damages, obligations, claims, and any other expenses, charges, or costs of every kind and nature, known or unknown, suspected or unsuspected, howsoever arising, at law or in equity, whether on an individual or representative basis, which were asserted or which could have been asserted as of the execution of this Settlement, including (but not limited to) those claims which were asserted or which could have been asserted in [the underlying

> action] as well as any and all other claims relating to the operation and administration of the PACT Program and/or the PACT Trust Fund, including (but not limited to) the payment/non-payment of tuition and fees and all claims available under the Uniform Trust Code ... other than the obligations embodied in this Settlement and any judgment entered by the court approving or adopting this Settlement."

On May 5, 2011 -- the same date the proposed settlement agreement was submitted -- the trial court entered an order preliminarily approving the proposed settlement agreement and setting a fairness hearing. Thereafter, pursuant to Rule 23(e), Ala. R. Civ. P., notice of the proposed settlement was purportedly provided to all class members,[12] who were given until June 10, 2011, to file written objections to the proposed settlement agreement. In response, numerous written objections were filed with the trial court by class members.

At the subsequent fairness hearing, the PACT board offered the expert testimony of Daniel Sherman, an actuary employed by the PACT board. Sherman explained that, although the PACT Trust Fund had, in the past, operated at a surplus, he calculated a deficit, in the spring of 2009, of $460

[12]At the direction of the trial court, notice was provided by mail to class members whose addresses were discernible from the records of the PACT program and, in addition, notice was posted on the Web site devoted to the PACT program.

million. According to Sherman, although the legislature appropriated approximately $548 million to the PACT program in Act No. 2010-725, subsequent evaluations revealed a $269 million deficit, which he attributed to "the increase in tuition levels at the Auburn [University] and [the University of] Alabama school systems," which increases, he said, were higher than the legislature had projected in reaching the determination that its 2010 appropriations had fully funded the PACT program. Sherman's quarterly evaluation in December 2010 revealed that "the deficit [had] increased from [$] 269 million ... to [$] 338 million." Sherman testified that, faced with evidence of the increasing deficit, even with the 2010 legislative appropriations, the assets of the PACT Trust Fund were insufficient to meet its future liabilities.

Regarding the proposed settlement, Sherman explained that it was aimed at ensuring that the available moneys were evenly distributed so that as many beneficiaries as possible received as much as possible and to make sure that the PACT program was fully funded on an actuarial basis. According to Sherman, the limitation in the settlement agreement on tuition increases, which limits tuition payments by the PACT Trust Fund to the fall 2010 rate as certified by each affected school, rendered

the settlement actuarially viable -- even with the reduction in assets associated with the attorney-fee award and any potential cancellations of PACT contracts by class members. He further noted that the investment of the PACT assets in fixed-income investments was also a central component of the proposed settlement agreement in that it was aimed at preserving the remaining capital in the PACT Trust Fund.

Regardless, Sherman acknowledged that the settlement, because of the variability of both tuition amounts and investment return, did not eliminate all future risk. While admitting that the previous actuarial assumptions underlying the legislative appropriations in Act No. 2010-725 turned out to be incorrect, Sherman testified that the probability that the actuarial assumptions underlying the proposed settlement agreement were accurate was much higher because of the elimination of the risks associated with tuition increases and investment losses. Sherman also acknowledged that nothing was absolute, that his calculations were merely "based on assumptions," and that there was no guarantee that the proposed settlement would ensure that the PACT Trust Fund would be fully funded. However, Sherman noted that, under the terms of the proposed settlement agreement, each contract

holder would actually receive much more money than he or she would receive by a mere refund.

The chairman of the PACT board testified and confirmed that based on Sherman's December 2010 report, even with the inclusion of the $548 million in legislative appropriations included in Act No. 2010-725, the PACT Trust Fund remained underfunded by $338 million. He further confirmed that, because of unanticipated tuition increases and the fact that the investments of the PACT Trust Fund had not performed as well as anticipated, the obligations of the PACT Trust Fund far exceeded its assets. The chairman of the PACT board testified that the PACT board, acting alone, had no knowledge of or access to any solution or other moneys that would allow it to provide full contract benefits to all PACT contract holders. The chairman, therefore, opined that the proposed settlement was fair and reasonable to all class members and recommended its approval.

At the conclusion of the PACT board's evidence, 13 objectors, who were present and who had filed written objections in the trial court, were provided an opportunity to argue in opposition to the proposed settlement. The various

objectors raised numerous issues, including the argument that the settlement was contrary to Act No. 2010-725.

By order entered July 27, 2011, the trial court entered a final judgment approving the proposed settlement agreement. The trial court's finding that the settlement was fair, adequate, and reasonable was explained in its 35-page order in which it both considered the factors outlined by this Court in Adams v. Robertson, 676 So. 2d 1265, 1273 (Ala. 1995), and purported to resolve the concerns of the objectors.

Following the entry of the trial court's judgment, the PACT board on August 9, 2011, paid to the clerk of the trial court $4,977,500 in satisfaction of the outstanding judgment for attorney fees, case-related expenses, and amounts awarded to the class representatives pursuant to the terms of the settlement agreement. On that same date, Perdue filed her notice of appeal.

The next day, class counsel petitioned the trial court for disbursement of the funds on deposit with the clerk of the trial court. That motion specifically referenced Perdue's pending appeal but stated that Perdue had failed to "include a supersedeas bond necessary to stay the above judgment." The following day, despite its awareness of Perdue's pending

appeal, the trial court entered an order permitting immediate disbursement of the funds.[13] In that order, the trial court explicitly acknowledged Perdue's pending appeal but concluded that Perdue's notice "specifically declined any attempt to supersede any of the judgments entered by the Court." On August 23, 2011, Perdue moved this Court to stay the trial court's judgment. Motlow and Sears filed their notice of appeal on September 7, 2011. We have consolidated the appeals for the purpose of writing one opinion. On November 18, 2011, this Court stayed execution of the trial court's judgment.

Standard of Review

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[13]In establishing the "effective date" of the settlement agreement, the terms of the settlement agreement specifically provide:

> "No action shall be taken to implement the terms of this Settlement unless and until an order approving the Settlement has been entered by the court and has become final. Such an order shall be deemed to be final (1) if no objections to the proposed Settlement have been filed within the time specified by the court, (2) if forty-three days have elapsed since the entry of such judgment and no notice of appeal has been filed, or (3) if a notice of appeal is filed, upon the appeal being dismissed or upon the court's judgment being affirmed, whichever shall first occur."

(Emphasis added.) The disbursement of the attorney fees appears contrary to this provision.

> "[T]he standard of review applicable to a trial court's approval of a proposed settlement of a class action is as follows:
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> > "'There can be no settlement [of a class action] without the trial court's approval. Rule 23(e) [Ala. R. Civ. P.]. Requiring the trial court's approval of the settlement protects the class from unjust settlements or voluntary dismissals. The burden is on the proponents of the settlement to show that it is fair, adequate, and reasonable. This Court's standard of review is to determine whether the trial court abused its discretion. Great weight is given to the trial court's views, because that court has been "exposed to the litigants, and their strategies, positions, and proofs."'
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> "Adams v. Robertson, 676 So. 2d 1265, 1272-73 (Ala. 1995) (citations omitted)."

Disch v. Hicks, 900 So. 2d 399, 404 (Ala. 2004).

Discussion

It is clear that the legislature, in enacting Act No. 2010-725, attempted to rectify the financial difficulties of the PACT program. Act No. 2010-725 provided supplemental funding to the program, placed a limitation on tuition costs, and authorized the PACT board to make certain changes for the benefit of the PACT program. That said, the legislature also clearly undertook to preserve the benefits originally promised to PACT contract holders. Section 12 of Act No. 2010-725, now

codified at § 16-33C-19 and quoted above, provides that the PACT board was "strongly encouraged" to make "any financially beneficial changes to PACT rules, procedures, or policies, to the extent that the PACT board is authorized or permitted to make such changes and to the extent that such changes would not violate the contractual relationship existing between a PACT contract holder and the PACT board." The PACT board was thus encouraged to make changes, but limited in making only those changes that "would not violate" the then "existing" contractual relationship between it and the contract holders.[14]

[14]"Contractual relationship" is not explicitly defined by Act No. 2010-725. That said, the legislature clearly believed that a contractual relationship was something that could be "violat[ed]" in its "existing" state by the powers granted the PACT board in § 16-33C-19. Thus, § 16-33C-19 expressly limits the PACT board's power to make changes to the PACT program. Given the language in that Code section, "contractual relationship" cannot simply refer to the general status of the parties as being in a relationship by virtue of a contract. Specifically, it is difficult to envision how such a status could be altered from its "existing" state or "violat[ed]" by the powers granted to the PACT board in § 16-33C-19; thus, if "contractual relationship" simply refers to the fact that the parties remain in a contract, then the legislature's limitations on the PACT board's power under § 16-33C-19 would be superfluous. Had the legislature intended merely to preserve some sort of contractual relationship, it could have easily, with slight alterations of the existing text, employed words to convey that message by authorizing changes "to the extent that such changes would not do away with the existence of a contractual relationship between a PACT contract holder and the PACT board." Reaching such a conclusion as to

On appeal, the objectors claim, among other things, that approval of the settlement agreement impermissibly contravenes Act No. 2010-725.

The settlement agreement states: "The purpose and effect of this Settlement shall be to modify the dispositive terms of the PACT Trust Fund and/or the terms of the contractual relationships between Class Members and the PACT Board."[15] It was undisputed in the trial court and it is undisputed on appeal that the terms of the settlement agreement alter the contract of each PACT contract holder, although there is some dispute as to how differing versions of the PACT contracts are affected. The objectors do not consent to any such

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legislative intent without support from the text of the act would violate settled principles of separation of powers.

"Contractual relationship" must instead refer to the terms and obligations of the contract between the parties; in other words, "contractual relationship" must consist of the terms of the contractual relationship "existing" and in place at the time Act No. 2010-725 was passed, because only the terms of the contract -- and not the relationship of the parties -- were susceptible to a violation of their "existing" state by the powers granted the PACT board in § 16-33C-19.

[15]The PACT board's counsel plainly acknowledged during the fairness hearing that the parties were "ask[ing] that [the trial] court modify the terms of the [PACT] contract[s] so that [the PACT Trust Fund] will be viable, and that the trust purpose will not be frustrated."

modification of their contracts or waive any statutory rights. Thus, to the extent the PACT board acted to change its existing rules, procedures, or policies to accept modification of the PACT contracts, as it indicated in its counterclaim that it had done, it violated the contractual relationship with the PACT contract holders by exceeding the express limitation set out in § 16-33C-19.

Green and the other appellees contend that § 16-33C-19 does not prohibit the underlying settlement because, they argue, that Code section was clearly predicated on the legislature's mistaken belief that, in light of the accompanying appropriations in Act No. 2010-725, the PACT program was 100 percent funded. They further maintain that the contravention by the settlement of that express statutory provision was permissible because "the settlement did not reflect a unilateral change by the PACT Board" and that "§ 16-33C-19 would only apply to changes made unilaterally by the PACT Board." (Appellees' brief, at p. 21.) Instead, they say, the settlement agreement represents "a mutual compromise entered by all affected parties." (Appellees' brief, at p. 21.)

