IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, c/o Office of General Counsel, Plaintiff and Respondent, v. JANSSEN PHARMACEUTICA, INC., trading as "JANSSEN, LP," Petitioner.	:	No. 24 EAP 2009

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether private attorneys hired by the Commonwealth under a contingent fee agreement that entitles the lawyers to fifteen percent of any recovery and wide discretion to make litigation decisions, while restricting the Commonwealth's ability to reach a nonmonetary settlement, must be disqualified because they have a profit-motive in the litigation and because the Governor's Office of General Counsel has acted without legislative appropriation.

STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 105 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 800 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Exhibit A.

PLAC submits this brief to assist the Court in assuring that product manufacturers, and others, who face civil claims brought in the name of the Commonwealth, are not targeted by attorneys who have a financial interest in the outcome of the litigation. PLAC has a strong interest in ensuring that the Commonwealth is not permitted to "contract out" its sovereign

enforcement and policymaking power to private attorneys with a profit interest in the outcome of a case, lest members find themselves targeted by private attorneys who are clothed in the mantle of state authority, but who are unrestrained in the exercise of that authority by constitutional checks and governmental ethics obligations. Such claims can lead to prosecution of government lawsuits on the basis of profitability, not public interest.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Amicus Curiae adopts Appellant's Statement of Jurisdiction.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Amicus Curiae adopts Appellant's Statement of the Standard of Review.

STATEMENT OF THE CASE

Amicus Curiae adopts Appellant's Statement of the Case.

SUMMARY OF THE ARGUMENT

Courts around the country have considered the issue of the propriety of the government hiring private counsel on a contingent-fee basis, but PLAC is not aware that any court has been presented with facts raising a suspicious eyebrow as high as this case. It involves a no-bid contract between the Governor's Office of General Counsel and a major campaign contributor in which private attorneys from Texas, motivated by a fifteen-percent contingent fee, would exercise the Commonwealth's sovereign power to set the public policy of Pennsylvania.

If successful, the lawsuit would significantly limit the access of low-income and elderly residents to a prescription drug approved by the U.S. Food & Drug Administration (FDA) by finding that the manufacturer of Risperdal®, an antipsychotic drug used to treat schizophrenia, bipolar mania, and irritability associated with autistic disorder, owes the Commonwealth millions of dollars for prescriptions under both its Medicaid and Pharmaceutical Assistance Contract for the Elderly ("PACE") programs. The Commonwealth's theory – initiated, developed, and litigated by profit-driven attorneys– is that all Risperdal prescriptions are "medically unnecessary."

The contingent fee arrangement is contrary to legal ethics, constitutional law, and sound public policy. As the Supreme Court of the United States has recognized, government attorneys are "the representatives not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). By contrast, contingent-fee attorneys are legitimately motivated by financial incentives to maximize recovery for their private clients. The two functions – impartial governance and for-profit lawsuits – are irreconcilably conflicted.

Contingent fee agreements are meant to increase access to courts for individuals without

the resources to pay an hourly attorney fee; but they are not meant for state governments. Indeed, Pennsylvania courts have, over time, restricted their use in several areas for reasons of public policy. States do not need to hire lawyers on a contingent-fee basis and have other alternatives available – options that safeguard the government's power.

The experience of other states that have engaged in the practice of entering contingent fee contracts demonstrates that government-hired private attorneys are often political donors, friends, or colleagues of the hiring government official – creating the appearance of impropriety, and sometimes worse. Such practices damage the public's confidence in government. Moreover, these government-endorsed lawsuits have led to financially-motivated litigation and ill-conceived attempts to expand tort and consumer protection law under the cloak of state authority. The experiences of other states repeatedly and persuasively demonstrates that Pennsylvania courts should not set down this path.

Instead, this Court should reject a contingent-fee agreement at issue in this case as contrary to public policy or adopt the reasoning of the high courts of California or Louisiana. Moreover, a test based on the government's level of control over the litigation, as adopted in Rhode Island and by an intermediate California appellate court, may be attractive. Yet, a control test is unworkable in practice and does not cure the irreconcilable conflict. The extent of the Commonwealth's exercise of supervision over private lawyers, which occurs out of public view, cannot be effectively monitored and is unenforceable due to attorney-client privilege. The more sound approach would recognize that delegating the Commonwealth's sovereign power to a private law firm that has a profit-making interest in its exercise of that power is contrary to public policy and violates due process.

ARGUMENT

I. THE LEGAL SERVICE CONTRACT AND ENVIRONMENT IN WHICH IT WAS ENTERED

The Contract for Legal Services (Exh. D to Appellant's Application for Extraordinary Relief) entered between the Governor's Office of General Counsel ("OGC") and the private Texas law firm of Bailey Perrin Bailey LLP (hereinafter "private firm"), provides a profit-driven private firm with significant discretion in exercising the Commonwealth litigation strategy, while limiting the government's ability to reach a nonmonetary remedy. It places maximizing a contingent fee for private attorneys above resolving the litigation in a manner that maximizes the public benefit to the citizens of Pennsylvania.

The language of the Contract for Legal Services specifically provides:

- The private firm is entitled to up to fifteen percent of the Commonwealth's recovery, plus expenses, if a recovery is obtained. (Appendix C, ¶¶ 1,4.)
- The private firm is obligated to "consult with and keep the OGC fully informed" regarding the case and provide the OGC with "the opportunity" to review court documents and briefs before filing. (Contract for Legal Services ¶ 4.)
- The OGC is specifically prohibited from agreeing to a settlement "that provides only for non-monetary relief unless the settlement also provides reasonably for the compensation of the law firm by the defendants to the Litigation. . . ." (Appendix C, ¶ 3.)

In addition, the circumstances surrounding OGC's entry into the Legal Service Contract with the private firm provide reason for significant concern as to whether this action is driven by a profit interest or the public interest. As fully detailed in the Petitioner's Statement of the Case and documented in its attached exhibits:

- This litigation was initiated through the solicitation of the Commonwealth by the private firm, not due to a public policy or law enforcement need initiated by the

Commonwealth.[1]

- A name partner of the private firm contributed approximately $100,000 to the Governor's re-election campaign, directly and through the Democratic Governor's Association, during the period immediately before and after the OGC and private firm entered the Contract for Legal Services here.
- The Contract for Legal Services was not subject to an open and competitive bidding process.
- The Commonwealth's attorneys have not even entered an appearance in the case.
- The Complaint was verified by an attorney of the private firm attesting that the signatory "is in a better position than any individual or officer or employee of the agencies of the Commonwealth Plaintiff to present this Verification."

The language of the Legal Services Contract and conditions under which the parties entered the agreement warrant a close review by this Court.

