IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Respondent, v. JANSSEN PHARMACEUTICA, INC., trading as "JANSSEN, LP," Applicant.	No. 2 EM 2009

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC.

Application for Extraordinary Relief Relating to an Action Pending
In the Court of Common Pleas of Philadelphia County
(January Term 2009; No. 002181; Howland W. Abramson, J., presiding)

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Pursuant to Rules 531 and 105 of the Pennsylvania Rules of Appellate Procedure, the Chamber of Commerce of the United States of America ("the Chamber") respectfully moves this Court for leave to file out-of-time the accompanying amicus curiae brief in support of Real Party in Interest Ortho-McNeil-Janssen Pharmaceuticals, Inc.

1. The Chamber only recently became aware that an application for extraordinary relief regarding the proprietary of the Commonwealth's use of contingency fee counsel in sovereign and quasi-sovereign actions was pending before this Court. Because the Chamber was unaware that the application would be filed, the Chamber was unable to comply with the requirements of Rule 531(a), which provide for the filing of an amicus brief simultaneously with the application. Upon learning of the application, the Chamber retained counsel on January 28, 2009 for purposes of filing an amicus brief and the accompanying brief was prepared without delay.

2. The Chamber's lack of knowledge regarding the pendency of the question during time for filing provides good cause. In cases where the party is unaware that the application will be filed, the Pennsylvania Rules of Appellate Procedure expressly note that the Court may grant relief under Rule 105(b) and accept an out-of-time brief for filing. *See* Pa. R. App. P. 531(a) official note, Pa. R. App. P. 105(b).

3. The Chamber has a unique perspective on the issues pending in the application and its brief would assist the Court in its consideration of the pending questions. The Chamber is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the over 4,000 Chamber members located in Pennsylvania, countless others do business in the Commonwealth and are directly affected by its litigation climate. The Chamber

advocates for its members in matters before the courts, Congress, and executive branch agencies. It regularly files amicus briefs in cases raising issues of vital concern to the nation's business community.

4. The Chamber has closely examined the pending questions in the application, sponsoring studies of the relationship between contingency fee lawyers and state attorneys general in 2000 and 2004. *See* John Fund, *Cash In, Contracts Out: The Relationship Between State Attorneys General and the Plaintiffs' Bar* (U.S. Chamber Inst. For Legal Reform, 2004), *available at* http://www.instituteforlegalreform.com/pdfs/Fund%20AG%20report.pdf; 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. Amicus has also filed briefs as amicus curiae in other cases presenting similar issues.

5. The Chamber seeks to assist this Court by highlighting the significance of the instant application to corporations doing business in Pennsylvania and the impact the Court's decision may have beyond the immediate concerns of the parties to this case. As the Chamber brings a unique perspective to the possibly far-reaching impact of this Court's decision, it has an important, independent contribution to make to the analysis of the issues presented to this Court.

WHEREFORE, the Chamber respectfully requests that this Court grant its motion to file out-of-time the attached brief as amicus curiae.

Respectfully submitted,

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Dated: February 9, 2009

IN THE SUPREME COURT OF PENNSYLVANIA

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. In addition to the over 4,000 Chamber members located in Pennsylvania, countless others do business in the Commonwealth and are directly affected by its litigation climate. The Chamber advocates for its members in matters before the courts, Congress, and executive branch agencies. It regularly files amicus briefs in cases raising issues of vital concern to the nation's business community.

This case is of particular interest to the Chamber and its members because permitting the Commonwealth's counsel to "contract out" its enforcement power to private attorneys can lead to prosecution of government lawsuits on the basis of private profitability, not public interest. Agreements that provide private attorneys with the right to a percentage of the recovery in an action brought on behalf of a state violates principles of due process, ethics, and fundamental fairness. They also divert public funds from use in public programs. The Chamber has a strong interest in ensuring that the government not be permitted to hire out its police power functions 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 by the constitutional checks and ethics obligations on the exercise of that authority.

INTRODUCTION

An impartial government, not influenced by personal pecuniary interests, is a cornerstone of due process. Financial interest should not cloud the judgment or discretion of a lawyer acting for the government on whether to sue, whom to sue, what claims to assert, what remedies to seek, how to prosecute the case, or how best to resolve a lawsuit filed on the public's behalf. As the California Supreme Court recognized:

> 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.

People ex rel. Clancy v. Superior Court 39, Cal.3d 740, 746 (1985). Based on these cherished principles, the California Supreme Court held that an attorney who represents the government's interests in a quasi-sovereign civil action must be "absolutely neutral," with no stake in the litigation from a contingent fee. *Id.* at 748. The rule tolerates no exception, just as public trust allows no financial taint, and good ethics condones no compromise.

The public interest and fair-minded justice, not a government attorney's potential windfall, must be paramount in any decision. Public trust in the government's fair use of its sovereign and quasi-sovereign powers and in the integrity of the judicial process is essential to our democracy. *See* The Federalist No. 78 (A. Hamilton) (J. Pole ed. 2005) (advocating the importance of "public and private confidence" in judicial integrity in order to avoid "universal distrust and distress"). This is true in civil as well as criminal cases.

