IN THE SUPREME COURT OF PENNSYLVANIA

No. 24 EAP 2009

COMMONWEALTH OF PENNSYLVANIA,
c/o Office of General Counsel,

Respondent,

v.

JANSSEN PHARMACEUTICA, INC.,
trading as "JANSSEN, LP,"

Petitioner.

BRIEF OF THE NATIONAL PAINT & COATINGS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Medicaid Fraud Control Units ("NAMFCU") announced on July 30, 2004, that it has reached an agreement in principle with pharmaceutical manufacturer Schering Plough ("Schering") available at http://www.namfcu.net/press/press-release-2004-07-30 9

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INTEREST OF THE *AMICUS CURIAE*

The National Paint & Coatings Association, Inc. ("NPCA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors. Collectively, NPCA represents companies with greater than 95% of the country's annual production of paints and coatings, which are an essential component to virtually every product manufactured in the United States.

Over the past decade, a number of private attorney law firms have been aggressively soliciting state and local governments to sign on to "no-cost" contingent fee lawsuits against NPCA member companies, alleging that their lawful sale of lead-containing paints many decades ago constitutes a public nuisance. These private attorneys have pursued this public nuisance theory despite the fact that the health risks associated with lead paint arise only through the intervening negligence of property owners who fail to maintain their premises in lead-safe condition and despite undisputed evidence that existing regulatory and public-private initiatives – including nationally recognized programs sponsored by NPCA and its member companies – have resulted in dramatic reductions in blood lead levels nationwide over the past thirty years. The vast majority of state and local governments properly rejected these private attorney solicitations, continuing instead with their successful efforts to reduce blood lead levels through proper governmental actions, and those governments who did respond to the private attorneys' siren song have seen their lawsuits uniformly

rejected by every court to finally address the issue.[1] But nonetheless, the costs imposed on NPCA members from the private attorneys' entrepreneurial litigation campaign have been significant. NPCA members have been compelled to expend scores of millions of dollars in defense costs, and they have been improperly stigmatized for the historic sale of lawful products over thirty years ago.

The California Supreme Court is currently considering a legal challenge to various California governmental entities' retention of contingent fee private attorney to prosecute such public nuisance claims against a number of NPCA member companies. *See County of Santa Clara v. Super. Ct.*, 188 P.3d 579 (Cal. 2008) (granting petition for review). NPCA is participating in that legal challenge as *amicus curiae*. NPCA submits the present *amicus curiae* brief in further support of the constitutional principles underlying the need for neutrality and balanced government decision making in *parens patriae* litigation, principles that are directly undermined by the transfer of *parens patriae* authority to contingent fee private plaintiffs' counsel. As set forth herein, the dangers presented by the contingent fee arrangement in this case are not limited to a single defendant or a single industry; they threaten the government's ability to properly insure that justice is done, and they undermine public trust in the proper functioning of the government in all areas of our society.

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[1] *See State v. Lead Indus. Ass'n, Inc.* 951 A.2d 428 (R.I. 2008); *In re Lead Paint Litig.* 924 A.2d 484 (N.J. 2007); *City of St. Louis v. Benjamin Moore & Co.* (Mo. 2007) 226 S.W.3d 110; *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 139 (Ill. App. Ct. 2005).

STATEMENT OF THE CASE

NPCA adopts the Statement of the Case set forth by the Petitioner in its Opening Brief on the Merits.

INTRODUCTION

Nearly ninety years ago, the Pennsylvania Attorney General cogently explained the Commonwealth's authority and obligation in acting as *parens patriae* on behalf of all of the people within the State:

> This power is based upon the maxim, *Salus populi suprema lex*, and extends, *inter alia*, to the promotion and protection of the public safety, convenience and general welfare of the people. All rights, franchises and property are held subject to its valid exercise. **It cannot be contracted, bargained or charter-granted away by the State**, nor has it ever been surrendered or transferred to the national government. It is an inalienable and indefeasible power of the people of the commonwealth.

Attorney-General's Department, Opinion to Hon. E.M. Bigelow, State Highway Commissioner, 22 Pa. D. 117, 1912 WL 5176, at *2 (Pa. Atty. Gen. Dec. 11, 1912) (hereinafter "AG Opinion") (emphasis added). The AG Opinion was in full accord with the United States Supreme Court's recognition of the *parens patriae* power in *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) ("the state of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian, or representative of all of her citizens").