However, Green and the other appellees cite no support for the proffered statutory construction, and this Court sees nothing within the prohibitory language of § 16-33C-19 indicating that the prohibition was contingent on the funding status of the PACT program. "When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning -- they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature." Ex parte T.B., 698 So. 2d 127, 130 (Ala. 1997). This is true even if "we might sometimes think that the ramifications of the words [in a statute] are inefficient or unusual. ... [I]t is our job to say what the law is, not to say what it should be." DeKalb Cnty. LP Gas Co. v. Suburban Gas, Inc., 729 So. 2d 270, 276 (Ala. 1998).

Further, it has long been the law of this State that every contract "adverse to the enactments of the legislature, is illegal and void." Carrington v. Caller, 2 Stew. 175, 192 (Ala. 1829) (citing Wheeler v. Russell, 17 Mass. 256). As noted in Carrington, this rule is premised on the universal principle that "[c]ourts of justice will not open their forums

to enforce contracts which are illegal, immoral, prohibited or contrary to public policy. For to do this would be to sanction by law, what the law itself forbids." 2 Stew. at 206 (opinion of White, J.). See also Alfa Specialty Ins. Co. v. Jennings, 906 So. 2d 195, 199 (Ala. Civ. App. 2005) (reiterating this Court's belief that a cautionary approach should be taken in refusing to enforce contractual provisions on the ground that they violate public policy in light of the danger that "'"courts are apt to encroach upon the domain of [the legislative] branch of the government if they characterize a transaction as invalid because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law"'" (quoting Milton Constr. Co. v. State Highway Dep't, 568 So. 2d 784, 788 (Ala. 1990), overruled in part on other grounds by Ex parte Alabama Dep't of Transp., 978 So. 2d 17, 23 (Ala. 2007), quoting in turn 17 Am. Jur. 2d Contracts § 178 (1964) (emphasis omitted))); Turner v. Merchants Bank, 126 Ala. 397, 403, 28 So. 469, 471 (1900) (noting that the "implied prohibition" under which usurious contracts "are held to be vitiated in toto is that they contravene a penal statute, and the enforcement by the courts of such contracts when relief is

sought upon them, would be in derogation of a sound principle, necessary to be maintained in order to uphold the supremacy of the law and the dignity of the state"); White Water Valley Canal Co. v. Vallette, 62 U.S. 414, 425 (1858) ("The courts, from public considerations, refuse their aid to enforce obligations which contravene the laws or policy of the State."); White v. Alabama, 74 F.3d 1058, 1069-70 (11th Cir. 1996) (vacating settlement order in class action seeking relief under Voting Rights Act as void where order crafted "remedy that [had] the effect of eliminating [the] essential element of choice ... for it contravene[d] the spirit and purpose of the Act"); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 850 (5th Cir. 1975) (stating that "[appellate court's] only alternative, if it were shown that [the trial court] abused [its] discretion or overlooked an illegal provision, would be to vacate [its] approval of the entire settlement"); and Atlantic Co. v. Broughton, 146 F.2d 480, 482 (5th Cir. 1945) ("Though settlements in accord and satisfaction are favored in law, they may not be sanctioned and enforced when they contravene and tend to nullify the letter and spirit of an Act of Congress." (citing Guess v. Montague, 140 F.2d 500 (4th Cir. 1943) (emphasis added))).

Cf. State Farm Mut. Auto. Ins. Co. v. Scott, 707 So. 2d 238, 242 (Ala. Civ. App. 1997) (holding that "pertinent provision of State Farm's [insurance] policies contravene[d] § 32-7-23[, Ala. Code 1975,] and [was] therefore void"). Here, it would contravene the plain language of § 16-33C-19 to allow the implementation of a settlement agreement that clearly "violate[s] the contractual relationship existing between [the] PACT Contract holder[s] and the PACT board." Thus, however well-intentioned, the settlement agreement is clearly contrary to state law.[16]

As to the argument that the modification of the PACT contracts by the settlement agreement is a mutual compromise and not a unilateral act by the PACT board, we note that the objectors do not have the ability to opt out of the class action or the settlement agreement. Adams v. Robertson, 676 So. 2d 1265, 1270 (Ala. 1995) ("Class members in a Rule 23(b)(1) or 23(b)(2) lawsuit do not have the choice of opting out of the class action."). As noted previously, the

[16]During the fairness hearing, the trial court asked the chairman of the PACT board whether, "if [the trial court] gave approval to [the proposed] settlement, [the court] would ... be violating the laws of the State of Alabama." The chairman responded: "I believe it would."

objectors do not agree to the "compromise" or alteration of the contractual relationship or to a waiver of their statutory rights,[17] and the settlement agreement deviates from the authority conferred on the PACT board and diminishes the objectors' contractual benefits in derogation of the statutory directive of § 16-33C-19. Although the number of objectors is relatively small,[18] there nonetheless exists no unanimous collective waiver of a right or a mutually agreed upon reformation of the "contractual relationship." Nothing before us indicates that the PACT board may be permitted to trump the statutory limitations on its power and the statutory rights of the PACT contract holders on the basis of majority rule and

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[17]Thus, it cannot be said that "all" PACT contract holders agree to the settlement or waiver or that any "mutual" agreement to alter the terms of the PACT contracts was unanimous.

[18]

> "[I]n sophisticated settlements when the majority of absent class members are usually unrepresented by counsel and possess insufficient knowledge to evaluate the fairness of the settlement, an inference [based on the number of objectors] should not be controlling. Despite a lack of opposition, the court should not lose sight of its responsibility to analyze independently and intelligently the settlement."

4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 11:48 (4th ed. 2002).

then force a "mutual compromise" on the objectors under Rule 23(b)(1) and 23(b)(2), Ala. R. Civ. P.

The trial court's final judgment approving the terms of the proposed settlement agreement stated, and Green and the other appellees contend, that the trial court derived its authority, at least in part, to approve portions of the proposed settlement agreement from § 19-3B-412, Ala. Code 1975, which provides, in pertinent part:

> "(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.
>
> "(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."

This Code section recognizes the general power of a trial court to modify certain terms of a trust. Assuming, without deciding, that § 19-3B-412 even applies to the facts of this case, the legislature has spoken specifically and directly to the terms, conditions, and modifications to the PACT program proposed by the settlement agreement. Statutes relating to specific subjects control general provisions in statutes

relating to general subjects; when the law descends to particulars, the specific provisions must be understood as exceptions to any general rules laid down to the contrary. Ex parte E.J.M., 829 So. 2d 105, 108-09 (Ala. 2001); see also Ex parte Jones Mfg. Co., 589 So. 2d 208, 211 (Ala. 1991) ("[A] specific statute relating to a specific subject is regarded as an exception to, and will prevail over, a general statute relating to a broad subject.").

In undertaking to remedy the financial problems facing the PACT program, the legislature has explicitly placed certain limits on the PACT board's authority to craft solutions that would violate the contractual rights provided to PACT contract holders. Neither the PACT board, under § 16-33C-19, nor the judiciary, under Ala. Const. 1901, § 43, has the authority to ignore the explicit statutory law specifically enacted to address a particular situation. See Ex parte Jones Mfg. Co., 589 So. 2d at 210 ("An administrative agency cannot usurp legislative powers or contravene a statute. A regulation cannot subvert or enlarge upon statutory policy." (citation omitted)); Finch v. State, 271 Ala. 499, 504, 124 So. 2d 825, 830 (1960) (noting that the

separation-of-powers doctrine of Ala. Code 1901, § 43, restrains the judicial branch "from imposing its methods or substituting its judgment for that of the executive and legislative branches of the government"); Champion v. McLean, 266 Ala. 103, 117-18, 95 So. 2d 82, 97 (1957) (observing that "[t]he power to make the law has been committed to the legislature by the Constitution" and that "'[s]o long as no constitutional limitations are exceeded, the Legislature is of supreme authority, and the courts, as well as all others, must obey'" (quoting State v. Birmingham S. Ry., 182 Ala. 475, 479, 62 So. 77, 79 (1913))); and L.C.S. v. J.N.F., 941 So. 2d 973, 980 (Ala. Civ. App. 2005) (stating both that "[i]t is well settled that in the absence of a valid constitutional challenge, the judicial branch is bound to enforce the will of the Legislature" and that "'[t]he Legislature's power should not be interfered with unless it is exercised in a manner which plainly conflicts with some higher law'" (quoting Beasley v. Bozeman, 294 Ala. 288, 290, 315 So. 2d 570, 571 (1975))). Therefore, we can reach no other conclusion but that the trial court exceeded its discretion in approving a settlement agreement that is plainly "adverse to the

enactments of the legislature, [and] is[, therefore] illegal and void." Carrington, 2 Stew. at 192.

The settlement is void, and we must vacate the entire settlement agreement, i.e., as to all the parties. See In re Airline Ticket Comm'n Antitrust Litig., 953 F. Supp. 280, 284 (D. Minn. 1997) ("[A]n illegal term would render a class action settlement invalid, 'no matter how much the parties, for whatever reason, wanted it.'" (quoting Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist., 921 F.2d 1371, 1384 (8th Cir. 1990))); and Dillard v. Crenshaw Cnty., 748 F. Supp. 819, 823 (M.D. Ala. 1990) ("The court also has a duty to ensure that the settlement is not illegal, against public policy, or the product of fraud or collusion."). In reversing orders adopting class-action settlements, other courts, albeit in factually and procedurally dissimilar cases, have rejected the conclusion that objectors who appeal represent only their own interests and that any reversal of the settlement applies only to those objectors. See Hefty v. All Other Members of the Certified Settlement Class, 680 N.E.2d 843, 857 (Ind. 1997) (reversing, upon appeal by six objecting class members, a class-action settlement and specifically rejecting the conclusion "that the Objectors represent only their individual

interests in challenging the fairness of the settlement and that any reversal of the settlement approval would only apply to those Objectors who appealed at the time of the settlement and not to the whole class"), and In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1122 (7th Cir. 1979) ("Limiting the representative capacity of the appellants on this appeal would effectively negate this court's obligation to act as the guardian of the class. We do not believe that the interests of class members are best served by leaving the settlement unreviewed." (citing McDonald v. Chicago Milwaukee Corp., 565 F.2d 416, 417 n.1 (7th Cir. 1977))). See also In re Katrina Canal Breaches Litig., 628 F.3d 185 (5th Cir. 2010) (reversing, upon appeal by two groups of dissenting class members in a non-opt-out "limited fund mandatory settlement class" both the trial court's class-certification order and, assuming the certification error was corrected on remand, reversing the trial court's order approving the entire class-action settlement); Clark v. American Residential Servs., LLC, 175 Cal. App. 4th 785, 96 Cal. Rptr. 3d 441 (Cal. App. 2009) (vacating, upon appeal by 20 objecting members of 2,362-member class, the trial court's order approving the proposed class-action settlement);

Hameroff v. Public Med. Assistance Trust Fund, 911 So. 2d 827 (Fla. Dist. Ct. App. 2005) (reversing, upon appeal by a single objecting class member, trial court's amended order awarding attorney fees, which effectively altered a term of the approved settlement agreement); and Bloyed v. General Motors Corp., 881 S.W.2d 422 (Tex. App. 1994) (reversing, in an appeal instituted by 3 objecting members of a class consisting of approximately 645,000 class members, the trial court's approval of a class-action settlement on the grounds that it was not fair, adequate, and reasonable to class members and concluding, therefore, that, in approving settlement, the trial court had abused its discretion).