The public trust should never be delegated under the guise of government control to financially self-interested attorneys who would be tempted to place their personal gain above the interests of justice. In this case, government control appears to be a paper fiction. No lawyer from the Commonwealth has even entered an appearance in this case, and the contingent fee lawyers from Texas, rather than a Pennsylvania public official, verified the complaint.

Immediate review of the contingency fee agreement is necessary to provide effective relief and to protect the public fisc. Particularly in areas of constitutional and ethical concerns, this Court should provide clear prospective guidance on permissible behavior. This Court regulates attorney conduct and is the only government body that can ensure that the

Commonwealth's use of contingent fee counsel complies with the Constitution and sound judicial policy. In this day of "pay-to-play" political headlines, this Court's immediate intervention is critical to preserve public confidence in the judicial system and to nip in the bud the taint of private financial self-interest influencing litigation by government.

ARGUMENT

I. THE COMMONWEALTH' S USE OF CONTINGENT FEE COUNSEL RAISES IMPORTANT CONSTITUTIONAL AND POLICY CONCERNS WARRANTING THIS COURT' S IMMEDIATE ATTENTION.

The contingency fee lawyers filed this lawsuit, based in part on the Commonwealth's sovereign and *parens patriae* authority, asserting that the manufacturer's improper marketing of Risperdal caused the Commonwealth to pay for off-label prescriptions. *See* Compl. ¶¶ 1, 10-11, 13, Counts I-II, IV, Prayers for Relief. The lawyers are seeking civil penalties for false claims, punitive damages, and reimbursement for *all* Risperdal prescriptions for which the Commonwealth paid through its Medicaid or Pharmaceutical Assistance Contract for the Elderly programs. The Commonwealth's sovereign authority provides its unique ability to prosecute civil or criminal penalties. *See Commonwealth v. TAP Pharmaceutical Products, Inc.*, 885 A.2d 1127, 1143 (Pa. Commw. Ct. 2005).

This lawsuit, accordingly, was brought in the name of the People purporting to protect the public interest. It raises a substantial public health issue of off-label use of prescription drugs, vitally important to thousands of citizens whom the Commonwealth claims to represent as *parens patriae*. The Commonwealth's *parens patriae* (or as is sometimes called, quasi-sovereign) authority permits the Commonwealth in certain circumstances to exert its "interest in [protecting] the health and well-being-both physical and economic-of its residents." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); *see also Commonwealth v. TAP*

Pharmaceutical Products, Inc., 885 A.2d 1127, 1143 (Pa. Commw. Ct. 2005) (recognizing that quasi-sovereign interests are required to maintain an action based on the Commonwealth's *parens patriae* authority). Indeed, the *parens patriae* authority of the state "derives from the inherent equitable authority of the sovereign to protect those persons within the state who cannot protect themselves because of a legal disability." *In re Terwilliger*, 450 A.2d 1376, 1381 (Pa. Super. Ct. 1982).[1]

Cases filed under the Commonwealth's sovereign and quasi-sovereign powers are far different from lawsuits seeking to protect the Commonwealth's own monetary or proprietary interests. *See TAP Pharmaceutical Products, Inc.*, 885 A.2d at 1143. It is a solemn obligation, with the lives and health of a multitude hanging in the balance. It is in these special classes of cases when due process protections over the ability of financially interested counsel to represent the government are the strongest.

A. Financially Interested Counsel Cannot Constitutionally Represent The Government In Its Sovereign Or *Parens Patriae* Capacity.

A government lawyer "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 whose interest, therefore...is not that it shall win a case, but that justice shall be done." *See Berger v. United States*, 295 U.S. 78, 88 (1935). Accordingly, the legal profession and the public are entitled to expect that "an attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." ABA Committee on Prof. Ethics, opn. No. 192 (1939); *see also* 65 Pa. Cons. Stat. §§ 1101.1, 1101.3 (1998)

[1] There is no suggestion that the individuals taking Risperdal are in fact under a legal disability, but the *parens patriae* suit attempts to make them unable to express and protect their own interests. Because contingency fee counsel could not succeed in bringing this case as a class action, they have recruited a government plaintiff to exercise its *parens patriae* authority.

(declaring that "public office is 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."); Model Code of Prof'l Resp. EC 8-8 (1983) ("A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties."); 28 U.S.C. § 528 (disqualifying "any officer or employee of the Department of Justice" from participating in litigation that "may result in a personal, financial, or political conflict of interest, or the appearance thereof"). Under these principles, the public "has assurance that those who would wield [the state's] power will be guided solely by their sense of public responsibility for the attainment of justice," and will not be influenced by consideration of personal benefit. *Young v. United States*, 481 U.S. 787, 814 (1987).

