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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

PHILIP MORRIS INCORPORATED, a : DEFENDANTS' MEMORANDUM OF
Virginia Corporation; BROWN & : POINTS AND AUTHORITIES IN REPLY
WILLIAMSON TOBACCO : TO PLAINTIFFS' OPPOSITION TO
CORPORATION, a Delaware : DEFENDANTS' MOTION TO DISMISS
Corporation; LORILLARD :
TOBACCO COMPANY, a Delaware :
Corporation; and R.J. REYNOLDS : Civil No. 960904948C
TOBACCO COMPANY, a New Jersey :
Corporation, : Judge William A. Thorne

Plaintiffs, :

vs. :

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. :

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The

STATUS OF THE CASE

The Attorney General moved to dismiss the Plaintiffs' complaint in its entirety, primarily on the ground that a declaratory judgment action is improper because Plaintiffs are asking the Court to adjudicate in advance the validity of their possible defenses to the Defendants' lawsuit. Secondly, when this case was filed, the "threatened lawsuit" and the challenged contingent fee contract were both hypothetical events. Since then, however, the Attorney General has sued the tobacco manufacturers, including the Plaintiffs in this case, in federal court. The Attorney General has also entered into a contract with outside counsel. (Contract, Exh. 1). In addition, the parties have agreed to stay indefinitely litigation of Plaintiffs' fourth and fifth causes of action, leaving only the Plaintiffs' challenge to the contingent fee contract (Plaintiffs' first, second and third causes of action) for disposition by this Court at this time.¹

Because Plaintiffs have moved for partial summary judgment on the same issue as the Defendants' Motion to Dismiss and the Defendants' response to the Plaintiffs' motion included additional factual material, also referenced in this brief, the Defendants suggest that the Court treat the Defendants' Motion to Dismiss as a Motion for Summary Judgment to be disposed of as provided in Rule 56 of the Utah Rules of Civil Procedure. Utah R. Civ. P. 12(b).²

¹ By agreeing that the Court should hear and decide the motions relating to the Plaintiffs' first, second and third causes of action on the validity of the contingent fee agreement, Defendants do not waive their argument that the Plaintiffs' fourth and fifth causes of action are improper for declaratory relief under any circumstances.

² Rule 12(b) provides that "[i]f, on a motion asserted the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56."

ARGUMENT

Introduction

The Plaintiffs challenge the Attorney General's contingent fee agreement with private counsel on three separate grounds. First, they claim that the Attorney General lacks constitutional or statutory authority to enter into the agreement. Second, they claim that the contract violates the Utah Public Ethics Act and public policy. Finally, they claim that the contract violates Utah's budgetary and appropriations laws.

These issues have all been briefed at length to the Court and, with respect to the first two claims, this memorandum will not reargue the Attorney General's position except as necessary to rebut the authorities cited by Plaintiffs. Rebuttal of these authorities, however, is not an insignificant task. In their Memorandum in Opposition to the Defendants' Motion to Dismiss, Plaintiffs cite over thirty cases on these three claims. With few exceptions, the authorities cited do little to advance Plaintiffs' argument and, in many cases, are misleading. To insure a complete and accurate analysis, therefore, it is necessary for the Attorney General to respond in some detail to most of the authorities cited by the Plaintiffs. To summarize, however, the Plaintiffs have not cited a single case which has held that a contingent fee agreement in a civil case violates the Utah Ethics Act or any similar statute or is against public policy. The few cases that have held that the Attorney General does not have constitutional or statutory authority to enter into such an agreement apply laws different from Utah's and are easily distinguished.

Plaintiffs' only colorable claim concerns the final question raised, whether the contingent fee

contract violates Utah’s budgetary and appropriations laws. Two states in tobacco litigation like Utah’s have upheld the Attorney General’s contract with outside counsel. Two states, one in tobacco litigation, have held that a contingent fee contract is invalid. These cases, as well as the related authority discussed by Plaintiffs, are reviewed in some detail.³ In summary, cases upholding the contract have generally held that the potential recovery to be paid by the Tobacco Companies is not “public funds,” and that deducting costs and attorney fees from the amount recovered does not violate state appropriation statutes or constitutional provisions.

I. THE ATTORNEY GENERAL AND OTHER STATE AGENCIES CAN ENTER INTO CONTINGENT FEE OR OTHER PERCENTAGE-BASED CONTRACTS.

A. The Attorney Fees Due under a Contingent Fee Agreement Are Not Public Funds under Utah Law Governing Public Funds and Accounts.

Plaintiffs insist that the contingent fee agreement violates Utah’s budgetary and appropriations laws. (Pls.’ Opp. Mem. at 20). The statutes on which the Plaintiffs rely are not dispositive but depend on the definition of “public funds” as applied to the potential recovery of damages from the Tobacco Companies.

The statutory provisions cited by the Plaintiffs (*Pls.’ Opp. Mem. at 20 & nn.8-9*) follow:

Utah Code Ann. § 67-5-1(4): The attorney general shall: . . . (4) account for, and pay over to the proper officer, all moneys which come into [her] possession, that belong to the state[.]

³ All cases cited by both parties on the validity of the contingent fee contract (Plaintiffs’ first, second and third causes of action) are included in alphabetical order in a Joint Appendix, submitted to the Court prior to the hearing on the pending motions. Cases cited relative to the motion to dismiss the Plaintiffs’ fourth and fifth causes of action, which have been stayed, are not included in the Appendix. The Appendix also includes a copy of all constitutional and statutory references relied on by the parties.

Utah Code Ann. § 51-4-1: All officers, boards, commissions, institutions, departments, division, agencies, and other similar instrumentalities of the state of Utah shall deposit daily all collections of state money and other public funds transferred by this act to the state treasurer for deposit or investment whenever practicable

Utah Code Ann. § 51-5-7: (1) The revenues and other resources of the governmental funds are subject to legislative review and appropriation for each fiscal period.

(2) Notwithstanding the source of the revenues and the restrictions imposed upon the expenditure of the revenues, the planned expenditures for the governmental funds shall be incorporated into the governor's budget and submitted to the Legislature according to Section 63-38-2.

* * *

Utah statutes do not define what moneys “belong to the state” under section 67-5-1(4).