The Commonwealth's responsibility to represent the interest of *all* of its citizens as *parens patriae* "often requires the government to weigh competing interests and favor one interest over another." *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1025 (8th Cir. 2003). Accordingly, as this Court has held on

numerous occasions in discussing the Commonwealth's like-responsibility in the exercise of its police power, a government attorney representing the Commonwealth in *parens patriae* litigation "has the responsibility of a minister of justice and not simply that of an advocate." *Commonwealth v. Eskridge*, 529 Pa. 387, 390, 604 A.2d 700, 701 (1992) (internal quotations omitted); *see also Commonwealth v. Toth*, 455 Pa. 154, 158, 314 A.2d 275, 278 (1974) (a district attorney "represents the commonwealth, and the commonwealth demands no victims. It seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see that no innocent man suffers as it is to see that no guilty man escapes. Hence, he should act impartially.") (quoting *Commonwealth v. Bubnis*, 197 Pa. 542, 549, 47 A. 748, 750 (1901)).

While this Court's opinions to date have arisen solely in the context of government prosecutors, courts faced with the issue have recognized that the same obligation of impartiality applies to the government's civil attorneys:

> A government lawyer "is the representative not of an ordinary party to a controversy," the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, "but of a sovereignty whose obligation ... is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935). The Supreme Court was speaking of government prosecutors in *Berger,* but no one, to our knowledge (at least prior to oral argument), has suggested that the principle does not apply with equal force to the government's civil lawyers. In fact, the American Bar Association's Model Code of Professional Responsibility expressly holds a "government lawyer in a civil action or administrative proceeding" to higher standards than private lawyers, stating that government lawyers have "the responsibility to seek

> justice," and "should refrain from instituting or continuing litigation that is obviously unfair." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14 (1981).

Freeport-McMoran Oil & Gas Co. v. FERC, 962 F.2d 45, 47 (D.C. Cir. 1992); *see also People ex rel. Clancy v. Super. Ct.*, 705 P.2d 347 (Cal. 1985) ("Occupying a position analogous to a public prosecutor, the government attorney is possessed ... of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice." (internal quotations omitted)).

As explained in the briefing by the Petitioner, in "contract[ing] ... away" its *parens patriae* power through contingent fee arrangements with private plaintiff counsel, AG Opinion, 1912 WL 5176, at *2, the Commonwealth has violated Petitioner's due process rights by bestowing the powers of the sovereign onto counsel who have a direct pecuniary interest in maximizing a purely financial recovery against the Petitioner. The Commonwealth's argument that this stain can be lifted by the exercise of supervisory authority by in-house government attorneys – an argument that is in any event directly contrary to the terms of the contingent fee retention agreement that provides for no such supervision – in effect proposes a two-tiered system: one in which only senior government attorneys are required to be neutral, but "subordinate" attorneys are allowed a direct financial stake in the outcome of *parens patriae* actions. NPCA joins in the arguments made by the Petitioner, which are fully dispositive and compel a ruling that the contingent fee agreement here at issue is unlawful.

SUMMARY OF ARGUMENT

NPCA will not repeat Petitioner's arguments in this brief. Rather, NPCA submits this *amicus* brief to address a separate fatal flaw in the Commonwealth's defense of its contingent fee agreement: Its failure to recognize the distorting impacts of contingent fee agreements not only on the decision-making of the retained private attorneys, *but also on the decision-making of the government attorneys who retained them and on the proper balancing of governmental authority exercised by the legislative, executive, and judicial branches in connection with its quasi-sovereign parens patriae interests.* This distortion arises because contingent fee agreements create improper financial incentives for *both* parties to the contract, the private attorney and the government.

While the Commonwealth argues that a neutral supervising government attorney can protect against the financial bias of subordinate private attorneys, it fails to acknowledge that the government's decision-making is itself distorted by the existence of contingent fee arrangements. The availability here of a purportedly no-cost option for prosecuting allegations of improper marketing of prescription drugs gives rise to what economists have described as the problem of "moral hazard." The problem of moral hazard is a well-recognized economic doctrine that explains that a person takes more risks and exercises less care when they are insured than she would if uninsured. For a government that contracts away its *parens patriae* power to contingent fee counsel (and thus "insures" itself against any payment of legal fees associated with exercise of that power), the resulting moral hazard leads to an over-consumption of enforcement resources (*i.e.*, a suboptimal and excessive pursuit of litigation) and an erroneous exercise of

prosecutorial discretion. Contingent fee agreements thus tip the scales of government decision-making away from the required neutrality in two key respects:

First, enticed by the illusion of a no-cost option of contingent fee legal representation, the government approaches the "weigh[ing] [of] competing interests" that must guide the exercise of *parens patriae* power, *Ubbelohde*, 330 F.3d at 1025, without the vital counterweight of fiscal responsibility that should inform all government action. The critical choice between, for example, pursuing a balanced and coordinated regulatory approach that insures the proper availability of needed prescription medications to all people in the Commonwealth and pursuing a prosecutorial approach that is guided by more narrowly defined financial interests but at "no government cost," involves neither a neutral decision nor a decision that will promote the confidence of society in the just and impartial functioning of its government.

