

IN THE DISTRICT COURT OF THE  
THIRD JUDICIAL DISTRICT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH

**PHILIP MORRIS INCORPORATED, a Virginia  
Corporation; BROWN & WILLIAMSON TOBACCO  
CORPORATION, a Delaware corporation;  
LORILLARD TOBACCO COMPANY, a Delaware  
corporation; and R.J. REYNOLDS TOBACCO  
COMPANY,  
a New Jersey corporation,**  
Plaintiffs,

v.

**JANET C. GRAHAM, Attorney General of the State of  
Utah; UTAH DEPARTMENT OF HEALTH; UTAH  
DEPARTMENT OF HUMAN SERVICES; ROD L.  
BETIT, Executive Director, Utah Department of  
Health, and Executive Director, Utah Department of  
Human Services,**  
Defendants.

Case No. 960904948 CV

February 13, 1997

#### **MEMORANDUM DECISION AND ORDER**

**William A. Thorne  
District Court Judge**

This case came before the court on December 13, 1996. Two motions were argued: the plaintiffs' motion for partial summary judgment and the defendants' motion to dismiss.

The plaintiffs filed their complaint against the defendants in response to the Attorney General's public pronouncement of her intention to sue the manufacturers of tobacco products to recover more than \$100 million in Medicaid payments. The plaintiffs' complaint seeks declaratory and injunctive relief with regard to: (a) the Attorney General's authority to retain private counsel on a contingent fee basis in order to prosecute the threatened lawsuit against the plaintiffs; and (b) the nature and scope of the State's right to recover medical assistance payments from third parties, including plaintiffs herein.

The original complaint enumerates five causes of action. The first cause of action alleges the Attorney

General does not have statutory authority to retain special counsel on a contingent fee basis. The second cause of action states the contingent fee arrangement constitutes an unauthorized use and improper diversion of public funds. The third cause of action asserts the contingent fee arrangement violates the Utah Public Officers' and Employees' Ethics Act, public policy, and the state constitution.

The fourth and fifth causes of action are unrelated to the hiring of counsel on a contingent fee schedule. All parties have agreed to stay these two causes of action and allow them to be dealt with during the principal case, since filed in federal court.

**L**

#### **STANDING**

A threshold determination is that of standing.<sup>1</sup> The Utah Supreme Court recognizes three general rules through which standing may be established. The three rules have a great deal of overlap. First, a plaintiff may show a distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute. Second, a plaintiff may show that on this important public issue, no one else has a greater interest in the outcome and that the issues are unlikely to be raised at all unless the plaintiff is given standing to raise them. Third, a plaintiff may show that the government action being challenged raises issues that are so unique and of such great importance that they ought to be decided in furtherance of the public interest. *See National Parks & Conservation Assn v. Board of State Lands*, 869 P.2d 909 (Utah 1993). *See also, Barnard v. Motor Vehicle Division of the Ut. State Tax Commission*, 905 P.2d 317 (Utah App. 1995).

##### **A. The First General Rule**

First, the plaintiffs may demonstrate standing by showing, "some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute." *Natl. Parks*, 869 P.2d at 913. There are two possible injuries the plaintiffs might claim: the first, injury as taxpayers, and the second, injury through being possible defendants in a separate lawsuit.

The first possible injury arises by virtue of the plaintiffs' status as taxpayers. Under a variety of circumstances, the Tobacco companies could be subject to increased taxes to make up for the fees paid

---

<sup>1</sup> Thought the parties did not directly address the issue of standing, "[s]tanding is an issue that a court can raise *sua sponte* at any time." *State v. Tuttle*, 780 P.2d 1203, 1207 (Utah 1989).

under the contingency contract that would otherwise be available to meet State needs. However, this is not a situation unique to the Tobacco companies, but rather extends to all taxpayers. This lack of distinction tarnishes the plaintiffs' claim as, "it is generally insufficient for a plaintiff to assert only a general interest he shares in common with members of the public at large." *Jenkins v. Swan*, 675 P.2d 1145, 1148-49 (Utah 1983). *Jenkins* also noted that "mere reliance on his general status as a taxpayer and citizen does nothing to distinguish him from any member of the public at large with regard to this dispute." *Id.* at 1151.<sup>2</sup> Thus, without more than just a general interest as a taxpayer, this type of injury fails to rise to the level necessary for standing.