II. THE PURPOSE OF CONTINGENT FEES IS TO PROVIDE ACCESS TO JUSTICE TO INDIVIDUALS WHO CANNOT OTHERWISE AFFORD TO BRING A LAWSUIT; GOVERNMENT USE IS SUSPECT

Contingent fees, once viewed as illegal in the United States,[2] gained grudging acceptance in the late nineteenth century. *See, e.g.*, 33 A.B.A. Rep. 80, at 579 (Canon 13 of the Canons of Ethics) (approving of contingent fees, but carefully noting that they "should be under the supervision of the court, in order that clients may be protected from unjust charges"). Contingent fees have a worthy purpose: providing access to the legal system, regardless of means. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the*

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[1] In fact, Pennsylvania Attorney General Tom Corbett reportedly declined to bring an action against Janssen Pharmaceutica when initially approached by the private firm because he "was not impressed" with the evidence presented. John O'Brien, *Corbett 'Not Impressed' With Major Firm's Case Against Janssen*, Legal Newsline, Apr. 15, 2009, *at* http://www.legalnewsline.com/news/220421-corbett-not-impressed-with-major-firms-case-against-janssen (quoting Kevin Harley, press secretary for Attorney General Corbett). Governor Rendell's General Counsel, however, opted to permit the private firm to proceed with the litigation under the auspices of his office. *See id.*

[2] *See, e.g., Butler v. Legro*, 62 N.H. 350, 352 (1882) ("Agreements of this kind are contrary to public justice and professional duty, tend to extortion and fraud, and are champertous and void").

Prince of Denmark, 37 UCLA L. Rev. 29, 43-44 (1989). Contingent fees can allow an individual to assert a claim that he or she might not otherwise afford to bring. As one commentator observed of the American system, "contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel." *See* Alfred D. Youngwood, *The Contingent Fee-A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965). Contingent fees can benefit society because they can "provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim. . . ." Model Code of Prof'l Responsibility EC 2-20 (1979). Lawyers who work on the basis of a contingent fee are legitimately motivated by financial incentives to maximize recovery for their private clients. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 374 n. 4 (1996) ("the promise of a contingent fee should also provide sufficient incentive for counsel to take meritorious cases").

When contingent fees do not further access to the courts for individuals with limited means or when these fee arrangements create incentives that violate public policy, they should be viewed with skepticism and scrutiny. As United States Court of Appeals for the Eleventh Circuit Judge William H. Pryor, Jr., when he was Attorney General of Alabama, observed:

> For a long time, contingent fee contracts were considered unethical, but that view gave way to the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy, because they have the power to tax and condemn. Governments also control access to the legal system. The use of contingent fee contracts allows governments to avoid the appropriation process and create the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor, Jr., *Curbing the Abuses of Government Lawsuits Against Industries*, Speech Before the American Legislative Exchange Council, Aug. 11, 1999, at 8.

Indeed, despite the widespread acceptance of contingent fee agreements today, there remain prohibitions based on sound public policy. For example, contingent fees are not permitted in criminal defense. *See* Brickman, *supra*, at 40-41. The bar against contingent fee arrangements in criminal cases is because they can create mis-incentives that threaten to corrupt justice. For instance, if a lawyer's recovery is based on his or her client's acquittal, the incentive is to win at any cost, possibly by suborning perjury. *See id.* In addition, contingent fee agreements in divorce cases are facially invalid because they would discourage reconciliation. *See* Pa. Rules of Prof. Cond. 1.5(d) (prohibiting contingent fees in domestic relations or criminal matters); *see also Polis v. Briggs*, 70 Pa. D. & C.2d 792, 795 (Pa. Ct. Com. Pleas, Philadelphia County, 1975) (finding, in pre-Rule 1.5 case, that enforcement of contingent fee arrangement in domestic relations case "would be an abrupt affront to the Commonwealth's policy of encouraging reconciliation of marital conflicts, particularly where, as here, minor children are involved").

Rule 1.5's express prohibition on contingent fees in domestic relations cases and in representing criminal defendants is not exclusive. The rule recognizes that "[a] fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) [regarding domestic relations and criminal matters] *or other law*." *Id.* 1.5(c) (emphasis added). Indeed, "it is well established that agreements for contingent fees will not be sustained where they are in violation of public policy." *Polis*, 70 Pa. D. & C.2d at 795 (citing *Fulton v. Lancaster County*, 162 Pa. 294 (1894)).

Over time, Pennsylvania courts have prohibited use of contingent fees as a matter of public policy in several contexts. For instance, this Court has recognized that a lawyer's fee may not be contingent on obtaining a pardon. *See Peyton v. Margiotti*, 398 Pa. 86, 91-94, 156 A.2d

865, 868-69 (1959) (finding void as against public policy contingent agreement providing that attorney was to retain a certain fee if client's brother, a convicted murderer, was released from prison by Christmas). Courts have also invalidated contingent fee agreements for the purpose of seeking a withdrawal of a criminal prosecution, *Ormerod v. Dearman*, 100 Pa. 561, 1882 WL 13459, at *4 (1882) (finding that Pennsylvania law "establish[es] the principle that contracts which have for their subject matter any interference with the creation of laws, or their due enforcement, are against public policy and are therefore void"), or the discharge of a draftee, *Bowman v. Coffroth*, 59 Pa. 19, 1868 WL 7273, at *5 (1868) (finding such a contingent fee contract "void and illegal" as inconsistent with morality and sound policy). Indeed, this Court has recognized that "[t]he law guards with jealousy every avenue to its courts of justice, and strikes down everything in the shape of a contract which may afford a temptation to interfere with its due administration." *Ormerod,* 1882 WL 13459, at *4.

Pennsylvania courts have also repeatedly ruled that contingent fees may not be used to procure legislation. *See Spaulding v. Ewing*, 149 Pa. 375, 378-80, 24 A. 219, 219-20 (1892) (finding invalid contract under which lawyer was to receive 25% of salary collected by client postmaster upon obtaining federal legislation to mandate such pay due to the potential for abuse in influencing the legislative branch); *Clippinger v. Hepbaugh*, 5 Watts & S. 315 1843 WL 5037, at *5 (Pa. 1843) (in invalidating contract in which the condition of the obligation to pay fee was contingent upon lawyer procuring from the legislature a law authorizing the client and his wife to sell and convey real estate, finding that "the law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil or political institutions of a State"). In fact, Governor Edward G. Rendell recently signed legislation prohibiting use of contingent fees based on the successful

enactment of legislation. "Prohibiting lobbyists from entering into contingent fee arrangements, under which they would be paid for their success in passing legislation, protects the integrity of votes cast by each member of the Legislature," said Governor Rendell. Office of the Governor, Press Release, *Governor Rendell Signs Major Reform Measures Including Tough New Gaming Law; Lobbyist Disclosure Act*, Nov. 1, 2006, *at* http://www.state.pa.us/papower/cwp/view.asp?A=11&Q=457740 (regarding H.B. 700, 2005 Sess. (Pa. 2006)).[3]

Of course, the Commonwealth could pay for such a suit without engaging private attorneys on a contingent fee basis: the Commonwealth takes in billions of dollars of revenue each year, and it has the power to raise even more money were this to prove insufficient. But the Legislature has not used its resources or raised additional funds. Instead, by entering into a contingent-fee arrangement that required no immediate out-of-pocket expenditure, the Governor's General Counsel circumvented the appropriations process. *See Meredith v. Ieyoub*, 700 So. 2d 478, 481-83 (La. 1997). This is not the type of "access to justice" that contingent fees were meant to promote.