“Revenue” in the Funds Consolidation Act, Utah Code Ann. §§ 51-5-1 to -8, is defined as “the increase in ownership equity during a designated period of time that is recognized as earned.” Utah Code Ann. § 51-5-3(24) (1994). “Public funds” are defined in the State Money Management Act as “monies, funds, and accounts, regardless of source from which the monies, funds and accounts are derived, that are **owned, held or administered by the state**” Utah Code Ann. § 51-7-3(18) (emphasis added).⁴

Fundamentally, the question is whether the definition of “public funds” includes the costs and fees associated with the recovery of damages in Utah’s suit against the Tobacco Companies. There are

⁴ In addition to the Budgetary Procedures Act, Plaintiffs cite Utah Const. art. VII, sec. 8(3), (4). (Pls.’ Opp. Mem. at 20 n.9). Article 7, section 8(3) states: “The governor may disapprove any item of appropriation contained in any bill while approving other portions of the bill. In such case the governor shall append to the bill at the time of signing it a statement of the item or items which are disapproved, together with the reasons for disapproval, and the item or items may not take effect unless passed over the governor’s objections as provided in this section.” Section 8(4) provides that the Legislature can reconvene to override a line-item veto. Neither constitutional provision is relevant to the Plaintiffs’ argument and their reference to

no Utah cases to assist the Court with this inquiry. As demonstrated in the argument that follows, however, case law from other jurisdictions supports the conclusion that the only portion of the potential recovery belonging to the State -- “owned, held and administered by the State” -- is the balance of the proceeds remaining after the costs and fees, including the contingent fee, have been deducted. *E.g., In re Washington Square Slum Clearance*, 157 N.E.2d 587, 590 (N.Y. 1959), *cert. denied*, 363 U.S. 841 (1960) (the only “property” belonging to the client “was the balance of the proceeds remaining after the attorney’s retainer assignment [contingent fee] has been satisfied in full”); *Louisiana State Bar Assoc. v. Longenecker*, 538 So.2d 156, 161 (La. 1989) (“a check representing the proceeds of a judgment belongs in part to the client and in part to the lawyer”); *Phillip Morris, Inc. V. Parris N. Glendening*, No. CG 2829, (Maryland Circuit Court for Talbot County, Aug. 8, 1996) slip op. at 26 (total recovery from the Tobacco Companies is not public funds). This conclusion is further supported by the accepted practice in Utah, which includes entering into contingent or percentage fee contracts and depositing only the net proceeds of the recovery in the general fund. (Richins Aff. at ¶ 8; Letter from Throne to Lamb of 9/30/96, attached as Exhs. A & B to Defs.’ Mem. Opp. Pls.’ Mot. for S.J.).

B. The Better Reasoned Cases Uphold the Attorney General’s Authority to Enter into Contingent Fee Agreements.

There are four recent decisions addressing whether a state’s attorney general can enter into a contingent fee agreement with private counsel. Three of those are in tobacco litigation much like Utah’s case. Two courts have upheld the validity of the Attorney General’s contingent fee agreement. *Phillip Morris, Inc. v. Parris N. Glendening*, No. CG 2829 (Maryland Circuit Court for Talbot County,

them demonstrates that the authorities cited must be reviewed with some caution.

Aug. 8, 1996); *State v. Phillip Morris, Inc.*, No. C1-94-8565 (Minn. Second Judicial District, Dec. 2, 1994). Two have invalidated similar contracts. *Meredith v. Ieyoub*, 672 So.2d 375 (La. App.), *cert. granted*, 675 So.2d 1094 (La. 1996); *McGraw v. American Tobacco Co.*, No. 94-C-1717 (Cir. Ct. W. Va., Nov. 29, 1995).⁵ All four were decided on state law grounds and may be helpful only to the extent the laws of the different states are similar.

The West Virginia decision, rendered in ongoing tobacco litigation, held that the Attorney General had no constitutional or statutory authority to hire outside counsel. Unlike Utah, West Virginia does not have a statute like Utah Code Ann. § 67-5-5 (1996) allowing the Attorney General to hire outside counsel. The West Virginia Attorney General's authority is limited to the power to appoint assistant attorneys general as necessary, and these assistants are to receive compensation "within the limits of the amounts appropriated by the Legislature for personal services." *McGraw*, slip op. at 5-6. The reasoning in the West Virginia case, therefore, does not apply here.

Meredith v. Ieyoub, 672 So. 2d 375 (La.App.), *cert. granted*, 675 So.2d 1094 (La. 1996), is the second case to hold that the Attorney General has no authority to enter into a contingent fee agreement. *Meredith* is not a tobacco case, but one in which the Louisiana Attorney General retained

⁵ Plaintiffs criticize the Attorney General for citing an unpublished opinion, even though Plaintiffs have similarly relied on the unpublished decision from the West Virginia court. The Attorney General acknowledges that unpublished decisions have no precedential authority in Utah and recognizes that the rule counsels against citing them to the Court. This case, however, presents a somewhat unusual circumstance in that the similar issues are currently being litigated across the country in lawsuits brought by various states against the Tobacco Companies. In addition, the issue is one of first impression in most jurisdictions, including Utah. Although these cases are not controlling and often can be distinguished based on the differences in state constitutions and statutes, they may be instructive given the uniqueness of the question and the recentness of these other decisions. The Attorney General cites them and has provided copies to assist the Court. Moreover, the published authority on which the Attorney General relies, both from the Utah courts and other jurisdictions, supports the conclusion that the Attorney General has the authority to enter into the contingent fee contract and that it is otherwise valid under Utah law.

private counsel to investigate and prosecute the state’s environmental damage claims. The Louisiana Independent Oil & Gas Association filed suit seeking a judicial declaration that the contingent fee contract was invalid as contrary to the Louisiana State Constitution and Louisiana statutes and asking the court to prohibit the implementation and enforcement of the contract. The court did not reach the alternate constitutional argument that “all money received had to be deposited in the state treasury.”⁶

The court instead held that the contract violated a Louisiana environmental law, which states:

All sums recovered through judgments, settlements, assessments of civil or criminal penalties, funds recovered by suit or settlement from potentially responsible parties for active or abandoned site remediation or cleanup . . . **shall be paid into the state treasury and shall be credited to the Bond Security and Redemption Fund.**

La.R.S. 30:2205(a)(1) (quoted, with emphasis, in *Meredith*, 672 So.2d at 380).

Based on the express language of the statute which governs the damage claims to be brought by contingent counsel, the appellate court affirmed the trial court’s determination that the Louisiana Legislature had “specifically mandated that all recoveries in cases involving environmental legislation shall be paid into the state treasury” *Id.* at 380-81. This statute was contrasted to other Louisiana statutes specifically providing that the Attorney General could hire private attorneys on a contingent fee basis. *Id.* The court did not state that the “total funds recovered necessarily were *public funds*,” as asserted by Plaintiffs here (Pls.’ Opp. Mem. at 23); rather, the court stated that the attorney fees were “part and parcel of the recovery to which the state is entitled under this particular statute.” *Id.* at 380. The court focused on the term “recovery” in the statute, not the definition of “public funds.” The statute

⁶ Article VII, sec. 9(a) of the Louisiana Constitution of 1974 states: “All money received by the state or by any state board, agency or commission shall be deposited immediately upon receipt in the state treasury” *Meredith*, 672 So.2d at 378.

defined “all sums recovered” broadly and directed how “all sums recovered” in environmental damage claims brought under the statute were to be deposited.

If, as Plaintiffs contend, all funds recovered are public funds in all instances, then the other Louisiana statutes authorizing contingent fees or other percentage fee contracts would similarly transfer public funds in violation of the Louisiana State Constitution. The *Meredith* court did not reach that conclusion.⁷ Presumably, the court distinguished between the constitutional language “all money received” and the statutory language “all sums recovered;” otherwise the contingent fee arrangements authorized by statute in the other contexts and referred to by the court would also be void on the grounds that the legislature could not abridge the constitutional provision.