Second, when the government enters into a contingent fee agreement with private attorneys, its ability to secure the continued services of those attorneys necessarily depends upon its willingness to continue to pursue a monetary damages award that will make the representation worth the private attorneys' time. Thus, the government has an artificial incentive to forego alternative approaches – such as seeking purely equitable or injunctive litigation relief or electing to suspend the litigation in preference for other government action – not because those alternatives fail to protect the public interest, but because they will not allow for the potential financial payout the government now needs to retain its

legal team. Particularly where, as here, the subordinate counsel provides no added special expertise, but rather offers real value only in its willingness to work on contingency, there should be special caution to the contracting out of vital government authority.

ARGUMENT

I. The Present *Parens Patriae* Suit Originated as a Brain Child of Private Plaintiff's Counsel, Not from the Proper Deliberation of the Commonwealth's In-House Medicaid Fraud Control Unit.

Pennsylvania has significant in-house experience and resources devoted to the prosecution of alleged Medicaid fraud. As set forth on the Pennsylvania Office of the Attorney General website, in 1978, the Attorney General created the Medicaid Fraud Control Unit whose purpose was to investigate and prosecute fraud committed by medical providers enrolled in the Medicaid program. The Pennsylvania Medicaid Fraud Control Unit is a part of the Office of the Attorney General's Criminal Law Division and is comprised of prosecutors, agents and auditors housed in three regional offices across the Commonwealth. *See Pennsylvania Attorney General Medicaid Fraud Control Unit, available at* http://www.attorneygeneral.gov/uploadedFiles/Crime/medicaid.pdf.

The Pennsylvania Medicaid Fraud Control Unit belongs to the National Association of Medicaid Fraud Control Units, a division of the National Association of Attorneys General that coordinates and disseminates information about practices that have nationwide implications. *See Investigating Health Care Fraud Within the Medicaid Program, available at* http://www.attorneygeneral.gov/crime.aspx?id=202. Over the more than 20 years that the Pennsylvania Medicaid Fraud Control Unit has been in existence, it has

investigated alleged fraudulent activity involving all types of health care providers, including claims of improper conduct against pharmaceutical manufacturers. *See id.*; *see also, e.g., The National Association of Medicaid Fraud Control Units ("NAMFCU") announced on July 30, 2004, that it has reached an agreement in principle with pharmaceutical manufacturer Schering Plough, ("Schering")* ("The state settlement team was led by Senior Assistant Attorneys General from the Ohio, Oregon, Illinois and Pennsylvania Medicaid Fraud Control Units"), *available at* http://www.namfcu.net/press/press-release-2004-07-30.

The present litigation did not originate with the Pennsylvania Medicaid Fraud Control Unit or indeed with any organ of the Pennsylvania government. Rather, the litigation originated with a private plaintiff's attorney, F. Kenneth Bailey, who initially brought the idea of this *parens patriae* action to the Attorney General and then, upon being rebuffed, secured a no-bid contingent fee contract to pursue the litigation on behalf of the Commonwealth through the intervention of Governor Rendell, to whose re-election campaign Mr. Bailey had made repeated and significant financial contributions. *See The Pay-to-Sue Business: Write a check, get no-bid contract to litigate for the state*, The Wall Street Journal, April 16, 2009, at A14. The appearance of a pay-to-play scheme has led to significant controversy that in itself has inflicted significant injury to the public trust in the fair exercise of government authority in Pennsylvania, an injury that is exacerbated by the fact that the State has thus apparently contracted away one of its most core responsibilities of serving as *parens patriae* for its citizenry as a

whole. *See id*; *Editorial: There has to be a limit*, The Philadelphia Inquirer, April 15, 2009, at A14. And the Commonwealth's contingent fee agreement inflicts an impermissible deprivation as well of the due process rights of the targets of the private plaintiff counsel's litigation business plans.

II. The Availability of Purported No-Cost Contingent Fee Representation Creates a Moral Hazard That Prevents the Commonwealth From Properly Exercising Its Role as *Parens Patriae*.