We are unaware of any precedent that supports the view that disapproval of a settlement agreement in a class action operates only to insulate an objector from the binding effect of a settlement agreement. Such a result would be particularly anomalous in the context of a class certified pursuant to Rule 23(b)(2), Ala. R. Civ. P., a mandatory class action designed to afford a class uniformity of relief. A member of a Rule 23(b)(2) class has no right to remove himself or herself simply by opting out as is the case in a class

certified pursuant to Rule 23(b)(3). Adams, 676 So. 2d at 1270. Nor does Devlin v. Scardelletti, 536 U.S. 1 (2002), compel a different conclusion. In Devlin, the Supreme Court recognized the right of an objector to appeal a judgment approving a settlement in a class action where the class had been certified pursuant to Rule 23(b)(1), Fed. R. Civ. P. The Court observed:

> "And like the appellants in the prior cases, petitioner will only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections. ... Petitioner's right to appeal this aspect of the District Court's decision cannot be effectively accomplished through the named class representative -- once the named parties reach a settlement that is approved over petitioner's objections, petitioner's interests by definition diverge from those of the class representative."

536 U.S. at 9 (emphasis added).

The subject of this appeal is the trial court's judgment approving the settlement agreement and rejecting the objections to the settlement agreement advanced by the objectors. The scope of the objections in the trial court was not the narrow question whether the order should bind only the objectors, but, on the contrary, the issue presented is the broader question whether the trial court's judgment approving

the settlement agreement is due to be affirmed. In the parlance of the Devlin Court, the objectors are allowed to appeal that aspect of the trial court's order that affects them -- "the [circuit court's] decision to disregard [their] objections." If the judgment is affirmed, the settlement agreement affects them in that it binds them, as members of the class, to terms of a settlement agreement inconsistent with § 16-33C-19.

We do not here deal with an attempt to assert an objection peculiar to the objectors and not the class as a whole. It is true that the objectors are different from the members of the class who have not objected in that the objectors have not acquiesced in the settlement agreement. However, if this circumstance alone creates a personal interest that can be resolved simply by protecting the objectors through reversal of the approval as to them and allowing the rest of the settlement agreement to stand, we would defeat the basis for certification of a mandatory class action pursuant to Rule 23(b)(2) by reaching a result that binds less than all members of the class. Indeed, if the objectors had sought to extract only themselves from the

settlement agreement and the trial court had obliged and the other parties appealed, a substantial question would exist as to whether we would be required to reverse to protect the mandatory nature of a Rule 23(b)(2) class action.

Conclusion

The trial court's judgment entered on the settlement agreement is vacated and this case is remanded for further proceedings.

1101337 -- JUDGMENT VACATED AND CAUSE REMANDED.

1101506 -- JUDGMENT VACATED AND CAUSE REMANDED.

Woodall, Parker, and Shaw, JJ., and Lyons and Pittman, Special Justices,* concur.

Houston, Special Justice,* concurs specially.

Moore, Special Justice,* dissents.

Malone, C.J., and Stuart, Bolin, Murdock, Main, and Wise, JJ., recuse themselves.

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*Retired Associate Justices J. Gorman Houston, Jr., and Champ Lyons, Jr., and Court of Civil Appeals Judges Craig S. Pittman and Terry A. Moore were appointed to serve as Special Justices in regard to these appeals.

HOUSTON, Special Justice (concurring specially).

Upon initial consideration, I was inclined to dissent; however, infallibility was not my long suit while I was on the Bench, nor is it in retirement.

Alabama Code 1975, § 16-33C-6(b), provides: "A PACT Contract ... does not constitute a debt or obligation of the state ...."

By the vacation of the judgment approving the settlement agreement, based upon the undisputed financial data presented to the trial court those beneficiaries of PACT contracts now in college or soon to be in college will have their tuition paid in full; those beneficiaries who are scheduled to attend college in future years will receive nothing. If this Court had affirmed the judgment in this case, each owner of a PACT contract could have, at his or her discretion, obtained a refund of the amount he or she paid into the fund, subject to certain taxes, or, if the owner elected not to withdraw from the PACT contract, each beneficiary would have received approximately $32,000 in tuition under the PACT contract, the specific value depending upon the college or university the beneficiary chose to attend. The 2008-2009 economic downturn

and the increased tuition costs caused the PACT program to close, which created a closed-end Ponzi.

I believe that the settlement may have provided the greatest good for the greatest number of people. That, however, is not a ground for dissent.

There are approximately 30,000 remaining owners of PACT contracts and approximately 40,000 remaining beneficiaries under those contracts. Therefore, only 0.18% of the total group objected to the settlement agreement and 99.82% of the owners and beneficiaries of all PACT contracts did not timely object to the settlement. This was not a ground for dissent.

At the fairness hearing to evaluate the merits of the settlement, the trial court heard live testimony from the ex officio chairman of the PACT board, who testified that the settlement was designed to distribute equitably among class members all the available assets to reflect the respective time value of money and to allow those class members who did not believe such value to be beneficial to cancel their PACT contracts and obtain refunds. However, he testified that in late 2012 the PACT program would lack sufficient assets with which to refund class members the full amounts of their original investments. He testified that the settlement

agreement would provide class members as a whole with a sufficient benefit and return on investment as opposed to merely receiving refunds or potentially nothing if all assets are depleted. He asked for the proposed settlement agreement to be approved, but he testified that the proposed settlement agreement violated the laws of the State. In fact, the settlement agreement provides: "The purpose and effect of the settlement shall be to modify the dispositive terms of the PACT Trust Fund" and/or "the terms of the contractual relationships between class members and the PACT board." (Emphasis added.)

Section 16-33C-19, Ala. Code 1975, added by Act No. 2010-725, Ala. Acts 2010, provides that any changes that the PACT board made to "rules, procedures, or policies" could not "violate the contractual relationship existing between a PACT contract holder and the PACT board." (Emphasis added.)

To "violate" is "to break or disregard (a law or promise)." American Heritage Dictionary of the English Language 1921 (4th ed. 2001). To "modify" is "to change in form or character; alter." Id., at 1131. A distinction without a difference -- or vice versa. Therefore, I concur.

MOORE, Special Justice (dissenting).

I respectfully dissent.

These consolidated appeals involve the validity of objections filed by Carol M. Perdue, William D. Motlow, Jr., and Shane Sears to a class-action settlement agreement approved by the Montgomery Circuit Court ("the trial court"). In that settlement agreement, all contract holders in the Alabama Prepaid Affordable College Tuition ("PACT") program and the beneficiaries of those contracts agreed, among other things, to accept payment of college tuition and mandatory fees at a baseline established by 2010 tuition rates and to waive any statutory or contractual rights they may have that would be inconsistent with the terms of the settlement, specifically including any rights arising under the Wallace-Folsom College Savings Investment Act ("the Act"), codified at § 16-33C-1 et seq., Ala. Code 1975. Perdue, Motlow, and Sears (sometimes hereinafter referred to collectively as "the objectors") filed timely written objections to the settlement agreement, which contained a non-opt-out provision, and appeared, through counsel, at two fairness hearings conducted on June 20 and July 15, 2011. Following the trial court's approval of the settlement on July 27, 2011, the objectors

filed two separate appeals; this Court consolidated those appeals on September 29, 2011.

The main opinion concludes that the judgment approving the settlement agreement should be vacated because it violates § 16-33C-19, Ala. Code 1975. I respectfully disagree. Section 16-33C-19 does not preclude the class members from waiving their rights or the PACT board from agreeing with the class members to a modification of the terms of their PACT contracts. Even if it did, the objectors do not have standing because they have failed to prove that they have been harmed by the settlement agreement. I also reject the objectors' argument that, in amending the Act through Act No. 2010-725, Ala. Acts 2010, the legislature intended to guarantee full funding for the PACT Trust Fund. The objectors have failed to present any other ground for vacating the trial court's judgment, and it should be affirmed.

I. § 16-33C-19 Does Not Preclude Waiver or Modification

A. Construction of § 16-33C-19

Section 16-33C-19 provides, in pertinent part:

> "The Legislature strongly encourages the PACT board to make any financially beneficial changes to PACT rules, procedures, or policies, to the extent that the PACT board is authorized or permitted to make such changes and to the extent that such

> changes would not violate the contractual relationship existing between a PACT contract holder and the PACT board."

By its plain language, § 16-33C-19 expressly forbids the PACT board from making "changes to PACT rules, procedures, [and] policies" that would "violate the contractual relationship existing between a PACT contract holder and the PACT board." See IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992) ("[W]here plain language is used a court is bound to interpret that language to mean exactly what it says.").

The first clause in § 16-33C-19 refers to "changes to ... rules, procedures, or policies" made by the PACT board, an agent of the State. See § 16-33C-5, Ala. Code 1975.

> "'We are to ascertain the true meaning of the Legislature in the use of the words of their statute, and we are to consider them, when legislating upon subjects relating to ... legal process, as speaking technically, unless from the statute itself it appears that they made use of the terms in a more popular sense.'"

Ex parte Western Union Tel. Co., 200 Ala. 496, 500, 76 So. 438, 442 (1917) (Sayre, J., dissenting) (quoting Merchants' Bank v. Cook, 21 Mass. 405 (1826)). The Act vests the PACT board with the power "[t]o adopt the rules and regulations necessary to implement the provisions of [the Act] ...," § 16-

33C-5(2), Ala. Code 1975, and "to establish other policies, procedures, and criteria necessary to implement and administer the provisions of this chapter," § 16-33C-5(11), Ala. Code 1975. Those terms -- rules and regulations" and "policies, procedures, and criteria" -- carry definite and well understood legal meanings; thus, the "rules, procedures, or policies" to which § 16-33C-19 refers must be those adopted and established by the PACT board pursuant to § 16-33C-5.

Most state agencies may change their rules only through compliance with the Alabama Administrative Procedure Act ("the AAPA"), § 41-22-1 et seq., Ala. Code 1975, see § 41-22-2(d), Ala. Code 1975, which generally requires notice and a period of public comment before an amendment may be adopted. See §§ 41-22-4 and -5, Ala. Code 1975. However, the PACT board may adopt rules and regulations "either with or without compliance with the Alabama Administrative Procedure Act," § 16-33C-5(2), and it appears that the PACT board has elected to adopt its rules, procedures, and policies without complying with the AAPA.[19] The public-disclosure statement issued by the PACT board indicates that the PACT board promulgates and amends its

[19]The AAPA does not contain any rules regarding the administration of the PACT program.

rules from time to time as it determines is necessary,[20] without publishing notice of its intent to adopt or amend its rules and without receiving or considering public comment on the proposed rule or rule amendment. Thus, the PACT board acts unilaterally when adopting and amending its rules, procedures, and policies. In referencing the power of the PACT board to "make ... changes to PACT rules, procedures, or policies" in § 16-33C-19, the legislature meant, and only meant, to regulate the PACT board's power to make unilateral decisions concerning its rules, procedures, and policies under § 16-33C-5.[21] See In re Dorsey, 7 Port. 293 (Ala. 1838) (holding that the use of words with a fixed legal significance evidences intent that those words carry that meaning unless context shows otherwise).

