

PHILIP MORRIS INCORPORATED,
et al.,

Plaintiffs,

v.

PARRIS N. GLENDENING,
et al.,

Defendants.

* IN THE
* CIRCUIT COURT
* FOR
* TALBOT COUNTY
*
* Case No. CG 2829

* * * * *

**DEFENDANTS’ REPLY TO PLAINTIFFS’ REPLY
MEMORANDUM IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT AND MEMORANDUM IN
OPPOSITION TO DEFENDANTS’ MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

I. The Tobacco Industry Lacks Standing to Complain about the Manner in Which the Attorney General Staffs Cases.

In the Complaint, the Tobacco Industry based its standing on its alleged taxpayer status, *see* Complaint at ¶¶2-8, and an allegation that “[t]he proposed contingency fee contract could potentially result in a tax burden on plaintiffs greater than the tax burden which would otherwise be imposed.” Complaint at ¶20. Apparently having recognized the fundamental illogic of their allegation of taxpayer standing, the Tobacco Industry now shifts ground in its Reply Memorandum in Support of Motion for Summary Judgment and Memorandum in Opposition to Defendants’ Motion to Dismiss or in the Alternative for Summary Judgment (“Opposition & Reply”) and claims general standing on the ground that it is injured by the Attorney General’s plans to sue it for its conduct. This new contention also does not create standing.

To have standing to sue, a party must have “an actual, real and justiciable interest susceptible of protection through litigation.” *Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md.

App. 390 (1991). At a minimum, a party claiming standing must demonstrate three elements: (1) an “injury-in-fact,” (2) a “causal connection between the injury and the conduct complained of,” and (3) a likelihood, as opposed to mere speculation, “that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992)(quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). A party claiming standing must show more than “an asserted right to have the Government act in accordance with law.” *Allen v. Wright*, 468 U.S. 737, 754 (1984) (holding that the stigmatic injury resulting from allegedly discriminatory government policy did not constitute injury-in-fact); *Laird v. Tatum*, 408 U.S. 1 (1972) (claimed “subjective chill” of First Amendment rights caused by government surveillance of political activities was not a sufficient injury for standing).

The Tobacco Industry lacks general standing under this test because it cannot demonstrate a real and substantial injury-in-fact and because any claimed injury is too speculative to be redressed by a court order. The essence of the Tobacco Industry’s “injury” is that it will be named in an imminent lawsuit by the Attorney General. This status does not confer standing to challenge how the Attorney General’s office staffs litigation that it handles. The Tobacco Industry’s claim of “injury” is indistinguishable from “an asserted right to have the government act in accordance with law,” *Allen*, 468 U.S. at 754, not the type of “distinct and palpable injury” required for standing. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982).

Moreover, a judicial order could not realistically redress the claimed injury. If a court order effectively denied the Governor and the Attorney General the power to hire outside counsel to bring this lawsuit--a lawsuit that even the Tobacco Industry

acknowledges is within his power to bring, *see* Opposition & Reply at 9--such a ruling could create serious and troubling separation of powers issues, raised in the Motion to Dismiss and not answered in the Tobacco Industry's Opposition & Reply. *See* C. Wright & A. Miller, Federal Practice and Procedure § 3531.6 at 465 n.3 ("Some decisions reflect requests for relief that go directly to the relationships between the courts and other branches of the government. The remedial constraints dictated by separation of powers concerns may provide powerful reasons to deny standing.").

In this case, the Attorney General made a proper request to the Governor under section 6-105(b) of the State Government Article for approval of the outside counsel arrangement, noting that because the litigation would be "prolonged and expensive," a contingent fee arrangement was "the most cost-effective means of advancing the State's interests." Exhibit A (March 20, 1996 letter from Attorney General J. Joseph Curran, Jr. to Governor Parris N. Glendening). The Governor approved the Attorney General's request. A contract for legal services, duly executed by the Attorney General and the contractors, and expressly approved and signed by each of the three members of the Board of Public Works (the Governor, the Comptroller, and the Treasurer), is now in effect. *See* Exhibit B (Contract for legal representation in planned litigation against the tobacco industry). Court invalidation of that agreement would profoundly undermine the ability of the Governor and Attorney General to exercise their constitutional duties on behalf of Maryland citizens. *Murphy v. Yates*, 276 Md. 475, 492 (1975) (separation of powers provision in Article 8 of the Maryland Declaration of Rights forbids one branch of government from "reduc[ing] to impotence" another by vitiating its constitutional powers); *Hamilton v. Verdow*, 287 Md. 544, 556 (1980) (separation of powers places "limits on a court's power to review or

interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority” (citations omitted)); *cf.* C. Wright & A. Miller, Federal Practice and Procedure § 3531.2 (Supp. 1995, at 232) (analyzing *Allen v. Wright* and noting that denial of standing reflected separation of powers concern that ruling “would require an inquiry of extraordinary difficulty and would intrude on executive affairs in a way that easily could become debilitating.”). In view of the separation of powers problems inherent in court intervention in this matter, the Tobacco Industry’s claimed injury is not redressable by a court order.

II. The Contingent Fee Contract with Outside Counsel Fully Complies with Maryland Statutory and Constitutional Law.

The Court need not be diverted too long by the question of standing, however, because the Tobacco Industry’s arguments against the contingent fee contract are utterly frivolous on the merits. The Tobacco Industry simply has no response to the single, crucial feature validating the assistant counsel arrangement at issue: *the Governor has expressly approved the contingency fee contract with outside counsel.* That is all that the law requires.

A. The Attorney General and Governor Have Complied with Maryland Law.

The Tobacco Industry concedes that the Attorney General has the authority to hire outside counsel and argues only that that power be exercised in accordance with Maryland law. *See* Opposition & Reply at 9. The applicable Maryland law is, of course, Md. State Gov’t Code Ann. § 6-105(b)(1), which authorizes the Attorney General “*with the written approval of the Governor*” to “employ any assistant counsel that the Attorney General considers necessary to carry out any duty of the Office in an extraordinary or unforeseen

case”¹ (emphasis added). Under section 6-105(b), the Governor’s is the only approval required to validate such an arrangement. The compensation agreement can be flexible, subject again to the approval of the Governor alone. There is no reference whatsoever to a need for separate legislative appropriation. *See id.* § 6-105(b)(2)-(3)(providing that Attorney General “shall submit to the Governor a written request that: (i) states the necessity of and each reason for the special employment; and (ii) states the proposed compensation and its source or certifies that the Attorney General cannot ascertain in advance the proper compensation” which, then, “may be agreed on or adjusted later.”)(emphasis added). Nor is there any express or implied prohibition of contingent fee arrangements. In fact, the language of section 6-105 allowing that any “proper compensation . . . may be agreed upon or adjusted later” is broad enough to contemplate a contingent fee in an appropriate case.

The Tobacco Industry also makes the untenable argument that Board of Public Works approval of the contingent fee contract does not suffice to validate the agreement over any possible objection. The Tobacco Industry acknowledges, as it must, that section 10-305 of the State Finance & Procurement Article authorizes the Board to validate contracts that sell, lease, transfer, exchange, grant, or otherwise dispose of any real or personal property of the State “for a consideration the Board decides is adequate.” *See Opposition & Reply* at 13. That is precisely what has occurred here. The Board of Public

¹Perhaps recognizing that the Governor’s approval is dispositive of this action, the Tobacco Industry argues in vain that the Planned Lawsuit would not be an “extraordinary” case. In light of the Tobacco Industry’s recitation of the “enormous” burdens it plans to visit upon State agencies once in litigation, *see Opposition & Reply* at 6, and its well-known “scorched earth” litigation tactics, the suggestion that the upcoming litigation will be “ordinary” is hardly to be taken seriously.

Works has authorized the disposition of a form of State property--an intangible, unliquidated, contingent right to a percentage of monies--in exchange for the adequate consideration of receiving legal representation of a fine law firm in what is likely to be protracted litigation. The Tobacco Industry's contention that the contract for legal services does not involve a disposition of State property is incoherent; it overlooks the fact that what the Board has approved is the disposition of one form of State "personal property"--an inchoate right to a percentage of monies--which is a core type of personal property. Except for the fact that the recovery of the fee is contingent on the State *also recovering a substantial sum*, the property "disposed of" is no different in kind from any other transfer of State funds for consideration under contracts routinely approved by the Board of Public Works.

