

IN THE SUPREME COURT OF PENNSYLVANIA
No. 24 EAT 2009

COMMONWEALTH OF PENNSYLVANIA,
c/o Office of General Counsel,

Plaintiff-Respondent,

v.

JANSSEN PHARMACEUTICAL, INC.,
Trading as "JANSSEN, LP",

Defendant-Petitioner.

**BRIEF OF *AMICUS CURIAE* ATLANTIC LEGAL FOUNDATION
IN SUPPORT OF DEFENDANT-PETITIONER**

Application for Extraordinary Relief in an Action Pending in the Court of Common Pleas of Philadelphia County (January Term 2008, No. 002181), Howland W. Abramson, J., presiding

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm incorporated in Pennsylvania in 1977. Its mission is to advance the rule of law by advocating limited, effective government, free enterprise, individual liberty, school choice and sound science in judicial and regulatory decision-making. It's goal is to advance the cause of economic and individual freedom by making government -- federal, state, and local -- more accountable and less intrusive. Atlantic Legal seeks to advance these goals through litigation, public advocacy, and education. Atlantic Legal provides *pro bono* legal representation to individuals, corporations, trade associations, and similar groups.¹

Atlantic Legal Foundation's supporters include individuals, business enterprises, law firms, and philanthropic foundations. The Foundation's board of directors and advisory council consist of legal scholars, corporate legal officers, business executives, prominent scientists, and attorneys.

Atlantic Legal Foundation has appeared in this Court and in numerous federal and state appellate courts as counsel to a real party in interest or as an *amicus* or as counsel to *amici*.

Amicus curiae Atlantic Legal Foundation will address Question D as set forth in this Court's Order of June 30, 2009 granting the Application for Extraordinary Relief.

¹ No counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* has made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE QUESTIONS INVOLVED

A. Whether 71 P.S. § 732-103 dictates that Petitioner lacks standing to seek disqualification of Bailey Perrin Bailey, LLP on the basis of alleged violations of constitutional law.

B. Whether the Attorneys Act, 71 P.S. § 732-101 et seq., authorizes the Office of General Counsel's contingent fee arrangement with Bailey Perrin Bailey, LLP.

C. Whether Bailey Perrin Bailey, LLP, should be disqualified because the General Assembly did not authorize the contingent fee arrangement between the Office of General Counsel and the law firm, such that the agreement violates Article III, § 24 and the separation of powers mandate of the Pennsylvania Constitution.

D. Whether Bailey Perrin Bailey, LLP should be disqualified because the due process guarantees of the United States and Pennsylvania Constitutions prohibit the Commonwealth from delegating the exercise of its sovereign powers to private counsel with a direct contingent financial interest in the outcome of the litigation.

STATEMENT OF THE CASE

Defendant and Applicant, Ortho-McNeil-Janssen Pharmaceuticals, Inc., f/k/a Janssen Pharmaceutica Inc. ("Janssen"), has asked this Court to reverse the Court of Common Pleas decision denying its motion to disqualify private contingent fee counsel who have appeared in this action.² Janssen argues that the contingent fee arrangement violates Article III, Section 24 of the Pennsylvania Constitution and the doctrine of separation of powers because it commits the Commonwealth to pay the law firm prosecuting this action a portion of any recovery without express authorization from the General Assembly. Janssen also argues that the contingent fee arrangement violates its due process rights under the United States and Pennsylvania Constitutions because attorneys representing the Commonwealth as sovereign must not have a direct contingent financial interest in the outcome of the litigation.

A. The Underlying Action

The Commonwealth asserts statutory and common law tort claims involving Janssen's allegedly improper marketing of Risperdal, a prescription medicine approved by the Federal Food and Drug Administration ("FDA") to treat schizophrenia, bipolar mania and irritability associated with autism. The Commonwealth alleges that Janssen marketed and promoted Risperdal for uses that were not approved by the FDA (so-called "off-label uses") and for uses that were not "medically necessary" and that Janssen failed to warn patients about possible harmful side effects of Risperdal *See* Exhibit B to Janssen's Application for

² On June 9, 2008, Janssen moved in the Court of Common Pleas for an order disqualifying Texas law firm Bailey Perrin Bailey LLP (hereafter "Bailey Perrin" or "contingent fee counsel") as counsel for the Commonwealth in this action. On December 8, 2008, that court (Howland W. Abramson, J.) denied Janssen's motion.