III. CONTINGENT FEE AGREEMENTS BETWEEN PUBLIC ENTITIES AND PRIVATE ATTORNEYS TO PURSUE LITIGATION ON BEHALF OF THE SOVEREIGN ARE UNCONSTITUTIONAL AND VIOLATE LEGAL ETHICS

In addition to running contrary to the history, purpose, and policy underlying the use of contingent fees, special considerations come into play when the Commonwealth enters into such an arrangement to hire private lawyers to pursue litigation in the name of the people through exercising the Commonwealth's sovereign power.

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[3] The law provides that no one may compensate a lobbyist and no lobbyist may work on the basis of compensation "contingent in whole or in part upon any of the following: (i) passage or defeat, or approval or veto, of legislation. (ii) occurrence or nonoccurrence of an administrative action." 65 Pa. Cons. Stat. § 1307.

There are key distinctions between government attorneys and private lawyers. The government attorney's duty is not necessarily to achieve the maximum recovery; rather, "the Government wins its point when justice is done in its courts." *Brady v. Maryland*, 373 U.S. 83, 88 n.2 (1963). A government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all," and therefore the government attorney is required to use the power of the sovereign to promote justice for all citizens. *Berger v. United States*, 295 U.S. 78, 88 (1935).[4] For example, requiring a defendant to change its behavior or remediate pollution for which it is responsible may be more important to the public interest than obtaining a monetary award.

Commonwealth attorneys, like other public officials, take an oath to "support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth." Pa. Const. art. IV, § 3. Government officials are statutorily prohibited from having a financial interest in matters in which they make decisions. *See* 65 Pa. Cons. Stat. §§ 1101-13. The Legislature has expressly recognized that these public officers are part of a "public trust and that any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust." 65 Pa. Cons. Stat. § 1101.1. Commonwealth attorneys are paid in full through public funds to ensure that their loyalty is to the people of the State. In addition, the Pennsylvania Constitution prohibits the government from paying extra

[4] It is beyond dispute that this solemn duty applies "with equal force to the government's civil lawyers." *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C. Cir. 1992) (Mikva, C.J.). Thus, it has long been recognized that a government lawyer in a civil proceeding should be held to a higher standard than a private lawyer, and that in civil proceeding "government lawyers have 'the responsibility to seek justice, and 'should refrain from instituting or continuing litigation that is obviously unfair.'" *Id.* (citing Model Code of Professional Responsibility EC 7-14 (1981)).

compensation to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part, or pay a claim under an agreement made without authority of law. *See* Pa. Const. art. III, § 26.

These rules exist to ensure that government officers and employees are independent and impartial, to avoid action that creates the appearance of impropriety, to protect public confidence in the integrity of its government, and to protect against conflicts of interest.[5] The very nature of a contingent fee is directly contrary to the letter and spirit of prohibitions applicable to public actions under Pennsylvania law.

Application of these principles has led courts in other states to question the appropriateness and constitutionality of contingent fee contracts entered between governments and private lawyers. The decisions in these jurisdictions reflect three modes of analysis for addressing the validity of such agreements.

A. California: "Antithetical to the Standard of Neutrality"

The California Supreme Court has recognized the impropriety, and inapplicability of any "access to justice" considerations, of a contingent fee arrangement between a municipality and a private attorney. *See People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347 (Cal. 1985). *Clancy* involved a city contract with a private attorney to bring public nuisance abatement actions on behalf of the city against adult businesses. *See id.* at 349. Under the contract, when the private

[5] Indeed, the contingent fee agreement in the case before this Court has garnered substantial scrutiny and criticism in Pennsylvania and nationally. *See, e.g.*, Editorial, *Pay to Sue on the Docket*, Wall St. J., July 29, 2009, at A14, *abstract available at* 2009 WLNR 14671092; Editorial, *Rendell's Deal: A Case for Justice*, Pittsburgh Tribune-Review, Apr. 12, 2009, *available at* 2009 WLNR 6851575; Mario F. Cattabiani & Angela Couloumbis, *Texas Firm With No-Bid Deal Gave to Rendell*, Pittsburgh Post-Gazette, Apr. 10, 2009, at A7, *available at* 2009 WLNR 6736465; Brad Bumsted, *Rendell Defends Contract With Houston Law Firm That Made Donation*, Pittsburgh Tribune-Review, Apr. 10, 2009, *available at* 2009 WLNR 6754541; Editorial, *The State Lawsuit Racket*, Wall St. J., Apr. 8, 2009, A12, *abstract available at* 2009 WLNR 6611948.

attorney won his case, he was paid $60.00 per hour. *See id.* at 350. If he lost, the city reduced his fee to $30.00 per hour. *See id.* The city attorney brought a nuisance abatement action against an adult book store, which challenged the arrangement between the private attorney and the city. *See id.* at 349-50.

Invoking long-standing constitutional and ethical principles, the California Supreme Court recognized that when acting as a representative of the sovereign, a private attorney "must act with the impartiality required of those who govern." *Id.* at 350. Noting that this duty is not limited to criminal prosecutors, the Court also found that a private attorney who has the "vast power of the government available to him" must "refrain from failing to act evenhandedly." *Id.* The California Supreme Court explained:

> Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.
>
> When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated.

Id. at 351. As the court further explained, unlike cases brought on behalf of private plaintiffs, the California Supreme Court recognized that government enforcement actions "involve a balancing of interests" and a "delicate weighing of values" that "demands the representative of the government to be absolutely neutral." *Id.* at 749. The court then concluded that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated," which "precludes the use in such cases of a contingent fee arrangement." *Id.* at 748-49.[6]

[6] The Georgia Supreme Court has also found that "[f]airness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends" and therefore invalidated an agreement between a county board of tax assessors and a private auditor whereby the (Footnote continued on next page)

Application of the California Supreme Court's approach in *Clancy* to the case before this Court would undoubtedly require disqualification of the private firm in this case. The millions of dollars at stake in this case pales in comparison to the slightly higher hourly fee collected by the private attorney in *Clancy* for winning a case. The profit motive of the contingent-fee arrangement here, which encourages the private firm representing the government to maximize monetary recovery to the expense of all other values, including access to medication by Pennsylvania residents, cannot stand.