Two cases have upheld a contingent fee agreement in tobacco litigation brought by a state’s attorney general. The first was the state district court in Minnesota. Like the West Virginia decision, there is little analysis in the court’s opinion to offer as guidance to this Court. The court simply relies on a statute, similar to Utah’s section 67-7-5, which gives the Attorney General a broad grant of authority to employ counsel.⁸ The court also noted that there was a “long history” in Minnesota of attorneys hired on percentage-based retainers. As the court explained:

In many situations this is the only way the Attorney General may prosecute certain matters under its fixed budget. This procedure avoids the fiscal commitment of hiring new employees while providing the flexibility required to commence actions in a timely

⁷ The court found the existence of express statutory authority for contingent fees in other circumstances contrasted with the specific requirement that “all recoveries” in cases involving environmental legislation be paid into a specified fund to be “strong supplemental argument” that the contingent fee in this case violated the environment code. 672 So.2d at 380-81.

⁸ Minn. Stat. § 8.02 provides: “The Attorney General shall have the power to employ such assistance, whether lay, legal, or expert, as the attorney general deems necessary for the protection of the interests of the state through the proper conduct of its legal business.” *State v. Phillip Morris, Inc.*, slip op. at 3-4.

manner. Defendants have failed to cite any statutes or case law which explicitly state that the attorney general is prohibited from utilizing contingent fee arrangements in the prosecution of civil matters.

State v. Phillip Morris, Inc., slip op. at 4.

The second court to reject the Tobacco Companies' challenge to the Attorney General was the Maryland Circuit Court. *Phillip Morris, Inc. v. Glendening*, No. CG 2829 (Maryland Circuit Court, Aug. 8, 1996). The Maryland court directly addresses the plaintiffs' argument that the contract is prohibited because it provides for the expenditure of public money without an appropriation by the legislature. As here, the Tobacco Companies argued that any recovery would constitute "moneys of the State." *Glendening*, slip op. at 16.⁹ The plaintiffs asserted that "any monies recovered in the underlying lawsuit would be public funds, which must be deposited promptly in the Treasury," and that counsel could only be paid in accordance with a legislative appropriation. *Id.* at 25.

The Maryland court rejected the plaintiffs' argument, noting that it would be impossible for the legislature to appropriate funds from a recovery that has not yet occurred. As the court stated, "those monies clearly belong to the tobacco companies, not to the State. Thus, Plaintiffs seemingly would have the legislature appropriate in advance Plaintiffs' own monies in order to pay [the attorney's] contingent fee." *Id.* at 25. Commenting on the plaintiffs' failure to identify any Maryland cases supporting their argument, the court was "not persuaded that any recovery in the underlying lawsuit would be transmuted

⁹ In rejecting plaintiffs' arguments, the Maryland trial court did not rely on either the West Virginia or Minnesota tobacco cases because, unlike the Attorney Generals of several jurisdictions, including Utah, the Maryland Attorney General has no common law powers and thus lacks broad authority to initiate lawsuits that he believes are in the public interest. *Glendening*, slip op. at 18. Nonetheless, the court held that the Attorney General had statutory authority to bring the lawsuit if directed to do so by the Governor and further had statutory authority to hire private counsel. *Id.* at 19-20.

immediately into public funds and thus would need to be deposited in full in the Treasury.” *Id.* at 26.

Moreover, according to the *Glendening* court, the plaintiffs’ theory lacked common sense. Extending their logic, the Maryland court concluded that the Attorney General would also be prohibited from settling the case for less than one hundred percent of the actual damages because, if there was a settlement for something less than the full amount, defendants would retain some of the state’s “public funds,” which would also be improper under the plaintiffs’ theory:

If the Attorney General could not agree to pay private counsel a portion of the proceeds of the underlying lawsuit absent an appropriation, then logic dictates that the Attorney General could not settle the State’s claims against the tobacco companies without legislative permission. Whether the Attorney General pays a contingent fee or settles the claims, the State would receive less relief than that to which it is entitled. Although, under the former scenario, private counsel would receive a portion of the State’s recovery, while under the latter scenario, Plaintiffs would retain some funds that rightfully belong to the State, the result would be the same. Yet no one would suggest that the Attorney General must obtain legislative approval before he may settle a lawsuit for less money than was sought by the State.

Id. at 26-27.

Finally, the *Glendening* court concluded that the plaintiffs’ theory was contrary to the public interest. “A lawsuit that is driven by a contingent fee, if the action is seen through to conclusion, is a win-win situation for Maryland taxpayers. If the lawsuit succeeds, then the State could recover billions of dollars that it has spent in order to treat citizens who are suffering from alleged tobacco-related illnesses. If the action fails, then private counsel would receive no fee and thus taxpayers would be no worse off.” *Id.* at 27.

C. The Attorneys Have a Contractual Interest in the Proceeds of the Litigation and Their Fees Are Not Properly Characterized as Public Funds .

Plaintiffs attack the *Glendenning* decision on the grounds that the court does not explain why the recovery is not public funds prior to the deduction of the contingent fee. (Pls.' Opp. Mem. at 23 & n.12). Yet the Plaintiffs themselves have not adequately defined the interest of the parties in the potential recovery, and the cases they cite offer little guidance on the question. For example, Plaintiffs cite *Isrin v. Superior Court of L.A. County*, 403 P.2d 728 (Cal. 1965), for the proposition that a "contingent fee transfers to the attorney only an interest in the proceeds of the litigation and does not transfer an interest in the litigation itself."¹⁰ (Pls.' Opp. Mem. at 21, n.10). Defendants agree. That proposition, however, does not answer the question of whether both the state's interest and the attorneys' interest in the proceeds are "public funds" under Utah's Budgetary Procedures Act.

In re Washington Square Slum Clearance, 157 N.E.2d 587 (N.Y. 1959), also cited by Plaintiffs, is consistent with the State's position that the clients' interest does not include the amounts contractually due to the attorney. *Washington Square* involved a government's lien for taxes on property subject to condemnation. The taxpayer retained counsel on a contingent fee basis to represent him in the government's condemnation action, and the United States claimed that its lien for taxes had priority over the attorney's lien for services. In ruling that the Government's lien was subordinate, the court adhered to the "long-established principle that an attorney's lien upon his client's recovery is a vested property right created by law and not a priority of payment." *Id.* at 590. The court further

¹⁰ In *Isrin*, the court held that an indigent plaintiff could not be denied the right to proceed in forma pauperis on the ground that her attorney, who is presumably solvent, is acting under a contingent fee contract. In reaching that conclusion, the court reviewed the conflicting authority on the nature of an attorney's interest in litigation conducted under a contingent fee contract and ultimately concluded that it did not need to attempt to resolve the conflicts in the law; for purposes of the issue before the court, it was enough to observe that the attorney had no more than a security interest in the proceeds of the litigation. 403 P.2d at 730-32.

concluded that the only “property” or “rights of property” belonging to the taxpayer/client “was the balance of the proceeds remaining after the attorney’s retainer assignment had been satisfied in full. The client’s interest thus amounted to no more than 80% of the proceeds remaining after satisfaction of the judgment held by [another debtor].” *Id.* at 591.