This Court has repeatedly recognized that the judicial system must work without bias in order to validate the public trust. "The citizens of this Commonwealth have a right not only to expect neutrality and fairness in the adjudication of legal cases, but also, they have a right to be absolutely certain this neutrality and fairness will actually be applied in every case." *County of Allegheny v. Commonwealth*, 517 Pa. 65, 75 (1987) (holding that the then-applicable scheme for county funding of the judicial system conflicted with the Pennsylvania Constitution's mandate for a unified judicial system). Thus, where the "independence, integrity and impartiality of the judicial system [is] threatened," this Court "ha[s] not hesitated to promulgate regulations and directives." *In re Matter of Stout*, 521 Pa. 571, 585 (1989). It is "this Court's core obligation in regulating attorney conduct . . . to protect the citizens of our Commonwealth, to secure the public's interest in competent legal representation, and to ensure the integrity of our legal system." *District Office of Disciplinary Counsel v. Marcone*, 579 Pa. 1, 12-13 (2004).

This Court thus has held, in the context of a criminal prosecutor, that the government lawyer must be financially neutral. A government lawyer, "unlike a private attorney, must exercise independent judgment in prosecuting a case and has the responsibility of a minister of justice and not simply that of an advocate." *Commonwealth v. Eskridge*, 529 Pa. 387, 389 (1992). To that end, "[w]hile a private attorney must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf, a prosecutor must abandon the prosecution if, in his professional judgment, justice will be promoted by doing so." *Id.* at 390 (internal citations and quotations omitted). The government lawyer, accordingly, cannot have a financial interest in the outcome of the case: a defendant has "'a right to have his case reviewed by an administrator of justice with his mind on the public purpose, not by an advocate whose judgment may be blurred by subjective reasons.'" *Id.* (quoting *Commonwealth v. Dunlap*, 233 Pa. Super. 38, 26 (1975) (Hoffman, J. dissenting)); *see also Commonwealth v. Lutes*, 793 A.2d 949, 956 (Pa. Super. Ct. 2002) (a conflict of interest exists where district attorney has a financial interest in the outcome of the case); *Commonwealth v. Balenger*, 704 A.2d 1385, 1889-90 (Pa. Super. Ct. 1997) (same).

Although this Court has not specifically addressed the duties of a civil prosecutor, there is no reason that these rules would be any different or would vary from the general ethical requirements required of all public officials. As the D.C. Circuit has explained, "no one . . . has suggested that the principle [of neutrality and duty to do justice] does not apply with equal force to the government's civil lawyers." *Freeport-McMoRan Oil & Gas v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992). It is time for this Court, too, to set forth unmistakable rules of conduct for civil actions brought by government officials.

1. The Constitution Guarantees A Neutral Civil Prosecutor.

Neutrality standards for government prosecutors are not only required by basic ethical rules and judicial policy, but are enforceable by constitutional norms as well. Entrusting the government's powers "to private persons whose interests may be and often are adverse" to the public's interest takes government out of the hands of publicly accountable, "presumptively disinterested" officials. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936). The result is governmental "delegation in its most obnoxious form," in violation of due process. *Id.*

The United States Supreme Court, for example, in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), explained that because *civil* "[p]rosecutors are also public officials, they too must serve the public interest." *Id.* at 249. There, a regional office of the Employment Standards Administration assessed civil penalties against Jerrico, Inc. *Id.* at 240. Because the regional office could receive revenue by imposing civil penalties, Jerrico argued that the prosecutor had an improper financial interest in the enforcement process in violation of due process. *Id.* at 241. Under those facts, the Court found no constitutional violation because it was "plain that no official's salary [was] affected by the levels of the penalties" collected in the "government's enforcement actions" and thus any "influence alleged to impose bias is exceptionally remote" and indirect. *Id.* at 245, 250. The Court explained, however, where civil penalties are being sought, "[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." *Id.* at 250. That is the precise "scheme" here, where the government is seeking civil penalties and punitive damages through which the contingency fee lawyers would benefit financially.

Citing the Due Process Clause, the California Supreme Court in *Clancy* likewise explained the dangers of allowing private contingent fee lawyers to represent the government's

quasi-sovereign interests in a civil case. In that case, a City had hired a private attorney on a contingent fee basis to bring an action against an adult book store to abate a public nuisance. The private attorney would receive $30 per hour for an unsuccessful case and $60 per hour for a successful case — a pittance compared to the fees potentially available to the Commonwealth's lawyers in this case. *Id.* at 745. The Court rejected the private attorney's contingent fee arrangement, holding that attorneys representing the government and the People of California in this "class" of quasi-sovereign actions must be "*absolutely neutral*" and that "*[a]ny* financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." *Id.* (emphases added).