The second possible injury to the plaintiffs is that if a contingent fee arrangement is permitted in this instance, then the plaintiffs will be defendants in a separate lawsuit.<sup>3</sup> Assuming, *arguendo*, that this is an adequate injury, the query turns to the remainder of the general rule: that this distinct and palpable injury gives rise to a personal stake in the outcome. *Natl. Parks*, 869 P.2d at 913.

"Whether a plaintiff has the requisite personal stake to challenge a governmental action turns on (1) the existence of an adverse impact on the plaintiff's rights, and (3) the likelihood that the relief requested will redress the injury claimed." *Id.* (quoting *Society of Professional Journalists v. Bullock*, 743 P.2d 1166, 1172-73 (Utah 1987)).

The first required element is that the contingent fee arrangement must adversely impact plaintiffs' rights. While it is undisputed that the plaintiffs are impacted by the contingent fee arrangement, it is not a protected right that is being affected. The impact of the contingent fee arrangement is that the Tobacco companies will be forced to defend themselves in a lawsuit; and the plaintiffs have not

demonstrated that they have a protected right to not be sued. The first element, an adverse impact of the contingent fee upon a protected right is lacking.

The second required element is that there must be a causal relationship between the challenged governmental action and the adverse impact on the plaintiff's rights. This element is inextricably linked to the first element. Consequently, without an impact upon protected rights, a causal relationship cannot be shown. In addition, even if the Court assumed an adverse impact, the State's right to hire contingent fee counsel is not the cause of the plaintiff's problem (the lawsuit to recover monies expended), and thus a resolution on the contingent fee arrangement would not eradicate the adverse impact on the plaintiffs.

The third element requires that the relief requested actually redress the injury claimed. It may. Though the State has indicated that bringing suit against the Tobacco companies depends upon the allowance of contingent fees, this is merely a practical effect, not a legal effect. Disallowing a contingent fee does not, in itself, legally prevent the state from filing suit against the Tobacco companies. As a legal matter, the State's right to maintain the lawsuit would survive, whatever this court's ruling. The State would be free to exercise alternative funding options in order to pursue its claims. Thus, this third element, actual redress of the threatened harm, is also missing.

The inability to sufficiently demonstrate the three elements of this first general rule results in standing not being established thereunder.

## **B. The Second General Rule**

If a plaintiff cannot meet the first standard, standing may still be established through the second general rule. *See Natl. Parks*, 869 P.2d at 913. Standing may be justified by the plaintiff "(1) for an important public issue, (2) when no one else has a greater interest in the outcome, (3) when the issue is unlikely to be raised at all unless [the plaintiff's have] standing to raise it, and (4) when the legal issues are sufficiently well-defined to be properly subject to judicial review." *Barnard*, 905 P.2d at 321.

The Utah Supreme Court has granted standing on the basis of an important public issue in only one case to date. *See National Parks & Conservation Assn. v. Board of State Lands*, 869 P.2d 909 (Utah 1993). In this case, the National Parks and Conservation Association, organized to protect the natural beauty of national parks, sought standing. The Court stated that the issue was of "great importance" to the state in the proper discharge of its fiduciary

---

<sup>2</sup> General taxpayer status is different from the status involved in *V-1 Oil v. Ut. State Tax Commission*, 302 Utah Adv. Rep. 30 (Utah 1996). In *V-1*, the plaintiffs were actually subjected to a specific fee that the Court ruled was a tax. *Id.* at 30. This is different than a potential tax upon the plaintiffs in the present case. The Tobacco companies are not being subjected to a tax specifically imposed upon them, but rather share the same interest as all Utahns. Furthermore, in *V-1*, the court noted that their decision would relieve the tax specific adverse impact on the plaintiffs. *Id.* at 32. A ruling by this court in the present case would not remove a tax specific adverse impact on the Tobacco companies.