Extraordinary Relief, Complaint, ¶¶ 1, 9-10, 85-91, 129. The Commonwealth alleges that under its Medicaid and Pharmaceutical Assistance Contract for the Elderly ("PACE") programs it paid for Risperdal prescriptions for which it need not have paid. Complaint, ¶¶ 1, 10, 19, 28, 34, 35. The Commonwealth seeks to recover "millions of dollars" in reimbursement for the expenditures that it made for Risperdal for Medicaid and PACE participants and for the cost of treating such participants for harmful side effects of Risperdal.³ Complaint, ¶¶ 1, 6, 7, 8, 9, 10, 128, 132. The Commonwealth also seeks to recover the expenses it incurred in providing medical treatment to Medicaid and PACE participants allegedly injured by Risperdal. Complaint, ¶11.

Significantly, the Commonwealth purports to act not only in a proprietary capacity but also "as sovereign" and as "*parens patriae*" on behalf of "thousands" of Medicaid and PACE participants. *See* Complaint ¶¶ 11, 13.

B. Private Contingent Fee Counsel's Role

The Complaint was brought by the Commonwealth "c/o Office of General Counsel." The Office of General Counsel ("OGC") retained Bailey Perrin, a private law firm in Texas to prosecute this action pursuant to a contingent fee contract.⁴ No attorney from the Office of the Governor's General Counsel ("OGC") signed the Complaint or even entered an

³ The Commonwealth seeks recovery for all Risperdal prescriptions written by physicians for Pennsylvania Medicaid or PACE participants, broadly characterizing such prescriptions as "medically unnecessary" despite the fact that FDA approved some uses of Risperdal and the legality of off-label prescriptions by physicians, *Id.* ¶¶ 25, 31, 34-36.

⁴ Exhibit A to Commonwealth's Opposition to Application for Extraordinary Relief, Contract for Legal Services by and between Bailey Perrin Bailey LLP and the Commonwealth of Pennsylvania, acting by and through the Governor's Office of General Counsel, dated September 22, 2006, but effective September 19, 2006.

appearance. The Complaint was signed by a private Philadelphia law firm serving as local counsel to Bailey Perrin. The Commonwealth's opposition to Janssen's Application for Extraordinary Relief was also signed by Philadelphia local counsel and an attorney from Media, Pennsylvania. Neither document was signed by any attorney from OGC or the Attorney General's office.

The contract between the OGC and Bailey Perrin provides that if the Commonwealth is successful in this litigation, Bailey Perrin will receive fees of "up to fifteen percent (15%) of the actual recovery to the Commonwealth by way of settlement or judgment." Exhibit A to Commonwealth's Answer, Appendix C, ¶ 1.^{5, 6} If the Commonwealth prevails on its claims, the potential benefit to Bailey Perrin pursuant to this contingent fee arrangement would be substantial because the Commonwealth seeks to recover "millions of dollars" in damages. *See, e.g.*, Complaint, ¶¶ 1, 6, 10.

The terms of the contract define contingent fee counsel's role in this litigation in a way that circumscribes the Commonwealth's ability to act in the best interests of all of the people of Pennsylvania and in the interests of justice:

⁵ The contingent fee agreement with Bailey Perrin was not the result of competitive bidding or legislative authorization. Rather, there were private negotiations between the Governor's General Counsel and Bailey Perrin in 2006. A name partner in Bailey Perrin made political contributions totaling more than \$100,000 to the Governor's re-election campaign and to the Democratic Governor's Association. *See* Janssen's Application for Extraordinary Relief at 4-5.

⁶ The "up to" language is somewhat ambiguous. Neither the Contract nor the Appendix provide criteria or a formula for calculating any fee other than fifteen percent. Paragraph 8 of Appendix C provides that Bailey Perrin could receive more than fifteen percent of the recovery if a court allows recovery of attorneys' fees "in addition to the compensation set forth in paragraph 1..."

- The contract provides that the "OGC shall agree to no settlement of the Litigation that provides only for non-monetary relief unless the settlement also provides reasonably for the compensation of the [contingent fee] law firm by the Defendants to the litigation for the services provided by the law firm under this Contract." Contract, Appendix C, ¶ 3.

- The contract does not include any express provision for "Control and Management of the Litigation" by OGC. Instead, it contains a "Consultation" paragraph that only obligates Bailey Perrin to "consult with" the OGC and to deal with the OGC as it would with any other client. Contract, Appendix C, ¶ 4. As a result, OGC has delegated a substantial part of the "control and management" of the litigation to contingent fee counsel.

