Appeal No. 13-5792/13-5881

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Merck Sharp & Dohme Corp.,

Plaintiff - Appellant Cross-Appellee,
v.

Jack Conway, in his capacity as Attorney General of the Commonwealth of Kentucky,

Defendant - Appellee Cross-Appellant.

On Appeal from the United States District Court
for the Eastern District of Kentucky
Hon. Danny C. Reeves
Case No. 3:11-cv-00051-DCR-EBA

AMICUS CURIAE BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PLAINTIFF - APPELLANT CROSS-APPELLEE AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 13-5792 Case Name: Merck, Sharp & Dohme Corp. v. Conway

Name of counsel: Mark A. Behrens and Cary Silverman

Pursuant to 6th Cir. R. 26.1, Product Liability Advisory Council, Inc.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on July 9, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Mark A. Behrens

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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QUESTIONS PRESENTED

1. Whether the district court erred in finding that a state can retain contingency-fee counsel with a direct and substantial financial stake in a quasi-criminal enforcement action seeking civil penalties against a product manufacturer.

2. Whether, assuming *arguendo* that retention of outside counsel is constitutionally permissible in such situations, the district court erred in finding the Commonwealth retained control over the subject litigation despite evidence demonstrating the lack of involvement of government attorneys?[1]

IDENTITY AND INTEREST OF *AMICI CURIAE* AND SOURCE OF AUTHORITY TO FILE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with over 100 corporate members from a broad cross-section of American and international product manufacturers. PLAC's corporate members are listed at Appendix A. In addition, several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC.

PLAC seeks to contribute to the improvement and reform of the law affecting product liability. PLAC's point of view reflects the experience of corporate members in diverse manufacturing industries. Since 1983, PLAC has

[1] No party or any counsel for a party in this appeal authored the proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than PLAC made a monetary contribution intended to fund the preparation or submission of the brief.

filed over 1,000 *amicus* briefs in state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in product liability law.

The issue of whether it is permissible for state officials to delegate enforcement of state law, including imposition of quasi-criminal civil penalties, to outside counsel on a contingent-fee basis is significant to product manufacturers. Such fee arrangements have occurred with increasing frequency since the hiring of private contingency-fee counsel by state attorneys general first gained nationwide attention in the coordinated litigation against the tobacco industry in the 1990s.[2]

In recent years, state officials have retained contingency-fee counsel to challenge the marketing and pricing practices of prescription drug manufacturers, in addition to claims against other defendants for environmental contamination to lead paint exposure. *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 S. Ct. Econ. Rev. 77, 81-82 (2010).[3]

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[2] *See* Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 Conn. L. Rev. 1143, 1193 (2001) ("Despite repeated assertions by the attorneys general and their attorneys that the tobacco suits were about tobacco only, these governmental suits have expanded to other industries—as anything so richly endowed will.").

[3] *See also* Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law, Hearing Before The Subcommittee on the Constitution of the Committee on the Judiciary, House of Representatives, Serial

Due process concerns are raised when state executives delegate enforcement of the law to private attorneys on a contingency-fee basis. Such litigation also raises public policy problems as the public interest may be in conflict with the interests of private attorneys who are motivated solely by profit.[4]

PLAC submits this brief with an accompanying Motion for Leave to File.

JURISDICTIONAL STATEMENT

PLAC adopts Plaintiff-Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

PLAC adopts Plaintiff-Appellant's Statement of the Case.

STATEMENT OF THE FACTS

PLAC adopts Plaintiff-Appellant's Statement of Facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

A state's delegation of its power to enforce the law and punish individuals and corporations through imposition of substantial civil penalties in actions by private contingency-fee counsel violates due process and is unsound public policy.

No. 112-82, 112th Cong., 2d Sess., at 4-6 (Feb. 2, 2012) (testimony of Testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute For Policy Research).

[4] *See* Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, But Critics Still Focus on Arguments of the Past*, 31 U. Dayton L. Rev. 173 (2006); 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 (2000).

