

PHILIP MORRIS INCORPORATED,
et al.,

Plaintiffs,

v.

PARRIS N. GLENDENING,
et al.,

Defendants.

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

* * * * *

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISMISS OR IN THE ALTERNATIVE
FOR SUMMARY JUDGMENT**

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON
JOHN B. HOWARD, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7055

Attorneys for Defendants

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In an effort to pursue a substantial recovery on behalf of Maryland taxpayers *without incurring expenses*, the Attorney General of Maryland has issued a request for proposals to determine whether outside law firms could represent the State on a contingent basis in a contemplated lawsuit against the tobacco industry. It is ironic, to say the least, that the tobacco industry plaintiffs, invoking their supposed standing as “Maryland taxpayers,”¹ have filed this preemptive strike against the Attorney General’s efforts to provide *cost-free tax relief* to Marylanders. The tobacco industry’s real purposes, of course, are not difficult to discern. As one of plaintiffs’ counsel has confessed in another lawsuit:

The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs’ lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]’s money, but by making that

¹All of the plaintiffs except for the Tobacco Institute, Inc., allege generally that they are Maryland taxpayers. For purposes of ruling on this Motion to Dismiss, the court must accept this and the other factual allegations of the Complaint as true. *Morris v. Osmose Wood Preserving*, 340 Md. 519 (1995). The Plaintiffs’ Motion for Summary Judgment, however, cannot be granted until the Defendants have an opportunity to conduct discovery on whether the plaintiffs are in fact Maryland taxpayers, a material fact relating to standing. See Maryland Rule 2-501.

other son of a bitch spend all of his.

Haines v. Liggett Group, 814 F. Supp. 414, 421 (D.N.J. 1993)(quoting an April 29, 1988 Memorandum authored by R.J. Reynolds counsel J. Michael Jordan). This lawsuit is yet another thinly veiled manifestation of the industry’s self-described litigation strategy to cripple their opponents so that the real merits of claims against them are never fully and fairly adjudicated.

Background

The plaintiffs, Philip Morris Incorporated, Brown & Williamson Tobacco Corporation, Liggett Group, Inc., Lorillard Tobacco Company, R.J. Reynolds Tobacco Company, the Tobacco Institute, Inc., and Richardson’s Country Store, LLC (collectively “the Tobacco Industry”),² have brought this action under the Maryland Uniform Declaratory Judgment Act, Md. Courts & Jud. Proc. Code Ann. § 3-401 *et seq.*, seeking a declaratory judgment and an injunction to prevent the Attorney General of Maryland from engaging outside counsel to assist the State in planned litigation against the Tobacco Industry (the “Planned Lawsuit”).

The Planned Lawsuit results from the Attorney General’s investigation into the legal and factual basis for asserting claims against the Tobacco Industry, as five other states (Mississippi, Minnesota, West Virginia, Florida, and Massachusetts) have already done. For years, the citizens of Maryland have paid out hundreds of millions of dollars in medical assistance to persons with tobacco-related illnesses, while the over-\$40-billion-per-year tobacco industry has reaped hundreds of millions of dollars in profits. Each year,

²This designation will also be used when referring to the probable defendants in the State’s planned lawsuit against the Tobacco Industry, although that lawsuit may ultimately name some other defendants.

approximately 425,000 Americans--6000 of them Marylanders--die from using the Tobacco Industry's deadly products as they are intended to be used.

The Attorney General's preliminary investigation included a review of newly discovered evidence showing, among other things, that

- * despite public pledges to disclose the health risks of smoking, the Tobacco Industry has for decades lied about and concealed its own research into, and knowledge of, the lethal effects of cigarette smoking, all in a calculated, concerted effort to mislead and confuse the consuming public about the magnitude of those risks;

- * while denying to this day that nicotine is addictive, the Tobacco Industry has long had a much more sophisticated understanding than public health authorities of the addictive properties of nicotine; and

- * with full knowledge of the lethal effects of continued cigarette smoking, the Tobacco Industry has manipulated nicotine levels in cigarettes to create and sustain smokers' addictions, causing premature death in up to half of regular smokers.

The import of this recently discovered evidence, some of which was featured in a series of articles in the July 1995 *Journal of the American Medical Association* ("JAMA"), was well summarized in an editorial personally signed by every trustee of the AMA and every editor of JAMA:

[T]he effect of the tobacco company tactics, long suspected, has been to obfuscate the conclusions of scientists, confuse the public, and to assist greatly the tobacco industry in its successful efforts to influence the political process in its favor. *The surgeon general's report of 1964 would have been far more decisive in its conclusions and recommendations had the evidence available to the executives of [Brown & Williamson] been available to the surgeon general's committee. We can only speculate how many lives would have been saved and how much suffering would have been averted.*

Exhibit A to this Memorandum (Editorial, July 19, 1995 issue of *JAMA*). In short, the preliminary evidence suggests that the Tobacco Industry may well have perpetrated the most

massive and devastating consumer fraud in history, wreaking havoc on the health of Maryland smokers and the finances of Maryland taxpayers.