The Tobacco Industry is also mistaken in asserting that the portion of the recovered funds that would be due to outside counsel under the validly approved contract would have to be deposited into the Treasury. As explained in the Motion to Dismiss, this percentage of the recovery would be properly withheld from the net proceeds to be deposited in the Treasury. If the Tobacco Industry's position were correct, no agency, under any circumstances--even with Board of Public Works approval--could compensate outside counsel on a contingent fee basis without separate legislative authorization. The Tobacco Industry well knows that this is not the law. Indeed, it acknowledges the correctness of the Attorney General's Opinion concluding that Department of Budget and Fiscal Planning could enter into contingent fee contracts to recover debts without Board of Public Works approval, and that the Attorney General could enter into such arrangements with Board of Public Works approval. *See* Opposition & Reply at 12. Maryland statutory law contains

other examples under which outside legal counsel may be retained and paid with the approval of the Board of Public Works. *See, e.g.*, Md. State Gov't Code Ann. §§6-105(c) & -106(d).

B. The Minnesota and West Virginia Decisions Support the Legality of the Contract in this Case.

The Tobacco Industry's restatement of its earlier argument that the West Virginia decision applies to this case fails to address the fatal points raised in the Motion to Dismiss: West Virginia has no statute like section 6-105(b) permitting the Attorney General to hire assistant counsel, *and* the Governor of West Virginia had not authorized the lawsuit. Among the states involved in tobacco litigation, the situation in West Virginia is truly unique. To date, seven states--Mississippi, Minnesota, West Virginia, Florida, Massachusetts, Louisiana, and Texas--have sued the tobacco industry by employing outside counsel on a contingency fee basis. This counsel arrangement has been invalidated only in West Virginia, and there in a poorly reasoned, but nonetheless distinguishable, ruling.

Similarly, the Tobacco Industry once again reaches to distinguish the ruling on this issue in Minnesota, but the fact remains that the Minnesota court's decision is directly on point: there, as here, the Attorney General proceeded under a statute that permitted the hiring of outside assistant counsel. Also, there, as here, the authorizing statute contained no prohibition on the use of a contingent fee arrangement to hire such counsel, a point that the Minnesota court considered dispositive. The Tobacco Industry makes the spurious argument that the Minnesota ruling does not apply because the Maryland Attorney General does not generally have common law powers. But this distinction is completely irrelevant here *because the Governor has approved both the lawsuit and the statutory hiring of*

outside counsel. In any event, as noted above, there is no distinction, relevant or irrelevant, with respect to the Attorney General's powers in the Planned Lawsuit: as noted in the Motion to Dismiss, and not controverted by the Tobacco Industry, *Burning Tree* is absolutely clear--as is the Maryland Constitution--that when the Attorney General acts at the direction of the Governor, he has powers at least as broad as an Attorney General with common law powers. *State v. Burning Tree Club*, 301 Md. 9, 33 (1984); Md. Const. Art. V, §3(a)(2) ("The Attorney General shall . . . (2) [i]nvestigate, commence, and prosecute or defend . . . any civil or criminal suit or action . . . on the part of the State or in which the State may be interested, which . . . the Governor shall have directed or shall direct to be investigated, commenced, and prosecuted or defended.") (emphasis added). In ruling that the Attorney General did not generally have common law powers and thus could not challenge the constitutionality of an enactment of the General Assembly, the *Burning Tree* court was careful to distinguish the entirely different powers of the Attorney General when he acts pursuant to the Governor's request. The court stated that Attorney General Sachs's reliance on *Reddick v. State*, 213 Md. 18, cert. denied, 355 U.S. 832 (1957), was "misplaced" because in *Reddick* "the Governor had written a formal letter to the Attorney General authorizing him to bring suit." *Id.* at 33. It went on to explain that the Attorney General has common law powers when he has been "granted express authority, by either the General Assembly or the Governor, to initiate a suit not within his constitutional or statutory powers." *Id.* at 34. That is precisely the situation here.