The interests of government and private contingency-fee attorneys are widely divergent. Attorneys for the state 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). Conversely, contingency-fee attorneys are legitimately motivated by financial incentives to maximize recovery for their private clients. The two functions—impartial governance and for-profit lawsuit—are irreconcilably conflicted.[5] They should not and cannot mix.

Here, the Commonwealth of Kentucky hired a private law firm on a contingency-fee basis to seek recovery from a pharmaceutical manufacturer based on its marketing of the anti-inflammatory pain reliever Vioxx five years after the product was removed from the market. The contingency-fee agreement gave the outside counsel the "lead role" in pursuing the litigation. As the Plaintiff-Appellant's brief shows, upon its retention, the private firm submitted all briefs, made all appearances at hearings, participated in mediation, and exchanged all correspondence with Merck. *See* Merck Br. at 14-16. The Commonwealth's

[5] *See* David M. Axelrad & Lisa Perrochet, *The Supreme Court of California Rules on Santa Clara Contingency Fee Issue – Backpedals on Clancy*, 78 Def. Couns. J. 331, 337 (July 2011) ("there can be serious conflicts between the objectives of an attorney who is paid a percentage of the recovery and the objectives of the public.").

attorneys lacked knowledge of, or involvement in, key aspects of the case. *See id.* at 11-13, 17.

The private attorneys developed the theory of the litigation. *See* Merck Br. at 23. The claim does not seek recovery of financial losses of the Commonwealth or its residents, but would punish the manufacturer by imposing the maximum civil penalties provided by the Kentucky Consumer Protection Act (KCPA) – $2,000 for each and every prescription of Vioxx filled in the Commonwealth, an amount that rises to $10,000 if the company is shown to have targeted the sale to a person over 65 years of age. *See* Ky. Rev. Stat. §§ 367.170, 367.990. The private lawyers prosecuting the case stand to obtain eighteen percent of any fines collected, a sum that could amount to millions of dollars in compensation. When the federal government and forty-two attorneys general entered into a settlement agreement in 2011 to settle Vioxx-related Medicaid claims, a result that may have also best served the interest of Kentucky residents, the Commonwealth's outside counsel signed a letter rejecting the offer. *See* Merck Br. at 16. By all outward appearances, the Attorney General had little involvement in this settlement decision. *See id.* at 16-17. Instead, the private lawyers appear to have decided on taking their chances at obtaining a jackpot verdict built on civil penalties.

The district court found this arrangement, particularly the Office of the Attorney General's (OAG) unfamiliarity with aspects of the litigation, "troubling."

Mem. Op. & Order, May 24, 2013, at 20 (hereinafter "MSJ Order"). The Assistant Attorney General assigned to oversee the litigation did not know if experts had been retained in the case, could only identify the role of seven of sixty-five listed witnesses, and did not even know the forty-five violations of the KCPA asserted by outside counsel. *See id.* at 20, 22-23. The district court viewed aspects of the government attorneys' involvement in the litigation as "disappointingly casual," "disconcerting," and indicative of "complacency or laziness." *Id.* at 23-24. The district court nevertheless relied on the government lawyer's general familiarity with the litigation, the OAG's limited involvement in the case, and language in the contingency-fee agreements[6] to find that since the OAG retained the right to direct the litigation, *id.* at 4, 19 n.6, 20, there was no due process violation. The Court found that "[a]s long as the AG's office is reviewing the contingency-fee counsel's work before adopting or approving it....the AG has retained and exercised his decisional authority." *Id.* at 26. But, given the attorney-client privilege and work-product doctrine, the district court has set an impossible standard.

Contingency-fees arrangements gained acceptance in the U.S. as a means to provide individuals with limited means with access to the legal representation, not for governments with substantial legal staffs and the ability to appropriate

[6] After the original contingency-fee agreement expired, and Merck challenged the arrangement in federal court, the Commonwealth entered a new contract that contained additional terms purporting to strengthen the OAG's authority to control litigation decisions. Slip Op. at 4.

resources. If the Commonwealth paid its health or building code inspectors, parking enforcement officers, or police officers a commission-based salary based on the amount of fines they impose, there would likely be a public outcry expressing concern that such arrangements would lead to excessive charges based on dubious violations. The same concerns apply to private lawyers acting in the name of the Commonwealth when such lawyers stand to receive a significant portion of civil penalties imposed under Kentucky's consumer protection laws.