The California Supreme Court emphasized that government attorneys "must act with the impartiality required of those who govern" and that the "proper function of the judicial process as a whole" requires the process itself to be free from any apparent taint to the general public. *Id.* at 746 (quotation marks and brackets omitted). Based on these fundamental principles of neutrality, the Court struck the City's fee arrangement, as it provided the attorney "an interest extraneous to his official function in the actions he prosecutes on behalf of the City." *Id.*

That Clancy was not a government employee did not matter. The Court explained that "a lawyer cannot escape the heightened ethical requirements of one who performs government functions merely by declaring that he is not a public official." *Id.* at 747. The same, higher standards apply to all lawyers, without exception, who represent the government. "The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards." [2]

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[2] The cases cited by the Commonwealth are inapposite as they do not deal with the government's sovereign or quasi-sovereign interests. As the California Supreme Court explained in *Clancy*, the government remains free to hire contingency fee counsel in cases where it is asserting a proprietary claim of a type that a private plaintiff could bring. 39 Cal.3d at 748. The Commonwealth's cited authority involves exactly those types of claims. *See City and*

Id. The Commonwealth's attorneys cannot evade the due process, ethical and policy limitations preventing them from having a financial interest in the outcome by delegating their powers and responsibilities to others.

2. The Commonwealth's Use of Contingency Fee Counsel Here Violates Due Process.

Contingent fee counsel in this case cannot live up to the constitutionally required standards of neutrality as they have a huge, direct financial interest in the outcome of the litigation. Counsel stand to recover hundreds of millions of dollars if successful—far more than the $30 an hour increase in compensation at issue in *Clancy*. The arrangement in *Clancy* also did not transfer the entire risk of litigation to the outside attorney, nor did it tie compensation to the size of the recovery. Here, if contingency fee counsel are unsuccessful, they will lose their entire investment in working up the case. Where, as here, private counsel are investing millions of dollars and hope to recover millions of dollars, no reasonable person can suggest that counsel's *sole* interest is that of the public's.[3] Robert Levy, *The New Business of Government Sponsored*

(continued...)

County of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130 (N.D. Cal. 1977) (contingency fee counsel allowed in lawsuit including ordinary tort claims like fraud, breach of warranty, and unjust enrichment); *Philip Morris, Inc. v. Glendening*, 709 A.2d 1230 (Md. 1998) (same).

[3] Commentators have expressed deep concern about the effect of this financial self-interest on the fair representation of the public's interest. *See* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 590 (1994) ("A private prosecutor, who is being paid handsomely to convict someone, cannot also, without at least some subtle bias, fairly represent the interests of that person and consider the 'public interest' in treating that person justly."); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. Rev. 29, 39-42 (1989) (discussing cases barring use of contingency fee agreements due to the danger of corrupting justice); Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 Mich. St. L. Rev. 941, 973-74 (2007) ("It certainly makes sense that an attorney cannot guarantee neutrality in a case in which he will not be paid unless he wins.").

For this reason, criminal prosecutors have long been prohibited from accepting contingent fees. *See Baca v. Padilla*, 190 P. 730, 731 (N.M. 1920) (finding it would be against state public policy to compensate a private prosecutor under a contingency fee arrangement, reasoning that a private prosecutor's "personal interests would be subserved best by securing the conviction of the defendant, and this regardless of the question as to whether or not the defendants were guilty or innocent"); *State v. Storm*, 661 A.2d 790, 794 (N.J. 1995) (holding that the victim's

Litigation, 9 Kan. J.L. & Pub. Pol'y at 592, 598 (2001) ("We cannot, in a free society, condone private lawyers enforcing public law with an incentive kicker to increase the penalties.").

Indeed, counsel's incentive under the contingent fee agreement in this case is to win and win big. To that end, counsel are seeking civil penalties and punitive damages in addition to money damages. *See* Janssen's Ex. B, Compl., Prayers for Relief to Counts I-V.[4] Counsel also contend that most Risperdal prescriptions were "medically unnecessary" and seek recovery of *all* payments for those prescriptions. *Id.* ¶¶25, 31, 34-36. But, "the government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants." Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 36 (2000). Government attorneys could not paper over this serious, inherent conflict by claiming that their superiors have no financial interest; accordingly, neither can private lawyers standing in the shoes of government attorneys and wielding their authority and power.

Counsel here are not representing an individual client, but instead purport to represent the Commonwealth's citizens and seek recovery on their behalf. *See* Janssen's Ex. B, Compl. ¶¶10, 11, 13. Counsel's decisions in this lawsuit will affect the affordability and in many cases the availability of prescription drugs that doctors have determined are medically necessary and have prescribed for the Commonwealth's citizens. Counsel with an extremely large financial interest to find every prescription to be "medically unnecessary" should not be permitted to insert

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(continued...)

counsel in a civil action could not also act as the private prosecutor against the defendant in the criminal action due to counsel's financial incentive to convict the defendant).