On November 16, 1995, the Attorney General issued a “Request for Proposals for Private Counsel to Assist in Representing the State in Major Litigation” (the “RFP”), the document on which the Tobacco Industry’s entire case rests. *See* Exhibit B to Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment (“Plaintiffs’ Memorandum”). The RFP stated that “in connection with an ongoing review of the possibility” of litigation against the Tobacco Industry, the State was soliciting proposals from outside law firms willing and able to represent the State in the Planned Lawsuit. The RFP explained that the outside firm or firms would be compensated by the State “on a contingent basis from any monies recovered by way of settlement or judgment.” *Id.* On the same day that the RFP was issued, the defendants herein, the Governor, Attorney General, and Secretary of the Department of Health and Mental Hygiene, held a press conference to announce the issuance of the RFP and the proposal to bring the Planned Lawsuit.

The Tobacco Industry filed its Complaint, based on the RFP, on January 22, 1996 and served it on defendants on January 24, 1996. Before the defendants responded, the Tobacco Industry moved for summary judgment. The Tobacco Industry argues that Maryland statutory and constitutional law would not authorize the Attorney General to enter into a contingency fee agreement to pay for outside counsel, on the theory that such an arrangement would be an unauthorized appropriation of funds by the Attorney General. Acknowledging the Attorney General’s clear statutory authority under Md. State Gov’t Code Ann. § 6-105 to hire outside counsel with the approval of the Governor, the Tobacco Industry nonetheless argues that a contingent fee arrangement would be unauthorized.

Finally, the Tobacco Industry asserts that the Attorney General's employment of contingent fee counsel would violate its right to impartial administration of justice.

Even if the Tobacco Industry had standing to assert these contentions (they do not) or they were justiciable (they are not), none of the contentions would withstand scrutiny. Maryland constitutional and statutory law clearly permit the Attorney General, with the approval of the Governor and without separate legislative appropriation, to hire outside "assistant" counsel in extraordinary cases. The Attorney General has validly exercised that authority here to pursue a matter very much in the State's interest. Moreover, the Attorney General, who will make all the important decisions relating to this litigation, has no personal or pecuniary interest in this matter. The Attorney General's only interest is in seeing that the taxpayers of Maryland have their day in court against the Tobacco Industry, a day the industry (with good reason) desperately hopes will never come.

ARGUMENT

I. The Tobacco Industry Lacks Standing Because There is No Possibility that Its Taxes Could Be Increased as a Result of a Contingent Fee Arrangement with Assistant Counsel.

The Tobacco Industry does not have standing to assert the challenges it raises. The allegation that a contingent fee contract could potentially increase its taxes is manifestly illogical. There is no rational causal connection between a contingent fee arrangement specifically designed to avoid the possibility of an additional tax burden on Marylanders and a possible increase in taxes. For this reason, despite Maryland's generally liberal approach to taxpayer standing, the Tobacco Industry lacks standing to bring this action.

The Court of Appeals has held that taxpayer status entitles a person or organization to standing "when the challenged statute, regulation, or government action increases or

threatens to increase the taxpayer's tax burden." See *State v. Burning Tree Club, Inc.*, 315 Md. 254, 292-293, *cert. denied*, 493 U.S. 816 (1989); *James v. Anderson*, 281 Md. 137, 142 (1977); *Citizens Planning and Housing Ass'n v. County Executive*, 273 Md. 333 (1974); *Gordon v. City of Baltimore*, 258 Md. 682, 686-690 (1970). Although Maryland courts generally take a broad view of taxpayer standing, it is not sufficient merely to allege taxpayer status without showing that the challenged action could cause a pecuniary loss to the plaintiff as a taxpayer. See *Citizens Committee v. County Commission*, 233 Md. 398 (1964); *Carroll Park v. Board, Frederick Co.*, 50 Md. App. 319 (1981).