Indeed, as this brief will show, there are important differences between government lawyers, who are bound by a special set of ethics considerations and rules, and private attorneys, who step into the shoes of the Commonwealth but are unrestrained by similar safeguards. The Commonwealth has effective alternatives to enforcing state law. These factors support Plaintiff-Appellant's position that the Commonwealth's use outside counsel with a direct and substantial financial stake in the outcome of the subject litigation violates due process.

When government litigation seeks to punish a manufacturer through imposition of civil penalties, a bright-line prohibition against the use of contingency-fee counsel is appropriate. If such arrangements are permitted in some circumstances, then due process must require rigorous safeguards to ensure that the government actually controls all aspects of the litigation.

PLAC urges the Court to reverse the district court's ruling and grant summary judgment to Merck. Alternatively, the case should be remanded for trial.

ARGUMENT

I. STATE EXECUTIVE RETENTION OF PRIVATE CONTINGENCY-FEE COUNSEL IN QUASI-CRIMINAL ACTIONS SEEKING CIVIL PENALTIES SHOULD BE FOUND TO VIOLATE DUE PROCESS AND REPRESENTS UNSOUND PUBLIC POLICY

Retention of private contingency-fee counsel by state attorneys general is contrary to the historic justification for such fee arrangements and raises significant due process, legal ethics, and public policy concerns.

A. The Purpose of Contingency Fees is to Provide Access to Justice to Those Who Cannot Afford to Sue; Government Use is Suspect

Contingency fees, when properly used, can serve a worthy purpose: providing access to the legal system, regardless of means. *See* Lester Brickman, *Contingency Fees Without Contingencies: Hamlet Without the Prince of Denmark*, 37 UCLA L. Rev. 29, 43-44 (1989). As the Model Code of Professional Responsibility recognizes, the historic basis for acceptance of contingency-fee arrangements is that they often "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); *see also* Alfred D. Youngwood, *The Contingent Fee-A Reasonable Alternative?*, 28 Mod. L. Rev. 330, 334 (1965) (observing that "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").

When contingency-fee agreements 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. Indeed, despite the widespread use of contingent-fee agreements today, such arrangements remain subject to prohibitions and limitations. For example, contingency fees are not permitted in criminal prosecutions because they threaten to corrupt justice by incentivizing lawyers to win at any cost. *See* Ky. S. Ct. Rule 3.130(d) (Rule of Professional Conduct 1.5). As one court explained in holding that sound public policy was violated by a contract which paid a private attorney assisting in the prosecution of a criminal case a fee that was contingent upon obtaining a conviction:

> [W]e have injected into the prosecution of a criminal case a prosecutor whose 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 defendant were guilty or innocent; that is to say, the size of his fee, or possibly whether he receive any fee at all, would be dependent upon the conviction of the defendant, however innocent he might be. This is contrary to the policy of our law. The state provides a prosecuting attorney, pays him a salary, and no part of his compensation is dependent upon the conviction or acquittal of those charged with infractions of the state law. He is supposed to be a disinterested person, interested only in seeing that justice is administered and the guilty persons punished. To permit and sanction the appearance on behalf of the state of a private prosecutor, vitally interested personally in securing the conviction of the accused,

> not for the purpose of upholding the laws of the state, but in order that the private purse of the prosecutor may be fattened, is abhorrent to the sense of justice and would not, we believe, be tolerated by any court.

Baca v. Padilla, 190 P. 730, 731-32 (N.M. 1920).[7] Contingency-fee agreements are also facially invalid in divorce cases because they would discourage reconciliation. *See* Ky. S. Ct. Rule 3.130(d).