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[20]This Court may take judicial notice of the rules of the PACT board. See Broadway v. Alabama Dry Dock & Shipbuilding Co., 246 Ala. 201, 212, 20 So. 2d 41, 51 (1944) (opinion on rehearing). As referenced by the PACT board's rules, on the date this opinion was released the public-disclosure statement issued by the PACT board in December 2010 could be found at http://www.treasury.alabama.gov/pact/program_docs.htm.

[21]The last sentence of § 16-33C-19 provides: "Any such changes made prior to July 1, 2011, require the prior approval of the Legislative Council." The judgment approving the settlement agreement was entered on July 27, 2011; hence, any agreed changes to the rules, procedures, and policies of the PACT board would have taken effect after July 1, 2011.

The last clause of the first sentence of § 16-33C-19 prohibits the PACT board from making changes to its rules, procedures, or policies that "would ... violate the contractual relationship existing between a PACT contract holder and the PACT board." The word "violation" is defined as "Injury; infringement; breach of right, duty, or law; ... The Act of breaking, infringing or transgressing the law." Black's Law Dictionary 1570 (6th ed. 1990). "Violate" means, among other things, "[t]o break or disregard (a law or promise, for example)." American Heritage Dictionary of English Language 1921 (4th ed. 2001). "Contractual" is defined as "of, relating to, or having the nature of a contract," American Heritage Dictionary 399, and "relationship" means "a particular type of connection existing between people related or having dealings with one another." Id. at 1473. The phrase "violate the contractual relationship" suggests a breaking of the interpersonal connection established by a contract. The last clause of the first sentence in § 16-33C-19 prohibits changes that would have the effect of rescinding, voiding, suspending, or terminating existing PACT contracts.

When the first sentence of § 16-33C-19 is properly read, the last clause specifically limits the general power of the PACT board to unilaterally amend its rules, procedures, and policies. Although the first clause confers upon the PACT board the power to make "any financially beneficial changes" to its rules, procedures, and policies, the last clause excepts from that authority the power to make changes to those rules, procedures, and policies that would violate the contractual relationship between the PACT board and a PACT contract holder. The last clause can be read only as a restraint on the rule-making, procedure-making, and policy-making power of the PACT board.

As properly construed, § 16-33C-19 does not address, nor does it limit, the power of the PACT board to enter into contracts with PACT contract holders, such as the settlement agreement at issue here. That power is actually addressed elsewhere. Section 16-33C-5(4) bestows upon the PACT board the broad authority "[t]o execute contracts and necessary instruments," the only limitation being that the contract must be "necessary or convenient to carry out the purposes and

provisions of [the Act]."[22] See Rogers v. City of Mobile, 277 Ala. 261, 277, 169 So. 2d 282, 297 (1964) (confirming power of state agency to enter into contracts when that authority is conferred by statute). Section 16-33C-7, Ala. Code 1975, lists various items each PACT contract must include, but it does not prescribe the exact terms, conditions, and provisions of those contracts, leaving that "to the sole discretion" of the PACT board. § 16-33C-7(a)(11), Ala. Code 1975. "[C]onflicting intentions in the same statute are never to be supposed or so regarded unless forced on the Court by unambiguous language." Leath v. Wilson, 238 Ala. 577, 579, 192 So. 417, 419 (1939). The last clause of the first sentence of § 16-33C-19 unambiguously limits the power of the PACT board to make unilateral changes to its "rules, procedures, or policies"; it does not unambiguously limit the power of the PACT board to perform any other authorized act, including the power to make bilateral contracts with PACT contract holders under either § 16-33C-5(4) or § 16-33C-7.

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[22]The objectors do not cite § 16-33C-5(4) or argue that the settlement agreement exceeds any contractual power conferred on the PACT board by that statute. "Issues not argued in a party's brief are waived." Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1167 (Ala. 2003).

The settlement agreement does not run afoul of § 16-33C-19 when that Code section is applied as written. The settlement agreement certainly cannot be considered a unilateral action of the PACT board to amend its rules, procedures, and policies to thereby rescind, void, suspend, or terminate the contractual relationships with any of the PACT contract holders. The settlement agreement did not result from any administrative proceeding; rather, it resulted from a legal proceeding in which the parties, considering the uncertainties involved and weighing their various options, decided to compromise and settle the protracted litigation.[23]

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[23]I recognize that the objectors do not want to waive their rights or to modify their contracts, but "all ordinary class members are bound by the deal struck by their named representatives in the event the court determines that they were adequately and fairly represented during the course of the negotiations." Grimes v. Vitalink Commc'ns Corp., 17 F.3d 1553, 1558 (3d Cir. 1994). Although the objectors charge that the parties colluded during the settlement negotiations, the record shows that the settlement resulted from a mediation conducted by retired Associate Justice Bernard Harwood, who confirmed by deposition that the parties negotiated at arm's length. The record further indicates that the named class representatives adequately and fairly represented all the class members, including the objectors, and that the settlement benefits the class as a whole. Thus, the fact that the objectors do not subjectively consent to a waiver or modification of their contracts, ___ So. 3d at ___, or that the class members have not unanimously concurred to the terms of the settlement agreement, ___ So. 3d at ___ n.17, does not mean that all class members, including the objectors, are not

The settlement preserves the contractual relationships between all the class members and the PACT board, leaving it solely to the class members whether to later cancel their contracts in conformity with the provisions of their contracts controlling cancellation. The settlement agreement simply cannot be characterized as a "change[] to PACT rules, procedures, or policies" that "violate[s] the contractual relationship existing between a PACT contract holder and the PACT board."[24]

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bound by this adequate, fair, and reasonable settlement agreement, nor does their dissent from the settlement alone vitiate the class's waiver and modification agreement, see Austin v. Pennsylvania Dep't of Corr., 876 F.Supp. 1437, 1458 (E.D. Pa. 1995) ("[T]he mere fact that there is opposition, even from class representatives, does not necessitate rejection of the settlement."), as the main opinion seems to indicate. ___ So. 3d at ___. "[A]ll class actions are brought to affect the rights of class members." Carlough v. Amchem Prods., Inc., 834 F.Supp. 1437, 1465 (E.D. Pa. 1993). I cannot locate any legal authority, and the main opinion does not cite any, see ___ So. 3d at ___, supporting the proposition that a fair, adequate, and reasonable class-action settlement falling under Rule 23(b)(1) and (b)(2) cannot mandate terms to which all class members do not personally agree. If the law required such unanimous consent, then no class-action settlement could be reached or be approved over even one objection. Cf. TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1982) (holding that a class-action settlement can be approved if manifestly reasonable even if those class members holding a majority interest object to its terms).

[24]Any opinion by a layperson that the settlement agreement violates the law of Alabama has no bearing on the determination whether the settlement, in fact, violates § 16-

B. The Main Opinion Misconstrues § 16-33C-19

The main opinion eschews the literal meaning of § 16-33C-19 by ignoring the first clause of the first sentence. The main opinion does not attempt to interpret the words "mak[ing] ... changes to the PACT rules, procedures, or policies." This leads the main opinion to construe the language in the last clause -- "violate the contractual relationship existing between a PACT contract holder and the PACT board" -- as if it existed separate and apart from the first clause. However, when construing a statute, this Court should not focus on isolated words and phrases but should consider them in the context in which they are used. Edwards v. Kia Motors of America, Inc., 8 So. 3d 277, 282 (Ala. 2008). The last clause cannot be construed independently of the first clause, which it modifies. As shown above, when considered with the first clause, the last clause can be read only as restraining the

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33C-19, which is a question for this Court. See Phillips v. Harris, 643 So. 2d 974, 976 (Ala. 1994) ("[A] witness, whether expert or lay, cannot give an opinion that constitutes a legal conclusion or amounts to the application of a legal definition."). Thus, I am not persuaded that the settlement is "clearly contrary to state law" based on any testimony in the record to that effect. See ___ So. 3d at ___ and n.16.

rule-making, procedure-making, and policy-making power of the PACT board.

The main opinion further misconstrues the last clause of the first sentence in § 16-33C-19 by substituting the words "terms and obligations" for the word "relationship." ___ So. 3d at ___ n.14. In doing so, the main opinion violates at least two other well settled rules of statutory construction.

First and foremost, "'[t]his Court is not at liberty to rewrite [a] statute or to substitute its judgment for that of the legislature.'" Willis v. Kincaid, 983 So. 2d 1100, 1103 (Ala. 2007) (quoting Gowens v. Tys. S., 948 So. 2d 513, 522 n.1 (Ala. 2006)). A court can depart from the literal meaning of the words in a statute when the literal meaning would "produce an absurd and unjust result that is clearly inconsistent with the purpose and policy of the statute." City of Bessemer v. McClain, 957 So. 2d 1061, 1075 (Ala. 2006). However, the application of the literal meanings to the terms "violate" and "contractual relationship" does not fail to accomplish any legislative objective or lead to an irrational and inequitable result in clear contravention of the overall purpose of the Act. Although it could be "financially beneficial," see § 16-33C-19, to the PACT board

to unilaterally rescind, void, suspend, or terminate some PACT contracts, the language used in § 16-33C-19 precludes the PACT board from taking such action, which is a legitimate legislative objective. As the main opinion points out, the legislature could have used different language to accomplish that same purpose, ___ So. 3d at ___ n.14, but that does not detract from the effectiveness of the language actually used.[25]

Second,

> "'[w]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.... The use of different terms within related statutes generally implies that different meanings were intended.' 2A Norman Singer,

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[25]The same criticism could be leveled at the main opinion's construction of § 16-33C-19. If the legislature had intended to leave the "terms or obligations" of the PACT contracts inviolate, unmodifiable, and nonwaivable, it could have clearly and explicitly stated as much. See, e.g., §§ 7-2-201 and 7-2A-201, Ala. Code 1975 (making certain contracts "not enforceable" under Statute of Frauds); § 8-1-1(a), Ala. Code 1975 ("Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind otherwise than is provided by this section is to that extent void."); § 26-17-601(b), Ala. Code 1975 (making stipulations in any agreement that seeks to bar paternity actions "not enforceable"); § 8-20-14, Ala. Code 1975 (precluding parties from modifying or superseding Motor Vehicle Franchise Act by "a choice of law clause in any franchise or dealer agreement, waiver, or other written instrument"); § 7-9A-405(a), Ala. Code 1975 (limiting effectiveness of modification of assigned contract); and § 10A-9-1.10, Ala. Code 1975 (listing "nonwaivable provisions" of partnership agreements).