<sup>3</sup> The State conceded during argument that in the absence of a contingent fee agreement, the State would, as a practical matter, be unable to maintain its claim against the Tobacco companies. The resources to maintain such a lawsuit are beyond the ability of the Utah Attorney General to devote to such an effort.

duties associated with administering school lands and the public schools as well as to others interested in "preserving the unique scenic, recreational, archaeological, and paleontological values" present in some state school lands. *Id.* at 913. The issues brought by the Association were central to the controversy, having a direct impact on the outcome of the case. In contrast, in the present case, the issues raised by the Tobacco companies regarding the contingent fee arrangement are collateral to the central issue: the question of liability. The contingent fee concerns do not have a direct impact upon the central issue of liability, but are instead an attempt to gain a tactical advantage in the case. This is not an "important public issue."

However, even if the issues presented here were classified as being "important public issues," the plaintiffs would still lack standing for failure to meet the remaining elements of the test.<sup>4</sup>

The existence of the second element, that no one else has a greater interest in the Attorney General's fee schedule, is not clearly supported by the facts. The plaintiffs are not the only party subject to suit where payment is made to outside counsel on a contingent fee basis.<sup>5</sup> As such, others, too, have the same interest in the outcome. Although the plaintiffs do have an interest in the outcome, this interest is merely a shared interest. The mere magnitude of the potential suit against the Tobacco companies does not render their interest "greater." The plaintiffs have not provided this court a basis to conclude that the plaintiffs' interest is different than that of any other party defendant in a contingent fee case brought by the State.

The third element is whether the issue is likely to be raised at all absent this particular plaintiff being allowed to do so. Recognizing that others share an interest in whether the Attorney General may use contingent fees, the issue does not belong solely to the plaintiffs. Knowing that the legislature has the power to prohibit or restrict contingent fee arrangements, it is unlikely that the issue will be ignored absent the plaintiffs. It is arguably more appropriate for the legislative branch of government to

determine the appropriate limits on state resource allocations. In our governmental framework, the State's Constitution places the ultimate purse strings in the hands of the legislative branch of government. The issue of contingent fees could suitably be addressed by the legislature. In addition, the Utah Supreme Court has directed that Courts "will not entertain generalized grievances that are more appropriately directed to the legislative and executive branches of state government." *Jenkins*, 675 P.2d at 1148. That is clearly the case in this matter. The issue will not be mooted by failing to grant standing to the plaintiffs.

The fourth and final element is whether the legal issues are sufficiently well-defined to be properly subject to judicial review. The issue of contingent fees may, in fact, be sufficiently crystallized to be subject to judicial resolution. Standing, however, is not established without all four elements. Though the issue may be ripe for judicial resolution, the remaining three required elements of the second test have not been sufficiently demonstrated. These plaintiffs, therefore, lack the requisite standing under this second general rule to bring the issue before this court.

### C. The Third General Rule

The third and final way to "maintain a suit against governmental action [is] in those limited circumstances in which a case raises issues that are so unique and of such great importance that they ought to be decided in furtherance of public interest." *Natl. Parks*, 869 P.2d at 913. (citations omitted). "Therefore, in order ... to successfully claim standing before this court under this third test, we must find that this dispute (1) raises a statutory or constitutional issue of substantial public import, (2) is presented by adverse parties, and (3) is otherwise suitable for resolution by the courts." *Barnard*, 905 P.2d at 322.

The plaintiffs must first show that their dispute raises a statutory or constitutional issue of substantial public import. Plaintiffs challenge the Attorney General's power to hire contingent fee counsel under existing statutory law. The Utah Supreme Court has explained the nature of the power given to executive officials:

The executive article ... was drafted to give effect to the fundamental principle that the organic law established the basic framework of government for this State should provide sufficient flexibility and latitude, within the limitations of certain fundamental restrictions, so that government could be organized to cope with the inevitable and unforeseeable

---

<sup>4</sup> Importantly, the Utah Supreme Court initially addressed the second prong, noting the unlikelihood that any other party possessed a "greater interest in asserting that the state ought to give priority to nonmonetary values" in deciding to transfer land for tourist development. *Natl. Parks*, 869 P.2d at 913. After this determination was made, the Court then went on to discuss the important public issue. Following the reasoning in *Natl. Parks*, the first prong, the "important public issue," would not be addressed as the plaintiffs failed the second prong.