Rule 1.5's express prohibition on contingency fees in representing criminal defendants and in domestic relations cases 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) *or other law*." *Id.* Ky. S. Ct. Rule 3.130(c) (emphasis added). "Other law" includes situations where such agreements are void for public policy, violate due process, or are prohibited by statute. *See, e.g., Marshall v. Baltimore & Ohio R.R.* Co., 57 U.S. 314, 334 (1853) (invalidating a contingency-fee contract based on securing the passage of state legislation as "tend[ing] to corrupt or contaminate, by improper influences, the integrity of our social or political institutions").[8]

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[7] The court also found that a contingency-fee agreement was invalid in the criminal context because "the state by its prosecuting officers is presumed to be able to attend to the prosecution of all criminal cases," and therefore there is no need to hire counsel on a contingency-fee basis. *See id.* at 731.

[8] *See also* National Conf. of State Legislatures, Ethics: Contingency Fees For Lobbyists (2011) (citing the laws of 43 states, including Kentucky, that have adopted statutes explicitly prohibiting contingent-fee contracts with respect to lobbying because "[a] majority of legislators seem to agree that legislation should be prompted solely from considerations of the public good, and agreements for

Here, similar public policy concerns are implicated when the government delegates (or abdicates) law enforcement power to a private firm through a contingency-fee agreement to seek civil penalties, a punitive remedy that is available only to the State. Once a private attorney spends time and money on a state enforcement action, he or she has a strong incentive to pursue a financial recovery regardless of whether evidence emerges that suggests the target of the suit is not liable or a nonmonetary settlement best serves the public interest.

B. Contingency-Fee Agreements Delegating State Power to Impose Civil Penalties Disregards Key Distinctions Between Government Attorneys and Private Lawyers

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). For example, requiring a defendant to change allegedly harmful behavior or remediate pollution for which it is responsible may be more important to the public interest than obtaining a monetary award.

Kentucky law, for example, includes a number of rules designed to ensure that government officers and employees are independent and impartial, to avoid

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compensation contingent upon success suggest the use of corrupt means for accomplishing the desired end and undermine the public confidence in government"); Ky. Rev. Stat. § 6.811(9) (providing that it is a felony to engage a person or accept any engagement to lobby legislation on a contingent fee basis).

action that creates the appearance of impropriety, to protect public confidence in the integrity of its government, and to protect against conflicts of interest. Employees of the Kentucky government are subject to the Executive Branch Code of Ethics. *See* Ky. Rev. Stat. §§ 11A.001 *et seq.* (hereinafter "Ethics Code"). At the core of this Ethics Code is a provision that requires government employees, including its attorneys, to be "independent and impartial," and precludes them from "us[ing] public office to obtain private benefits." Ky. Rev. Stat. § 11A.005(1)(a), (c). These provisions help ensure that "[t]he public has confidence in the integrity of its government and public servants." *Id.* § 11A.005(1)(d). When a public servant has a personal financial interest in his or her government work, the Ethics Code recognizes a potential conflict that "tend[s] to bring public servants into disrepute." *Id.* § 11A.005(2).

For these reasons, the Ethics Code provides that a public servant may not "[u]se his official position or office to obtain financial gain for himself or any members of the public servant's family." Ky. Rev. Stat. § 11A.020(1)(c). Public servants generally are permitted to receive only their government salary as compensation for performance of official duties. *See* Ky. Rev. Stat. § 11A.040(5). Thus, the Commonwealth's attorneys are paid in full through public funds to ensure that their loyalty is to the people of the State.

These basic good government principles are antithetical to arrangements in which private lawyers, standing in the shoes of government attorneys, seek to impose significant fines—potentially millions of dollars—a portion of which they will personally receive. When a litigant is prosecuted by a private attorney on a contingency-fee basis, the violation of the spirit, if not the letter, of the Ethics Code indicates a violation of due process.

C. State Use of Contingency-Fee Agreements Are Not Needed to Pursue Corporate Misconduct

Contingency fee agreements are not, as the district court suggests, necessary for state officials to prosecute civil enforcement actions. Slip Op. at 24 (finding that requiring government lawyers to maintain actual oversight over contingent-fee counsel would "have a chilling effect on the AG's ability to prosecute civil enforcement actions in the future"). Experience has proven that state governments – large and small –have a choice as to whether to contract with lawyers on a contingency-fee basis, even when taking on large corporations.