In an effort to meet this requirement, the Tobacco Industry speculates vaguely that "the proposed contingency fee contract could potentially result in a tax burden on Tobacco Industry greater than the tax burden which would otherwise be imposed." Complaint at ¶20. This allegation is illogical on its face, and is simply wrong: there are no conceivable circumstances under which a contingency fee arrangement that might result from the RFP could result in an increase in taxes generally. If the Attorney General hires outside attorneys to prosecute the Planned Lawsuit and the State does not prevail, the action will have cost the State nothing.³ If the State prevails in the Planned Lawsuit, the result would be

³This assumes that the State will actually enter into a contract as planned. The uncertainty of this, of course, demonstrates that this action is not ripe and therefore not justiciable. "The existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action." *Hatt v. Anderson*, 297 Md. 42, 45 (1983); *Hamilton v. McAuliffe*, 277 Md. 336, 340 (1976). Cases involving constitutional questions, such as this challenge to the constitutional authority of the Attorney General, must meet an even more exacting standard of justiciability. *Hatt*, 297 Md. at 46. When and

a *benefit* to Maryland taxpayers *under any possible percentage contingency fee arrangement*.

In situations like this, where the governmental action either would have no effect on taxes or might actually inure to the benefit of taxpayers, Maryland courts have denied taxpayer standing. In *Citizens Committee v. County Commission*, 233 Md. 398 (1964), the Court of Appeals held that taxpayers lacked standing to challenge legislation that authorized the licensing of gambling devices and activities. The court reasoned that, however much the taxpaying plaintiffs might object to it, the gambling license program had the potential to decrease, rather than increase, the taxpayers' burden. *Id.* at 404 (“[I]t is evident that the taxpayers would be damaged by a discontinuance of the program rather than a continuance of it.”). Moreover, the court noted that the plaintiffs had failed to show any conceivable harm to a special interest of theirs, because funds to administer the program came from general public funds so that any pecuniary loss would be “proportionately suffered by all other taxpayers in the county.” *Id.*

In *Carroll Park v. Board, Frederick Co.*, 50 Md. App. 319 (1981), the Court of

if a contract is agreed upon, the Tobacco Industry's claim would still be nonjusticiable unless it could demonstrate a substantial certainty that the purportedly threatened injury--an increase in their taxes--was substantially certain to occur. *See Anne Arundel County v. Ebersberger*, 62 Md. App. 360, 371 (1985) (“at least until the prospect of such an appropriation or such a tax becomes substantially more certain, the plaintiffs will have suffered no injury from the challenged ordinance, and its validity or invalidity is therefore of no practical consequence.”).

Special Appeals confronted a similar instance of taxpayers objecting to a law that could actually benefit taxpayers generally. In *Carroll Park*, some citizens and taxpayers in Frederick County sought declaratory and injunctive relief to require the County to use a tract of land only for the benefit of the poor, consistent with a charitable trust in the deed to the property that the County obtained. The court held that the citizen-taxpayers lacked standing because the alleged *ultra vires* use of the tract, though arguably harmful to the poor, in fact “might inure to the taxpayers’ benefit.” *Id.* at 324-25.

The Tobacco Industry’s illogical taxpayer-standing allegation in this case also resembles that made in *In re Adoption No. 2633*, 101 Md. App. 274 (1994), another case where plaintiffs impermissibly sought to use taxpayer status as a broad commission to challenge governmental action. There, the plaintiffs were foster parents who challenged as racially discriminatory the local social services agency’s decision to place a child with other, same-race parents. The plaintiffs alleged that they had standing as taxpayers to challenge a racially discriminatory use of public funds. Applying the rule that plaintiffs must show that a law or governmental action, as applied, increases their taxes, the Court of Special Appeals denied standing, noting that the plaintiffs’ standing allegation was “illogical” because “the tax liability would be the same” regardless of whom adopted the child. 101 Md. App. at 297.

As discussed above, there is no conceivable scenario under which a contingency fee contract could increase taxes. To be sure, the Attorney General’s office will commit some of its resources to this litigation, but the Tobacco Industry clearly has no standing to challenge this lawful allocation of existing resources. *Citizens Planning & Housing Ass’n v. County Executive of Baltimore County*, 273 Md. 333, 344 (“In determining a taxpayers’

pecuniary injury resulting from the unlawful expenditure of public funds, we may not weigh lawful expenditures against unlawful expenditures, because no legal injury results from the lawful expenditure of public funds.”) (quoting *Horace Mann League v. Board*, 242 Md. 645, *cert. denied*, 385 U.S. 97 (1966)(internal citation omitted)). Indeed, by exploring the possibility of hiring outside firms to handle this matter on a contingent basis, the Attorney General is seeking to minimize the burden on the Office’s resources and to safeguard the interests of Maryland taxpayers, a fact that the Tobacco Industry acknowledges by quoting from the RFP. *See* Complaint at ¶15 (stated purpose of the proposed contingency fee arrangement is to “minimize the State’s ‘commitment of personnel and resources to this lawsuit’”). As the Tobacco Industry realizes, the alternative to the possible contingency fee arrangement would be to staff this matter “in-house,” a much more costly proposition for the State and one that may not be feasible. Not to pursue the planned litigation would *truly* harm the taxpayers of Maryland.