<sup>5</sup> The State, in its argument, noted that the Attorney General's office has previously made use of contingent fee schedules.

exigencies that would arise. In part, the powers conferred on the constitutional executive officials were constitutionally based. However, the framers also conferred on the Legislature broad authority to shape the powers and authority of those officials as the needs of the times dictated.

*Hansen v. Ut. State Ret. Bd.*, 652 P.2d 1332, 1334 (Utah 1982). As an officer of the Executive Branch, the Attorney General has been given broad statutory and common law powers. It is the duty of the legislature to shape the powers of the executive beyond those powers enumerated in the State Constitution. The Utah State Legislature has outlined the general duties of the Attorney General in Sections 67-5-1 through -15 of the Utah Code, including the fiscal responsibilities of the Attorney General. If further definition of her responsibilities is necessary, it is a matter more appropriately addressed by the legislature.

The Attorney General has been delegated the responsibility to manage the legal affairs of the State. The court in *Hansen* recognized that the powers enjoyed by the Attorney General under the State Constitution, statutory and common law, are broad. 652 P.2d 1332, 1337 (Utah 1982). The Attorney General's hiring of outside counsel on a contingent fee basis is not violative of the any clear statutory or constitutional prohibition. The legislative branch has not yet chosen to limit the Attorney General's options in representing the State in litigation. The legislature may at any time choose to impose such a limitation. Until the legislature chooses to adopt such limitations, or until the Attorney General exceeds her constitutional authority, this Court should accord deference to her decisions as a constitutional officer of the state charged with managing the litigation affairs of the State. Since there is no statutory or constitutional issue of substantial public import, the plaintiffs fail the first prong.

The adverse party requirement of this test has clearly been satisfied by the parties. The interests of the parties are obviously adverse to each other. The third element has not, however, been satisfied. This element requires that the question be suitable for resolution by the courts. Disallowing the State's use of a contingent fee arrangement may resolve this case on a practical level. It is not the practical, however, but the legal aspect of the dispute that must be resolved by the requested relief. The question of contingent fee usage by the Attorney General could be answered by this court. This court, however, believes the question is more appropriate for resolution by the legislature.

Lacking two of the three requirements, the plaintiffs are unable to establish standing under this third general rule.

#### **D. Conclusion**

The Supreme Court has articulated three general rules under which standing may be established. The plaintiff has not demonstrated standing under any of these three. Thus, standing is lacking and Counts I, II and III should be dismissed.

## **II.**

### **DECLARATORY JUDGMENT**

The Tobacco companies have asked for a declaration of their legal rights and status based upon the first three counts of this lawsuit. Assuming, *arguendo*, that standing is proper in this case, the court will look to the propriety of a declaratory judgment. Utah case law sets forth the requisite elements for declaratory judgment.

[T]he conditions which must exist before a declaratory judgment action can be maintained are: (1) a justiciable controversy; (2) the interests of the parties must be adverse; (3) the party seeking such relief must have a legally protected interest in the controversy; and (4) the issues between the parties involved must be ripe for judicial determination.<sup>6</sup>

*Lyon v. Bateman*, 228 P.2d 818, 820 (Utah 1951). *See, e.g., Backman v. Salt Lake County*, 375 P.2d 756 (Utah 1962); *Parker v. Rampton*, 497 P.2d 848 (Utah 1972); *Baird v. State*, 574 P.2d 713 (Utah 1978); *Jenkins v. Swan*, 675 P.2d 1145 (Utah 1983). Failure to meet any of the four requirement requires the dismissal of the petition for declaratory judgment. *Boyle v. National Union Fire Ins. Co.*, 866 P.2d 595, 598 (Utah App. 1993).