For example, former Delaware Attorney General Jane Brady has said she had "real aversion" to contingency-fee arrangements with private law firms because "[t]he motivation of public attorneys is, or should be, to serve the best interests of the people they represent and to pursue equity, justice, and fairness. Contingency fee arrangements are not consistent with these motivations." Manhattan Inst., Center for Legal Pol'y, *Regulation Through Litigation: The New*

Wave of Government-Sponsored Litigation, Conference Proceedings, at 37 (Wash., D.C., June 22, 1999) (transcript of remarks). Similarly, Eleventh Circuit Court of Appeals 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 contingency 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., *Novel Government Lawsuits Against Industries: An Assault on the Rule of Law*, Federalist Society, Federalism & Separation of Powers Practice Group Newsletter (Spring 1999) (presentation before the U.S. Chamber of Commerce).[9] In the multistate tobacco suits, the attorneys general of some states, such as Virginia, opted *not* to hire contingent-fee attorneys and instead pursued the litigation with available resources, while private lawyers in other states received many millions of dollars. *See* Editorial, *Angel of the O's?*, Richmond Times Dispatch, June 20, 2001, at A8, *at* 2001 WLNR 1140793 (comparing the additional

[9] *See also* William H. Pryor, Jr., Comment, *Symposium: Tort Liability, The Structural Constitution, and The States; Panel One: State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers*, 31 Seton Hall L. Rev. 604 (2001).

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

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.

In fact, the federal government pursues litigation without hiring lawyers on a contingency-fee basis. Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007), 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." 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 Attorney General could have used the OAG's publicly-paid government lawyers to pursue the litigation. The Legislature provided the OAG with a $17.5 million budget for personnel expenses in Fiscal Year 2013. *See* 2012-2014 Budget of the Commonwealth, Operating Budget -

Volume I, at 35. The Attorney General leads a Department of Law that includes thirteen units, including a Consumer Protection Division. *See* Ky. Rev. Stat. § 15.010. The OAG does not need to hire outside legal experts to enforce the KCPA, a state statute that the Attorney General is specifically authorized to enforce. *See* Ky. Rev. Stat. § 367.120(1) (creating a "Division of Consumer Protection of the Department of Law…for the purpose of aiding in the development of preventive and remedial consumer protection programs and enforcing consumer protection statutes").

For example, when twenty-nine state attorneys general settled consumer protection litigation with Merck related to its marketing of Vioxx in 2008 (Kentucky did not participate), they appear to have relied on government attorneys to handle the litigation.[10] *See* Martha Raffaele, *Merck Agrees to $58M Settlement Over Vioxx Ad Claims*, USA Today, May 20, 2008. Likewise, many of the forty-two states that entered the 2011 settlement of Medicaid claims rejected by Kentucky's outside counsel, *see* Merck Br. at 16, also appear to have been represented by government, not private contingency-fee, attorneys.[11]

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[10] *See, e.g., Commonwealth of Pennsylvania v. Merck & Co.*, No. 273 M.D. 2008 (Stipulated Final Judgment Decree and Permanent Injunction) (Pa. Com. Ct. May 20, 2008) (providing terms of multistate settlement signed solely by an OAG attorney for the government); *State of Florida v. Merck & Co.*, No. 08-22328 (Fla. May 20, 2008) (Agreed Final Judgment and Consent Decree).

[11] The 2011 multi-state settlement was led by the Massachusetts Attorney General's Medicaid Fraud Division, assisted by an Assistant Attorney General

II. THE COMMONWEALTH'S DECISION TO COMPENSATE OUTSIDE COUNSEL BASED UPON A SHARE OF THE CIVIL PENALTIES THEY COLLECT VIOLATES DUE PROCESS

In examining the constitutionality of contingency-fee agreements between state governments and private attorneys, the Rhode Island and California Supreme Courts adopted a test that would permit such arrangements in ordinary civil cases if the government maintains complete control over the litigation. In a case seeking quasi-criminal penalties, however, a categorical bar is appropriate. Even if the Court were to apply a "control" test in this instance, an approach that has practical flaws, the requisite government control is lacking here.