These cases are consistent with the other cases characterizing the nature of the parties’ interests in the proceeds of recovery. For example, in two Louisiana bar disciplinary actions, the court observed that “a check representing the proceeds of a compromise belongs in part to the client and in part to the lawyer and must be deposited in a trust account. The lawyer must promptly and unconditionally tender the portion which represents the client’s share of the funds.” *Louisiana State Bar Assoc. v. Alker*, 530 So. 2d 1138, 1142 (La. 1988). Similarly, “a check representing the proceeds of a judgment belongs in part to the client and in part to the lawyer, and must be deposited in a trust account.” *Louisiana State Bar Assoc. v. Longenecker*, 538 So.2d 156, 161 (La. 1988). This is consistent with the practice contemplated in Rule 1.5(c) of the Utah Rules of Professional Conduct¹¹ and in the contract between the Utah Attorney General and the attorneys retained in the State’s tobacco case. (Exh. 1 at ¶ 2). The State’s interest in the proceeds of the recovery is no more than what remains after the costs of the litigation and the attorney fees are deducted as provided in the contract.

D. The Tobacco Companies’ Profits, from Which the Potential Recovery Will Be

¹¹ Rule 1.5(c) states, in pertinent part:

(c) 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. . . . Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Paid, Are Not Public Funds and Are Not Derived from the Collection of Taxes or Raised by Operation of Some General Law.

Plaintiffs challenge the Attorney General's reliance on *State v. Musgrave*, 370 P.2d 778 (Id. 1962), and *Board of Comm'rs of Wa. County v. Clapp*, 86 N.W. 775 (Minn. 1901), and assert that these cases undercut the Attorney General's position. (Pls.' Opp. Mem. at 26). A close reading of the cases, however, demonstrates that they do support the Attorney General's argument.

Musgrave was an action by the state auditor challenging the payment of an attorney's contingent fee out of the state workers' compensation insurance fund. The court rejected the plaintiff's argument that this practice violated the constitutional provision that "[n]o money shall be paid out of the state treasury except by appropriation made by law" because, even though the premiums were actually paid into the treasury, they were not public funds requiring an appropriation for this purpose. 370 P.2d at 783. No tax moneys were involved and the insurance fund was derived primarily from premiums paid on insurance funds. *Id.* at 784. Thus, the court held that the payments to the attorney directly from the fund and without an appropriation were legal. *Id.* at 785.

Because of the unique nature of the fund in question in *Musgrave*, it does not provide the final answer to when, if ever, attorney fees are "public funds." Two earlier Idaho cases, however, help to develop the Idaho court's definition of "public funds." The first is *State v. National Surety Co.*, 161 P. 1026 (Id. 1916). In *National Surety*, the state treasurer embezzled large sums of state money. The State of Idaho sued National Surety, which furnished a bond to the state to insure the faithful performance of the treasurer's duties. The attorney for the state, not retained on a contingent fee, intervened seeking a portion of the recovery as payment of his fees. The court held that the proceeds of

the judgment, representing what had been embezzled by a public official and recovered back, were public funds belonging to the state. The court therefore rejected the attorney's claim and directed him to present his claim to the state Board of Examiners. *Id.* at 1032.

The second case, which clarifies *National Surety*, is *Barnard v. Young*, 251 P. 1054 (Id. 1926). In *Barnard*, an Idaho county retained attorneys on a contingent fee basis to recover funds deposited in banks which had been closed and placed in the hands of receivers for liquidation. A taxpayer challenged the authority of the county to enter into a contingent fee agreement. Ruling in favor of the county, the court held that the counties were expressly empowered to employ counsel in civil cases when necessary, and had "dominion" over civil suits. *Id.* at 1055. On the question of whether the recovery was public funds, the court distinguished this case because the attorneys were not collecting public revenues from the taxpayers. Instead the court noted that, while the money in the banks consisted to some extent of tax money, the taxes had already been collected and the county was seeking to recover the amounts already deposited in the banks in question.¹² *Id.* at 1035.

Reconciling *Musgrave* and *Barnard*, in which contingent fee agreements were upheld, with *National Surety* results in a narrow definition of public funds, one that does not encompass the potential recovery in Utah's tobacco lawsuit. In *Barnard*, the recovery of moneys that had previously

¹² In upholding the contingent fee agreement, the court in *Barnard* also relied on provisions that parallel the Attorney General's authority in Utah. Like the Utah Attorney General, the counties were given broad dominion over civil cases and express authority to hire counsel. The court relied on a statute, similar to Utah's, which provided that the compensation of attorneys would be left to the agreement of the parties. 251 P. at 1055-56; *compare* Utah Code Ann. § 78-51-41 (1996). The court concluded that the contingent fee was "not a charge against, nor to be paid out of the revenues of the county, but was to come out of such moneys as might be recovered in the several suits." *Id.* at 1057. The court further found that there was nothing in the statute that placed the government entity (the county) "in any different category than that of individuals or private corporations in the employment of an attorney so far as fees are concerned, except the fees must be reasonable and contingent fees have generally been held a legitimate method of compensation." *Id.* at 1057.

been collected from taxpayers, deposited, and then lost, were **not** public funds for purposes of the statutory or constitutional requirements of an appropriation. They were not collecting public revenues. Utah's case against the Tobacco Companies presents an even stronger argument that the proceeds of the potential recovery are not public funds because, unlike the funds in *Barnard*, the potential recovery here has no connection to the collection of taxes.

Similarly, Utah's case is stronger than *Musgrave*, in which the funds were actually deposited in the treasury and were administered by a quasi-governmental agency and the treasurer actually paid the attorney fees out of the "state funds." 370 P.2d at 782. In this case, there is no reason to even deposit the attorneys' share of the recovery with the state treasurer. Although the State of Utah has spent taxpayer dollars to treat tobacco-related illnesses, it is not seeking to recover taxpayer dollars paid to the Tobacco Companies nor is it seeking to collect taxes owed by the Tobacco Companies. It is the Plaintiffs' money, obtained unjustly at the expense of the State, that the Attorney General seeks to collect. The recovery from this source -- the Plaintiffs' profits -- would not be classified as public funds under the rationale of *Musgrave*, *National Surety*, or *Barnard*.

Board of Commissioners v. Clapp, 86 N.W. 775 (Minn. 1901), further supports this reasoning. Like *National Surety*, *Clapp* does not involve a contingent fee contract, but concerns the issue of whether the attorney has a right to withhold owed attorney fees from funds recovered. In *Clapp*, the county sought to recover unpaid taxes from an out-of-state resident. The county was authorized to employ whatever legal assistance was necessary to collect the debt and appointed special attorneys to collect the delinquent taxes from the estate. The special attorneys were successful, and they deducted fees and expenses before paying the remainder of the recovery to the county. *Id.* at 775.

The county brought an action to recover the amount withheld, arguing that all of the monies collected by special counsel belonged to the county, the state, and the several other governmental subdivisions that would benefit from the tax collections, and was not subject to any set-off for attorneys' fees. *Id.* at 776.