II. The Attorney General Has Clear Constitutional and Statutory Authority to Employ Assistant Counsel in an Extraordinary Case Such as the Planned Lawsuit.

Without standing to complain, the Tobacco Industry seeks to enlist the power of this Court to hinder the Attorney General in carrying out his core constitutional powers and duties, and to prevent the execution of a clear directive from the Governor. In asking this Court to restrain a valid exercise of power by a coordinate branch of the State government, the Tobacco Industry misstates and misconstrues the Attorney General’s authority to act on the Governor’s direction to vindicate the State’s interests through civil litigation, and to employ whatever assistant counsel may be necessary for that purpose.

A. The Attorney General Has the Authority to Bring the Planned Lawsuit.

The Attorney General, acting at the Governor's direction, plainly has the constitutional power to initiate a civil suit in the interest of the State to pursue injunctive relief and damages against the Tobacco Industry. Article V, Section 3, of the Maryland Constitution provides, in relevant part:

(a) The Attorney General shall . . . (2) [i]nvestigate, commence, and prosecute or defend . . . any civil or criminal suit or action . . . on the part of the State or in which the State may be interested, which . . . the Governor shall have directed or shall direct to be investigated, commenced, and prosecuted or defended.

Md. Const. Art. V, §3(a)(2) (emphasis added). Thus, when the Attorney General is acting at the direction of the Governor, he has broad constitutional powers. *State v. Burning Tree Club*, 301 Md. 9, 33 (1984). Here, with the Governor's approval, the Attorney General has investigated and plans to commence a civil suit on the part of the State against the Tobacco Industry. As described above, the Attorney General's decision to exercise his constitutional power in this matter is unusually well-grounded. *See supra* "Background."

A lawsuit by the State to recover State-paid medical assistance funds and to obtain injunctive relief against the Tobacco Industry's conduct is, beyond any doubt, very much in the "interest of the State" and therefore within the Attorney General's core constitutional authority. A court order preventing the Attorney General from engaging assistant counsel would effectively undermine the Attorney General's ability to carry out his constitutional powers and would therefore raise serious and troubling separation of powers concerns. The separation of powers provision in Article 8 of the Maryland Declaration of Rights prevents, among other things, one branch of government from "reduc[ing] to impotence" another by transferring or vitiating its constitutional powers. *Murphy v. Yates*, 276 Md. 475, 492 (1975); *see also id.* at 488 (General Assembly may not limit or modify the constitutional

duties of the Attorney General); *Hamilton v. Verdow*, 287 Md. 544, 556 (1980) (separation of powers under Art. 8 of the Maryland Declaration of Rights places “limits on a court’s power to review or interfere with the conclusions, acts or decisions of a coordinate brach of government made within its own sphere of authority.” (citations omitted))

B. The Attorney General May Employ Assistant Contingent Fee Counsel for the Planned Lawsuit.

The Tobacco Industry’s wealth and its determination to make litigation against it prohibitively burdensome make the Planned Lawsuit an “extraordinary” one for the Attorney General to manage. In such a case, the Maryland statutory law provides clear authority for the Attorney General, with the Governor’s approval, to “employ any assistant counsel that the Attorney General considers necessary to carry out any duty of the Office in an extraordinary or unforeseen case” Md. State Gov’t Code Ann. § 6-105(b)(1). The statute provides substantial flexibility regarding how such special assistant counsel may be compensated, subject only to the approval of the Governor. Section 6-105(b)(2) provides that, when the Attorney General wishes to engage special assistant counsel, he “shall submit to the Governor a written request that: (i) states the necessity of and each reason for the special employment; and (ii) states the proposed compensation and its source or certifies that the Attorney General cannot ascertain in advance the proper compensation.” If the compensation cannot be determined in advance, it “*may be agreed on or adjusted later.*” *Id.* § 6-105(b)(3) (emphasis added).