> Sutherland on Statutes and Statutory Construction § 46:06, at 194 (6th ed. 2000)."

Trott v. Brinks, Inc., 972 So. 2d 81, 85 (Ala. 2007) (holding that legislature's use of terms "reimbursement" and "subrogation" in Alabama Workers' Compensation Act, § 25-5-1 et seq., Ala. Code 1975, signaled legislative intent that those words be treated differently). In § 16-33C-5(9), Ala. Code 1975, the legislature authorized the PACT board "[t]o define the terms and conditions of ... PACT contracts." In § 16-33C-6(b), Ala. Code 1975, the legislature designates the PACT Trust Fund as "the source for payment of PACT Program's obligations under PACT contracts" and pledges that the moneys in the PACT Trust Fund will be used "to pay amounts due under the terms of its PACT contracts." Section 16-33C-7(a), Ala. Code 1975, specifically provides that the PACT contracts "shall include ... the terms and conditions" for payment by PACT contract purchasers, for substitution of beneficiaries, and for any other purpose deemed necessary by the PACT board, as well as terms prescribing "all other rights or obligations of the purchaser and the PACT Program." The term "contractual relationship" appears only in § 16-33C-19. Therefore, we must presume that the legislature did not intend "contractual

relationship" to be synonymous with "contractual terms or obligations" because, if it had so intended, the legislature would have used those more precise terms already used in other sections of the Act.

By substituting the words "terms and obligations" for "relationship," the main opinion gives an entirely different substantive meaning to § 16-33C-19, effectively amending the statute. "[I]t is not the function of the court to usurp the role of the legislature and to amend statutes under the guise of construction." Honeycutt v. Employees' Ret. Sys. of Alabama, 431 So. 2d 961, 964 (Ala. 1983). It is beyond the judicial power to "revise or correct the language used." Morris v. McElroy, 23 Ala. App. 96, 99, 122 So. 606, 608 (1929). "[T]he courts are not at liberty ... to read into [a statute] and interpolate words which do not appear in the language enacted by the Legislature." McCall v. Automatic Voting Machs. Corp., 236 Ala. 10, 13, 180 So. 695, 697 (1938). To hold that § 16-33C-19 actually reads "contractual terms and obligations" in place of "contractual relationship" amounts to "legislating rather than interpreting." Town of Loxley v. Rosinton Water, Sewer & Fire Prot. Auth., Inc., 376 So. 2d 705, 708 (Ala. 1979). The legislature deliberately used the

term "contractual relationship," and this Court cannot, without violating the separation-of-powers clause, see Ala. Const. of 1901, § 43, insert into the statute different words with different meanings.

C. The Construction of § 16-33C-19 in the Main Opinion Does Not Invalidate the Settlement Agreement

Even assuming that the language of § 16-33C-19 could validly be transformed to prevent the PACT board from changing its rules, procedures, and policies so as to "violate" the "contractual terms and obligations" of the "existing" PACT contracts, as the main opinion posits, ___ So. 3d at ___ n.14, nothing in § 16-33C-19 would preclude the PACT contract holders from waiving any terms in their PACT contracts or from agreeing with the PACT board to a modification of those terms.[26]

A waiver is "the voluntary and intentional surrender or relinquishment of a known right." Dominex, Inc. v. Key, 456

[26]At one point, the main opinion indicates that the settlement agreement constitutes "a mutually agreed upon reformation of the 'contractual relationship.'" ___ So. 3d at ___. However, reformation is an equitable remedy by which a court reforms a contract so as to accurately express the terms to which the parties originally agreed and differs from a modification by which the parties agree to change the original terms of the contract. See Federated Guar. Life Ins. Co. v. Painter, 360 So. 2d 309 (Ala. 1978).

So. 2d 1047, 1058 (Ala. 1984). "'Waiver involves the acts and conduct of only one of the parties ....'" Inland Mut. Ins. Co. v. Hightower, 274 Ala. 52, 56, 145 So. 2d 422, 425 (1962) (quoting Sovereign Camp, Woodmen of the World v. Newsom, 142 Ark. 132, 219 S.W. 759, 768 (1920)). "Waiver of the right to enforce an agreed term is accomplished unilaterally ...." Angus Med. Co. v. Digital Equip. Corp., 173 Ariz. 159, 164, 840 P.2d 1024, 1029 (Ct. App. 1992); see also 3A Arthur L. Corbin, Corbin on Contracts § 752 (1960) ("[I]t appears that 'waiver' consists of the voluntary action of the obligor alone."). A waiver does not remove, modify, or terminate the contractual terms, but excuses nonperformance of those terms. See generally E. Allan Farnsworth, Contracts § 8.5, at 561 (3d ed. 1999). A waiver relinquishes only the right to enforce a contractual provision and does not affect the existence of the underlying right.[27] See Emery v. Progressive Cas. Ins. Co.,

[27]The legislature signaled its knowledge of the distinction between a waiver and a modification in § 35-9A-143, Ala. Code 1975 ("If the court, as a matter of law, finds: ... a settlement in which a party waives or agrees to forego [sic] a claim or right under this chapter or under a rental agreement was unconscionable when made, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result."), and in §§ 7-2-209 and 7-2A-208, Ala.

49 So. 3d 17, 21 (La. Ct. App. 2010) ("Waiver occurs when there is an existing right, a knowledge of its existence, and an actual intention to relinquish it, or conduct so inconsistent with the intent to enforce the right as to induce a reasonable belief that it has been relinquished." (emphasis added)).

By waiving any rights they may have that are inconsistent with the terms of the settlement, the class members are acting unilaterally. Unlike an offer to make a binding bilateral contract, a waiver does not require any formal acceptance in order to be effective. See Robinson v. Robinson, 961 S.W.2d 292, 298 (Tex. Ct. App. 1997) (finding no waiver but recognizing that waiver, as a unilateral act, does not require acceptance by other party). By acknowledging the class members' waiver, the PACT board does not take any action that could implicate its authority; it certainly would not be unilaterally "changing" "any rules, procedures, or policies." § 16-33C-19. Moreover, even if the PACT board adopted rules, procedures, and policies consistent with the class members'

Code 1975 (distinguishing between waiver, rescission, and modification).

waiver, doing so would not "violate the contractual [terms and obligations] existing between a PACT contract holder and the PACT board." Id. The terms and obligations of the PACT contracts remain intact; the class members only voluntarily and unilaterally agree not to enforce those terms and obligations against the PACT board.[28]

A modification of a contract, on the other hand, requires mutual assent from both parties and, therefore, can be achieved only through bilateral conduct. Angus Med. Co., 173 Ariz. at 164, 840 P.2d at 1029. Section 16-33C-19 prohibits only unilateral actions by the PACT board in adopting or amending rules, procedures, and policies; it does not prohibit bilateral actions involving the PACT board and the PACT contract holders. Moreover, with all due respect to Justice

[28]In her brief to this Court, Perdue argues that the class could not waive any of its statutory rights under the Act because such a waiver contravenes public policy. Perdue did not argue that point in the trial court, and this Court cannot consider that argument for the first time on appeal. Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992); see also Disch v. Hicks, 900 So. 2d 399, 404-05 (Ala. 2004) (applying rule to objector's appeal, but finding that argument had been adequately preserved); and In re Philadelphia Stock Exch., Inc., 945 A.2d 1123, 1134-35 (Del. 2008) (refusing to consider issues raised by objectors for first time on appeal). At any rate, that argument lacks merit because the waiver does not violate § 16-33C-19 or any public policy favoring college education.

Houston, a modification of a contract is not equivalent to a violation of a contract. ___ So. 3d at ___ (Houston, J., concurring specially). Legally speaking, the term "violation of a contract" is synonymous with the term "breach of contract," which is defined as a "[v]iolation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance." Black's Law Dictionary 213 (9th ed. 2009). A "modification of a contract," on the other hand, involves the mutual assent of both contracting parties to new or changed contractual terms while the original contract remains executory. See McLemore v. Hyundai Motor Mfg. Alabama, LLC, 7 So. 3d 318, 333 (Ala. 2008); and Alabama Terminix Co. v. Howell, 276 Ala. 59, 62, 158 So. 2d 915, 918 (1963); see also Beacon Terminal Corp. v. Chemprene, Inc., 75 A.D.2d 350, 354, 429 N.Y.S.2d 715, 717-18 (1980) ("The modification of a contract results in the establishment of a new agreement between the parties which pro tanto supplants the affected provisions of the original agreement while leaving the balance of it intact."). A contract "may be modified by mutual agreement before a breach without any other consideration than the mutual assent of the parties ...." Hartford Fire Ins. Co.

v. Aaron, 226 Ala. 430, 433, 147 So. 628, 630 (1933) (emphasis added). If the parties modify the terms of a contract, performance in compliance with the changed terms is not a breach of the contract, although that performance may not comply with the original terms of the contract. McLemore, 7 So. 3d at 332-33 ("Parties may modify the terms of their agreement and 'if the terms of a subsequent agreement contradict the earlier agreement, the terms of the later agreement prevail.'" (quoting Cavalier Mfg., Inc. v. Clarke, 862 So. 2d 634, 641 (Ala. 2003))). Modification clearly alters the terms of a contract, but that alteration is in no sense a breach of that contract; modification is a means of avoiding a breach altogether.

Therefore, even under the main opinion's revised version of § 16-33C-19, that statute does not preclude the PACT board from entering into an agreement with PACT contract holders to modify existing contract terms and to adopt rules, procedures, and policies consistent with those agreed-upon modifications. It appears from the language in § 16-33C-19 that the legislature did not even contemplate such an agreement. Ex parte Berryhill, 801 So. 2d 7, 9-10 (Ala. 2001) ("The polestar

of statutory construction is to ascertain and give effect to the Legislature's intent in enacting a statute.").

D. Summary

The language of § 16-33C-19, applied either literally or as revised by the main opinion, does not dilute the general contractual authority of the PACT board. The PACT board has the contractual power to enter into an enforceable settlement, see Smith v. Tillman, 958 So. 2d 333 (Ala. 2006), including the power to agree to all the terms contained in the settlement agreement in this case. The contractual power of the PACT board is not even implicated in regard to the waiver provision, which does not require its acceptance to be valid. Because the settlement does not contravene § 16-33C-19, I find no basis for vacating, on that ground, the judgment approving the settlement.

II. The Objectors Lack Standing

A. The Objectors Did Not Prove an Adverse Modification of Their Contracts

I further note that, even if § 16-33C-19 could be construed as preventing the PACT board from entering into agreements that modify the terms or obligations in existing PACT contracts, the objectors have utterly failed to show that

they have been harmed by such a modification. A thorough review of the record shows that Perdue did not even enter her PACT contract into evidence. Although Motlow and Sears represented to the trial court and to this Court that, between them, they had entered into four separate PACT contracts, they attached only one 1992 PACT contract, presumably benefiting Lindsey Motlow, to their written objections. Motlow has failed to produce evidence showing that the now 20-year-old PACT contract remains executory, i.e., that Lindsey has yet to receive the full benefits set out in the contract and that the PACT board remains obligated to pay, on her behalf, full tuition and fees at current rates. Even assuming that the 1992 PACT contract guaranteed payment of full tuition and fees and remains executory, Motlow has not shown that the PACT board has paid, or will pay, less than those amounts on Lindsey's behalf.[29]

An objecting class member may have standing to appeal a judgment approving a class-action settlement, see Devlin v.