The Minnesota Supreme Court rejected the county's argument and held that the state and its subdivisions were entitled only to the portion of recovery that remained **after** the expenses of litigation, including attorney fees, were paid. The court conceded that, if the recovery belonged absolutely to the various entities in certain proportions, there could be no offset for attorney fees because the attorney's contract was only with one entity, the collecting county. The court, however, did not consider the "claim against the estate, which was merged into a judgment and converted into money, as funds, absolutely of the different governmental subdivisions, until the proper amount was determined and ready for distribution. That amount could not be determined until the expenses connected with its collection were known and deducted." *Id.* at 776. Likewise, if Utah's tobacco lawsuit is successful the recovery will not belong entirely to the State and the only portion of the recovery that can be characterized as public funds cannot be determined until the amount contractually due to the attorneys is deducted.¹³

¹³ *Gonzales v. Personal Collection Service*, 494 P.2d 201 (Wyo. 1972) and *Bourne v. Cole*, 77 P.2d 617 (Wyo.1938), not addressed by Plaintiffs, reach a similar conclusion on the nature of the funds recovered. Both cases distinguish between proceeds in existence and claims. A possible fund is not treated in the same manner as a fund whose existence is known. While there was statutory authorization for a contingent fee in *Bourne*, that was not true in *Gonzales*, in which there was just general statutory authorization for the management and control of a hospital and charging recipients for services. *Gonzales*, 494 P.2d at 204. Both decisions turned on the characterization of the potential recovery, and both held that the deduction of expenses, including attorney fees, was not illegal. *Id.* at 205.

Plaintiffs also assert that the Attorney General's argument is flawed because it would lead to "absurd results." (Pls. Opp. Mem. at 22 n.11). To support this argument, Plaintiffs posit a hypothetical situation in which the division of Parks and Recreation would unilaterally increase its funds to maintain state parks without legislative appropriation or oversight. Apparently Plaintiffs believe this result is not only bad public

II. PLAINTIFFS' ASSERTION THAT THE CONTINGENT FEE CONTRACT VIOLATES THE ETHICS ACT AND IS CONTRARY TO PUBLIC POLICY IS WITHOUT MERIT.

A. The Contingent Fee Contract with Counsel for the State in the Tobacco Litigation Does Not Violate Public Policy and Is Not Prohibited by the State Ethics Act.

Plaintiffs argue that a contingent fee contract is inconsistent with the state's responsibility to seek justice and is prohibited by the Ethics Act. Plaintiffs are wrong, and the authorities they cite do not support their argument. In order to fully demonstrate Plaintiffs' errors, it is necessary to review in detail each step in the Plaintiffs' argument and the authorities on which they rely.

Tobacco Argument No. 1: *“Contrary to the Attorney General’s claim that ‘the legal profession has long accepted that a fee may be contingent on the outcome of a matter,’ contingency fees were prohibited at common law and were considered champertous.” (Pls.’ Opp. Mem. at 10).*

Response:

Contingent fees may not have been accepted at common law, but the Attorney General is correct in asserting that contingent fees have long been accepted in Utah. Plaintiffs' own authorities demonstrate that contingent fees were accepted prior to statehood and specifically contemplated in territorial law. In *Croco v. Oregon Short-Line R. Co.*, 18 Utah 31, 54 P. 985 (1898), cited by Plaintiffs, the Court points out that, as of 1888, Utah territorial law provided that “[t]he measure and

policy, but contrary to law. Plaintiffs' hypothetical, however, comes very close to describing exactly how substantial revenues are raised by state government departments and the exact nature of many contracts. (See Richins Aff. & Letter from Throne to Lamb of 9/30/96, Ex. A & B to Def.'s Opp. to Pls. Mot. for S.J.).

mode of compensation of attorneys and counselors at law, is left to the agreement, express or implied, of the parties.” *Id.* at 987 (*quoting* Comp. Laws Utah § 3683 (1888)).¹⁴ The Court, finding no error in the trial court’s refusal to instruct the jury that a contingent fee was illegal, held that “it was competent for an attorney and client to agree upon the attorney’s compensation; and such compensation may be made contingent upon success, and payable, by percentage or otherwise, out of the proceeds of the litigation.” *Id.* Thus, while the Court suggested that such contracts may have been contrary to the English common law, it noted that the reasons for the English rule “had their origin . . . in a different state of society from that which prevails at the present time.” *Id.* Based on *Croco*, an 1898 case, the Attorney General’s statement that contingent fees have long been accepted is unquestionably true.¹⁵

Tobacco Argument No. 2: *A contingent fee contract with private counsel is contrary to the government’s responsibility to “see that justice is done” and violates due process of law. (Pls.’ Opp. Mem. at 10-11).*

Response:

The Attorney General does not dispute the general proposition that the government has a duty

¹⁴ The territorial provision is similar to current Utah law: “The compensation of an attorney and counselor for services is governed by agreement, express or implied, which is not restrained by law.” Utah Code Ann. § 78-51-41 (1996).

Plaintiffs have argued that the Attorney General may be committing the state to pay special counsel if she terminates the contract prior to resolution of the case or if the case is resolved without payment of monetary damages. (Pls.’ Opp. Mem. at 18, citing *Phillips v. Smith*, 768 P.2d 449 (1989)). As the *Phillips* case makes clear, the contract between the parties governs such contingencies. *Id.* at 450, 452 n.5; see Contract, Exh. 1 at ¶¶ 2, 3.

¹⁵ *In re Evans*, 42 Utah 282, 130 P. 217 (1913), the second case cited by Plaintiffs in support of their criticism of the Attorney General’s memorandum, also contradicts Plaintiffs’ argument. The Court in *Evans* notes that “few rules of the common law have undergone more sweeping changes in their application than those relating to maintenance and champerty.” *Id.* at 238 (citation omitted). The Court quoted Warvelle’s work on Legal Ethics, stating that “[s]uch an agreement does not conflict with the law as now administered; **nor does it, in any proper sense, contravene any principle of public policy.**” *Id.* (emphasis added).

to seek justice. Similarly, there is no dispute that litigants are entitled to due process of law. Accepting those propositions as true, however, does not lead to the Tobacco Companies' conclusion that a contingent fee contract violates those principles, and the five cases cited as authority also do not support that conclusion. Three of those are criminal cases, two are civil cases, and none of them addresses whether a contingent fee agreement violates principles of fairness and due process.

Walker v. State, 624 P.2d 687 (Utah 1981), *Codianna v. Morris*, 594 P.2d 874 (Utah 1979 (cited in *Walker*), and *Berger v. United States*, 295 U.S. 78 (1935), cited by Plaintiffs, are all criminal cases. They primarily deal with either prosecutorial misconduct or the failure of the prosecution to provide defense counsel with exculpatory evidence. In *Walker*, the Utah Supreme Court reversed the district court's denial of a writ of habeas corpus and required a new trial, holding that "[k]nowing use of false testimony is fundamentally unfair and totally incompatible with 'rudimentary demands of justice,'" and that the prosecution's actions deprived defendant of a fair trial.¹⁶ Similarly, in *Codianna*, the trial court remanded for hearing on the defendant's petition for postconviction relief because the depositions taken from witnesses prior to trial in the murder prosecution were not submitted to defense counsel before the hearing on the habeas petition. The Court repeated the fundamental proposition that the prosecution had a duty to vigorously enforce the laws and to also see that justice is done "even if that means disclosing to defense counsel in criminal case evidence which is exculpatory." 594 P.2d at 877.