Rhode Island's Attorney General hired two private law firms to pursue a public nuisance action against former manufacturers of lead paint on a contingent-fee basis. *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

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from Illinois and an analyst from the Ohio Attorney General's Office. *See* Massachusetts Attorney General Martha Coakley, Press Release, *Pharmaceutical Manufacturer Merck to Pay Nearly $10 Million to Massachusetts Medicaid Program*, Nov. 22, 2011. Press releases of several state attorneys general offices announcing their respective shares of the 2011 settlement do not indicate any involvement or payment of a share of the recovery to outside counsel. *See, e.g.*, Georgia Dep't of Law, Press Release, *Merck to Pay Over $15 Million to Settle Georgia Medicaid*, Nov. 29, 2011; Indiana Office of Attorney General, Press Release, *State to Receive $2.7 Million from Merck in Vioxx Settlement*, Nov. 23, 2011; Washington State Office of Attorney General, Press Release, *Merck to Pay Washington State $6.7 Million to Settle Vioxx Claims*, Nov. 23, 2011.

private lawyers must include "exacting limitations" that ensure that the Office of the 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). Under these conditions, the Rhode Island Supreme Court permitted the contingent-fee representation with trepidation. *Id.* at 476 n.50 ("Given 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.").

In 2010, the California Supreme Court followed Rhode Island's lead by adopting a similar approach in ordinary civil litigation brought by the state. *See County of Santa Clara v. Atlantic Richfield Co.*, 235 P.3d 21, 36-37 (Cal. 2010). The court first clarified that a categorical prohibition on the government's use of contingency-fee representation applies when an action implicates interests akin to those inherent in a criminal prosecution. *See id.* at 31. In so doing, the court reaffirmed its holding in *People ex rel. Clancy v. Superior Ct.*, 705 P.2d 347, 352 (Cal. 1985), that "there is a class of civil actions that demands the representative of the government to be absolutely neutral." In that instance, the court invalidated an agreement that paid a private attorney a higher rate when he prevailed in nuisance abatement actions to close adult bookstores than when he did not prevail. *See id.*

In ordinary civil litigation, the California Supreme Court found that private lawyers who represent the state "are subject to a heightened standard of ethical conduct applicable to public officials acting in the name of the public—standards that would not be invoked in an ordinary civil case." *Id.* at 35. The court found that the "heightened standard of neutrality" required for private lawyers bringing lawsuits on behalf of the government is not compromised so long as "neutral, conflict-free government attorneys retain the power to control and supervise the litigation." *Id.* at 36. The private lawyers must "serve in a subordinate role" and "not supplant a public entity's government attorneys." *Id.* The court concluded, "when public entities have retained the requisite authority in appropriate civil actions to control the litigation and to make all critical discretionary decisions, the impartiality required of government attorneys prosecuting the case on behalf of the public has been maintained." *Id.* at 39. Applying these standards, the court found that the contingent-fee agreements at issue lacked adequate "safeguard[s] against abuse of the judicial process." *Id.* at 41.[12]

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[12] The West Virginia Supreme Court of Appeals recently upheld its state attorney general's use of a contingency fee agreement in *State of West Virginia ex rel. Discover Fin. Servs.*, Nos. 13-0086, 13-0102, 2013 WL 2460623 (W. Va. June 4, 2013). This decision, however, addressed whether West Virginia's Attorney General, absent statutory authority, had inherent common law authority to hire outside counsel as "Special Assistant Attorneys General" and whether the West Virginia Governmental Ethics Act required disqualification of outside counsel hired by the state. The court made clear it was "not addressing the appropriateness of awarding attorney's fees to special assistant attorneys general directly from any

Even if this Court were to apply a similar standard in this case, the Commonwealth's involvement in the litigation at issue falls woefully short of meeting the "absolute and total control" required by the high courts of California and Rhode Island. As discussed earlier, the contract itself provides the "lead," not subordinate, role to the private lawyers. The record reflects that the private lawyers controlled the litigation – they developed the theory of the litigation, they were the sole counsel appearing on pleadings, and at hearings and mediations, and they rejected a proposed settlement. The Assistant Attorney General charged with overseeing the litigation was unfamiliar with basic aspects of the case, such as the violations alleged, expert witnesses employed by the state, and the role of witnesses scheduled to testify on behalf of the Commonwealth at trial.