SUMMARY OF ARGUMENT

The due process protections of the United States Constitution and the Pennsylvania Constitution prohibit the Commonwealth representation by private attorneys who have a direct contingent financial interest in the outcome of the litigation. Due process requires that government officers exercising the powers of the sovereign, and their lawyers, will be impartial and will not have a direct contingent financial interest in the success of litigation when, as here, the Commonwealth acts in "its capacity as sovereign" and "as *parens patriae*." The Fourteenth Amendment to the United States Constitution and Article I, sections 1 and 11 of the Pennsylvania Constitution require that criminal and civil tribunals be impartial and that those who exercise the government's powers in adjudicatory proceedings may not have a pecuniary interest in the outcome. The principles of impartiality applies with equal force to the government's lawyers in civil proceedings who are held to higher standards than private lawyers because they have and overriding the "responsibility to seek justice."

Private lawyers representing the government are subject to the same standards as government employees and therefore must avoid even the "potential for private interest" and who must strive "for the attainment of justice." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805-06, 807, 814 (1987) (plurality opinion). Because the Commonwealth brings this action "as sovereign" and "pursuant to the Commonwealth's *parens patriae* powers," the private contingent fee counsel should be disqualified because they have an interest that is in conflict with the government's overriding duty to seek justice and to create both the reality and appearance of fairness.

Although courts in some other states have held that it is acceptable for the government to retain private contingency fee attorneys to prosecute civil case, so long as they are engaged to play a “limited, subordinate role” and are “merely *assisting*” government attorneys in the litigation, and so long as government attorneys retain absolute control over and “retain final authority” over litigation, no amount of supervision by the government attorneys and no amount of *post hoc* review of contingent fee counsel’s performance by a court can cure the appearance of impropriety that exists in this case. Moreover, as a practical matter it is virtually impossible to implement that standard without intrusive and disruptive court supervision.

Even if this Court were to adopt the position, in principle, that the government can retain private contingency fee attorneys if those private attorneys are subject to vigorous supervision and control, the facts of this case militate against condonation of the arrangement between the Commonwealth and the firm which has a direct contingent financial interest in the outcome of the litigation in this case because that law firm has been given broad discretion to make or influence critical decisions about the conduct and resolution of the litigation. The contract between the Commonwealth’s Office of General Counsel and the private law firm gives the private law a veto on the Commonwealth’s ability to settle and that contract does not even include an express provision for "control and management of the litigation" by the Office of General Counsel.

Finally, there is no overriding need for the Commonwealth to retain private contingency fee attorneys because the Office of General Counsel, in its own words, has the

capacity and capability to take on matters “as sophisticated and professionally challenging as that performed by [its] counterparts in the private sector.”

ARGUMENT

I. Due Process Prohibits the Commonwealth's Representation By Private Contingency Fee Attorneys.

OGC's contingent fee arrangement with Bailey Perrin violates federal and state constitutional guarantees of due process. Due process requires that government officers exercising the powers of the sovereign, and their lawyers, will be impartial and will not have a direct contingent financial interest in the success of litigation when, as here, the Commonwealth acts in "its capacity as sovereign" and "as *parens patriae*."

A. Due Process Requires That Those Who Exercise the State's Power in Legal Proceedings Act Impartially and Without a Financial Stake in the Outcome.

The United States Constitution requires that criminal and civil tribunals be impartial; those who exercise the government's powers in adjudicatory proceedings may not have a pecuniary interest in the outcome. U.S. Const., amend. XIV; *Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 58, 60 (1972); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987).

Likewise, the Pennsylvania Constitution, art. I, §§ 1, 11, has the same guarantee of due process. *Lyness v. Commonwealth*, 529 Pa. 535, 547 n.12, 605 A.2d 1204, 1210 n.12 (1992) ("The right to a fair and impartial tribunal in the first instance is a cornerstone of our notion of due process."). *See also Minnich v. Rivera*, 509 Pa. 588, 590 n.2, 506 A.2d 879, 881 n.2 (1986), *aff' d*, 483 U.S. 574 (1987) (The Pennsylvania Supreme Court's analysis of

Fourteenth Amendment due process claim also applies to due process concerns under the Pennsylvania Constitution),.

In *Tumey*, a village mayor with authority to try those accused of violating a law prohibiting the possession of alcoholic beverages faced two potential conflicts: Because he received a salary supplement for performing judicial duties that was funded from the fines assessed, he received a supplement only upon a conviction; and sums from the fines were deposited to the village's general treasury fund for village improvements and repairs. Disqualification was required under the principle that "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." 273 U. S., at 532.⁷ The *Tumey* court was concerned both with direct pecuniary interest of a judicial officer and "with a more general concept of interests that tempt adjudicators to disregard neutrality." See *Caperton v. A. T. Massey Coal Co.*, No. 08-22, June 8, 2009, slip opinion at 8, available at <http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf>.