¹⁶ In *Walker*, the defendant was convicted of possession of a controlled substance. Her defense was that a codefendant, who had access to the room where drugs were found, was the only individual criminally culpable. At trial, the police testified for the State that only the defendant had access to the locked room. During the course of trial, however, the prosecutor was informed that the testimony was untrue and that men's clothing had been found in the room. There was also evidence that he slept there. This exculpatory evidence was not given to the defense nor presented to the jury.

The United States Supreme Court's decision in *Berger* is also a criminal matter. The Court found serious prosecutorial misconduct and ordered a new trial. The Court stated:

The United States Attorney is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; *and whose interest therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.*

Berger, 295 U.S. at 88 (italics represent portion of quote omitted by the Plaintiffs) (emphasis added).

As demonstrated in the italicized portion of the quotation omitted by the Plaintiffs, the Supreme Court's admonition was specifically directed at criminal prosecutions. Even if applied to government lawyers in a civil matter, there is nothing in the language that would suggest that a contingent fee arrangement with private counsel would undermine the Attorney General's duty to "prosecute with earnestness and vigor" while refraining from "improper methods." A contingent fee agreement is not an improper method in a civil matter.

The two civil cases cited by the Plaintiffs add little to their argument. *Freeport-McMoran Oil & Gas Co. v. Federal Energy Reg. Comm'n*, 962 F.2d 45 (D.C. Cir. 1992), is cited by the Tobacco Companies for proposition that the rule relating to government lawyer's duty to do justice applies equally to civil lawyers. In that case, the court chastised the FERC lawyer for failing to settle when the attorney's client, the Commission, had no objection to petitioner's request that the challenged orders be vacated as moot as a result of subsequent facts. Extending the reasoning of *Berger* to civil lawyers, the

court stated that government lawyers have obligations beyond those of private lawyers. The court also relied on the Model Code of Professional Responsibility 1981) EC-7, no longer in effect in Utah, which provided that a government lawyer has the “responsibility to seek justice, and should refrain from instituting or continuing litigation that is obviously unfair.” *Id.* at 47. Nothing in the decision, however, supports the Plaintiffs’ conclusion that counsel working for the State on a contingent fee basis cannot be held to this higher standard. More importantly, regardless of the type of fee agreement, the Attorney General does not abdicate her responsibility to be fair and does not give up her control over the case when private counsel is hired to represent her and the State of Utah. *See* Utah Rules of Professional Conduct, R. 1.2 (“[a] lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult the client as to the means by which they are pursued . . . [and] shall abide by a client’s decision whether to accept an offer of settlement in a matter”); R. 1.16(a)(3) (giving client authority to discharge her lawyer).

Finally, Plaintiffs seem to suggest that allowing the attorneys adverse them to be paid a contingent fee violates their due process rights. They then cite *Schiller v. Lafkowitz*, 219 A.2d 378 (Md.), *cert. denied*, 385 U.S. 947 (1966), for the proposition that “litigants in civil matters are as much entitled to due process of law and all it implies as are defendants in criminal prosecutions.” (Pls.’ Opp. Mem. at 11). *Schiller* has no relevance to the issues before this Court. The question in *Schiller* was whether a recent Supreme Court case, which held that it was a violation of the fourteenth amendment to require a juror to demonstrate a belief in God to be qualified for jury service, was retroactive. The court held that the rule was not retroactive in that case because there was no showing of prejudice. *Id.* at 381. Moreover, contrary to the suggestion that due process is the same in criminal cases as in civil

cases, the Court noted that “what the concepts of fairness embodied in due process of law entail necessarily varies with the nature of the litigation. The rights of civil adversaries do not encompass all the protections guaranteed to defendants in criminal cases.” *Id.* at 384.

The Court further commented that one of the distinctions between civil and criminal matters is that, in criminal matters, “all the resources of the government” are “pitted against the individual whose liberty or even life is at stake.” *Id.* Presumably, in some civil matters in which the government is a party, it could be argued that “all the resources of the government” are “pitted against” the adverse party. However, life and liberty are not at stake in many civil cases and are not at stake in this case. Moreover, the resources of the billion dollar tobacco industry far overshadow the resources of the State of Utah. While Utah seeks millions of dollars in damages, the amount claimed is but a fraction of the Tobacco Companies’ advertising budget, let alone their gross revenues.¹⁷ The distinction, therefore, must be considered in light of the circumstances of the parties to this case.

Tobacco Argument No. 3: *The Attorney General’s compensation is fixed by law; “[t]o the same end, the Ethics Act precludes a government employee from accepting compensation that may ‘tend to influence him in the discharge of his official duties’; and “[t]he state cannot free itself these constitutional and statutory limitations by deputizing private persons to do what the state cannot.” (Pls.’ Opp. Mem. at 11-13).*

Response:

Plaintiffs argue that the principles guiding a prosecutor’s conduct in criminal cases are reflected

¹⁷ In 1994, the cigarette companies spent a \$4.83 billion on cigarette advertising and promotion, down from the \$6.03 billion spent in 1993. Federal Trade Comm’n Report to Congress for 1994, pursuant to the Federal Cigarette Labeling and Advertising Act, p. 5 (Oct. 9, 1996) (attached here as Exh. 2). This compares to the total budget for the State of Utah of \$5.4 billion for FY97. 1996-97 Appropriations Report, Office of the Legislative Fiscal Analyst, State of Utah.

in Utah’s Constitution and statutes governing public employees. Specifically, they apparently believe the principles found in *Berger* are the reason that the Attorney General’s compensation is fixed by law. Utah Const. art. VII, § 18.¹⁸ Plaintiffs cite no authority for this conclusion, and the constitutional provision is irrelevant to the issue here.

Article VII, section 18 of the Utah Constitution addresses salaries for the State’s executive officers, including the Governor and the Attorney General. It does not apply to their respective staffs, nearly all state employees. It does not address payment to outside counsel, which the Attorney General is authorized to hire under section 67-5-5. Indeed, the Constitution does not address compensation of assistant attorney generals who are part of the Attorney General staff. Their salaries are not even set by statute. *See* Utah Code Ann. §§ 67-5-7 to -15 (1996) (establishing Attorney General Career Service Act, but not setting compensation for attorneys).¹⁹

The Ethics Act, repeatedly referred to by Plaintiffs, also adds nothing to their argument. Plaintiffs argue that the contingent fee is compensation that will “tend to influence” counsel “in the

¹⁸ Article VII, section 18 states, in pertinent part:

(1) The Governor, . . . Attorney General and any other state officer as the Legislature may provide, shall receive for their services a fixed and definite compensation as provided by law.

(2) (a) The compensation provided for in Subsection (1) shall be in full for all services rendered by those officers in any official capacity or employment during their terms of office.

(b) An officer may not receive for the performance of any official duty any fee for personal use, but all fees fixed by the Legislature for the performance by any of them of any official duty shall be collected in advance and deposited with the appropriate treasury.