B. A Bright Line Test is Needed: Monitoring Government Control Over Private Lawyers is Neither Feasible in Practice Nor Would it Cure the Constitutional Deficiency

In examining the constitutionality of contingent fee agreements between state governments and private attorneys, the Rhode Island Supreme Court and a California appellate court recently adopted an alternative approach. In both cases, the courts adopted a test that would permit such arrangements so long as the government maintains close supervision over the private attorneys. Such control is facially lacking in the case before this Court. Nevertheless, PLAC urges this Court to avoid the temptation to embrace a control-based test because this approach does not provide an effective safeguard as a matter of practice. PLAC urges this Court to instead adopt a bright-line test that precludes the use of contingent fee arrangements by government entities.

In Rhode Island, the state's Attorney General commenced a public nuisance action against former manufacturers of lead paint, then hired two private law firms to pursue the action

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auditor would receive 35% of any additional amount collected if his or her audits of tangible personal property returns resulted in an increased value. *See Sears, Roebuck & Co. v. Parsons*, 401 S.E.2d 4, 5 (Ga. 1991).

on a contingent fee basis in which they would receive 16 2/3 percent of any monies recovered. *See Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 469 (R.I. 2008). In light of the special obligations of the Attorney General to the public, the Rhode Island Supreme Court found that contingent fee agreements between the state and private lawyers must include "exacting limitations" that ensure that the Office of Attorney General "retains ***absolute and total control over all critical decision-making***" and that the case-management authority of the Attorney General is "final, sole and unreviewable." *See id.* at 475-76 (emphasis in original). At a minimum, the court found that the following provisions must be included in a contingent fee agreement between the state and private attorneys:

> (1) that the Office of the Attorney General will retain complete control over the course and conduct of the case; (2) that, in a similar vein, the Office of the Attorney General retains a veto power over any decisions made by outside counsel; and (3) that a senior member of the Attorney General's staff must be personally involved in all stages of the litigation."

Id. at 477. In addition, the court found that "not only must the Attorney General have absolute control over all stages of the litigation, but he or she must also *appear* to the citizenry of Rhode Island and to the world at large to be exercising such control." *Id.* at 477 (emphasis in original).

Under these conditions, the Rhode Island Supreme Court permitted the contingent fee representation, but did so with trepidation. *See id.* Indeed, the Rhode Island Supreme Court expressly noted that "[g]iven the continuing dialogue about the propriety of contingent fee agreements in the governmental context, we expressly indicate that our views concerning this issue could possibly change at some future point in time." *Id.* at 476 n.50.

The limitations imposed by the Rhode Island Supreme Court may seem to address the issue in theory. Indeed, if applied to the Contract for Legal Services in this case, the Rhode Island Supreme Court's reasoning would require invalidating the contract, due to the lack of

involvement of the Commonwealth's attorneys, the state's limited right to review and consult, not veto, decisions, and restrictions on the Commonwealth's ability to settle the case. As a practical matter, however, the Rhode Island "control" test is unworkable and unenforceable. While a court may have the authority to review the language of the contingent fee contract to ensure that it contains the judicially-mandated language, it cannot oversee the day-to-day management of the litigation to ensure that the government's lawyers, not financially motivated private attorneys, are calling the shots. If the contract in the case before this Court, for example, were amended to include standard boilerplate language regarding the Commonwealth's control over the case, and a government attorney entered a pro forma appearance, the test might be considered met. Who is leading the actual litigation of the case would be shielded from the court's view, and that of the public, by the attorney-client privilege.

The flaw of this approach is evident in a matter that is pending on appeal before the California Supreme Court. *See County of Santa Clara v. Atlantic Richfield Co.*, 74 Cal. Rptr.3d 842 (Cal. Ct. App. 2008). This litigation involved a similar public nuisance action against former manufacturers of lead paint pursued by Santa Clara County and later joined by the City and County of San Francisco. Applying the principles of *Clancy*, the trial court invalidated contingent fee agreements entered with two private firms and rejected the government's claim that it maintains control over the litigation:

> [A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for the contingent fee arrangement with outside counsel to be permissible; (b) what types of decisions the government attorneys must retain control over, e.g., settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel . . . . Given the inherent difficulties of determining whether or to what extent the prosecution of

> this nuisance action might or will be influenced by the presence of outside counsel operating under a contingency fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by government attorneys.

Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, *County of Santa Clara v. Atlantic Richfield Co.*, No. 1-00-CV-788657, 2007 WL 1093706 (Cal. Super. Ct., Santa Monica County, Apr. 4, 2007).

Nevertheless, an intermediate appellate court largely abandoned this rationale, distinguishing *Clancy* on the premise that the use of private contingent fee counsel "only to assist" the litigation, not to control it, upheld the standard of neutrality necessary to pursue an action on the public's behalf. *See* 74 Cal. Rptr.3d at 848. The court grounded its decision in provisions of some, but not all, of the contingent fee agreements indicating that ultimate control over the litigation remained with the state. Indeed, the court acknowledged that two of these agreements actually had to be disclaimed or re-worded after the fact because they expressly had stated that private counsel had "absolute discretion" in the case. *Id.* at 849. Thus, under the California appellate court's reasoning, all a private law firm must do to overcome a challenge is include a provision in the agreement that final say over the litigation rests with the state, even if this assertion has no basis in reality.

In the case before this Court, the private firm is not merely assisting the Commonwealth's attorneys under the *Santa Clara* standard. Rather, the private firm solicited the Commonwealth to bring the action, developed the legal theories pursued, and verified the Complaint. The Attorney General declined to pursue the case and, while the Governor elected to proceed, OGC attorneys to this day have not entered an appearance in the case. Should the Commonwealth determine that the public interest is best served by settling or dismissing the

action, the Legal Service Contract places restrictions on its ability to do so. While this Court should not adopt a control test along the lines of *Santa Clara*, even if it did so, the Legal Service Contract would be invalid.

C. Louisiana: A Violation of the Separation of Powers

The Supreme Court of Louisiana has also invalidated a contingent fee agreement, but taking a different route than the California high court in *Clancy*. In *Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997), Louisiana's Attorney General contracted with two private law firms to enforce the state's environmental protection laws. Under the agreement, the firms would receive twenty-five percent of any damages recovered on behalf of the state, subject to a cap of $10 million per claim per firm. *See id.* at 479. Before the private firms filed suit, a trade association challenged the constitutionality of the legal services contract. *Id.* at 479-80.

Rather than consider the conflicting obligations, loyalties, and motivations of government and private lawyers as in *Clancy*, the Louisiana court found that such an agreement violated the separation of powers established by the state constitution. *See id.* at 481-83. The court held that "under the separation of powers doctrine, unless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingent fees from state funds or the Legislature has enacted such a statute, then he has no such power." *Id.* at 481. Finding no such grant of authority in Louisiana law, the court invalidated the contingent fee agreement. *See id.* at 481-83.