In *Ward v. Monroeville*, 409 U. S. 57 (1972) the court held that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle" (409 U. S., at 60). The "possible temptation" the mayor might face due to his

⁷ The *Tumey* court held that the Due Process Clause incorporates the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case and that this rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." The Federalist No. 10 at 59 (J. Cooke ed. 1961) (J. Madison); see J. Frank, "Disqualification of Judges," 56 *Yale L. J.* 605, 611–612 (1947).

“executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to the town’s general finances] from the mayor’s court” was enough to bring into question his impartiality. *Id.*⁸ As the U.S. Supreme Court reiterated in another case that same term, “the [judge’s] financial stake need not be as direct or positive as it appeared to be in *Tumey*.” *Gibson v. Berryhill*, 411 U. S. 564, 579 (1973) (an administrative board composed of optometrists had a pecuniary interest of “sufficient substance” such that it could not preside over a hearing against competing optometrists).

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824-25 (1986) the U.S. Supreme Court recognized that “what degree or kind of interest is sufficient to disqualify a judge from sitting ‘cannot be defined with precision.’” 475 U. S., at 822 (quoting *In re Murchison*, 349 U.S. 133, at 136 (1955)), but further clarified the reach of the due process clause regarding a judge’s financial interest in a case.⁹ The Court stressed that it was “not required to decide whether in fact [the justice] was influenced.” *Id.*, at 825. The proper constitutional inquiry is “whether sitting on the case then before the Supreme Court of Alabama ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’” *Ibid.* (quoting *Ward v. Village of Monroeville*, *supra*, at 60, in turn quoting *Tumey*, *supra*, at 532). See also *In re Murchison*, 349 U.S. 133 at 136 (“[O]ur system of law

⁸ In *Ward v. Monroeville* the mayor derived no direct personal gain because the fines the mayor assessed went into the town’s general account.

⁹ In *Lavoie*, a justice of the Alabama Supreme Court had cast the deciding vote to uphold a punitive damages award against an insurance company for bad-faith refusal to pay a claim; at the time of his vote, the justice was the lead plaintiff in a nearly identical lawsuit pending in Alabama’s lower courts. His deciding vote, the Court found, “undoubtedly ‘raised the stakes’” for the insurance company defendant in the justice’s suit. 475 U.S. at 823–824.

has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."); accord *In re Schlesinger*, 404 Pa. 584, 597-98, 172 A.2d 835, 840-41 (1961) (citing *In re Murchison*, 349 U.S. at 136 and *Tumey*, 273 U.S. at 532).

Most recently, in *Caperton v. A. T. Massey Coal Co., Inc.*, No. 08-22, June 8, 2009, slip opinion available at <http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf>, the United States Supreme Court has spoken vigorously about the need for impartiality where “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable,” and addressed the need to have the due process clause implemented by objective standards that do not require proof of actual bias, citing *Tumey*, *Mayberry v. Pennsylvania*, 400 U. S. 455, at 465–466 (1971); *Lavoie*, 475 U. S., at 825. In defining these standards the Court has asked whether, “under a realistic appraisal of psychological tendencies and human weakness,” the interest “poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.” *Withrow v. Larkin*, 421 U. S. 35, 47 (1975).

Justice Thurgood Marshall explained the rationale for this rule eloquently in *Marshall v. Jerrico, Inc.*:

The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews v. Eldridge*, 424 U. S. 319, 424 U. S. 344 (1976). ***At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done,"*** *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 341 U. S. 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may

present his case with assurance that the arbiter is not predisposed to find against him.

* * *

A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." (citations omitted).

446 U.S. at 242, 250 (emphasis supplied).

The same requirement of neutrality and objectivity on the part of governmental actors is reflected in Pennsylvania cases. *See Commonwealth v. Eskridge*, 529 Pa. 387, 392, 604 A.2d 700, 702 (1992) (sentence vacated where defendant "was prosecuted by a district attorney who had a direct financial interest in obtaining a criminal conviction" and "his right to an impartial prosecutor" was therefore violated); *Commonwealth v. Gilman*, 470 Pa. 179, 188, 368 A.2d 253, 257 (1977) this Court wrote "[T]he prosecutor is a quasi-judicial officer representing the Commonwealth. His duty is to seek justice, not just convictions." (citations omitted); *Commonwealth v. Toth*, 455 Pa. 154, 158, 314 A.2d 275, 277 (1974) ("A district attorney . . . must exercise his duties with complete impartiality."); *Commonwealth v. Bubnis*, 197 Pa. 542, 550, 47 A. 748, 749 (1901) ("The district attorney is a quasi-judicial officer. He represents the commonwealth, and the commonwealth demands no victims. It seeks justice only, equal and impartial justice. . . .") (citation omitted).