#### **A. Justiciable Controversy**

The first prong of the declaratory judgment test, a justiciable controversy, requires an actual conflict between adverse parties with claims on a real, not hypothetical, state of facts. *Baird v. State*, 574 P.2d 713, 715 (Utah 1978). Where there is no justiciable controversy, it is the court's duty to dismiss the action, as the use of declaratory judgments is not appropriate

---

<sup>6</sup> These elements are not dissimilar to the requirements for standing, discussed earlier.

for advisory opinions or judgments on abstract questions. A mere general contention between parties that has not become a definite controversy does not qualify for declaratory relief. *Id.* at 716. The Utah Supreme Court noted the importance of the existence of an actual conflict at the time of filing. "While it is entirely possible that the matter might have matured into a full-blown controversy at a later time, no actual controversy existed *when Barnard commenced his lawsuit.*" *Barnard v. Utah State Bar*, 857 P.2d 917, 919 (Utah 1993) (emphasis added).

In the present case, the plaintiffs requested declaratory judgment before an actual conflict arose. At the time of filing, the Attorney General's outside counsel had not yet entered into a contingent fee arrangement. In their pleadings, the plaintiffs referred to the lawsuit and related contingent fee arrangement as "planned," "threatened," and "inten[ded]." While there was every indication that the State would eventually file a lawsuit against the plaintiffs (and indeed it has since been filed), at the time the complaint was filed the lawsuit and the contingent fee arrangement were still hypothetical scenarios. Because there was no actual conflict at the time of filing, there was no justiciable controversy. This case fails the first prong of the test.

#### **B. Adverse Interests**

The second requirement for an award of declaratory judgment is that the interests of the parties must be adverse. The test is easily met in the present case. The plaintiffs risk losing money if the State prevails on the liability issue. Conversely, the state seeks to recover Medicaid payments for tobacco-related illnesses from the Tobacco companies.

#### **C. Legally Protectible Interest**

The third requirement in an action for declaratory judgment is that the party seeking relief must have a legally protectible interest in the controversy. "Plaintiff must be able to show that he has suffered some distinct and palpable injury that gives him a personal stake in the outcome of the legal dispute." *Jenkins*, 675 P.2d at 1148. The plaintiffs' ability to meet this prong of the test is, at best, debatable. The plaintiffs have not presented a viable argument demonstrating a legally protected interest in preventing either the proposed fee arrangement or in *not* becoming party to a lawsuit. In the event that the plaintiffs were to be held liable in the feared (and now actual) lawsuit, their interest in the fee arrangement would not change the amount recovered by the State.

Because the plaintiffs assert only a

generalized interest in the contingent fee dispute, they fail the third prong of the test for declaratory judgment.

#### **D. Ripe for Judicial Resolution**

The final prong in the test for declaratory judgment is that the issues must be ripe for judicial determination. Ripeness occurs when "a conflict over the application of a legal provision [has] sharpened into an actual or *imminent* clash of legal rights and obligations between the parties thereto." *Boyle*, 866 P.2d at 598, (quoting *Redwood Gym v. Salt Lake County Comm'n*, 624 P.2d 1138, 1148 (Utah 1981)) (emphasis added). When the request for declaratory judgment was filed in this case, the plaintiffs did not allege that the challenged contingent fee arrangement had been entered into. However, there were indications that the fee arrangement and subsequent lawsuit were imminent. In fact, the office of the Attorney General had submitted requests for proposals from outside counsel, and had made several public statements concerning the State's intention to file suit. As a technical matter, the dispute was still a hypothetical situation at the time of filing in this court, but the clash of legal rights was imminent and meets the test for ripeness.

#### **E. Conclusion**

Declaratory judgment is improper as the present case fails the first and third prongs of the declaratory judgment test. "[A] plaintiff's failure to satisfy *any* of the four requirements will result in a dismissal of a declaratory judgment action." *Id.* at 598. (emphasis added).