As in Louisiana, the Pennsylvania Constitution provides that the General Assembly must authorize any expenditure of Commonwealth funds. *See* Pa. Const. art. III. § 24. This Court has recognized that the legislative branch has exclusive power to control the Commonwealth's finances and determine its spending. *See Snyder v. Snyder*, 533 Pa. 203, 210, 620 A.2d 1133,

1137 (1993); *Leahy v. Farrell*, 362 Pa. 52, 57, 66 A.2d 577, 579 (1979); *Shapp v. Sloan*, 480 Pa. 449, 463, 391 A.2d 595, 601-02 (1978). Violation of this separation of powers, in which the Governor spends the Commonwealth's resources without the necessary legislative approval, provides this Court with a sound, additional basis upon which the contingent fee contract cannot stand.

IV. USE OF CONTINGENT FEE AGREEMENTS BY PUBLIC ENTITIES OFTEN LEADS TO CONFLICTS OF INTEREST, EXORBITANT FEES, AND A "REVOLVING DOOR," AND IT REDUCES THE PUBLIC'S FAITH IN GOVERNMENT

A legal service contract that provides private lawyers with a financial incentive to exercise the government's sovereign power should be void because it is contrary to the historic purpose of contingent fee agreements, violates principles of neutrality that are crucial to the government's use of its enforcement power, and permits the executive branch to spend monies without legislative appropriation. Aside from these principles of legal ethics and constitutional concerns, this Court should also closely consider the practical implications of, and real-world experience with, such agreements. In case after case, the experience of other state and local governments that have entered into such behind-closed-door contracts, and the resulting exorbitant legal fees that resulted, have more than just raised eyebrows. These circumstances have created the appearance of impropriety, and, in one case, led to a criminal conviction. This is by no means a partisan issue. State hiring of lawyers on a contingent-fee basis provides equal opportunity for political patronage – both Democratic and Republican officials have awarded lucrative contracts to their friends, colleagues, and supporters. This practice fosters a pay-to-play culture that has damaged the public's faith in government and the civil justice system.

A. Political Patronage and the Hiring of Friends and Colleagues

When public entities hire contingent fee counsel, they often do so without the open and

competitive process used with other contracts to assure the state or county receives the best value. Even where governments have issued some type of request for proposals, the selection standards are often lax. As a result, governments routinely have hired and awarded potentially lucrative contracts to friends and political supporters. In turn, the ultimate result is a system whereby the government may not receive the most qualified counsel, taxpayers may not have received the best value, and private attorneys benefit at the expense of the public. There are many such examples, several of which come from the multi-state tobacco litigation.

For instance, Connecticut Attorney General Richard Blumenthal requested letters from individual firms or consortia of firms to represent the state in the tobacco litigation.[7] The Attorney General selected four of sixteen firms that expressed interest. The three Connecticut-based firms included his own former law firm, his former partner's wife's firm, and a firm whose managing partner served as personal counsel and counselor to Governor John Rowland. *See* Thomas Scheffey, *Winning the $65 Million Gamble*, Conn. L. Trib., Dec. 6, 1999, at 1. Other firms that wanted to be considered for the litigation publicly stated they did not have a fair chance at the contract. For example, Robert Reardon of New London, a former president of the Connecticut Trial Lawyers Association, reportedly could not even get in the door for a meeting. *See id.* These three firms, each having a close personal, political, familial, or financial relationship to Attorney General Blumenthal or the Governor, divided $65 million in legal fees. "I know how it [looks]," conceded the lead attorney, David Golob. *See id.*

In 1996, then-Attorney General Carla Stovall of Kansas hired her former law partners at

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[7] *See* Connecticut Gen. Assem., Office of Legal Research, Research Report, *Attorney General Hiring Practices and the Tobacco Settlement*, No. 2000-R-0879, Sept. 15, 2000, *available at* http://www.cga.ct.gov/2000/rpt/olr/htm/2000-r-0879.htm.

Entz & Chanay to serve as local counsel in the State's tobacco lawsuit. *See* Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 14, 2000, at 16 (testimony of Carla Stovall, Attorney General of Kansas), *at* http://www.kslegislature.org/committeeminutes/2000/house/HsTax2-14-00b.pdf. Attorney General Stovall testified that she asked her former law firm to take the case "as a favor" in part due to their "personal loyalty." *Id.* at 17. In addition to accepting the case that resulted in a "jackpot" fee award, Entz & Chanay performed other "favors" for Attorney General Stovall during her campaign. For example, Entz & Chanay's basement housed Ms. Stovall's Attorney General campaign. *Id.* at 16. The firm also contributed money to her campaign effort. *See* John L. Peterson, *Payment for Law Firm Draws Fire; Hearing Continues in Case Involving Tobacco Litigation*, Kansas City Star, Feb. 17, 2000, at B3. Attorney General Stovall selected her former firm at the expense of another Kansas firm, Hutton & Hutton, which specializes in large product liability cases, and had experience in tobacco litigation. *See* Hearing on H.B. 2893, Before the Kansas House Taxation Comm., Feb. 17, 2000, at 27-88 (testimony of Andrew W. Hutton & Mark B. Hutton, Hutton & Hutton), *at* http://www.kslegislature.org/committeeminutes/2000/house/HsTax2-17-00b.pdf.

Then-Texas Attorney General Dan Morales also hired contingent fee lawyers to file his state's tobacco lawsuit in 1996. Four of the five hired firms together had contributed nearly $150,000 in campaign contributions to Morales from 1990 to 1995. *See* Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27. After hiring the firms, Morales reportedly asked them to make an additional political contribution of $250,000. *See* Miriam Rozen & Brenda Sapino Jeffreys, *Why Did Dan Morales Exchange Good Judgment for the Good Life?*, Tex. Law., Oct. 27, 2003, at 1.

South Carolina Attorney General Charles Condon came under fire for cronyism after he

handpicked seven law firms to represent the state in the tobacco litigation, six of which included the Attorney General's friends or political supporters. *See* Assoc. Press, *Lawyer Fees Weren't S.C.'s, Official Says*, Charlotte Observer, May 2, 2000, at 1Y, *available at* 2000 WLNR 1932617.[8] Attorney General Condon's practice of hiring contingent fee attorneys was not limited to the tobacco suit. He faced heavy criticism after two attorneys with close ties to his party received lucrative fees based on a contingent fee contract by which the lawyers pursued an environmental case on behalf of the state. *See* John Monk, *Lawyers May Get $1.48 Million from State; Controversial Fees is for Work S.C. Hired Them to Do in Wake of Reedy River Oil Spill in 1996*, The State (Columbia, S.C.), Nov. 17, 2000, at A1.