These principles apply "with equal force to the government's civil lawyers" in civil proceedings who are held to "higher standards than private lawyers" because they "have 'the responsibility to seek justice,' and 'should refrain from instituting or continuing litigation that is obviously unfair.'" *Freeport-McMoRan Oil & Gas Co. v. Federal Energy Regulatory*

Comm'n, 962 F.2d 45, 47 (D.C. Cir. 1992), citing the American Bar Association, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1981).¹⁰

The United States Supreme Court extended these neutrality requirements disinterestedness and impartiality to private lawyers representing the government, holding that they are subject to the same standards as government employees and therefore must avoid even the "potential for private interest." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 805-06 (1987). Because the exercise of the state's police power often involves "considerable discretion" and critical decisions "made outside the supervision of the court," courts "must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice." *Id.* at 807, 814.

The California Supreme Court in *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985) applied the principles and held that private contingent fee counsel should be disqualified because private outside counsel had an interest "extraneous to his official function" in cases brought on behalf of the City. In *Clancy*, a municipality retained outside counsel to bring actions under a nuisance ordinance. Under its retainer agreement with the city, outside counsel's hourly rate would double if the city were successful and the court ordered the losing party to pay the city's attorneys' fees. *Id.* at 350. The contingent fee arrangement "[o]bviously" gave outside counsel "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.* at 351. The court held that

¹⁰ A government lawyer "is the representative not of an ordinary party to a controversy," the Supreme Court has said "but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). The statement is chiseled on the walls of the United States Department of Justice.

it was "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 353. The California court rejected the argument that outside counsel was not subject to the same requirements as public officers or lawyers on the government payroll.

B. Contingent Fee Counsel's Substantial Financial Interest in the Outcome of This Action Prevents the Commonwealth from Exercising Its Powers Impartially.

The Commonwealth brings this action "as sovereign" and "pursuant to the Commonwealth's *parens patriae* powers." It seeks to recover "millions of dollars" and also seeks to avoid paying in the future for a medication deemed beneficial by physicians for Pennsylvanians covered by Medicaid and PACE, potentially depriving those patients of what their physicians believe, in their professional judgment to be a helpful therapy. The Commonwealth's obligation to assure the health of these patients requires a careful "balancing of interests" by the Commonwealth, represented by an attorney who does not have a direct personal financial interest in the outcome of the litigation.

The Commonwealth's use of private contingent fee counsel in cases of high public interest like this one without greater public accountability than is present here is inconsistent with the requirement of impartiality required by due process. Private contingent fee counsel's direct and substantial financial stake in the outcome of this litigation necessarily prevents it from seeking the overriding objective of the exercise of sovereign power – protecting the health of its citizens entitled to assistance from the Commonwealth while

attaining justice. The United States Supreme Court has noted that a civil society under the rule of law

must have assurance that those who would wield this power will be guided ***solely by their sense of public responsibility for the attainment of justice.*** A prosecutor of a contempt action who represents the private beneficiary of the court order allegedly violated cannot provide such assurance, for such an attorney is required by the very standards of the profession to serve two masters. The appointment of counsel for [a private party] to conduct the contempt prosecution in these cases therefore was improper.

Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787 at 814 (emphasis supplied).

The private contingent fee law firm in this case has such a direct and significant financial interest in the outcome that there is a substantial risk that it cannot be, or at least will not be perceived to be, objective and neutral. This creates far more than the mere possibility that the private lawyers' financial interest will determine or influence decisions that should be made by disinterested public servants, and it thus violates due process. *See Young v. United States ex rel. Vuitton et Fils S.A.* at 805 ("*potential for private interest*" that constitutes a denial of due process, "[r]egardless of whether the appointment of private counsel . . . resulted in any prosecutorial impropriety") (emphasis in original); *Marshall v. Jerrico, Inc.*, 446 U.S. 238 at 242 (No governmental official stands to profit economically from vigorous enforcement of the child labor provisions at issue and thus there is no realistic possibility that the assistant regional administrator's judgment will be distorted by the prospect of institutional gain as a result of zealous enforcement effort); *Lyness v. Commonwealth*, 529 Pa. 535, 542, 605 A.2d at 1207 ("There is a strong notion under

Pennsylvania law that even an *appearance* of bias and partiality must be viewed with deep skepticism, in a system which guarantees due process to each citizen.").