[4] Although not an issue at this time, in addition to civil penalties, the manufacturer may be subject to future criminal penalties as well if the civil case is successful. *See* 62 Pa. Cons. Stat. § 1407(b)(1) (1967) (imposing criminal penalties, including third-degree felony charges with a maximum penalty of up to $15,000 in fines and seven years imprisonment).

themselves into the doctor-patient relationship and make decisions affecting individual patient and public health.[5]

Moreover, by prohibiting the Commonwealth from settling the case for non-monetary relief without defendants' payment of attorney fees (Appendix C, ¶3), the agreement also impedes the government's freedom to solve a perceived public health problem. Particularly in public health, monetary relief is not always the best solution. Prospective programs or regulatory action instead of lawsuits oftentimes are preferable and can be agreed to or recommended to resolve litigation. Nonetheless, pushing the lawsuit until some monetary recovery is made is the only solution that makes any financial sense to contingent fee counsel.[6] As one commentator explained in the context of litigation brought under the government's *parens patriae* authority: "[I]t is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work." David Dana, *Public Interest and Private Lawyers: Toward A Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. 315, 326 (2001).[7]

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[5] One would surely object to the ethical problem of a company paying a physician for each prescription he or she wrote, or the government rewarding a physician for each prescription or treatment terminated. The ethical odor is no different than if the government were to reward a lawyer for inducing a client's guilty plea or a client's agreement to stop or reduce disability benefits.

[6] One could imagine, for example, that the Commonwealth could save millions of dollars in the future through a prospective program in which it defines "medically necessary" and compensable uses of Risperdal, and Janssen educates doctors regarding the prohibition on billing for prohibited off-label uses. The legislature, with its ability to hold hearings and investigate, could also devise a global regulatory solution to ensure that the Commonwealth's interests are protected in all prescription drug cases. Practical or regulatory solutions, however, are unlikely to generate a sufficient fee for counsel.

[7] *See also* Dana, *Public Interest and Private Lawyers: Toward A Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. at 323 ("Sometimes public interest considerations dictate dropping litigation altogether or focusing on non-monetary relief more than monetary relief. But contingency fee lawyers, perhaps unlike most government lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims or some faction of them, in return for non-monetary concessions.")

The Commonwealth's ability to protect public health is severely limited by the contingent fee agreement in this case. Where neutral government lawyers have never even entered an appearance and the complaint was verified by contingent fee counsel, the risk that counsel could steer important government programs based on profit motive rather than public interest is heightened.

In the public's eyes and in reality, "money talks." The choice of defendants, theories, claims and remedies are all potentially influenced by the size and type of recovery that could potentially be extracted from a defendant.[8] The Due Process Clause prohibits disrupting these public decisions through the introduction of personal pecuniary interests—even if the judiciary itself remains unbiased. *See, e.g.*, *Young*, 481 U.S. at 809 (appointing a private attorney to prosecute a contempt action that benefited the attorney's client violates due process); *Ganger v. Peyton*, 379 F.2d 709, 713-14 (4th Cir. 1967) (due process violation where prosecutor also represented the defendant's ex-wife in her divorce from the defendant). Under these circumstances, there is no neutrality and due process is violated.

B. Pennsylvania Public Policy Prohibits Contingency Fee Contracts Under These Circumstances.

The constitutional and ethical rules prohibiting the Commonwealth's use of a contingency fee agreement here align with sound judicial policy. In many areas of law, contingency fees continue to be proscribed because of the risk of introducing an improper financial interest. Where the government, which has the power to tax and regulate, resorts to contingent fee counsel, the courts' skepticism is even higher, because of the grave risk that

[8] The incentives to bring a lawsuit and then to shape it to maximize the financial recovery are not there when only government officials or even hourly outside counsel are used. No matter the outcome of the litigation, they will be paid. Nor are lawyers left penniless and out-of-pocket on expenses in the event of a non-monetary settlement or if changed circumstances no longer warrant the lawsuit. There is no incentive for non-contingent fee counsel to shape the lawsuit through the selection of defendants, theories, claims or remedies in the same way as contingent fee counsel.

contingency fee agreements create an appearance of impropriety. *See City of Hialeah Gardens v. John L. Adams & Co., Inc.*, 599 So.2d 1322, 1325 (Fla. Dist. Ct. App. 1992) ("For our citizens to support our institutions of government, they must have confidence in the integrity of public officials and in their actions, and among other things, they have a right to expect good faith and honest dealings in expenditure of the public treasury. As between the innocent tax paying public and those who would gain from contingent contracts with public entities or agencies, we come down on the side of the tax payer.").

For example:

- Thirty-two states, including Pennsylvania, prohibit contingency fee agreements to pay attorneys to petition the government because of "the potential for abuse in public decision-making." *Sholer v. State ex rel. Dep't of Public Safety*, 49 P.3d 1040, 1046 (Okla. Ct. Civ. App. 2006); 18 Pa. Cons. Stat. § 7515 ("No person may compensate or incur an obligation to compensate any person to engage in lobbying for compensation contingent in whole or in part upon the passage, defeat, approval or veto of legislation.").[9] This blanket prohibition applies even though government representatives have no financial interest and total control over their vote.
- Contingency fee agreements, likewise, have been prohibited in both criminal prosecutions and criminal defense cases out of risk of an undue and unfair influence on the judicial system. Pa. R. Prof. Conduct 1.5(d)(2); *Baca*, 190 P. at 3; *United States ex rel. Simon v. Murphy*, 349 F.Supp. 818, 823 (E.D. Pa. 1972) (granting writ of habeas corpus because defense attorney, whose payment depended on a not-guilty finding, failed to present offer of plea bargain: "To put it bluntly, by advising the persistence in a not guilty plea, [the attorney] had nothing to lose but his client's life.").
- Contingency fees are barred in divorce cases because they provide incentives that are not in the public interest, such as discouraging reconciliation, and risk the