The Commonwealth cannot credibly argue that Bailey Perrin is a neutral representative of the public interest or that the lawyers of the firm can be trusted to exercise the Commonwealth's "inalienable and indefeasible" *parens patriae* authority in a properly balanced fashion. AG Opinion, 1912 WL 5176, at *2. But its argument instead – that in entering into a no-bid contingent fee partnership with the Bailey Perrin firm it has not impaired its own ability to serve as neutral representative of the people – is equally implausible. As the history of Mr. Bailey's solicitation of both the State Attorney General and Governor's Office of General Counsel demonstrates, but for private plaintiff attorneys' (1) conceiving the idea of the litigation, (2) marketing the litigation to the Commonwealth, and (3) advancing the legal costs of the litigation in exchange for a financial stake in securing a hoped-for financial recovery from the defendant, this litigation might never have been brought.

The decoupling of the Commonwealth's decision-making – both in agreeing to the filing of the lawsuit and in its supervision (or lack thereof) of the litigation as it proceeds – from any financial obligation to fund the litigation gives rise to a classic example of moral hazard. *See* Danya Bowen Matthew, *The Moral*

Hazard Problem With Privatization of Public Enforcement: the Case of Pharmaceutical Fraud, 40 U. Mich. J.L. Reform 281 (2007) (addressing moral hazard problem in context of *qui tam* litigation) ("*The Moral Hazard Problem*"). When the Commonwealth is faced with the question whether to initiate a *parens patriae* claim independently, it must choose which cases are meritorious and most likely to lead to a return on its investment of public resources (as measured not simply in dollar recoveries but in the broader benefit to the public good). In cases of alleged improper marketing of pharmaceuticals, the Commonwealth will thus consider, *e.g.*, the strength of the evidence that a wrong has in fact been done, the seriousness of the alleged wrongdoing, and the consequences of a litigation-approach on the availability of medically needed pharmaceuticals and on the coordination of the provision of health care services with other States. Further, if the decision is made to prosecute the litigation, the Commonwealth's financial investment in the case insures its continued diligence in maximizing the public benefit at every stage of the litigation.

The Commonwealth's calculus changes in the presence of a contingent fee agreement. While the Commonwealth may still attempt to evaluate the factual bases and potential benefit of a lawsuit, the lack of any financial cost to the Commonwealth necessarily shifts the balance in favor of prosecution. And the financial incentives are even further perverted as the case proceeds, because any effort to monitor the progress of the litigation will lead to a diversion of its public resources. (This perverse effect is illustrated by the fact that no attorney from the

Office of the Governor's General Counsel has even entered an appearance in this case). *See The Moral Hazard Problem*, at 297-98.

Because the Commonwealth's investment in spurious false marketing claims brought by a contingent fee counsel "is minimal, and the potential payoff is sizeable, the Government will behave opportunistically and allow [contingent fee counsel] to prosecute excessive numbers of [such] cases, regardless of their merit." *Id.* at 300-01. "Moreover, the Government, as a result of the moral hazard, exercises suboptimal caution in selecting legal theories, which arguments to make, and which strategies to employ." *Id.* at 301. "The Government imagines it has nothing to lose [sic] even if these cases fail because all immediate costs of failed cases ... are borne by the private plaintiff [counsel]. Thus, in the face of weak monitoring incentives, the Government will allow cases based on weak facts or even unfounded or experimental theories of recovery to proceed. Nothing is immediately lost to the Government for this carelessness." *Id.*

But, of course, there is a loss to the public. "This suboptimal exercise of care allows the Government to take on (or allow) prosecution of cases that well may be weakly supported, poorly reasoned, and therefore of limited value as either a legal precedent or as a signal to future actors who wish to avoid engaging in fraudulent conduct. When such cases proceed, the public good is not served." *Id.* at 301-02. Moral hazard costs include "the risk of compromising socially important goals, the imposition of unnecessary litigation costs on parties to excessive litigation, the risk of establishing unclear or affirmatively bad legal

precedent, and the risk of sending mixed deterrence signals to other providers and manufacturers who may be targeted as ... defendants in the future." *Id.* at 303-04.