The California Supreme Court in *Clancy, supra*, did not prohibit the government's use of contingent fee agreements in all cases, but because a public nuisance action involves the vindication of public rights it is in "a class of civil actions that demands the representative of the government to be absolutely neutral" and involves a "balancing of interests," and "a delicate weighing of values" and therefore contingent fee agreements were prohibited because "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* at 352.¹¹

The Rhode Island Supreme Court has held that in order for a contingency fee to be valid, the outside counsel must serve a subordinate role: "it is vital that the Office of the Attorney General have absolute control over the course of any litigation" and that the Attorney General "must *appear* to the citizenry of Rhode Island and to the world at large to be exercising such control." *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 475-477 (R.I. 2008) (emphasis in original). *See also County of Santa Clara v. Superior Court*, 74 Cal. Rptr. 2d 842 (Cal. Ct. App. 2008), in which an intermediate state appellate court concluded that the contingent fee arrangement was acceptable because the private attorneys were "engaged to play a limited, subordinate role," and the public entities would "retain final authority over all aspects of the Litigation." However, the court announced an exacting

¹¹ Thus, for example, the Commonwealth may continue to engage private lawyers on a contingent fee basis in collection cases – e.g. to collect delinquent taxes or other debts owed to the Commonwealth. Such cases do not implicate the substantial public interests and do not require the delicate balancing of interests involved here.

standard, explaining that “where private counsel are merely *assisting* government attorneys in the litigation . . . and are explicitly serving in a *subordinate* role, in which private counsel *lack any decision-making authority or control*, private counsel are not *themselves* acting ‘in the name of government,’” (*Id.* at 850, emphasis in original). The court noted that because in that case private counsel do not supplant the role of the government attorneys, their interest in maximizing contingent fees cannot upset the balance of interests that government attorneys are bound to uphold and protect. *Id.* The contingent fee agreement was held not to impermissibly impair the neutrality required of counsel representing public interests because “The public entities have. . . established that their private counsel serve in a subordinate role in which private counsel merely assist in-house counsel and lack any authority to control the litigation.” *Id.* at 849 and “the California Supreme Court decision in *People ex rel. Clancy v. Superior Court*, does not bar . . . public entities from engaging private counsel under a contingent fee arrangement to assist in ...[public nuisance] litigation, so long as the public entities’ in-house counsel retain control over all decision-making.” 74 Cal. Rptr. 2d at 853.¹²

In *City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4166238 (E.D. Cal. Nov. 20, 2007), a city hired outside counsel on a contingent fee basis to litigate claims that included a request for abatement of a public nuisance. Defendants moved to disqualify plaintiffs’ outside counsel on grounds that outside counsel’s

¹² This case is currently on appeal to the Supreme Court of California, *County of Santa Clara v. Superior Court County of Santa Clara v. Superior Court (Atlantic Richfield Co., et al.)*, (No. S 163681), 188 P.3d 579 (Cal. 6/23/08) (granting petition for review). As of this date there has been no decision of the California Supreme Court.

contingent fee arrangement violated a government attorney's duty of neutrality. The federal district court concluded that because the City Attorney acted "as co-counsel in this action and the City retains 'ultimate decision-making authority in the case,'" the City's retention of outside counsel on a contingent fee basis did not violate the government attorney's duty of neutrality.

In *City and County of San Francisco v. Philip Morris, Inc.* 957 F. Supp. 1130 (N.D. Cal. 1997) a federal district court held that a contingency fee agreement between several public entities and a private law firm in tobacco-related tort litigation was not barred under *Clancy*. The court stated, "While the contingent fee arrangement here clearly gives [the private firm] a stake in the litigation, the Court finds that this case is sufficiently distinguishable from *Clancy* to allow for the government's retention of private counsel. First, as plaintiffs explain, [the private firm] is acting here as co-counsel, with plaintiffs' respective government attorneys *retaining full control* over the course of the litigation. Because plaintiffs' *public counsel are actually directing this litigation*, the Court finds that the concerns expressed in *Clancy* regarding overzealousness on the part of private counsel have been adequately addressed by the arrangement between [the private firm] and the plaintiffs." (*Id.* at p. 1135, emphasis supplied.)

In *Philip Morris Inc. v. Glendening*, 349 Md. 660, 709 A.2d 1230 (1998), the Maryland Court of Appeals rejected the defendants' challenge to the contingency fee agreement between the Attorney General of Maryland and the private law firm that represented the State of Maryland in tort litigation against the tobacco industry. The

contingency fee agreement expressly provided that the “ ‘Attorney General shall have the authority to control all aspects of [outside counsel’s] handling of the litigation . . . [and] such authority shall be final, sole and unreviewable.’ ” (*Id.* at p. 663.)