[9] *See also* 10 U.S.C. § 2306(b); *Providence Tool Co. v. Norris*, 69 U.S. 45, 54-55 (1864) (holding that contingency fees for procuring government contracts are against public policy, reasoning that "[t]hey tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds."); *Marshall v. Baltimore & Ohio R.R. Co.* 57 U.S. 314, 335 (1853) (invalidating a contingency fee lobbying contract, stating that "[l]egislators should act with a single eye to the true interest of the whole people, and courts of justice can give no countenance to the use of means which may subject them to be misled by the pertinacious importunity and indirect influences of interested and unscrupulous agents or solicitors."); *City of Hialeah Gardens*, 599 So.2d at 1323-24 (reasoning that contingency fee contracts for services to procure a government contract are contrary to public policy because "[t]here is a legitimate public policy concern that such contingent fee arrangements promote the temptation to use improper means to gain success."); *Bereano v. State Ethics Comm'n*, 944 A.2d 538 (Md. 2008); *Holt v. City of Maumelle*, 817 S.W.2d 208, 211(Ark. 1991); *Rome v. Upton*, 648 N.E.2d 1085, 1088 (Ill. App. Ct. 1995).

manipulation of the form of recovery to maximize profit. *See, e.g.*, Pa. R. Prof. Conduct 1.5(d)(1) (prohibiting contingency fees based on the amount of alimony or support obtained in a divorce action); *McCrary v. McCrary*, 764 P.2d 522, 525 (Okla. 1988) ("Public policy encourages reconciliation between the parties. A contingency fee arrangement, based on the amount recovered in a divorce case, gives the attorney a personal interest in the litigation thus serving as an impediment to reconciliation."); *In re Jarvis*, 869 P.2d 671, 674 (Kan. 1994) (by tying the attorney's fee to the amount recovered through alimony or property settlement "self interest would encourage the attorney to seek a maximum maintenance award at the expense of other parts of the decree. . .").

- Even expert witnesses are prohibited from being paid under a contingency fee agreement due to concerns that the fee would influence their testimony. *Merva v. Workers' Compensation Appeal Bd.*, 784 A.2d 222 (Pa. Commw. Ct. 2001) ("Fee agreements with expert witnesses that exceed the legal fee provided for other witnesses are now permitted. . . but only if such expert fees are not 'contingent on the outcome of the controversy.'" (quoting Restatement of Contracts § 552)).

The potential for and appearance of impropriety based on contingency fees apply with equal force here. As one commentator explained, a contingency fee contract between a state and private attorney is "a sure-fire catalyst for the abuse of power." *Business of Government Sponsored Litigation*, 9 Kan. J.L. & Pub. Pol'y at 598.[10] Sound judicial policy has long recognized that the moral is to remove financial temptation in order to maintain public trust.

This Court stands as the guardian of ethics and due process in the courtroom. It should not tolerate an exception to the bedrock principles that government representatives, especially when acting as *parens patriae* or in its sovereign capacity, have a unique obligation to serve the People, impartially treat all persons, and safeguard the public trust.

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[10] *See also Litigation in Mississippi Today: A Symposium Luncheon Featuring Attorney General Dick Thornburgh*, 71 Miss. L.J. 505, 511 (2002) ("Recent lawsuits involving lawful products . . . promote a kind of regulation by litigation, where trial lawyers take the place of legislators. A development described . . . as not healthy."); D. Thornburgh, *Commentary, The HMO Dilemma: What's the Fairest Battlefield in the Fight for Better Health Care? The Courts Should Be Used To Redress Harms and Not As a Vehicle To Change the System*, L.A. Times, April 23, 2000, at Part 5 ("[P]laintiff attorneys now are targeting the deep pockets of managed health care insurance companies. Their goal, according to one of the lead attorneys, Richard Scruggs, is not to redress alleged wrongs but to 'change this unconscionable health care system through the courts.' Very dramatic. Yet not very democratic.")

II. THE QUESTION OF THE PROPRIETY OF THE COMMONWEALTH RETAINING PRIVATE COUNSEL WITH CONTINGENCY FEE CONTRACTS WILL RECUR AND CANNOT BE EFFECTIVELY ADDRESSED AFTER FINAL JUDGMENT.

A. The Court Should Immediately Review The Issues.

The Court should not wait until final judgment to address the serious issue posed by the Commonwealth's use of a contingency fee agreement in this case. Courts have recognized that once conflicted attorneys participate in a case, it is almost impossible to determine the effect of their conflict on representation. As a plurality of the United States Supreme Court has explained, the "[a]ppointment of an interested prosecutor is also an error whose effects are pervasive. . . . 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." *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 812-13 (1987) (plurality op.).