Even so, the "control test" is flawed. While the control test is appealing on its surface, its application may be impractical and unworkable. As the trial court in the *Atlantic Richfield* case recognized, while a court can review the language of the contingent-fee contract to ensure that it contains judicially-mandated language placing control with the Attorney General:

> [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 be permissible, (b) what types of decisions the government attorneys must retain

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actual monetary judgment award to the State because such a contingent fee agreement is not at issue in this case." *Id.* These state-specific determinations have no bearing on the issues here.

> 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 contingent 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 the government attorneys.

County of Santa Clara v. Atlantic Richfield Co., 2007 WL 1093706, *3-4 (Cal. Super. Ct. Santa Monica County Apr. 4, 2007) (Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys). 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 and work-product doctrine. *See, e.g.*, Merck Br. at 26-27, 46 n.14 (noting that Kentucky's OAG invoked privilege in deposition testimony and with respect to production of correspondence, potentially denying the Plaintiff-Appellant relevant evidence regarding control).

Nor should the insertion of boilerplate language into the retention agreement, which provides the OAG with final authority over certain decisions or a right to veto private counsels' actions, blind the Court from the practical reality of who controls the litigation. Here, the OAG and the private firm, prompted by Merck's challenge, entered a new contingent-fee agreement containing stronger language regarding the Commonwealth's control of the litigation. This

amendment to the contract should not insulate the arrangement from meaningful judicial review, particularly when the new terms had no more than a nominal impact on the actual conduct of the litigation.

The Court should recognize that the only practical, fair, and effective option for protecting due process is to find that enforcement of state law by individuals who are to receive a share of the fines they impose is categorically impermissible. There is support for reaching such a result. *See Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 791-92 (1987) (holding that private attorneys retained as special prosecutors must be "as disinterested as a public prosecutor who undertake a prosecution" and not influenced by private interest); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249-50 (1980) (recognizing that arrangements that inject a personal interest in enforcement decisions by prosecutors raise "serious constitutional questions"); *Tumey v. Ohio*, 273 U.S. 510 (1972) (finding that compensation of a judge based on fines derived through convictions deprived a criminal defendant of due process).

CONCLUSION

For these reasons, PLAC urges the Court to reverse the district court's ruling and grant summary judgment to Merck. Alternatively, the case should be remanded for trial.

Respectfully submitted,

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Dated: July 9, 2013

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 29 AND 32(a)

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because the brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

This brief complies with the length requirements of Rules 29(d) and 32(a)(7)(B) because the brief contains no more than 7,000 words (5,531 words), excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

/s/ Mark A. Behrens
Mark A. Behrens

Dated: July 9, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July, 2013, I electronically filed the foregoing brief with the clerk of the court by using the CM/ECF system

I further certify that on the same date, I served a copy of the foregoing by through the CM/ECF system on the following:

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APPENDIX A:
Corporate Members of the
Product Liability Advisory Council, Inc.
as of 7/3/2013
Total: 105

3M
Altec, Inc.
Altria Client Services Inc.
Anadarko Petroleum Corporation
AngioDynamics, Inc.
Ansell Healthcare Products LLC
Astec Industries
Bayer Corporation
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boehringer Ingelheim Corporation
The Boeing Company
Bombardier Recreational Products, Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
CC Industries, Inc.
Celgene Corporation
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire & Rubber Company
Crane Co.
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
Deere & Company
Delphi Automotive Systems
Discount Tire
The Dow Chemical Company
E.I. duPont de Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, LLC
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors LLC
Georgia-Pacific Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Kawasaki Motors Corp., U.S.A.
KBR, Inc.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Lincoln Electric Company
Lorillard Tobacco Co.
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda Motor of America, Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.

Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic Corporation of North America
Peabody Energy
Pella Corporation
Pfizer Inc.
Pirelli Tire, LLC
Polaris Industries, Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
RJ Reynolds Tobacco Company
SABMiller Plc
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Teva Pharmaceuticals USA, Inc.
TK Holdings Inc.
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Wal-Mart Stores, Inc.
Whirlpool Corporation
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.