¹⁹ The fees potentially paid to private counsel hired by the Attorney General can in no way be construed as compensation to the Attorney General. She will not receive a percentage of the damages which may be recovered. Nothing in the agreement modifies her compensation, the source of funds that pay her or how she is paid.

discharge of [their] official duties.” Presumably, Plaintiffs believe that the contingent fee contract will *improperly* influence the lawyers. This assertion, however, is made without factual or legal support. Nothing in the language of the Utah Public Officers’ and Employees’ Act prohibits contingent fees or any other contract that provides for payment based on a percentage of the funds recovered. In fact, Plaintiffs have not, and cannot, cite to any specific statute that would prohibit a contingent fee agreement in this case. Had the legislature intended to limit the use of contingent fees by the Attorney General, it could have done so specifically as it has done in other instances. *See, e.g.*, Utah Code Ann. § 59-2-703 (prohibiting counties from contracting with private firms or individuals under a contingent fee arrangement to appraise or assess property); *id.* § 61-2b-36 (prohibiting real estate appraiser from accepting fees contingent upon the valuation reached in a property appraisal); *see also* Utah Rules of Professional Conduct 1.5(c) (allowing contingent fees except as specifically provided in the Rules).

Plaintiffs claim that under *Utah Public Employees Ass’n v. State*, 610 P.2d 1272 (Utah 1980), the “purpose of the Ethics Act is to ensure the public’s faith in government by avoiding even the appearance of impropriety.” (Pls.’ Opp. Mem. at 12). In *Utah Public Employee’s Ass’n*, the Court noted that “[t]he Governor and all public employees have a responsibility to avoid all actual and potential conflicts of interest between their public duties and their private interest.” *Id.* at 1274. In support of that proposition, the Court cited section 67-16-2, which states:

The purpose of [the Public Officers’ and Employees’ Ethics Act] is to set forth standards of conduct for officers and employees of the state of Utah and its political subdivisions in areas where there are actual or potential conflicts of interest between their public duties and their private interests. In this manner the Legislature intends to promote the public interest and strengthen the faith and confidence of the people of Utah in the integrity of their government. It does not intend to deny any public officer or employee the opportunities available to all other citizens of the state to acquire private

economic or other interests so long as this does not interfere with his full and faithful discharge of his public duties.

Utah Code Ann. § 67-16-2 (1996). The Act prohibits certain specific types of transactions. It did not prohibit the Division of Wildlife Resources' staff from participating in a drawing for hunting permits in *Utah Public Employees*,²⁰ and it does not prohibit percentage or contingent fee contracts, either expressly or implicitly. It prohibits specified transactions which are viewed as conflicts of interest. Contingent fee agreements do not constitute a conflict of interest under either the Ethics Act or the Utah Rules of Professional Conduct.

Erroneously assuming that the Utah Constitution and Public Employees' Ethics Act prohibit private counsel from agreeing to pursue this litigation for a contingent fee, Plaintiffs next argue that the Attorney General cannot avoid the alleged constitutional and statutory violations by hiring private counsel. In support of this argument, Plaintiffs cite *Evans v. Newton*, 382 U.S. 296 (1966), for the proposition that "when private individuals are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its **constitutional limitations.**" (Pls.' Opp. Mem. at 12, *quoting Evans*, 382 U.S. at 299) (emphasis added). Plaintiffs, however, have not and cannot demonstrate that the contingent fee agreement in

²⁰ In *Utah Public Employees*, the Utah Supreme Court upheld the Governor's policy that employees of the Division of Wildlife Resources could not participate in drawings for hunting permits. The employees had contended that the Governor's policy was unconstitutional under the equal protection clause. Although the Court referred to the Ethics Act in dicta, it did not hold that employees' participation in the drawing violated the Act. To the contrary, the Court noted that there was "no evidence of impropriety." *Id.* at 1274. The Court rejected the constitutional claims of the employees and held that the Governor had the prerogative to adopt a policy that would avoid the appearance of conflict on the part of his employees. No such policy was required by the Ethics Act; it simply was within the Governor's discretion to adopt one. Thus, *Utah Public Employees* is irrelevant here.

question is unconstitutional.²¹

Tobacco Argument No. 4: *Applying these same principles, other courts have invalidated “similar arrangements.” (Pls.’ Opp. Mem. at 12-13).*

Response:

In perhaps their most misleading citation to authority, Plaintiffs state:

The Attorney General’s retention of private lawyers, and the potential payment to them of tens of millions of dollars in contingent fees, violates these laws and policies. Specifically, the contingent fee arrangement creates the inescapable impression that the special counsel’s conduct of the case will be influenced by the form and potentially enormous amount of his or her compensation. **These considerations led the Washington Supreme Court to strike down a similar arrangement.**

(Pls.’ Opp. Mem. at 12) (emphasis added). The Washington decision cited as striking down a “similar arrangement” is *Callahan v. Jones*, 93 P.2d 326 (Wash 1939). In *Callahan*, the attorney defendants, Jones and Cushing, were co-partners, engaged in general practice. Mr. Cushing had also been elected prosecuting attorney and he appointed Mr. Jones as his deputy. Callahan had reported the theft of his trailer and some stock certificates to the prosecuting attorney. Defendants Jones and Cushing successfully prosecuted the thief, Baird, for grand larceny. After the prosecution, Mr. Callahan paid the defendants a \$5.00 retainer fee and orally agreed to pay them twenty-five percent of any stolen property they recovered. Defendants succeeded in recovering \$4,850, of which they claimed twenty-

²¹ In *Evans*, a former United States Senator devised property to the city and mayor to be used as a city park “for white people only.” 382 U.S. at 297. As the law changed, the city took the position that it was a public facility which it could not constitutionally manage and maintain on a segregated basis. Individual members of the Board of Managers of the park brought an action against the city and residuary beneficiaries of the Senator’s estate, asking the court to remove the city as trustee and to appoint new trustees to whom title would be transferred. The Georgia court accepted the resignation of the city as trustee, appointed new trustees, and held that the Senator had the right to bequeath his property to a limited class. The United States Supreme court reversed, reasoning that the park had become integral to the city’s activities and that the mere substitution of trustees did not transfer this park from the public to the private sector.

five percent pursuant to their agreement, but Callahan challenged the attorneys' claim.

The trial court found that the defendants had rendered the services but that, pursuant to Washington statute, they were prohibited from charging the plaintiff any fee. The Washington Supreme Court affirmed. The statute provided that “no prosecuting attorney shall receive any fee or reward from any person on behalf of any prosecution for any of his official services, except as provided in this act, nor shall he been engaged as attorney or counsel for a party in any civil action, [or for] a party to any criminal proceedings depending upon the same facts as such criminal proceedings.” *Id.* at 328. The Washington court also stated:

[T]he [attorney defendants] were “diligent and conscientious in all that they did, both prosecuting Baird and recovering for respondent his property. **It does not appear that they violated any principle of ethics**, but the trial court held that a declared legislative public policy, as embodied in the statute above referred to, prohibited [the attorneys] from representing [Callahan] as his attorneys in the particular matter which is the subject of this action. We are convinced, as was the trial court, that [the attorneys] at all times acted in entire good faith, and that no prejudice to anyone resulted from what they did.

Id. at 829 (emphasis added).²² Thus, the arrangement between the prosecuting attorney and the crime victim in *Callahan* is in no way similar to the contingent fee agreement between the Attorney General and private counsel in the tobacco case.