Missouri Attorney General Jay Nixon selected five law firms that had made over $500,000 in political contributions over the preceding eight years, most to him and his party, to handle the state's participation in the tobacco litigation. Editorial, *All Aboard the Gravy Train*, St. Louis Post-Dispatch, Sept. 17, 2000, at B2, *available at* 2000 WLNR 870396. Those firms eventually received $111 million in fees, an amount decried as "out of proportion to the work performed and the risk involved," given that Missouri was the 27th state to join the litigation, coming in only after the hard work had been done by other states and settlement was inevitable. *Id.* Nixon refused to provide state officials with the criteria used to select the firms and claimed it was "privileged information." *See* John Fund, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar* 8 (U.S. Chamber Inst. for Legal Reform, 2004), *available at* http://www.instituteforlegalreform.com/pdfs/Fund%20AG%20report.pdf.

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[8] Condon, accused of cronyism in his hiring of the firms, later proposed legislative oversight and competitive bidding for the government's hiring of private attorneys. *See* John P. McDermott, *Ness Motley Tobacco Suit Fee $82.5M*, Charleston Post & Courier, June 30, 2000, *at* http://archives.postandcourier.com/archive/arch00/0600/arc0630261513.shtml.

And when Nixon ran unsuccessfully for the United States Senate in 1998, numerous attorneys in those firms made the maximum individual donation permitted by law. *See id.* at 7.

While the tobacco litigation provides some of the most blatant examples of political favoritism, contingent fee contracts between states and private lawyers have raised controversy and concern in other areas as well. In 1994, Louisiana Attorney General Richard Ieyoub proposed to hire fourteen law firms – including many past contributors to his campaigns – to pursue environmental claims on behalf of his office. Editorial, *Ieyoub's Expedition*, New Orleans Times Picayune, Nov. 28, 1994, at B6, *available at* 1994 WLNR 937621. The private firms, which did not specialize in environmental law, were to receive 25% of the amounts recovered. *See id.*; *Judge Stops Louisiana's Environmental Bounty Hunt*, Gas Daily, Dec. 19, 1994. When the propriety of these contracts was challenged in court, the Louisiana Supreme Court invalidated the contingent fee agreements. *See Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997) (discussed *supra* pp. 18-19). Nevertheless, Ieyoub received more than $84,500 for his successful 1991 and 1995 attorney general races and his failed 1996 bid for the U.S. Senate from twelve of the seventeen law firms he hired to pursue the state's tobacco case. *See* Manuel Roig-Franzia, *Attorneys Hired for Suit Gave to Ieyoub Campaigns*, New Orleans Times Picayune, Nov. 21, 1998, at A8, *available at* 1998 WLNR 1207563.

Similar state litigation continues today. *See* Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10, *available at* 2007 WLNR 12954006 (discussing *Oklahoma v. Tyson Foods, Inc.*, No. 4:05-cv-00329-GKF-SAJ (N.D. Okla.), in which Oklahoma Attorney General W.A. Drew Edmondson has retained three private plaintiffs' firms to sue poultry companies for water pollution in an agreement that entitles the firms to receive up to half of the recovery). Likewise, here, the Governor has hired, without any open or

competitive bidding process, a private firm whose principal contributed more than $100,000 to his re-election campaign directly and through the Democratic Governors Association. (See Exhibit F of Petitioner's Application).

B. A Well-Documented History of Exorbitant Fees at the Public's Expense

Delegation of government authority to profit-motivated attorneys has predictably resulted in exorbitant fee awards at the public's expense. Contingent fee agreements have siphoned recovery that would otherwise go to the treasury that could be used to support public programs or reduce taxes. *See* Susan Beck, *The Lobbying Blitz Over Tobacco Fees: Lawyers Went All Out in Pursuit of Their Cut of a Historic Settlement and the Arbitrators Went Along*, Legal Times, Jan. 6, 2003, at 1 (reporting that at least $13.6 billion in fees were awarded to private attorneys); Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003* 6 (2003) (estimating that approximately 300 lawyers from 86 firms are projected to earn up to $30 billion total over the next 25 years from the 1998 tobacco settlement). Instead, such agreements have transferred millions of dollars to private lawyers with little relation to the number of hours actually spent working on the government's behalf. History has shown that lawyers chosen to represent the government are "often from the ranks of their own campaign contributors and cronies." Stuart Taylor, *How a Few Rich Lawyers Tax the Rest of Us*, Nat'l J., June 26, 1999.

For example, in Maryland, Attorney General J. Joseph Curran, Jr. entered into a contingent fee agreement with personal injury attorney (and Baltimore Orioles owner) Peter Angelos. Angelos demanded the full twenty-five percent share of the state's $4.4 billion of the national settlement, as provided in his 1996 contract, and refused to submit his claim to arbitration. *See* David Nitkin & Scott Shane, *Angelos to Get $150 Million for Tobacco Lawsuit*,

Baltimore Sun, Mar. 23, 2002, at 1A, *available at* 2002 WLNR 1361294. This would have entitled Angelos to more than $1 billion, the equivalent of $30,000 per hour. *See* Scott Shane, *Angelos Says Panel Can't be Impartial*, Baltimore Sun, Nov. 30, 2001, at 1B, *available at* 2001 WLNR 1062682. After a three-year legal battle, Angelos settled with the state for $150 million. *See* Nitkin & Shane, *supra*.

Kansas Attorney General Stovall's former firm, Entz & Chanay, reportedly received $27 million in legal fees for its "favor" of serving as local counsel in the State's tobacco lawsuit. *See* John L. Peterson, *Attorneys for Kansas Collect $55 Million In Tobacco Case, Stovall's Ex-Firm Expects $27 Million*, Kansas City Star, Feb. 1, 2000, at B1. Because Entz & Chanay was not required to keep detailed billing records, the arbitration panel that set the firm's fees estimated that 10,000 hours of work was performed. *See* Jim McLean, *A.G.'s Firm to Share $54 Million Fee Award*, Topeka Cap. J., Feb. 1, 2000, at 1, *available at* 2000 WLNR 4092996. Accepting the arbitration panel's estimate, Entz & Chanay was paid the equivalent of $2,700 per hour for simply acting as local counsel in the State's case.

The tobacco settlement awarded the lawyers hired by then-Texas Attorney General Dan Morales fifteen percent of the State's $15.3 billion recovery – about $2.3 billion, which ultimately was increased by an arbitration panel adjudicating the fee dispute to $3.3 billion. *See* Bruce Hight, *Lawyers Give up Tobacco Fight*, Austin American-Statesman, Nov. 20, 1999, at A1. That amounted to $105,022 per hour, assuming the lawyers worked eight hours per day, seven days per week, for eighteen months. *See* Sheila R. Cherry, *Litigation Lotto*, Insight on the News, Apr. 3, 2000, *available at* 2000 WLNR 4426003. The eight-year Attorney General and former state representative and prosecutor was ultimately sentenced to four years in federal prison for attempting to funnel millions of dollars worth of legal fees to a long-time friend who

did little work on the case. *See* John Moritz, *Morales Gets 4 Years in Prison*, Ft. Worth Star Telegram, Nov. 1, 2003, at 1A, *available at* 2003 WLNR 2222516.