In *Sherwin-Williams Co. v. City of Columbus, Ohio*, No. C2-06-829, 2007 U.S. Dist. Lexis 51945 (S.D. Ohio July 18, 2007), three cities entered into contingent fee agreements with private counsel to prosecute public nuisance actions. The district court had directed the cities to amend their fee agreements “based upon a finding that the contingency fee agreements between private counsel and the three cities were unconstitutional insofar as the agreements reposed an impermissible degree of public authority upon retained counsel, who have a financial incentive not necessarily consistent with the interests of the public body.” However, the court found that contingent fee agreements are permissible if they provide that the cities retain control over the litigation, *including authorization of settlement, with the private attorneys working under the direction and at the discretion of the city governments.* The federal court in *Sherwin-Williams* approved two of the contingency fee agreements that had been amended to expressly vest in the city attorney “control over the litigation and the sole authority to authorize any settlement of any claim or complaint.” (*Sherwin-Williams, supra*, 2007 U.S. Dist. Lexis 51945 at *6.) However, the court found that the third contingency fee agreement was not adequately amended because the agreement provided that neither private counsel nor the city could settle or dismiss the case without the consent of the other. (*Id.* at p. *10.) The federal court concluded that “an agreement between a municipality and private counsel in a public nuisance action *which purports to vest in private*

counsel authority to prevent a settlement or dismissal of a suit is unconstitutional.” (2007 U.S. Dist. Lexis 51945 *10, emphasis supplied). That is precisely one of the major defects in the arrangement between the Commonwealth and Bailey Perrin in this case.

The neutrality principle, grounded in due process concerns, is a formidable obstacle to contingency fee arrangements. The *Grass Valley*, *Sherwin-Williams*, *Glendening*, and *Lead Industries* decisions assume that the government’s assertion of control eliminates the appearance of impropriety created by the retention as prosecuting attorneys of outside counsel with a financial stake in the outcome of public nuisance actions.¹³

The problem these decisions fail to confront is that (I) whether the professed control over the litigation is actually asserted is almost impossible to determine, (ii) the appearance to the public of an improper financial motive is not eliminated by government reassurances that “we’re still in charge,” and (iii) regardless of the extent of government control, the contingent fee counsel’s profit motive necessarily colors, and therefore corrupts, the day to

¹³ The theory, adopted explicitly or implicitly by some courts, that a trial court can review the proceedings while they are ongoing to determine as a factual matter whether contingent fee counsel is adequately supervised by government lawyers, and the proceedings are therefore sufficiently neutral would require a continuous and intrusive inquiry. But, even then, how would a trial court and the defendants ever be able to discover the “facts” necessary to make such a determination? Realistically, obtaining the information necessary to test sufficiency of control would be exceedingly difficult, if possible at all. If a “subordinate lawyer” exception were to be adopted, the parties would then engage in factual disputes regarding the sufficiency of control exercised by the government “supervisor.” What makes this result even more problematic is that the *defendant* would have the responsibility to police the relationship between the government and its contingent fee counsel. Government plaintiffs would most likely attempt to withhold any evidence indicating a lack of proper control on grounds of attorney-client privilege and work product protection.

The United States Supreme Court has recognized the impossibility of monitoring a conflict of interest once it is found. See *Young v. United States ex rel. Vuitton* 481 U.S. 787, 812-813 (1987)

day decision-making required in the prosecution of any case, including one on behalf of the Commonwealth. Ultimately, we submit, no amount of “control” can mask the fact that, unlike the government, contingent fee counsel are “in it for the money.” The windfalls reaped by private contingency fee attorneys can be very substantial. *See, e.g.*, R. O. Faulk and J. S. Gray, *Getting the Lead Out? The Misuse of Public Nuisance Litigation By Public Authorities and Private Counsel*, *Toxics L. Rep.* 170 (2006). These contingency fee arrangements generally develop when private plaintiffs' lawyers, motivated by the possibility of lucrative damages awards, approach the government with a litigation theory. *See, e.g.*, J. Beisner, J. D. Miller, and T. McSweeney, *Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs' Lawyers*, 1 (2005), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?id=939 (last accessed 08-10-2009).

The *Santa Clara* court justified its holding on the theory that the trial court can review the proceedings after they are concluded to determine as a factual matter whether contingent fee counsel was adequately supervised by the government and sufficiently neutral to justify any contingent fee that may be earned. But no amount of supervision by government attorneys and no amount of *post hoc* review of contingent fee counsel’s performance can cure the appearance of impropriety that exists in this case, where private contingent fee counsel become the government’s representatives. The profit motive that necessarily drives contingent fee representation irrevocably casts doubt on the impartiality and neutrality of the government’s case. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 812-813 (plurality opinion):

Appointment of an interested prosecutor is also an error whose effects are pervasive. Such an appointment calls into question, and therefore requires scrutiny of the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision. Determining the effect of this appointment thus would be extremely difficult. A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to shape the record in a case, but few of which are *part* of the record.

(plurality opinion) (emphasis in original).