[29]The record indicates that, as a result of the period of their postsecondary enrollment, some beneficiaries of PACT contracts will receive full tuition and fees without modification. The record does not indicate that Lindsey falls outside that category of beneficiaries.

Scardelletti, 536 U.S. 1, 14 (2002),[30] but "[an objector] will only be allowed to appeal that aspect of the [lower court]'s order that affects him [or her]."[31] 536 U.S. at 9 (emphasis

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[30]The appellees jointly moved to dismiss Perdue's appeal, asserting that she had released any claims that would support her appeal and, thus, that she lacked standing. However, the release upon which the appellees rely was superseded by a judgment of the Montgomery Circuit Court that limited the release to claims "aris[ing] from the factual allegations made a basis of the [lawsuit referred to in the release]." See ArvinMeritor, Inc. v. Johnson, 68 So. 3d 870, 875 (Ala. Civ. App. 2011). So limited, the release does not affect Perdue's status as a class member or her general right as an objector to appeal.

[31]As the main opinion correctly observes, Devlin continues by stating that an objector can appeal "the District Court's decision to disregard his objections." 536 U.S. at 9. In Rutter v. Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1183 n.1 (10th Cir. 2002), the United States Court of Appeals for the Tenth Circuit held that this language allowed objectors to a class-action settlement to appeal based on any objections they had raised in the district court, concluding that those objections "were directed at the entire settlement" and that there was "no practical way to separate Objectors' individual interests from those of the other class members without upsetting the entire settlement fund." Id. The federal district court for the Southern District of Florida refused to follow Rutter, explaining:

> "In Devlin, the Supreme Court clearly stated that although the petitioner could appeal the district court's final approval of the class settlement, the 'petitioner will only be allowed to appeal that aspect of the District Court's order that affects him' (emphasis added). Further, I note that although the Eleventh Circuit did not specifically address the issue of the scope of the appeal by an objector to a final order approving a settlement in a class

added). An individual objector to a class-action settlement may appeal only as to asserted errors in the settlement that, in fact, have injuriously affected his or her rights, not the rights of other class members. See also Rebney v. Wells Fargo Bank, 220 Cal. App. 3d 1117, 269 Cal. Rptr. 844 (1990) (objectors, although class members, lacked standing to contest settlement terms that did not impact objectors but purportedly injured only other class members); National Ass'n of Chain

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> action, the Eleventh Circuit, in interpreting Devlin, found that the objectors were not allowed to appeal such a final order because they were not seeking to 'protect their own property, their own allotment from an award or settlement or any other cognizable legal right or interest.' [AAL High Yield Bond Fund v. Deloitte & Touche LLP, 361 F.3d 1305, 1305 (11th Cir. 2004).] As the express language in Devlin limits the right of an objector to appeal the district court's order to the extent that it affects the objector personally and the Eleventh Circuit's conclusion in AAL High Yield Bond that an objector who was not specifically challenging his allotment from the class action settlement, I conclude Westheimer should only be allowed to appeal this Order to the extent that it affects him personally."

Allapattah Serv., Inc. v. Exxon Corp., (No. 91-0986-CIV, Apr. 7, 2006) (S.D. Fla. 2006) (not reported in F. Supp. 2d).

I agree with the district court that Devlin intended that an objector may challenge on appeal only those aspects of a settlement that adversely affect the objector personally. To the extent that the main opinion relies on any contradictory federal circuit court cases predating Devlin, ___ So. 3d at ___, I do not find those cases persuasive.

Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 39 (1st Cir. 2009) ("But a class member other than a named plaintiff is not a representative; that member is individually bound by a class judgment and is free to pursue his own interest on appeal." (final emphasis added)). Although no Alabama case has directly addressed this question in a class-action context, as a matter of general Alabama law, an individual cannot appeal a judgment on behalf of another, see B.H. v. Marion Cnty. Dep't of Human Res., 998 So. 2d 475, 477 (Ala. Civ. App. 2008) (great aunt had no standing to assert errors in termination of mother's parental rights), because "[s]tanding ... turns on 'whether the party has been injured in fact and whether the injury is to a legally protected right,'" State v. Property at 2018 Rainbow Dr., 740 So. 2d 1025, 1027 (Ala. 1999) (quoting Romer v. Board of Cnty. Comm'rs of the Cnty. of Pueblo, 956 P.2d 566, 581 (Colo. 1998) (Kourlis, J., dissenting) (first emphasis added)). In particular, appellate standing depends on whether the judgment complained of has in fact aggrieved the appellant by impairing his or her individual rights. B.H., supra.[32]

[32]The main opinion cites cases in which judgments in class-action settlements have been reversed in their entirety

The objectors lack standing to complain that the judgment approving the settlement agreement injures other class members.[33] Those class members presumably know what is in their best interests and, if they felt aggrieved by the judgment approving the settlement agreement, they could have filed their own appeals. See generally TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1982). Having failed to show that their PACT contracts have, in fact, been modified to their detriment, the objectors lack standing to challenge the settlement agreement on the ground that it violates § 16-33C-19. Thus, this Court should not even consider that issue, much less rule in favor of the objectors on that point.

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based on errors raised by individual objectors. ___ So. 3d at ___. I agree that if the objectors in this case proved reversible error, then the judgment would be vacated as to all class members. However, I do not agree that the objectors have standing to raise issues affecting only other class members or that they can win a vacation of the judgment through those arguments.

[33]In the trial court, Perdue purported to object on behalf of, among others, the PACT Trust Fund itself. However, she appealed only on behalf of herself and as next friend and guardian of Anna K. Perdue, and Perdue has expressly disavowed that she is asserting the rights of any other person or entity.

B. Perdue Has Not Proven that the Waiver of § 16-33C-17 Harmed Her

That same standing problem infects Perdue's argument that the settlement agreement violates § 16-33C-17,[34] which Code section generally prohibits public institutions of higher learning within this State, other than the University of Alabama and Auburn University, from charging

> "the PACT plan or a PACT plan contract owner mandatory fees or tuition per credit hour in an amount exceeding the cost of mandatory fees or tuition per credit hour as of September 30, 2009 ...."

In enacting § 16-33C-17, the legislature plainly intended "to limit the cost of tuition for certain PACT plan participants," Preamble to Act No. 2010-725, Ala. Acts 2010 (emphasis added), namely, those contract holders whose beneficiaries attend State postsecondary institutions other than the University of Alabama and Auburn University. This Court need not decide whether mandatory waiver of § 16-33C-17 is contrary to the interests of those class members, as Perdue argues, because Perdue has failed to show how that waiver adversely affects

[34]Motlow and Sears did not join in that argument. Because it vacates the judgment on other grounds, the main opinion does not address this aspect of Perdue's appeal. I nevertheless must address the issue because I disagree with the main opinion's disposition of the appeal.

her. Perdue does not argue that Anna, her daughter and the beneficiary under Perdue's PACT contract, is attending, or will attend, one of the schools subject to this settlement term. The evidence presented at the first fairness hearing indicated that this settlement term would apply to only 15% of the PACT contract beneficiaries. Without evidence indicating that Perdue falls within that relatively small class of PACT contract holders who, Perdue argues, would be damaged by the inclusion of that term in the settlement agreement, Perdue does not have standing to object to its purported illegality under § 16-33C-17.

III. The Legislature Has Not Agreed To Fully Fund The PACT Trust Fund

A. The PACT Trust Fund is Underfunded

By vacating the judgment, the main opinion essentially determines that the class members are forbidden by law from working out a plan with the PACT board to avoid a devastating financial outcome. Cf. Kinmon v. J.P. King Auction Co., 290 Ala. 323, 325, 276 So. 2d 569, 570 (1973) (noting that "[a] citizen of Alabama is free to contract in any way he sees fit" and that "[c]ontracting parties are free to modify their contract by mutual assent"). Despite the objectors'

protestations to the contrary, the evidence fully supports the trial court's factual findings regarding the poor financial health of the PACT Trust Fund. Daniel Sherman, an actuary employed by Buck Consultants and retained by the Retirement Systems of Alabama to review the financial condition of the PACT Trust Fund, testified at the first fairness hearing that, as of the end of 2010, the PACT Trust Fund needed an additional infusion of $338 million to fully fund the present value of its future obligations.[35] Young Jacob Boozer III, the current State Treasurer and, in that capacity, the ex officio chairman of the PACT board, testified that, unless the PACT board receives some form of financial relief, the current beneficiaries will exhaust the PACT Trust Fund before 2015.

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[35]As part of its statutory duties, the PACT board is required to submit an annual report to the Governor of Alabama detailing the financial state of the PACT program. See § 16-33C-8(2), Ala. Code 1975. That public record, of which this Court may take judicial notice, see Broadway v. Alabama Dry Dock & Shipbuilding Co., 246 Ala. 201, 212, 20 So. 2d 41, 51 (1944) (opinion on rehearing) (recognizing that the Alabama Supreme Court takes judicial notice of the annual report to the Governor of the director of the Department of Industrial Relations), indicates that, on March 10, 2011, the PACT board reported exactly the same financial information to the Governor that it presented at the fairness hearings. On the date this opinion was released, a copy of the 2011 PACT Annual Report could be found at http://www.treasury.alabama.gov/pact/additional_info.htm.

In enacting Act No. 2010-725, the legislature agreed to make annual appropriations for the benefit of the PACT Trust Fund beginning in 2015, but those appropriations will provide only a fraction of the moneys needed to provide tuition and mandatory fees for each contract holder prospectively.[36] Consequently, as the trial court found, "a majority of the class members would recover less (or perhaps nothing) if the proposed Settlement is not approved."

B. PACT Contracts Are Not Debts of the State

The objectors dispute those dire projections, arguing that they have been fabricated or that they were not adequately proven at the fairness hearings and that, at any rate, the PACT contracts are debts of the State, which the State has, in essence, guaranteed. As shown above, the first argument is totally without merit. The second argument also fails because the contractual obligations in the PACT

[36]The State Treasurer testified that the PACT board currently pays out $125 million per year in tuition and fees. The legislature appropriated $23,558,000 for 2015, see § 16-33C-14(a)(1), Ala. Code 1975, which is less than 25% of the current payout figure. The appropriations increase annually, but none of them approximate the current $125 million payout rate. See §§ 16-33C-14, -15, and -16.

contracts are not debts of the State for which the legislature has ensured payment.