In the context of a *parens patriae* claim, these moral hazard costs give rise not only to a suboptimal public outcome but to an abandonment of the Commonwealth's due process obligation to exercise its quasi-sovereign authority in an impartial manner. First, by entering into a contingent fee agreement, the Commonwealth has impermissibly shifted the "delicate weighing of values" that must guide its decisions whether to file and prosecute *parens patriae* litigation in the first instance. *See Clancy*, 39 Cal. 3d at 749. Second, the Commonwealth has tied itself to financial arrangements that require the continued pursuit of even legally-dubious monetary awards rather than the types of non-monetary, injunctive remedies or negotiated outcomes that may provide a more advantageous outcome for the public as a whole. (As evidenced here by the Commonwealth's agreement in its contingent fee agreement with the Bailey Perrin law firm to a provision that precludes the Commonwealth from agreeing to "settlement of the Litigation that provides only for non-monetary relief unless the settlement also provides reasonably for the compensation of [Bailey Perrin] by [Janssen] for the services provided by the law firm under the Contract." Application for Extraordinary Relief of Ortho-McNeil Janssen Pharmaceuticals, Inc., Exhibit D, Contract, App. C, ¶ 3.)

A. Contingent Fee Agreements Impermissibly Tip the Scale Towards Purported "No Cost" *Parens Patriae* Litigation.

In ordinary circumstances, a neutral government attorney weighing whether to bring a *parens patriae* lawsuit would need to determine whether the public interest in proceeding with such litigation is of sufficient magnitude to outweigh the costs of that litigation, including the cost of diverting funds from other interests that are more highly valued by the public. However, the willingness of private attorneys to advance the costs of pursuing *parens patriae* litigation in return for a contingent stake in the outcome impermissibly tips the scale on which the government attorney balances those interests. Rather than engaging in a "sober inquiry into values, designed to strike a just balance" between potentially conflicting interests of its citizens, *see Clancy*, 39 Cal. 3d at 749, the government attorney must resist the enticement of a contingent fee option whereby a *parens patriae* action that otherwise would not have been of sufficiently high value to the public can be prosecuted "on the cheap," without the discipline of sound fiscal responsibility.

Certainly, the Commonwealth would never defend a scenario where a private party offers to pay the government a substantial sum of money in exchange for the government's agreement to prosecute specific private companies and to share in any proceeds with the payor. This image of a government-for-rent and champerty is antithetical to the central tenets of our representative government. But that effectively is the very deal that the Commonwealth has struck in this litigation. The private contingent fee attorneys approached the Commonwealth with the offer of free legal services (worth a substantial sum of

money) in exchange for use of the Commonwealth's *parens patriae* authority to prosecute a Medicaid fraud claim against the private defendant and an agreement to share in any damages award.

Absent the essential restraint against such contingent fee arrangements required by due process, government attorneys in Pennsylvania will continue to be subject to "marketing" pitches by private contingency attorneys and those private attorneys will continue to view the Commonwealth's *parens patriae* authority as a private vehicle for new business development and potential profit. Armed with substantial financial resources from tobacco and asbestos litigation, the private attorneys will be able to directly impact government decision-making by offering their "no cost" services only in connection with those alleged public wrongs that they believe provide the greatest potential financial returns on their investment.

As a noted legal scholar has observed and at least one private plaintiff counsel has advocated, private counsel paid by contingent fee agreements thus are poised to become "a de facto fourth branch of government." Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. Rev. 913, 921 (2008) ("*Impersonating the Legislature*"); *see also* Douglas McCollam, *Long Shot*, 21 American Lawyer 86 (June 1999) (interview with plaintiff lawyer Wendell Gautheir). Rather than neutral decisions motivated in the first instance by a government attorney's impartial balancing of the public interest of the people he serves as representative

of the sovereign, the government's decisions originate in the financial calculations of private counsel searching for potential deep-pocket private defendants.

> [M]ost often, the power shift is not simply one between two elected branches of government .... Instead, public policy decisions regarding which public health and safety crisis to address and who should be held financially accountable for these matters have been functionally delegated to a small handful of mass products plaintiffs' lawyers who specialize in litigation brought by states and municipalities against products manufacturers.

Impersonating the Legislature, at 921.

The Commonwealth did not reach an independent neutral judgment that the Petitioner had engaged in wrongful conduct or that a *parens patriae* lawsuit against the Petitioner would be a proper allocation of resources that would lead to an optimal public outcome. Rather, the Commonwealth (ultimately) acceded to the insistent solicitation of a private plaintiff counsel who conceived of this litigation as a means to increase his own financial fortune. Absent the Governor's Office's acceptance of the private plaintiff counsel's solicitation, which called for the targeting of a particular defendant with the vast powers of the government and the acceptance of the plaintiff counsel's financial terms of a share in the recovery, this litigation might not have been brought.