Plaintiffs also cite *Baca v. Padilla*, 190 P. 730 (N.M. 1920), claiming that the

²² There is dicta in *Callahan* discussing the propriety of a public officer receiving personal gain as the result of any criminal matter. The rule extends to civil matters when the state's attorney “has been given to understand that he will be employed to prosecute a civil case after the conclusion of the criminal case” and thus “may be influenced by improper motives of self-interest to secure a conviction of a citizen charged with crime or to prevent such conviction.” 93 P.2d at 330. From that, the court concluded that the Legislature intended that a “state's attorney should not any time be interested or employed in a civil case which might reasonably be presumed would grow out of and depend upon the facts upon which the criminal prosecution depends.” *Id.* Private counsel in the instant case are not involved in any related criminal prosecution against the Tobacco Companies.

New Mexico court reached a similar holding in denouncing “the appointment of a prosecutor on a contingent fee basis.” (Pls.’ Opp. Mem. at 13). Plaintiffs’ quotation from the case, however, demonstrates its irrelevance -- it prohibits a contingent fee agreement in a criminal matter. The Attorney General does not dispute this proposition, but the instant case is not a criminal case.

B. The Attorney General has the Authority to Enter into a Contingent Fee Agreement with Outside Counsel.

Plaintiffs do not dispute that, in addition to her constitutional and statutory authority, the Attorney General has powers derived from common law. (Pls.’ Opp. Mem. at 15). The dispute between the parties is whether Utah law must expressly provide the terms under which private counsel may be retained and specifically authorize a contingent fee agreement. Plaintiffs argue that there must be a specific grant of authority to enter into a contingent fee agreement. It is the Attorney General’s position that, absent a statute prohibiting contingent fees,²³ she has the authority to hire counsel on whatever terms she determines -- the decision to seek the assistance of outside counsel on any particular case and the terms of any specific engagement have been properly left to the Attorney General’s discretion, consistent with the applicable administrative rule governing hiring outside counsel. Utah Admin. Code R 105-1-6 (referencing contingent fees as one type of fee arrangement for contracts with private counsel) (Exh. 3).

²³ See *State v. Robertson*, 886 P.2d 85, 91 (Utah App. 1994), *aff’d*, 301 Utah Adv. Rep. 13 (Utah 1996), in which the Utah Court of Appeals noted that rather than “rigorously demanding that the Legislature expressly restrict the attorney general’s common law power,” it looked for an actual conflict between the statutory scheme and her common law power. In *Robertson*, the court found no conflict between the statute giving cities the authority to prosecute criminal actions and the Attorney General’s common law authority to intervene in any prosecution brought by a city attorney in the name of the State.

In a futile effort to find conflicting law, Plaintiffs repeatedly cite to sections 67-5-4 and -5. Neither preclude the contract at issue here. Section 67-5-4 requires the Attorney General to “pay directly out of [her] funds all members of [her] staff, whether housed in her office or not.” Private counsel are **not** members of her staff. Plaintiffs argue that this section extends to private counsel as individuals not “housed” in her office. (Pls.’ Opp. Mem. at 17, n.4). The plain meaning of the word “housed” does not suggest a reference to private counsel hired under section 67-5-5, but simply acknowledges the fact that many assistant attorney generals are co-located with their client agencies and thus are not “housed” in the Office of the Attorney General. Section 67-5-4 neither applies to this contract nor conflicts with the Attorney General’s authority to retain counsel on a contingent fee basis.

Section 67-5-5 also does not prohibit the contract in this case. It simply requires the Attorney General to pay for outside counsel out of her budget. That provision only applies if the Attorney General agrees to pay counsel at all from state funds. In this case, as in many other instances in state government, counsel will be paid out of the proceeds of the recovery and the fees will be deducted as an expense prior to deposit of any moneys into the state general fund. (*See* Letter from Thorne to Lamb of 9/30/96, Def.’s Opp. Mem. Exh. B).

Finally, Plaintiffs urge this Court to disregard the Utah Department of Administrative Services’ Rule 105-1-6(b)(5),²⁴ which contemplates the Attorney General paying private counsel a contingent fee, contending it is inconsistent with the statutory framework. This argument fails because no statute

²⁴ This rule was expressly “adopted to allow the Attorney General to obtain the services of outside counsel . . . in recognition of the overlapping jurisdiction in this area under the Utah Constitution and applicable statutes and the unique needs of the Attorney General in obtaining these professional services.” Utah Admin. Code R105-1-1A (attached here as Defendants’ Exh. 3).

specifically or implicitly prohibits the Attorney General from entering into a contingent fee agreement with outside counsel. Sections 67-5-4 and -5 do not limit her authority and thus do not contradict this administrative rule. Similarly, the budgetary and appropriations laws do not limit her ability to enter into such an agreement and thus do not contradict the administrative rule.

Plaintiffs also ignore the corollary rule of construction. That is, while “any administrative body must function in conformity with the statutory authority given and may not depart therefrom . . . if there is any doubt, ambiguity or uncertainty in a statute under which an administrative agency is required to operate, its administrative interpretation should be given considerable weight.” *Lockheed Aircraft Corp. v. State Tax Comm’n*, 566 P.2d 1249, 1251 (Utah 1977) (cited by the Plaintiffs).²⁵ The Legislature’s grant of authority to the Attorney General to hire outside counsel does not prescribe the terms on which counsel must be hired. The administrative rule interpreting the statute as allowing different types of fee arrangements, including a contingent fee, is a reasonable interpretation of the statute by the Department of Administrative Services. Because it is not obviously arbitrary or erroneous, that interpretation should be given considerable weight.

CONCLUSION

In summary, Plaintiffs ask the wrong question. The appropriate question is not whether a statute grants the Attorney General specific authority to enter into a contingent fee contract, but whether there is a statute that expressly prohibits such an agreement. The answer to that question is no. Plaintiffs are

²⁵ *Lockheed*, as well as the other cases cited by Plaintiffs, acknowledges this rule. *E.g.*, *McKnight v. State Land Board*, 14 Utah 2d 238, 381 P.2d 726 (1963) (affirming decision of State Land Board and noting that an administrative agency’s interpretations will usually not be overwritten by a court unless the interpretation is obviously arbitrary or erroneous). In *Lockheed*, the Tax Commission’s interpretation of the statute was upheld.

unable to cite to a statute that limits the Attorney General's ability to hire private counsel on a contingent fee basis. She has been given far-reaching authority to represent the public interest, Utah Code Ann. § 67-5-1, as well as the express authority to hire outside counsel. *Id.* § 67-5-5. Neither the Ethics Act nor the Budgetary Procedures Act prohibits the contract in question. The Utah Legislature is not required to specifically authorize this contract with outside counsel any more than it must authorize any agreement the Attorney General enters into with outside counsel or any other independent contractor. The decision to seek outside counsel on any particular case and the terms of any specific agreement have been properly left to the Attorney General's discretion, consistent with the applicable administrative rule. For this reason, the Defendants' Motion to Dismiss the Plaintiffs' first, second and third causes of action should be granted.

Respectfully submitted this ____ day of October, 1996.

CAROL CLAWSON
Solicitor General
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of October, 1996, I caused to be hand-delivered a true and correct copy of DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS to the following:

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