The deals between governments and private personal injury lawyers have spawned bitter fee disputes. These disputes have occurred in Florida, Kansas, Maryland, Massachusetts, Texas, and other states. *See, e.g.*, Alex Beam, *Greed on Trial*, Atlantic Monthly, June 1, 2004, at 96, Scott Shane, *Judge to Rule on Dispute Over Legal Fees*, Baltimore Sun, Dec. 10, 1999, at 2B, *available at* 1999 WLNR 1128710; Levy, *Tobacco Robbery*, *supra*; Hight, *supra*. These controversies force government officials to waste taxpayer dollars, divert their attention from other matters, and engage in unnecessary litigation.

C. Contingent Fee Awards Take Away Public Dollars

Contingent fee awards are often misrepresented as coming at no cost to the public, with no need for government resources – allowing prosecution of litigation for free. These contracts are, of course, not free. The cost, the lucrative fees paid to private lawyers as a result of the litigation, is money that would otherwise fund government services or offset the public's tax burden. When governments make the unwise decision to enter into a contingent fee arrangement that can yield multi-million dollar payouts to private firms when they could either use their own lawyers or supplement their resources with private attorneys at a competitive hourly rate, the public loses.

For example, South Carolina Attorney General Charlie Condon was criticized by environmental groups after a contingent fee contract he entered resulted in a $1.48 million fee to two private lawyers. *See* Monk, *supra*. The suit, a result of a 1996 oil spill, was initially handled by the South Carolina Department of Natural Resources, which usually handles suits against polluters, but then handed over to the private lawyers. *See id.* The contingent fee lawyers did

not file the lawsuit, make any motions, or engage in pretrial discovery. *See id.* The company quickly settled for $6.5 million, with the amount of the settlement placed in a trust fund while the private attorneys haggled with the state about their cut of the recovery. *See id.* Even accepting the attorneys' unsubstantiated claim that they worked 1,500 hours on the suit, the $1.48 million fee would result in the equivalent of nearly $1,000 per hour in a case in which there appeared to be little controversy. Dell Isham, the Executive Director of the South Carolina Sierra Club, said that the state should have used government lawyers. *See id.* "This fee is offensive because it goes outside the system to benefit individuals, and it harms the environment by taking money away from it." *Id.* (quoting Mr. Isham). Common Cause blamed the Attorney General for "giving away the house." *Id.* (quoting John Crangle, Director of Common Cause in South Carolina).

In Mississippi, Attorney General Jim Hood came under fire by the state's auditor after he hired the law firm of his top campaign contributor to pursue back taxes owed by MCI related to the collapse of its predecessor, WorldCom, then entered a settlement directing MCI to pay the private attorneys $14 million. *See* Office of the State Auditor, Mississippi, Informational Review: MCI Tax Settlement With the State of Mississippi (2006), *available at* www.osa.state.ms.us/documents/performance/mci-tax-review06.pdf. The Auditor found that the Attorney General acted beyond the scope of his constitutional and statutory authority by paying the private lawyers out of funds not in his legislatively-approved budget. *See id.* at 2-4. That money, the Auditor stated, should have been placed in the general treasury for the benefit of the public. *See id.* at 13; *see also* Emily Wagster Pettus, *Auditor, Attorney General Feud Over $14M Fee to Private Attorneys*, Assoc. Press, Oct. 23, 2006.

V. BETTER CHOICES EXIST FOR STATE AND LOCAL

GOVERNMENTS THAN USING CONTINGENT FEE AGREEMENTS

Restricting the ability of the Commonwealth to hire private counsel on a contingent fee basis will not impede the government's ability to protect the public interest. The Commonwealth can make better choices when pursuing litigation on behalf of constituents.

Experience has proven that state and local governments do, indeed, have a choice as to whether to contract with lawyers on a contingent fee basis, even when taking on the largest of adversaries. For example, former New York Attorney General Eliot Spitzer was considered one of the most aggressive and active state attorneys general. *See, e.g.*, Sara Fritz, *Another N.Y. Official Making National Name for Himself*, St. Petersburg Times, Nov. 29, 2002, at A1, *available at* 2002 WLNR 13002990 (reporting on Spitzer's aggressive approach). Yet, Attorney General Spitzer did not enter into contingent fee agreements with private lawyers as a matter of principle and practice. *See* Manhattan Inst., Center for Legal Pol'y, *Regulation Through Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, at 7 (Wash., D.C., June 22, 1999) (transcript of remarks) ("I would never enter into an agreement with the plaintiffs' bar on a contingency fee basis to give away billions of dollars."), 23 ("I never would have entered into [the tobacco contingent fee] agreements and I criticized my predecessor for the terms, bidding process, and determination method his office used for choosing attorneys.").

In the multi-state tobacco suits, it is notable that the attorneys general of some states, such as Virginia, opted *not* to hire contingent fee attorneys and instead pursued the litigation with available resources. *See* Editorial, *Angel of the O's?*, Richmond Times Dispatch, June 20, 2001, at A8, *available at* 2001 WLNR 1140793 (comparing the additional benefits gained by Virginia

citizens whose Attorney General did not hire outside counsel with the money lost by its neighbor, Maryland, to legal fees).

Other attorneys general who were not motivated by contingent fee attorneys, such as then-Delaware Attorney General Jane Brady, decided that joining the tobacco suits did not have the support of her constituents, despite the potential for a financial windfall. *See, e.g., Regulation Through Litigation, supra*, at 38. When Attorney General Brady occasionally hired private lawyers to assist her office on other matters, she did so through an open bidding process, closely-defined contractual responsibilities, limited term, and, most importantly, hourly rates. *See id.* Attorney General Brady recognized that the state's use of private attorneys is "inconsistent with contingency fee arrangements." *Id.*

There may be some tasks not involving the state's enforcement power that are either routine or require special expertise for which the use of outside counsel on an *hourly* basis by state or local government may be appropriate. For example, under former Kansas Attorney General Phill Kline most legal work was undertaken by attorneys on his staff, but his office hired outside counsel to assist state attorneys when expertise in certain areas was needed, such as to defend the state in a school finance suit. *See* Jim Sullinger, *Kansas Paid $2 Million for Legal Aid; Unusual Report Fulfills a Promise by Attorney General*, Kansas City Star, Dec. 29, 2004, at B1, *available at* 2004 WLNR 19045569.

In fact, the federal government pursues litigation without hiring lawyers on a contingent fee basis. *See* Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007). The Executive Order, which remains in place today, states "the policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts

that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law." *Id.* Hiring attorneys on a hourly or fixed fee basis, and not through a contingent fees arrangement, "help[s] ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States." *Id.*

In the case before this Court, the Commonwealth could have proceeded by using its own publicly-paid government lawyers, such as those in the Attorney General's Medicaid Fraud Unit, to pursue the litigation. If needed, the Commonwealth could have hired private lawyers on an hourly-fee basis, within its legislatively-approved appropriation, to assist the government's attorneys with the case.