B. Contingent Fee Agreements Prevent Government Attorneys From Pursuing Properly Balanced Approaches to Address Alleged Public Wrongs.

The improper influence of contingent fee agreements on government attorney decision-making continues well after the initial decision to bring a *parens patriae* action. The Commonwealth's attempt to minimize this ongoing conflict rests upon a fundamental misconception: that the only remedy for a

dispute over the proper marketing of prescription drugs is monetary damages. From this misconceived starting point, the Commonwealth argues that the interests of the government attorneys and the private contingent fee attorneys are completely aligned, with the only question being whether the government attorneys retain control so as to prosecute and/or settle the litigation for a financial payment that may not maximize the private attorneys' recovery. *See* Respondent Commonwealth of Pennsylvania's Answer in Opposition to Application for Extraordinary Relief, at 10 ("In this context, the Commonwealth's attorneys should be no less motivated and zealous that [the private] counsel seeking [financial] remedies for private losses.").

But this framing of the issue is directly contrary to the Commonwealth's obligation to serve as *parens patriae* on behalf of all of its citizens. As is always the case in a State's exercise of quasi-sovereign authority, the determination of what best serves the interests of the public as a whole cannot be reduced to a mere monetary calculation. The present litigation addresses the question whether and to what extent the Commonwealth should have provided payment under its Medicaid and Pharmaceutical Assistance Contract for the Elderly ("PACE") programs for uses of the prescription drug Risperdal®. While the Bailey Perrin firm has a financial interest in arguing that all uses of Risperdal® were not medically necessary so as to maximize its potential monetary recovery, the Commonwealth as *parens patriae* is obligated to protect the interests of patients within the Commonwealth for whom their doctor's prescription of Risperdal® provided beneficial medical care. The Commonwealth must also consider the

potential consequences of its broad-brush attack on all off-label uses of Risperdal® on the availability of other drugs for medically needed, but off-label, uses, and on the ability of physicians in the Commonwealth to best exercise their medical judgment in determining that an off-label use of a prescription drug is in the best interest of their individual patients. *See Wash. Legal Found. v. Henney*, 202 F.3d 331, 333 (D.C. Cir. 2000) ("A physician may prescribe a legal drug to serve any purpose that he or she deems appropriate, regardless of whether the drug has been approved for that use by the FDA. … [T]he prescription of drugs for unapproved uses is commonplace in modern medical practice and ubiquitous in certain specialties."); *In re Schering-Plough Corp. Intron/Temodar Consumer Class Action*, No. 2:06-cv-5774, 2009 WL 2043604, at * 11 (D.N.J. July 10, 2009) ("the off-label use of pharmaceutical products is both prevalent and is, often times, the best means for providing effective treatment for patients").

Moreover, even if the Commonwealth were to conclude that use of a medication was uniformly detrimental to the public, it is far from clear that a lawsuit focused on a maximum monetary recovery would lead to an optimal public outcome. For example, in May 2004, the drug manufacturer Pfizer entered into a $430 million dollar nationwide settlement with the United States Department of Justice and numerous states over alleged improper off-label marketing of the drug Neurontin. But in the three months following the settlement, sales of the drug *increased* 32% from the year before.[2] Clearly, if the

[2] Julie Schmit, *Drugmaker admitted fraud, but sales flourish*, USA Today, Aug. 16, 2004, at 1A.

goal of the litigation was to restrict allegedly injurious or medically unnecessary off-label use of Neurontin, the pursuit and obtaining of a substantial monetary recovery was not an effective means of improving the public health.[3]

By entering into a contingent fee agreement, the Commonwealth thus has abdicated its *parens patriae* responsibility by artificially restricting the scope of its remedial power to legal claims that seek a maximum financial award without regard to the consequences to the public health. Indeed, as noted above, under the terms of the contingent fee agreement, the Commonwealth is precluded from agreeing to any settlement that does not provide "reasonably for the compensation of" the Bailey Perrin law firm. The Commonwealth, as *parens patriae*, is "compensated" by the outcome that best advances the interest of the public as a whole. Its contingent fee counsel Bailey Perrin, by sharp contrast, can be compensated only by money. Any argument that the Commonwealth's decision-making is not distorted by its retention of Bailey Perrin fails in the face of this most basic fact.