The original act, Act No. 89-862, Ala. Acts 1989, established the PACT Trust Fund in former § 16-33C-6(a), Ala. Code 1975, to consist of "[p]ayments received by the board from purchasers on behalf of qualified beneficiaries or from any other source, public or private." Former § 16-33C-6(c), Ala. Code 1975. The assets of the PACT Trust Fund were considered "public funds of the state" that could be pooled with other state funds for investment purposes. Former § 16-33C-6(d), Ala. Code 1975. The original act further provided that,

> "[i]n order to provide funds to enable the trust to pay all amounts that shall be due under prepaid tuition contracts, there is hereby irrevocably pledged to that purpose and hereby appropriated from the trust fund such moneys as shall be necessary to pay all amounts that shall be due under prepaid tuition contracts at any time. In order to carry out the said appropriation and pledge, in each fiscal year the board shall, as provided in subsection (f) above, determine the amount of the future obligations of the trust fund under prepaid tuition contracts by any appropriate actuarial method. After that determination has been made, all moneys on deposit in the trust fund up to and including the amount of such future obligations shall remain on deposit in the trust fund and shall be subject to the aforesaid appropriation and pledge."

Former § 16-33C-6(h), Ala. Code 1975.

From its plain terms, the original act did not obligate the State to fund the PACT Trust Fund.[37] Former § 16-33C-6(c) provided that the PACT Trust Fund would consist of any payments received by the PACT board from, among others, "public" sources, but nothing in the law obliged the State to provide any funding to the PACT Trust Fund. The funds deposited in the PACT Trust Fund did become "funds of the state," but that designation did not require the State to replenish those funds in the event they declined below the amount necessary to pay all PACT contracts. More pointedly, former § 16-33C-6(h) provided that payment of "all amounts due" under PACT contracts would come exclusively from the PACT Trust Fund, not from any other public source.

Effective May 9, 2001, see Act No. 2001-427, § 1, p. 544, Ala. Acts 2001, the legislature amended the original act to state that "[a] PACT contract and any other contract entered

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[37]In their brief to this Court, Motlow and Sears assert that "the state law that created the PACT program prior to 2001 indicated that the PACT program was a 'guaranteed' fund." They do not cite any portion of the original act that contains that alleged guarantee. See Rule 28(a)(10), Ala. R. App. P. (requiring citation to legal authority when arguing point of law).

into by or on behalf of the [PACT Trust Fund], does not constitute a debt or obligation of the state ...." Former § 16-33C-6(b), Ala. Code 1975. When the legislature again amended the original act in 2010, it retained that clause. See § 16-33C-6(b), Ala. Code 1975, as amended by Ala. Acts 2010, Act. No. 2010-725.[38] That language only emphasizes the legislative intent that any liabilities arising from PACT contracts belong solely to the PACT Trust Fund and not to the State in general. Thus, in 2010, when the legislature appropriated public funds in order to bolster the PACT Trust Fund, it was not acting out of any legal obligation. Its largesse cannot, by opinions of executive officials or otherwise,[39] be transformed into a continuing legal duty to fully fund the PACT Trust Fund.

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[38]In their brief to this Court, Motlow and Sears claim that, after the original act was passed, "[l]ater, amendments were made to the statute that the legislature and representatives of the State of Alabama continued to interpret and promote the PACT program as a guaranteed fund." Again, they do not cite any part of the record or any part of the legislation upon which they rely in making that assertion.

[39]In a news report attached to the written objection filed by Motlow and Sears, the reporter states that, after signing Act No. 2010-725 into law, "Governor Riley said he believed the state had a moral and legal obligation to make sure the PACT Program was fiscally sound."

C. § 16-33C-16(b) Does Not Guarantee Full Funding

Motlow and Sears interpret the language in § 16-33C-16(b), Ala. Code 1975, as establishing that the PACT Trust Fund is, and always will be, 100% fully funded by state funds as a matter of law so that it cannot be proven as a matter of fact that the State will not fully fund the PACT Trust Fund. That interpretation seriously overstates the meaning of the language employed in § 16-33C-16(b). Section 16-33C-16(b) provides that

> "[t]hese appropriations [contained in § 16-33C-16(a)], along with the appropriations made in Section 16-33C-14 and Section 16-33C-15, [Ala. Code 1975,] will make the PACT Program 100 percent fully funded, according to the actuarial professional retained by the PACT board."

(Emphasis added.) Section 16-33C-16(b) explains only that the legislature had received information indicating the amount needed to fully fund the PACT Trust Fund at the time the 2010 amendments became effective and that the legislature had relied upon that information in determining the amount of financial aid it would appropriate to fulfill that need. Nowhere does Act No. 2010-725 provide that, should the amount allocated prove insufficient, the legislature was committing

itself to additional funding in order to guarantee the contractual obligations of the PACT board.[40]

According to the testimony at the fairness hearings, absent the settlement agreement, the PACT Trust Fund needs $338 million, in addition to the approximately $548 million already appropriated by the legislature, to fully fund its current liabilities. That amount could increase in the future depending on the rate of tuition and fee increases and the rate of investment returns realized by the PACT Trust Fund. In §§ 16-33C-14, -15, and -16, the legislature appropriated funds for the PACT Trust Fund from the Education Trust Fund, which is the primary source of funding for statewide public education. See Ala. Const. of 1901, Art. XIV, § 260. In effect, the objectors argue that the legislature diverted additional hundreds of millions of dollars from other public educational institutions attended by hundreds of thousands of Alabama students, if not more, in order to ensure the

[40]Although the main opinion states that the legislature has undertaken "to remedy the financial problems facing the PACT program," ___ So. 3d at ___, that language should not be read as holding that the legislature has agreed to, or will, allocate moneys for the PACT Trust Fund beyond those amounts set out in Act No. 2010-725.

viability of the PACT Trust Fund for the benefit of 30,000 PACT contact holders and their beneficiaries.

First, in Act No. 2010-725, the legislature only "appropriated" funds to support the PACT Trust Fund. A legislative appropriation of funds is not a guarantee of funding. Under § 41-4-90, Ala. Code 1975, with some exceptions not applicable here,

> "[a]ll appropriations are hereby declared to be maximum, conditional and proportionate appropriations, the purpose being to make appropriations payable in full in the amounts named only in the event that the estimated budget resources during each budget year of the period are sufficient to pay all of the appropriations for such year in full."

As explained in Siegelman v. Alabama Association of School Boards, 819 So. 2d 568 (Ala. 2001):

> "'[Section 41-4-90] recognizes that the Legislature can make appropriations in such amounts as it deems proper for state agencies but that these appropriations are conditional in the sense of being paid in full "only in the event that the estimated budget resources during each budget year of the period are sufficient to pay all of the appropriations for each year in full."'"

819 So. 2d at 579 (quoting brief of Alabama Association of School Boards). Consequently, by appropriating approximately $548 million to aid the PACT Trust Fund, the legislature did not, by any means, guarantee that those payments would be made

as scheduled. Otherwise, the legislature would have incurred a debt in violation of Ala. Const. of 1901, Art. XI, § 213 ("[N]o new debt shall be created against, or incurred by the state, or its authority except to repel invasion or suppress insurrection ...."). See John E. Ballenger Constr. Co. v. State Bd. of Adjustment, 234 Ala. 377, 380, 175 So. 387, 389 (1937).[41]

Second, even if the legislature could guarantee the payment of all PACT contracts, such a guarantee must be shown clearly and unequivocally from the terms of the appropriating statute. Shamburger v. Tierney, 257 S.W.2d 592, 593 (Ky. 1953) ("It is a fundamental rule of construction that statutes authorizing the appropriation of public funds will not be extended beyond the natural and fair meaning of the words used."). Outside the legislative context,

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[41]This Court should construe a statute to avoid conflicts with constitutional provisions, if possible. City of Homewood v. Bharat, LLC, 931 So. 2d 697, 701 (Ala. 2005); see also James v. Todd, 267 Ala. 495, 505, 103 So. 2d 19, 27 (1957) (noting that "where a statute is capable of two constructions, one which renders it [constitutionally] valid and the other invalid, the construction which will uphold its validity must be adopted"). Hence, this Court cannot construe § 16-33C-16(b) as creating an unconstitutional debt when that statute can be easily construed otherwise.

> "[f]or an instrument to be enforceable as a guaranty, it must show, with reasonable clarity, an intent to be liable on an obligation in case of default by the primary obligor, and the agreement must contain the express conditions of that liability and the obligations of each party within the four corners of the document. That undertaking must be clear and explicit."

38 Am. Jur. 2d Guaranty § 5 (2012). No good reason exists to treat statutes any differently. Any promise undertaken by the legislature to "guarantee" the debts of the PACT Trust Fund should be "clear and explicit," especially considering the monumental amount at issue. See California State Employees' Ass'n v. Cory, 123 Cal. App. 3d 888, 896, 176 Cal. Rptr. 904, ___ (1981) (refusing to find appropriation of $18 million in interest, "hardly a small-change operating budget item," without extant statute expressing intent for appropriation). Section 41-4-40 provides that, when sufficient funds are available, appropriations are payable "in the amounts named." In Act No. 2010-725, the legislature specified the exact amounts it was appropriating for the purpose of supporting the PACT Trust Fund.[42] The legislature did not indicate that any

[42]Section 16-33C-14(a) provides:

> "(a) There is annually appropriated from the Education Trust Fund to the Trust Fund of the Prepaid Affordable College Tuition (PACT) Program

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the following amounts in the following fiscal years:

"(1) For the fiscal year ending 2015 -- $23,558,000

"(2) For the fiscal year ending 2016 -- $23,952,000

"(3) For the fiscal year ending 2017 -- $22,622,000

"(4) For the fiscal year ending 2018 -- $41,783,000

"(5) For the fiscal year ending 2019 -- $42,539,000

"(6) For the fiscal year ending 2020 -- $81,646,000."

Section 16-33C-15(a) provides:

"(a) In addition to the appropriations made in Section 16-33C-14, there is also annually appropriated from the Education Trust Fund to the PACT Trust Fund the following amounts in the following fiscal years:

"(1) For the fiscal year ending 2020 -- $7,092,300

"(2) For the fiscal year ending 2021 -- $31,881,600

"(3) For the fiscal year ending 2022 -- $32,181,600

"(4) For the fiscal year ending 2023 -- $33,494,400

"(5) For the fiscal year ending 2024

additional amounts would be, or could be, appropriated. Nothing in the Act clearly and explicitly requires any further public funding of the PACT Trust Fund or provides for any payment of PACT contracts from any source other than the PACT Trust Fund, as the trial court correctly found. ("The Court finds that the PACT Trust Fund constitutes the sole funding

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> -- $33,728,700
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> "(6) For the fiscal year ending 2025 -- $38,449,500
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> "(7) For the fiscal year ending 2026 -- $39,201,000
>
> "(8) For the fiscal year ending 2027 -- $32,500,000."

Section 16-33C-16(a) provides:

> "(a) In addition to the appropriations made in Section 16-33C-14 and Section 16-33C-15, there is annually appropriated from the Education Trust Fund to the PACT Trust Fund the following amounts in the following fiscal years:
>
> "(1) For the fiscal year ending 2016 -- $10,000,000
>
> "(2) For the fiscal year ending 2017 -- $20,000,000
>
> "(3) For the fiscal year ending 2018 -- $20,000,000
>
> "(4) For the fiscal year ending 2019 -- $13,000,000."

source to provide such benefits." (trial court's order, p. 3)).