The private attorneys, who run the litigation on a day-to-day basis, inform the public officials' view of the case, making it impossible to separate the officials' decisions from those of private counsel. *See Normative Evaluation Of Parens Patriae Litigation By Contingency Fee*, 51 DePaul L. Rev. at 329 ("As long as contingency fee lawyers lead the litigation, these lawyers invariably will control the development and presentation of the 'facts' to the [government lawyers] and their staff. Thus, even when the [government lawyers] are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the [government lawyers] and their staff may lack the necessary information to shape litigation outcomes."). The Commonwealth's assurance that it is in control, so "just trust it," should ring hollow—it ignores reality. Moreover, waiting until the end of the litigation merely invites error to compound and

eliminates the possibility of forming any effective relief other than reversal of a plaintiff's verdict, if one occurs, after years of expensive litigation.

Delay also places the public's money at risk. Contingency fee awards are often misrepresented as coming at no cost to the public, with no need for government resources, but that is hardly true. Bill Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder (Wash. Legal Found., Wash., D.C.), May 18, 2001, at 4, available at http://www.wlf.org/upload/051801LBPryor.pdf ("The use of contingent-fee contracts allows governments to avoid the appropriation process; it creates the illusion that the 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."). Indeed, the Commonwealth says in this case that money paid to outside counsel under a contingency fee agreement does not qualify as public funds because the fee is paid out of the award prior to submitting it to the Treasury. But these contracts are not free. A fee 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.

The public loses when contingency fee counsel skim a percentage off the top and public funds are siphoned off before they reach the Treasury. For instance, in Pennsylvania, the twenty-fourth state to join the tobacco litigation, two private firms handpicked by the then Attorney General split $50 million in fees, the equivalent of about $1,323 per hour. Glen Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, Philadelphia Inquirer, Oct. 4, 1999, at A1. This Court should consider the propriety of the fee agreement before the end of the litigation to ensure that public funds are not squandered and that all parties are treated fairly.[11]

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[11] *See Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997) (finding contingency fee arrangement between state and private firm violated the principles of separation of powers); *see also* Office of the State Auditor,

Nor is there any apparent impediment to immediate review. The issue is one of pure law and is discrete. This Court undoubtedly has the authority to oversee the practice of law in Pennsylvania, including attorney fee issues, and to protect the Constitution. Pa. Const. art. V, § 10(c); *Capek v. Devito*, 564 Pa. 267 (2001) (deciding appeal where attorney sued former client to recover fees owed under a contingency fee contract; *Beyers v. Richmond*, 594 Pa. 654, 665-667, 671 (2007) (holding that application of the Unfair Trade Practices and Consumer Protection Law to attorney conduct in collecting and distributing settlement proceeds would encroach upon the exclusive authority of the Supreme Court to govern the practice of law in Pennsylvania). In fact, Pennsylvania courts have held that the legislature has no authority to regulate the practice of law. *Gmerek v. State Ethics Commission*, 751 A.2d 1241 (Pa. Commw. Ct. 2000) (determining that legislation was void where it sought to regulate activities constituting the practice of law in violation of Article 5, Section 10 of the Pennsylvania Constitution, which gives the judiciary the exclusive authority to regulate the practice of law in Pennsylvania). This Court thus is the only body that can decide these important issues.

B. Guidance Is Necessary As These Issues Are Likely To Recur.

As the many news articles, editorials and law review commentaries demonstrate, many responsible public officials and citizens are troubled by the serious constitutional, ethical, public policy and separation of powers problems raised by government's expedient use of contingency fee counsel to prosecute public interest lawsuits. These problems are not going away. The Court's guidance is necessary so that governments and attorneys can adjust their conduct.

(continued...)

Mississippi, Informational Review: MCI Tax Settlement With the State of Mississippi (2006) 2-4, 13, *available at* www.osa/state.ms.us/documents/performance/mci-tax-review06.pdf. (auditor findings that the Attorney General had acted beyond the scope of his constitutional and statutory authority by paying private lawyers out of funds not in his legislatively-approved budget and which should have been placed in the Treasury for public benefit).

Particularly where ethical or constitutional concerns are raised, it is important for all involved to understand how to act. *See, e.g.*, *Commonwealth v. Coleman*, 574 Pa. 261, 275 n.10 (2003) (recognizing that bright-line rules provide guidance to law enforcement officials); *Snider v. Superior Court*, 113 Cal. App. 4th 1187, 1197 (2003) ("[W]ith regard to the ethical boundaries of an attorney's conduct, a bright line test is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible."); *Arizona v. Roberson*, 486 U.S. 675, 681-82 (1988) (bright line rule important to guide law enforcement officials). As is evident from the parties' briefing, as more governments have attempted to circumvent the rules of neutrality, these issues have been raised with growing regularity.