If declaratory judgment had been appropriate in this case, the court still has discretion and may thus decline to grant a request for declaratory judgment. The Utah Declaratory Judgment Act "gives a trial court discretion to either grant or deny a party's declaratory judgment action by virtue of the statute's use of the word 'may.'" *Strawberry Electric Service District v. Spanish Fork City*, 918 P.2d 870, 882 (Utah 1996). In *Boyle v. National Union Fire Ins. Co.*, the court held that if a declaratory judgment under Section 78-33-6 of the Utah Code would not terminate the uncertainty or controversy giving rise to the proceeding, then the court may decline to grant it. 866 P.2d 595, 598 (Utah App. 1993); Utah Code Annotated, Section 78-33-6. A decision by the court today concerning the propriety of the contingent fee arrangement will not terminate the controversy in the underlying case. Regardless of how this court decides the issue, the State would either be free to continue its federal lawsuit under the existing contingent fee arrangement or the State could opt to proceed under some other fee arrangement. A

declaratory judgment would not terminate the uncertainty or the controversy in the underlying case, nor affect the merits of the positions taken by the parties.

If the requirements of the Utah Declaratory Judgment act had been satisfied, this Court would have exercised discretion to deny the requested declaratory relief it would not resolve the controversy, it is not legally essential to such a resolution, and it is better left to the legislative branch to set limits, if any, upon the Attorney General's use of state resources.

### III.

#### MERITS

Dismissal is proper for counts I, II, and III as the plaintiffs lack standing, or in the alternative, as the plaintiffs have failed to meet the requirements of declaratory judgment. However, if standing were proper and the declaratory judgment requirements were met, then an evaluation of the merits would be appropriate. This evaluation, however, leads to the same conclusion: that a dismissal is proper of Counts I through III.

#### A. Statutory Authority

In their complaint, the plaintiffs assert that the Attorney General does not have statutory authority to hire outside counsel on a contingent fee basis.<sup>7</sup> Citing Utah Code Annotated, Section 67-5-3, the State contends that there is a statutory basis for contingent fee payments. This Court adopts the State's position.

Section 67-5-3<sup>8</sup> allows the Attorney General to assign legal assistants, which reasonably includes contingent fee counsel, to perform legal services for any agency of state government, which includes the Departments of Health and Human Services as well as the Attorney General. The Attorney General can then bill

that agency for the legal services performed, if ... (2) the agency collects funds from any other source in the form

of fees, costs, interest, fines, penalties, forfeitures, or other proceeds reserved or designated for the payment of legal fees sufficient to pay for all or a portion of the legal services rendered; however, the agency may deduct any unreimbursed costs and expenses incurred by the agency in connection with the legal services rendered.

Utah Code Annotated, Section 67-5-3. In other words, the Attorney General can bill the Departments of Health and Human Services, or themselves, once funds are collected by the law firm from the tobacco companies, particularly proceeds that are reserved or designated for the payment of legal fees. The costs and expenses of the agency itself, may also be deducted from the proceeds. Thus, contrary to the plaintiffs' assertion, the funds to pay the contingent fees are not available only through legislative appropriation, but may, in the alternative, be deducted from funds received from the Tobacco companies.

Utah Code Annotated, Section 67-5-3, appears to allow payment of contingent fees. In any event, it is certainly not a prohibition of such fees. In the absence of such a prohibition or an objection by the branch of government charged with allotting fiscal resources to the State, the legislature, the Attorney General's interpretation is reasonable and ought to be accorded deference.

#### B. Public Funds

Public funds and monies are defined by Utah Code Annotated, Section 51-7-3(18)<sup>9</sup> Stipulating to these definitions, the parties' dispute whether the monies sought to be recovered by the State will constitute public funds and therefore be subject to restrictions preventing the payment of contingent fees.

The Tobacco companies argue that the language of the contingent fee contract results in the recovered monies becoming "public monies." The contract states: "In order for the contingent fee to be due and payable, the State of Utah must actually receive its share of such funds." (Defendant's Memorandum of Points and Authorities in Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss, Exhibit 1, page 3). The plaintiff's interpret this

<sup>7</sup> There is no dispute that the Attorney General can hire outside counsel. Similarly undisputed is that the Attorney General has recognized common law powers. The question remaining is whether the Attorney General can, through statutory or common law power, pay this outside counsel on a contingent fee basis.

<sup>8</sup> Utah Code Annotated, Section 67-5-3 defines agency as, "any department, division, agency, commission, board, council, committee, authority, institution, or other entity within the State of Utah."