The contingent fee agreement in this case is even more problematic than the agreement struck down by the California Supreme Court in *Clancy*, where the private attorney's contingent fee did not depend upon the pursuit of monetary rather than abatement relief. *See Clancy*, 39 Cal. 3d at 745 (explaining fee arrangement in which private attorney would be paid an additional $30 per hour if

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[3] Moreover, if the government entities that entered into that settlement truly believed that the off-label use of Neurontin was injurious to the public health, they had alternative and more effective means at their disposal. For example, they could have directly prohibited or restricted Medicaid reimbursements for such use of the drug. But they did not do so.

successful in securing abatement remedy). While the contingent fee agreement in *Clancy* created an impermissible bias in favor of the filing of public nuisance claims, the agreement did not – as does the agreement here – create the additional artificial biases in favor of the pursuit of certain types of remedies unrelated to the potential benefit to the public or against certain groups of defendants based on the depths of their pockets rather than their responsibility for, control over, or ability to address, an alleged public harm.

The distorting effects of contingent fee arrangements on government attorney decision-making were starkly illustrated in a recent case in New Mexico, where the state attorney general – and her contingent fee private counsel – unsuccessfully used, *inter alia*, *parens patriae* public nuisance theories to pursue a series of increasingly outlandish damages theories based on alleged unremediated contamination in the Rio Grande aquifer. *See New Mexico v. General Electric Co.* 322 F. Supp. 2d 1237 (D.N.M. 2004), *aff'd*, 467 F.3d 1223 (10th Cir. 2006); *see also* Donald W. Fowler & Eric G. Lasker, *Federal Court Rejects State AG/Trial Lawyer Effort to Expand "Public Nuisance" Theory*, 22 Washington Legal Foundation Legal Backgrounder, April 13, 2007, *available at* http://www.wlf.org/upload/041307fowler.pdf. The State AG's claim in the New Mexico litigation started from a dubious factual foundation. While her claim was based on the argument that contamination of the aquifer had deprived the State of clean drinking water, the source of this alleged contamination was a Superfund groundwater site that was being successfully remediated to drinking water standards under the supervision of both federal and state regulators. But of

greater significance here is the manner in which the State AG and her contingent fee counsel were plainly guided in prosecuting the case by the pursuit of money rather than the public welfare.

In granting summary judgment to the defendants, the federal district court focused particular attention on the State AG's damages theory, which "was unequivocal" in seeking monetary damages rather than an equitable remediation of the alleged contaminated groundwater. *New Mexico*, 322 F. Supp. 2d at 1262. This fact was established in questioning by the court during an extensive pretrial conference:

> THE COURT: As I understand in this case, you're asking for money. You're not asking for remediation, you're asking for money.
>
> MR. LEWIS: That is correct.
>
> . . .
>
> THE COURT: Your effort here, as I understand it, isn't to have them fix [the deep contaminant plumes], and you don't want to fix them, apparently. You want money, and that's it.
>
> MR. LEWIS: Well, in this courtroom, that is it, yes.
> ...

Id. The court continued: "So long as the damages award would be large enough, the Attorney General of New Mexico – asserting the State's standing as public trustee of the public's interest in the waters of the State of New Mexico and as *parens patriae* of the people of the State of New Mexico – has been content to assume that nothing further could be done to protect the public health and safety against the grave risks to health and safety that Plaintiffs insist the contaminants

pose." *Id.*

Thus, the court explained, the State AG and her contingent fee counsel blatantly abandoned what courts have properly recognized is the government attorney's crucial role as a neutral representative on behalf of the public trust:

> Under the damages theory propounded by the Attorney General and her outside counsel ... the State of New Mexico ... as *parens patriae* for and on behalf of the people of the State of New Mexico – proposed to stand idle and do *nothing* further to clean up toxic contamination beneath the South Valley Site that counsel insist will go untreated by the existing remedial actions. Instead, the State of New Mexico, by and through the Attorney General, sought to be paid *billions* of dollars in damages – *not* to clean up the deep groundwater contamination they insist can be found beneath the South Valley Site, but to leave that contaminated water exactly as they allege it is, untreated and unusable. ...

Id. at 1259.