The legislature erased any doubt about that conclusion when, as Boozer testified, it refused his requests for additional funding beyond the $547,629,100 appropriated under Act No. 2010-725. The clear expression of the legislature as to the amount of public funds to be committed to the PACT Trust Fund cannot be overcome by any statutory language allegedly implying otherwise. See Hale v. Randolph Cnty. Comm'n, 423 So. 2d 893, 896 (Ala. Civ. App. 1982) (rejecting argument by deputy sheriffs that county commission must pay all overtime incurred by them because that "would be to approve an open-ended appropriation for [that] purpose," which would not "be the law"). A court cannot infer an additional legislative appropriation from a statute that does not explicitly provide such. See California State Employees' Ass'n v. Cory, supra (holding that court could not infer that legislature intended to appropriate funds to cover interest from statute appropriating only principal amount).

D. This Court Cannot Mandate Legislative Funding

In order to agree with the objectors on this point, this Court would have to mandate that the legislature appropriate

funds for the purpose of paying full tuition and fees to PACT contract holders, regardless of the amount needed. Article IV, § 71, Ala. Const. of 1901, provides that "[n]o money shall be paid out by the treasury except upon appropriation by law ...." "'The authority to determine the amount of appropriations necessary for the performance of the essential functions of government is vested fully and exclusively in the legislature.'" Riley v. Joint Fiscal Comm. of Alabama Legislature, 26 So. 3d 1150, 1154 (Ala. 2009) (quoting Morgan Cnty. Comm'n v. Powell, 292 Ala. 300, 306, 293 So. 2d 830, 834 (1974), citing in turn Abramson v. Hard, 229 Ala. 2, 155 So. 590 (1934)). Article III, § 43, Ala. Const. of 1901, provides, in pertinent part, that "the judicial shall never exercise the legislative and executive powers, or either of them." Hence, "the judiciary may not encroach upon power given to the Legislature, and judicial officials cannot order legislative officials to take a particular policy course." Ex parte James, 713 So. 2d 869, 909 (Ala. 1997) (Hooper, C.J., dissenting). The courts "do not have the authority to tell the Legislature ... in what fashion it must spend public funds in a particular area." Ex parte James, 836 So. 2d 813, 868 (Ala. 2002) (Moore, C.J., concurring in the result in part and

dissenting in part). "It is therefore not within the sphere of the judicial branch to determine what appropriations are to be made ...." Sparks v. Parker, 368 So. 2d 528, 531 (Ala. 1979).

E. Summary

The legislature has not guaranteed the obligations of the PACT Trust Fund, and the legislature has not appropriated or agreed to appropriate any funds for the purpose of paying PACT contracts other than those explicitly set out in §§ 16-33C-14, -15, and -16. The objectors are simply incorrect in arguing that the legislature has resolved to take responsibility for PACT funding and to supply any funds necessary to assure PACT contract holders full tuition and fees. Their argument, therefore, provides no basis for vacating the judgment approving the settlement agreement.

IV. The Objectors Have Not Presented Any Other Grounds for Vacating the Judgment

A. This Court Cannot Consider Most of the Objectors' Remaining Arguments

The objectors make numerous other arguments in an effort to secure a reversal of the judgment. However, the objectors

lack standing to assert some of those arguments;[43] many other arguments cannot be considered on appeal because they are being raised for the first time;[44] and most of their other

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[43]Perdue argues that the class action should have been dismissed under § 6-5-440, Ala. Code 1975, but that defense belongs solely to the PACT board, see Ex parte J.E. Estes Wood Co., 42 So. 3d 104, 110-11 (Ala. 2010), and cannot be raised by Perdue. See also Ex parte State Mut. Ins. Co., 715 So. 2d 207, 220 (Ala. 1997) (plurality opinion) (holding that § 6-5-440 does not apply to class actions). Perdue also lacks standing to contest the allegedly disparate treatment between class members because she did not present any evidence indicating that she is in the allegedly adversely affected subclass.

Motlow and Sears contend that the notice did not adequately and timely inform class members of the terms of the settlement agreement. They clearly read and understood the settlement agreement and filed written objections within the time parameters established by the trial court; therefore, they cannot assert any objections based on lack of sufficient notice. Likewise, they do not have standing to contest any alleged failure to send copies of the notice to the beneficiaries of the PACT contracts because they received notice and have appealed solely as PACT contract holders.

[44]At no point did Perdue argue in the trial court that the trial court, when deciding the adequacy, fairness, and reasonableness of the settlement agreement, erred in failing to consider the likelihood of the success of the claims and counterclaims at stake in the class action, the stage of the proceedings at which the settlement was achieved, and the complexity, expense, and duration of the litigation, the substance and amount of opposition to the settlement agreement, and whether the named plaintiffs are the only class members to receive monetary relief or are to receive relief that is disproportionately large. Motlow and Sears did not argue below that the settlement agreement unconstitutionally impairs contractual obligations or that the trial court failed

objections can only be described as vague, undeveloped assertions without adequate supportive legal argument.[45] See K.D.H. v. T.L.H., 3 So. 3d 894, 899 n.2 (Ala. Civ. App. 2008) (refusing to consider argument that is "vague and undeveloped"); and Jimmy Day Plumbing & Heating, Inc. v. Smith, 964 So. 2d 1, 9 (Ala. 2007) (holding that, under Rule 28(a)(10), Ala. R. App. P., an appellate court will not consider arguments without citation to legal authority or based on undelineated general propositions of law). As has already been shown, those truly substantive arguments as to the legal validity of the settlement lack any merit. The objectors' remaining arguments as to the alleged collusive manner in which the parties reached the settlement, the alleged improper methods used by the trial court to approve the settlement agreement, and the purported exorbitant award

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to perform a proper rigorous analysis before certifying the class.

[45]That description applies to Perdue's arguments that the law prohibits prospective releases; that a class-action settlement cannot be approved unless it resolves the claims contained in the pleadings; and that attorney fees cannot be paid in an up-front lump sum. Motlow and Sears also did not comply with Rule 28(a)(10), Ala. R. App. P., when arguing that a release of monetary claims in a Rule 23(b)(2), Ala. R. Civ. P., class-action settlement is improper and that 20 days' notice of the fairness hearings was legally insufficient.

of attorney fees[46] do not warrant any serious discussion, except to say that the trial court did not commit any reversible error in conducting its proceedings, see Grayson v. State, 824 So. 2d 804, 841 (Ala. Crim. App. 1999) (holding that circuit court has inherent authority to control the proceedings before it to ensure proper decorum), in finding that the terms of the settlement agreement were reached in an arm's-length transaction, Ingram v. Coca-Cola Co., 200 F.R.D. 685, 693 (N.D. Ga. 2001) (holding that, in determining whether settlement resulted from collusion, court must examine the negotiating process to determine "whether the compromise was the result of arms-length bargaining between the parties"), in concluding that the settlement agreement was fair, reasonable, and adequate, see Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1981) (holding that, to be approved, class-action settlements must be fair, adequate, and reasonable), and in

[46]I do agree with the main opinion that the order allowing immediate payment of the attorney fees appears to conflict with the term of the settlement agreement preventing any action from being taken to implement the settlement agreement until after a timely appeal has been dismissed or the judgment has been affirmed. ___ So. 3d at ___ n.13. However, the judgment approving the settlement agreement modified that term to require that the settlement take place immediately (trial court's order, pp. 14-15), so I find that the trial court did not err in ordering the payment of the attorney fees.

approving the payment of reasonable attorney fees from the PACT Trust Fund. See Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1265 (D.C. Cir. 1993) (holding that attorney fees can be paid out of "limited fund").

B. The Objectors' Argument that the Release is Overbroad is Without Merit

Perhaps the only objection that deserves further consideration concerns the argument that the settlement agreement releases the PACT board from any further responsibility for properly managing the PACT Trust Fund, although that argument does not warrant vacating the trial court's judgment.

The settlement agreement provides that all class members release the PACT board members and their representatives from all claims that could have been brought in this action, as well as

> "any and all other claims relating to the operation and administration of the PACT Program and/or the PACT Trust Fund, including (but not limited to) the payments/non-payment of tuition and fees and all claims available under the Uniform Trust Code as codified at Ala. Code § 19-3B-101 et seq. other than the obligations embodied in this Settlement and any judgment entered by this court approving or adopting this Settlement."

(Emphasis added.)

Section "F" of the settlement agreement provides that any future receipts will be deposited in the PACT Trust Fund

> "to be administered in a manner which is deemed by the PACT Board at its discretion to fulfill the purposes of the PACT Program and which is consistent with the duties and obligations of the Board."

(Emphasis added.) Section "K" of the settlement agreement further provides that, except for those specific provisions waived by the class members, the PACT board remains subject to the Act. Those two provisions require the PACT board to comply with existing statutes regarding the management of the PACT Trust Fund.

Section 16-33C-4.1, Ala. Code 1975, provides, in pertinent part, that

> "all members of the PACT board have the fiduciary responsibility to devise and implement an investment strategy designed to maximize investment returns in a manner that correlates with future projected benefit payouts."

Section 16-33C-6(d) also provides, in pertinent part:

> "In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property of the PACT Trust Fund, the PACT board and any person or investment manager to whom the PACT board delegates any of its investment authority shall exercise the judgment and care under the circumstances then prevailing which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but to permanent disposition of funds, considering the

> probable income as well as the safety of their capital. When acting within this standard of care, no PACT board member, or any person or investment manager to whom the PACT board delegates any of its investment authority, shall be held personally liable for losses suffered by the PACT Program on investments made pursuant to this chapter. No PACT board member shall be held personally liable for any losses, damages, or claims which have arisen or may arise from or are related to any act or omission of the board member taken in service as a member of the board or as a trustee, so long as the board member acted in good faith."

Those statutes require the members of the PACT board to exercise fiduciary responsibilities when managing the PACT Trust Fund, subject to liability for acting in bad faith when deviating from the standard of care set out in § 16-33C-6(d).

By stating that the release applies to claims "other than the obligations embodied in this Settlement and any judgment entered by this court approving or adopting this settlement" and by incorporating by reference the terms of §§ 16-33C-4.1 and -6, the settlement agreement preserves any claims based on future breaches of fiduciary duty. In the first fairness hearing, the trial court stated that the settlement agreement would not be approved if it included any release "shielding anybody from any future mismanagement." Because the settlement agreement does not absolve members of the PACT board of liability for future breaches of fiduciary duty, the

trial court did not renege on that stated intention when it approved the settlement agreement.

In addition, the release language also expressly preserves any claims the class members may have in the event of a default of the obligations set out in the settlement agreement. Thus, in the event the PACT board fails to pay out tuition and fees in accordance with the terms of the settlement agreement, the class members have not released any claims arising out of that breach. The settlement agreement does not allow the PACT board to shirk its settlement obligations without legal consequence, and the trial court did not err on that ground in approving the settlement agreement.

V. Conclusion

The settlement agreement provides for an equitable distribution of the PACT Trust Fund that will significantly increase the probability that all class members will receive at least some economic benefit from the PACT contracts. The settlement was within the authority of the PACT board and the class members to make. Those objections properly raised and argued by the objectors do not justify a vacation of the judgment approving the settlement agreement. For the foregoing reasons, I respectfully dissent.