VI. THE GROWING USE OF CONTINGENT FEE AGREEMENTS BY STATE AND LOCAL GOVERNMENTS IS CONTRARY TO PUBLIC POLICY

In addition to the constitutional and ethical questions raised by such arrangements, contracting out of the state's enforcement power to private contingency fee attorneys facilitates what has been called "regulation through litigation." *See* Robert B. Reich, *Regulation is Out, Litigation is In*, USA Today, Feb. 11, 1999, at A15; *see also* John Fund & Martin Morse Wooster, *The Dangers of Regulation Through Litigation: The Alliance of Plaintiffs' Lawyers and State Governments* (American Tort Reform Found. 2000), *available at* http://www.heartland.org/Article.cfm?artId=8162. The strategy of the private contingent fee attorneys to select an industry and go after it through tort litigation – as opposed to through legislation – may result in an end-run around representative government. *See* Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 258-59 (2000). For example, the private

attorney/state attorney general alliance in the tobacco litigation "legislated" by achieving enormous settlements – and did so with private personal injury lawyers working hand in hand with state attorneys general.

Despite the claims of most attorneys general during the tobacco litigation that tobacco was a "unique" situation, states and localities have hired contingent fee lawyers to attack a wide range of manufacturers and service providers. Soon after the tobacco settlement, local governments hired private attorneys to sue handgun manufacturers in a large number of cities.[9] In Connecticut, Attorney General Blumenthal solicited private attorneys for their services in pursuing litigation against any company connected with the manufacture, distribution, or sale of gasoline with Methyl tertiary butyl ether ("MTBE")[10] and hired private attorneys to sue pharmaceutical companies over prescription drug pricing practices.[11] Reports suggest that other targets include HMOs, automobiles, chemicals, alcoholic beverages, Internet providers, "Hollywood," video game makers, and even the dairy and fast food industries. *See* Michael Y. Park, *Lawyers See Fat Payoffs in Junk Food Lawsuits*, Fox News Channel, Jan. 23, 2002; *see also* John J. Zefutie, Jr., Comment, *From Butts to Big Macs--Can the Big Tobacco Litigation and*

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[9] Most of these early cases were unsuccessful. *See, e.g., City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3rd Cir. 2002); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001) (applying New Jersey law); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042 (Fla. App. Ct. 2001).

[10] *See* State of Connecticut, Attorney General's Office, Request for Proposals: Litigation Services Involving Compensatory and Punitive Damages and Injunctive Relief Against Manufacturers, Designers, Refiners, Distributors, and Sellers of Methyl Tertiary Butyl Ether ("MTBE") for Pollution and Contamination of the Waters of the State of Connecticut, RFP No. 04-01 (MTBE), Feb. 25, 2004.

[11] *See* State of Connecticut, Attorney General's Office, Request for Proposals: Litigation Services Involving Claims for Restitution and Other Relief Authorized by Law With Respect to Unfair and Deceptive Sales and Marketing Practices by Pharmaceutical Companies With Respect to the Sale, Marketing and Reporting of the Average Wholesale Price of Their Drugs and Which Conduct Has Caused harm to the State of Connecticut and to Consumers, RFP No. 04-02, Dec. 20, 2004; William Hathaway, *State Sues Drug Companies, Claiming Price Gouging*, Hartford Courant, Mar. 14, 2003, at B7, *available at* 2003 WLNR 15209620 .

Nation-Wide Settlement With States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?, 34 Seton Hall L. Rev. 1383, 1411-13 (2004).

This alliance will no doubt continue, because these "new style" cases give the state executive branch and local governments a new revenue source without having to raise taxes. These lawsuits also give government officials the chance to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, may not support. *See id.* As Robert B. Reich, Secretary of Labor in the Clinton Administration, has sagely observed, "The strategy may work, but at the cost of making our frail democracy even weaker. . . . This is faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy." Robert B. Reich, *Don't Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22, *abstract available at* 2000 WLNR 2042670; *see also* Victor E. Schwartz, *Trial Lawyers Unleashed*, Wash. Post, May 10, 2000, at A29.

In addition to offending the democratic process, contingent fee agreements on behalf of the Commonwealth pose a danger to the business and legal environment in Pennsylvania. They encourage lawsuits against "deep pocket" defendants that are often in industries viewed as unpopular by the public, making it difficult for them to receive a fair trial. This is particularly true when what is essentially private litigation is backed by the state's moral authority and seal of approval. As Michael Greve of the American Enterprise Institute has asked, "Do you want your state attorney general to be an ambulance chaser?" Jeff Shields, *Taking Law into Their Own Hands*, Philadelphia Inquirer, Oct. 4, 2004, at A1, *available at* 2004 WLNR 19337186. Should this Court accept use of contingent fee agreements by the Commonwealth, the political patronage and unwarranted payouts seen in other states can be expected in Pennsylvania, and exercise of

the government's power based on profit, not public interest, will result.[12]

CONCLUSION

For the reasons stated herein, PLAC respectfully requests that this Court invalidate the Contract for Legal Services and disqualify contingent-fee counsel from representing the Commonwealth in this case, and hold that private attorneys may not represent the Commonwealth on a contingent-fee basis.

Dated: August 11, 2009

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[12] Editorials and op-eds stemming from such lawsuits have been highly critical of the practice of paying private attorneys to prosecute civil enforcement claims on behalf of the State based on their success in bringing in the greatest monetary award. *See, e.g.*, Editorial, *The Pay-to-Sue Business*, Wall St. J., Apr. 16, 2009, at A15, *abstract available at* 2009 WLNR 7178777 (examining Houston plaintiffs lawyer F. Kenneth Bailey's contributions to several state attorneys general and Pennsylvania Governor Ed Rendell and his firm's receipt of no-bid, contingent fee contracts to sue pharmaceutical companies on behalf of those states); Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10, *available at* 2007 WLNR 12954006 (stating that any recovery belongs to the state's taxpayers and a large portion of it should not be diverted to private lawyers); Andrew Spiropoulos, *New AG Model Harms State*, The Oklahoman, July 8, 2007, at 17A, *available at* 2007 WLNR 13043559 (opining that the state's hiring contingent fee lawyers "not only undermines the fair and impartial administration of justice[, but] . . . will economically harm, not benefit, the state"); Editorial, *Prosecution for Profit*, Wall St. J., July 5, 2007, at A14, *abstract available at* 2007 WLNR 12788210 (urging against use of contingent fee agreements by governments as antithetical to prosecutorial neutrality).

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The Heil Company
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Hyundai Motor America
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International Truck and Engine Corporation
Isuzu Motors America, Inc.
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Johnson & Johnson
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
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Kraft Foods North America, Inc.
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CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief upon counsel by depositing a copy in a first-class postage-prepaid envelope into a depository under the exclusive care and custody of the United States Postal Service this 11th day of August, 2009, addressed as follows:

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