We also submit that reliance on the mere words of the retainer agreement is not sufficient in most cases. It is easy to include the requisite contractual formulaic language stating that the attorney general or OGC retains control and authority over the litigation, but these clauses may be mere abstractions; it is often extremely difficult for the court to compare from the bench the decision-making authority of outside contingency fee counsel with the authority retained by the government officials. The mere inclusion of particular words in a retainer agreement is a questionable check on the influence and power of outside counsel. Even government officials' promises that they will retain complete control over the litigation lacks concrete value and provides no real assurance that public policy concerns and the interests of justice will be given priority over recovering monetary damages.

But this case is clearer, because OGC has delegated the exercise of the Commonwealth's powers to a private law firm in Texas whose members are not even admitted to practice in Pennsylvania. That law firm has been given broad discretion to make or influence critical decisions about the conduct and resolution of the litigation. For example, the fee agreement gives the private law a veto on the Commonwealth's ability to settle on terms that do not include a monetary payment by the defendant either to the Commonwealth or to the law firm: "OGC shall agree to no settlement of the Litigation that

provides for non-monetary relief unless the settlement also provides reasonably for the compensation of the law firm by the defendants to the Litigation for the services provided by the law firm under this Contract." Contract, Appendix C, ¶ 3. This provision restricts the OGC's ability to consent to a non-monetary settlement of this action, even if such a resolution were in the best interests of the Commonwealth and its people.

The Contract between OGC and Bailey Perrin does not even include an express provision for "control and management" of the litigation by OGC. Instead, it contains a "Consultation" paragraph that only obligates Bailey Perrin to "consult with" the OGC and to deal with the OGC as it would with any other client. Contract, Appendix C, ¶ 4. Thus, OGC has delegated a substantial part of the "control and management" of the litigation to contingent fee counsel. The absence of "full control" or "actual direction" of the litigation by government employees, and OGC's lack of actual participation in the litigation, are evidenced by the fact that all of the pleadings and the Commonwealth's Answer in Opposition to the Application for Extraordinary Relief in the court below were signed by local Pennsylvania counsel retained by the Texas firm and the Texas firm itself, not by any attorney regularly employed by OGC. This case is much closer to *Clancy* than to those cases in which courts have found that the state's lawyers' "full control" of the litigation satisfies due process requirements.

Finally, any contention that the retention of private contingent fee counsel is the only, or best, way for the Commonwealth to recover the damages monies it seeks is, we submit, without merit. The Commonwealth can obtain effective representation without a contingent

fee arrangement that creates unlawful incentives to win instead of to seek justice. The Commonwealth can, of course, use its own lawyers from OGC. OGC certainly has adequate resources:

The Office of General Counsel is the largest legal enterprise in the Commonwealth of Pennsylvania, employing approximately 500 attorneys who represent 32 executive and independent agencies across the Commonwealth. *The legal work our team of attorneys performs is as sophisticated and professionally challenging as that performed by our counterparts in the private sector.* What distinguishes us most from the in-house counsel of any Fortune 500 Company and attorneys employed by any private law firm is the mission of our office to provide superior legal representation in the context of public service. . . . *Office of General Counsel attorneys appear in every state and federal court and administrative forum in the Commonwealth and provide counsel on legal issues that touch upon the business of the agencies we represent.*

* * * *

Whether we are advocating the Commonwealth's position in court, reviewing or preparing one of the tens of thousands of contracts that the Commonwealth executes annually, or negotiating a sophisticated investment vehicle, our practice is geared to the particular goals and needs of our clients.

See Pennsylvania Office of General Counsel website at http://www.ogc.state.pa.us/portal/server.pt/community/about_the_office/3252 (last accessed 08-10-2009) (emphasis supplied).

Alternatively, if despite its own extensive capabilities, OGC nonetheless it needs expertise it does not have, it can hire outside lawyers on an hourly or flat rate basis. In short, there was no necessity for the Commonwealth to compromise the Commonwealth's impartiality and integrity, or the public interest, by retaining out-of-state contingent fee lawyers.

We respectfully submit that the arrangement between OGC and the private contingency law firm in this case does not meet the due process requirements of the United States and Pennsylvania Constitutions because contingent fee counsel's profit motive necessarily colors, and therefore corrupts, the day-to-day decision-making required in any case brought in the name of the public.

CONCLUSION

For the foregoing reasons, amicus Atlantic Legal Foundation respectfully requests that this Honorable Court reverse the order of the Court of Common Pleas and direct that the law firm of Bailey Perrin Bailey LLP be disqualified from representing the Commonwealth in this case.

Dated: August 11, 2009

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing Application for Extraordinary Relief upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R. A. P. 121 and 3309(a):

Service by First-Class Mail as Follows:

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