The increasing frequency of these types of contingent fee contracts and the headlines they generate unfortunately undermine public faith in the judicial system and create the appearance that lucrative contracts are for sale in exchange for political patronage. *See e.g.*, Editorial, *All Aboard the Gravy Train*, St. Louis Post-Dispatch, Sept. 17, 2000, at B2; Assoc. Press, *Lawyer Fees Weren't S.C.'s, Official Says,* Charlotte Observer, May 2, 2000, at 1Y; Glen Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, Philadelphia Inquirer, Oct. 4, 1999, at A1; Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, Legal Times, Feb. 1, 1999, at 27. When public entities hire contingency fee counsel, as here, they often circumvent open and competitive process used with other contracts to assure that the government receives the best value and quality. Even where governments have issued some type of request for proposals, there are often lax selection standards. Thus, governments have routinely awarded highly lucrative contingency fee contracts to friends and political supporters, so that private attorneys benefit at the expense of the public interest and taxpayers.

Abundant examples around the country show that state officials routinely choose their political donors to represent the state on a contingency fee basis. The examples of political favoritism and dangers of corruption are well-reported:

- Former Texas Attorney General Dan Morales was 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 state's tobacco litigation;[12]
- The two firms selected by then Pennsylvania Attorney General to handle the tobacco lawsuits also happened to be among his largest campaign donors, placing in the top ten on a list of more than two hundred contributors. [13]
- South Carolina Attorney General Charles Condon handpicked seven law firms to represent the state in the tobacco litigation, six of which included the attorney general's friends or political supporters;[14]
- 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, for which they eventually received $111 million in fees;[15]
- In 1996, then-Attorney General Carla Stovall of Kansas hired her former law partners at Entz & Chanay to serve as local counsel in the State's tobacco lawsuit.[16] Attorney General Stovall testified that she asked her former law firm to take the case "as a favor" in part due to the "personal loyalty."[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 and contributed money to her campaign effort;[18]

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[12] *See* John Moritz, *Morales Gets 4 Years in Prison*, Forth Worth Star Telegram, Nov. 1, 2003, at 1A.

[13] *See* Glen Justice, *In Tobacco Suit, Grumblings Over Lawyer Fees*, Philadelphia Inquirer, Oct. 4, 1999, at A1.

[14] *See* Assoc. Press, *Lawyer Fees Weren't S.C.'s, Official Says*, Charlotte Observer, may 2, 2000, at 1Y.

[15] Editorial, *All Aboard the Gravy Train*, St. Louis Post-Dispatch, Sept. 17, 2000, at B2; 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.

[16] *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.

[17] *Id.* at 17.

[18] *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.

- Oklahoma Attorney General Drew Edmondson retained three private plaintiffs' firms to sue poultry companies for water pollution in an agreement that entitled them to receive up to half of the recovery;[19] and
- 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.[20]

In contrast, other public officials have wisely decided not to use contingency fee counsel for public interest, *parens partiae* litigation. And, they have found no imperative need to use contingency fee counsel to litigate effectively. As Bonnie Campbell, the former Attorney General of Iowa explained,

> In Iowa, where I was attorney general, we resolved the issue quite simply. When it was necessary to retain private counsel, we paid an hourly fee. Furthermore, the decision to retain outside legal assistance required approval from an executive council that included the governor and other senior elected officials. Thus, ultimate decision-making power remained with public officials and was not clouded by the desire for personal financial gain.
>
> There are times when private attorneys can help advance the public interest, but they must always be the servant of the public, not the master. When a state decides to litigate, there must be no doubt that prosecutorial neutrality prevails.

Penny-wise, Pound Foolish: Hiring Contingent-fee Lawyers to Bring Public Lawsuits Only Looks Like Justice on the Cheap, LegalTimes.com, at 4, August 18, 2003.[21] The

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[19] *See* Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. Times, July 9, 2007, at A10.

[20] Editorial, *Ieyoub's Expedition*, New Orleans Times Picayune, November 28, 1994, at B6. Upon a challenge, the Louisiana Supreme Court invalidated the contingency fee agreements. *See Meredith v. Ieyoub*, 700 So. 2d 478 (La. 1997).

[21] Former New York Attorney General Eliot Spitzer, considered one of the most aggressive and activist state attorneys general, did not enter into contingency fee agreements with private lawyers. *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). In the multi-state tobacco suits, the attorneys general of some states, such as Virginia, also opted not to hire contingency 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. The federal government also pursues litigation without hiring lawyers on a contingency fee basis. *See* Executive Order 13433, "Protecting American Taxpayers from Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007).

Commonwealth's implicit argument that the "ends justify the means" is not only repulsive to due process, good ethics and prudent policy, but it cannot withstand scrutiny in actual practice.

In the wrong situation, as here, contingency fee contracts force government officials to waste taxpayer dollars and divert their attention from the public good. Without this Court's intervention, in this day of "pay-to-play" headlines, these cases will continue to arise and public confidence will continue to erode. The Court should act now to preserve the appearance of propriety and instill public faith in an impartial legal process. There can be no appearance of justice when the government's counsel has a financial stake in the lawsuit.

CONCLUSION

The Court should grant Janssen's application for extraordinary relief.

Respectfully submitted,

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