C. There Is No Prohibition on Government Engaging Contingent Fee Counsel in an Appropriate Civil Case.

Finally, the Tobacco Industry's Opposition recycles its far-fetched arguments that a

contingent fee arrangement between the government and outside counsel in an appropriate civil case somehow, infringes a right to an impartial prosecution. The Tobacco Industry cites no meaningful authority for this mysterious proposition and relies on cases that are distinguishable on their face. For example, the Tobacco Industry makes the ludicrous contention that *Montgomery County v. Walker*, 228 Md. 574 (1962) “demolishes the Attorney General’s argument.” Opposition & Reply at 19. In *Montgomery*, the Court of Appeals held that a zoning board member was justified in disqualifying himself--an unusual circumstance, the court noted--because he had a personal and financial interest in a rezoning application before the board. Reversing a circuit court order requiring the board member to participate despite the conflict of interest, the *Montgomery* court emphasized the board member’s subjective feeling that he could not be impartial:

[I]t is not for us to say that his once intense personal interest had subsided to the point where he could render an objective decision, particularly in view of his own feeling of disqualification on this score; nor can we say that the fact of his employment by a corporation wholly owned by one of the interested parties could be thrust aside in complete subservience to his public duty. [The board member] testified that under the circumstances he didn't see how he could sit in objective judgment on the case, or in good conscience vote either way.

Id. at 580. The distinctions between *Montgomery* and the instant case are almost too obvious to enumerate: *Montgomery* involved a decisionmaker, not an advocate, who himself had personal and financial interests in the matter, and who chose to disqualify himself on that ground. This meager authority hardly “demolishes” the Attorney General’s statutory right to hire outside counsel on a contingent basis. The other cited cases are similarly inapposite, involving in most cases judicial officers or criminal prosecutors who had direct personal interest in matters they were handling. *See, e.g., Tumey v. Ohio*, 273

U.S. 510 (1927)(due process right to impartial *judge* violated when decisionmaker received a personal benefit from fines levied); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972)(due process right to impartial *judge* violated when mayor of village adjudicated traffic offenses, the fines for which went directly into the village coffers); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (invalidating court appointment in a contempt action of a private prosecutor who had a personal interest in the matter and would make *all* prosecutorial decisions himself).

The Tobacco Industry cites only one case in which a contingent fee arrangement with outside counsel for the government was disapproved, *People ex rel. Clancy v. Superior Court (Ebel)*, 705 P.2d 347 (Cal. 1985), *cert. denied*, 475 U.S. 1121 (1986), and that case itself specifically held “certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case.” *Id.* at 352. Moreover, subsequent cases have distinguished *Clancy* and limited it to its peculiar facts. *See, e.g., Davis v. Southern Bell Tel. & Tel.*, 149 F.R.D. 666, 680-81 (S.D. Fla. 1993)(stating that *Clancy* has no application to a case where there is “an independent check on attorney conduct”).

Ironically, some of the cases cited by the Tobacco Industry actually affirm the validity of the contingent fee arrangement in this case. For example, in *Marshall v. Jerrico*, 446 U.S. 238 (1980), the Supreme Court found no due process violation in allowing attorneys enforcing the child labor provisions of the Fair Labor Standards Act to have some degree of financial incentive for securing civil penalties. There, the Court explicitly declined to state what “limits there may be on a financial or personal interest of one who performs a prosecutorial function. ” *Id.* at 250. The Court explained that the degree of neutrality required of prosecutors was different from that required of judges:

“[p]rosecutors need not be entirely ‘neutral and detached’ In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests . . . are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties.” *Id.* at 248-49.

In this case, however, unlike the arrangement approved in *Marshall*, there is not even a remote possibility that a financial incentive could affect important decisions about the conduct of the litigation. The Attorney General of Maryland, it bears repeating, will control all aspects of this litigation and has no personal interest whatsoever in this matter except to see that justice be done for Maryland’s citizens and taxpayers. *See* Exhibit B, at 2.1 (“The Attorney General shall have the authority to control all aspects of the Contractor’s handling of the litigation contemplated by the Contract Such authority shall be final, sole and unreviewable.”). This important feature of the counsel arrangement distinguishes it from the entirely different circumstances in the cases cited by the Tobacco Industry. *Cf. Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (invalidating appointment of a private prosecutor for contempt action who had a personal interest in the litigation *and* would make *all* prosecutorial decisions outside of court supervision.).