In affirming the summary judgment ruling, the Tenth Circuit squarely addressed the tension between the State AG's need to compensate her contingent fee counsel and her proper role in prosecuting public nuisances on behalf of the public interest. "The AG's right to pursue public nuisance claims against [defendants] ... was largely illusory (at least as far as the AG was concerned) because ... New Mexico law limited the available remedy to injunctive relief." *See New Mexico v. Gen. Elec. Co.*, 467 F.3d 1223, 1238 (10th Cir 2006). Of course, if the State AG had been acting in her proper role as a neutral sovereign, the ability to secure injunctive relief to abate a purported public nuisance would have been anything but illusory. The State AG considered the right illusory because her entry into a contingent fee agreement with private plaintiffs' counsel

impermissibly "tempt[ed] the government attorney to tip the scale" in her prosecution of the alleged public nuisance and to focus solely on monetary remedies rather than the putative public interest in securing clean drinking water. *Clancy*, 39 Cal. 3d at 749. The Tenth Circuit was even more pointed in its admonition against contingent fee agreements in discussing the related issue of the State AG's *parens patriae* claim for natural resource damages for alleged injury to the groundwater. The Tenth Circuit held that the use of any financial recovery for payment of contingent fee attorneys would be contrary to the sovereign objective of restoring the alleged injured groundwater. *See New Mexico*, 467 F.3d at 1248 (rejecting State AG's damages theory because "a portion of the recovery ... could be used for something other (for example, attorneys fees) than to restore or replace the injured resource").

The New Mexico litigation also provides a real world answer to the Commonwealth's assertion here that its retention of contingent fee counsel will not have any impact on its neutrality in determining the nature and magnitude of any request for monetary relief in this litigation. As the district court in the New Mexico litigation explained, the State AG's damages theory "sought to maximize the dollar amount of their damages award, largely unconstrained by practical considerations." *New Mexico*, 322 F. Supp. 2d at 1261.[4] Indeed, rather than

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[4] As subsequently noted by the Tenth Circuit:

> As of January 2004, the [New Mexico AG] demand[ed] over $1.2 billion dollars in cash compensation, including $609,000,000 as the cost of water rights to nearly a quarter-million acre-feet of potable water that likely will never be purchased, and up to $609,000,000 for the construction of a 289,500 acre-foot "replacement" surface storage reservoir that likely will never be built.

conducting *Clancy*'s "delicate weighing of values" or *Ubbelohde*'s "weigh[ing] of competing interests," the New Mexico AG's claimed damages "underscore[d] the effort in [her] damages theory to maximize rather than mitigate the State's asserted losses." *Id.*

This same dynamic was evident in the Rhode Island lead paint public nuisance litigation, where, prior to the Rhode Island Supreme Court reversal of the trial verdict, the State's contingent fee private counsel dreamed up a $2.4 billion monetary remedy – a remedy some 4.5 times more expensive than the State's largest existing public works project – to address a public health concern that was being successfully addressed without any court involvement whatsoever (from 1991 to 2006, the incidence of elevated blood lead levels in children under the age of 6 in Rhode Island had decreased from 29.6 percent to below 2 percent).[5] Under the government's damages theory, the $2.4 billion would have been used to retain 10,000 workers (despite the fact that there are only 833 workers licensed in Rhode Island to do lead removal work and only 6,000 to 8,000 registered construction workers of any type in the entire State) and to remediate more than half the houses and apartments in the State (the vast majority of which did not have deteriorating lead paint and accordingly would pose no health risk unless the encapsulated paint was disturbed, *e.g.*, through the proposed remediation), requiring the forced temporary relocation of the private residents

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New Mexico, 467 F.3d at 1237 n.24.

[5] Peter B. Lord, *Lead paint cleanup: a $2.4-billion solution*, The Providence Journal (September 15, 2007), *available at* http://www.projo.com/news/content/Lead_Cleanup_09-15-07_CB738JA.3274607.html.

from those homes.[6] That is, of course, after private counsel took out their contingent fee 16.7 percent share of over $400 million for themselves.

The argument that government decision-making in *parens patriae* litigation is not distorted by the presence of contingent fee counsel is simply false.

CONCLUSION

The retention of contingent fee counsel to prosecute *parens patriae* actions on behalf of the Commonwealth impermissibly tips the scale in the Commonwealth's exercise of its quasi-sovereign power and violates the due process rights of parties targeted by such actions. The December 8, 2008 Order of the Philadelphia Court of Common Please should reversed and the Commonwealth should be prohibited from prosecuting this or other *parens patriae* litigation using contingent fee counsel.

August 12, 2009

Respectfully submitted,

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[6] *Id.*

CERTIFICATE OF SERVICE

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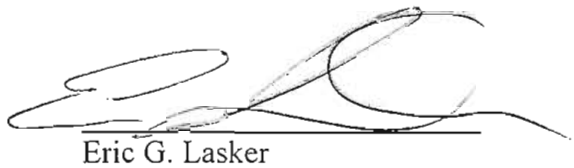

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