<sup>9</sup> "Public funds' means monies, funds, and accounts, regardless of the source from which the monies, funds, and accounts are derived, that are owned, held, administered by the state or any of its boards, commissions, laboratories, or other similar instrumentalities, or any county, city, school district, political subdivision, or other public body." U.C.A. § 51-7-3(18). "Public monies' means 'public funds.'" U.C.A. § 51-7-3(19)(a).

to mean that actual receipt and possession of the funds by the State is necessary before the funds are available to the law firm for payment of their fees. The plaintiffs further argue that once received by the State, the monies become public monies, and thus are unavailable to the Attorney General for payment, absent legislative appropriation.

However, the plaintiff's interpretation is appropriate only when the sentence is read alone and out of context. The contract specifies one page later that funds recovered from the lawsuit are to be paid to the law firm and held in trust. (Defendant's Memo, Exhibit 1, page 4). The "actual receipt" language, in context, explains that the law firm will not receive their 25% share if there is no actual recovery from the lawsuit. Reading the contract as a whole, the wording implies that, in order for the contingent fee to be due and payable, the State of Utah must actually receive its share of the funds into the trust account held by the law firm. If judgment were rendered for the State, but no funds received, none would be due to contingent fee counsel. If a judgment is rendered in favor of the State and the money actually received, the monies would be held in trust by the law firm, their 25% contingent fee then would be deducted, and the remainder turned over to the State.

If the plaintiffs are correct that the State must have actual receipt of the funds prior to the law firm being paid, the funds might, in fact, become public funds. In that event, however, the Attorney General may bill itself, or the Departments of Health and Human Services, pursuant to Utah Code Annotated, Section 67-5-3, *supra*, and pay the law firm without specific legislative appropriation. Under either scenario, the fees can be paid to the law firm without misuse or misappropriation of the funds.

### C. Public Employee

The Tobacco companies' final contention is that paying outside counsel on a contingent fee basis will violate the Utah Public Officers' and Employees' Ethics Act, public policy, and the state constitution. Pursuant to statute, persons hired as outside counsel are public employees for the purposes of this lawsuit. See Utah Code Annotated, Section 67-16-3(12).<sup>10</sup>

The plaintiffs contend that this designation as a public employee results in a violation of Section 67-16-5 if the outside counsel is paid on a contingent fee

basis. Section 67-16-5(1)(a) states that "(1) No public officer or employee shall knowingly receive, accept, take, seek, or solicit, directly or indirectly, any gift, compensation, or loan for himself or another if: (a) it tends to influence him in the discharge of his official duties." The plaintiffs contend that the potentially large payment would influence the contingent counsel in the discharge of their duties and give the appearance of impropriety.

It is the opinion of this court that Section 67-16-5(1)(a) seeks to prevent only influences that are *improper*. Payment of wages or salary are *intended* to "influence" the proper performance of duties. Payment of bonuses, merit increases and special recognition awards are also designed to "influence" state employees toward even better performance of their duties. Section 67-16-5(1) is, instead, intended to prevent interests that may conflict with duties owed by the employees to their employer, the State. This is not dissimilar to the conflict of interest rules governing the proper professional conduct of attorneys. As an added safeguard, the State has maintained that they will retain the final decision-making authority in the underlying case. The plaintiffs have failed to sufficiently demonstrate an improper influence upon the contingent fee counsel resulting from the contingent fee arrangement.

## IV.

### CONCLUSION

The Court finds:

1. Plaintiffs do not have standing to bring this action for declaratory and injunctive relief.
2. The requisite elements for declaratory relief are absent.
3. The Court ought to exercise its discretion and refuse to grant the relief requested.
4. If declaratory judgment were properly available, the plaintiffs have failed to prevail on the merits of their request.

Therefore, the Petitioner's request for Summary Judgment in Counts I, II and II is denied. Defendant's Motion to Dismiss is granted as to Counts I, II, and III.

---

<sup>10</sup> "'Public employee' means a person who is not a public officer who is employed on a full-time, part-time, or contract basis by the state or any of its political subdivisions." U.C.A. § 67-16-3(12).