The Tobacco Industry tries in vain to suggest that the cases involving judges and criminal prosecutors who have a personal incentive to pursue a case apply with equal force in the civil context. *See* Opposition & Reply at 17. This is not the law. *See, e.g., Kelly v. Boeing Co.*, 9 F.3d 743, 759 (9th Cir. 1993)(requirement of prosecutorial disinterest “is simply not extant” in civil context when private and public interests are congruent). In fact, as the Tobacco Industry surely knows, the law provides numerous examples of the government delegating to a private attorney the right to pursue an action, in the public

interest, in exchange for a percentage of the recovery. The most prominent such example is a *qui tam* enforcement action, under which a private attorney may institute a civil action on behalf of the United States to recover damages, enforce penalties, or seek other relief. For example, the federal False Claims Act (“FCA”), 31 U.S.C. §3729-3731, specifically authorizes private citizens to sue on behalf of the federal government for damages and civil penalties in return for a percentage share of the recovery. *See id.* §3730(d)(1)-(2)(allowing private attorney 25-30% share of the recovery when the government does not intervene in the action and a lesser share in other cases). Similarly, 31 U.S.C. §3718(b)(1)(A) permits private counsel to sue to recover debts of the United States and retain a percentage of the recovery. These provisions, and others like them, are permissible, despite the fact that they give the private attorney a direct (and sometimes massive) financial stake in the outcome of the litigation.

The constitutionality of giving a private attorney an incentive to pursue an action in the public interest is beyond serious doubt. *See, e.g., U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743 (9th Cir. 1993), *cert denied*, 114 S. Ct. 1125 (affirming constitutionality of *qui tam* actions); *U.S. ex rel. Robinson v. Northrop Corp.*, 824 F. Supp. 830 (N.D. Ill. 1993)(same); *U.S. ex rel. Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115 (S.D. Ohio 1992)(same); *see generally* Caminker, *The Constitutionality of Qui Tam Actions*, 99 Yale L.J. 341 (1989) (discussing the validity of private attorneys sharing monetary recovery with the government and noting that “the *qui tam* enforcement framework is familiar to our legal tradition”). In *Kelly*, a challenge to the constitutionality of *qui tam* actions under the FCA, the Ninth Circuit explicitly rejected arguments remarkably similar to those advanced by the Tobacco Industry here. The defendant in *Kelly* claimed that the *qui tam* provisions of the

FCA violated its due process rights by permitting financially interested persons to sue in the name of the government, thereby creating a conflict of interest between the litigants' personal stake in the outcome and the government's interest in justice and fairness. The court squarely rejected this argument, noting that the alleged conflict "is simply not extant in the *qui tam* situation, where private and public goals are congruent." *Id.* at 760. In *Kelly*, as in this case, "the interests of the private prosecutor . . . coincide with the public interest in remedying harm [The government and the private attorney] share a single interest in successful litigation [,] . . . thus the public's interest in successfully enforcing the [law] and the relator's private interest are intertwined rather than conflicting."

The *Kelly* court's words resonate in this case. Outside counsel and the Attorney General share a single interest in maximizing recovery on behalf of Maryland taxpayers; the private and public goals are perfectly congruent. The Attorney General and the Governor have determined that the paramount public interest in remedying the harm done to Maryland citizens by the Tobacco Industry's fraud, deceit, and unlawful conduct necessitates the counsel arrangement set forth in the attached contract, which has been approved by the Board of Public Works. The Governor, Attorney General, and Secretary of the Department of Health and Mental Hygiene respectfully request that this Court uphold their constitutional and statutory prerogatives to engage outside counsel to pursue recovery in the Planned Lawsuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 1st day of April, 1996, a copy of the foregoing Defendants' Reply to Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment and Memorandum in Opposition to Defendants' Motion to Dismiss or In the Alternative for Summary Judgment was mailed, first class, postage prepaid to:

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