Section 6-105(b), and especially the provisions on compensation for assistant counsel, demonstrate two critical points that are dispositive of this case: (1) the General

Assembly intended that the Attorney General, with the Governor's approval, should have the ability to hire special counsel in unique and important cases so that resource limitations would not hinder him in carrying out his constitutional responsibilities; and (2) that such assistant counsel should receive a "proper compensation," using any appropriate method of payment, whether set in advance or agreed on and adjusted later. Payment of attorneys on a contingent basis is a traditional, ethically sound, and entirely proper method for compensating attorneys in cases, such as this one, where a party has a valid claim but lacks the resources to pursue litigation. *See Schackow v. Medical-Legal Consulting Serv.*, 46 Md. App. 179, 196 (1992); Md. Rules of Prof. Conduct 1.5(c) and commentary. Moreover, "except for the situations controlled by Rule 1.5(d) [prohibiting contingent fees in domestic and criminal cases], there is no restriction against such arrangements in other contexts." 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* (2d ed. 1994).

C. The Assistant Counsel Arrangement in the Planned Lawsuit Does Not Have to Be Separately Approved by the General Assembly.

Section 6-105(b) of the State Government Article indicates that the Governor, acting independent of the legislature, may approve the compensation arrangement for outside counsel. At most, the Attorney General's contingent fee arrangement with outside counsel under section 6-105(b) requires approval by the Board of Public Works. Section 10-305 of the State Finance & Procurement Article authorizes the Board of Public Works to sell, lease, transfer, exchange, grant, or otherwise dispose of "[a]ny real or personal property of the State . . . to any person . . . for a consideration the Board decides is adequate." For example, a contingent fee contract between the Attorney General and

outside counsel to represent the State in debt-collection matters would need Board of Public Works approval. *See* 74 Op. Att’y Gen. 136 (1989). Although it is not clear whether such approval would be required for the contingent fee contract at issue in this case,⁴ there is no question that such approval would satisfy any conceivable objections to the legality of the agreement. If the State can hire a firm willing to represent it in the Planned Litigation for a percentage of the recovery despite the well-known difficulties and uncertainties of litigating against the Tobacco Industry, that representation would certainly be “adequate consideration” under Md. State Fin. & Proc. Code Ann. § 10-305(b).

The Tobacco Industry’s argument that such a contract would require separate legislative appropriation is based on the flawed premise that the contingency fee payments would be deposited into the Treasury. Whether the Governor alone, or the Board of Public Works, approves the percentage contingency fee contract, the portion of the funds recovered in the Planned Lawsuit that would be used to pay the attorneys are not “moneys of the State” and would never be placed in the State Treasury. Only the net proceeds of the

⁴Section 6-105, read in its entirety, strongly implies that Board of Public Works approval is not necessary when the Attorney General hires assistant counsel in an “extraordinary or unforeseen case.” Subsection 6-105(c), which immediately follows the “assistant counsel” provision, expressly requires Board of Public Works approval for “special counsel” to defend State officers or employees in cases where the Attorney General determines that representation by his office would be “impracticable or uneconomical.” In such cases, “[t]he special counsel is entitled to compensation, as set by the Attorney General *and approved by the Board of Public Works.*” Md. State Gov’t Code Ann. § 6-105(c). Under the canon of statutory interpretation “*expressio unius exclusio alterius*,” the reference to Board of Public Works approval in subsection 6-105(c) indicates an intentional *exclusion* of that requirement when the Attorney General engages counsel under subsection 6-105(b).

In addition, the Attorney General may approve “a sole source contract to obtain the services of a contractor in connection with . . . threatened or pending litigation,” expending funds as the Attorney General deems necessary, without the approval of the Board of Public Works. Md. State Fin. & Proc. Code Ann. § 13-107(b).

recovery remaining after payment of the attorneys' fees would be deposited into the State Treasury, and therefore only those net proceeds would be subject to the appropriations process. Md. Const. Art. III, § 32 ("once funds are *received* into the State Treasury, they become subject to the appropriation process" and shall not "be drawn from the Treasury of the State . . . except in accordance with an appropriation of law.") (emphasis added); *cf.* Md. State Fin. & Proc. Code Ann. § 6-213 (providing that the Comptroller, with the approval of the Governor, may exempt revenues from the requirement that they be placed in the State Treasury).

D. The West Virginia and Minnesota Precedents Support the Legality of the Proposed Contingent Fee Arrangement.

In objecting to the proposed contingent fee arrangement here, the Tobacco Industry places significant weight on a West Virginia trial court judge's ruling that the West Virginia Attorney General's office could not retain outside counsel on a contingent fee basis. The Tobacco Industry submits to this Court that West Virginia law is "strikingly similar [to Maryland's] and requires the same result." Motion for Summary Judgment at 3-4 & 10-11.

This is a remarkable, blatant mischaracterization of West Virginia and Maryland law. As discussed, Maryland law expressly authorizes the Attorney General to hire outside counsel to assist him in extraordinary cases, Md. State Gov't Code Ann. § 6-105(b); West Virginia has *no* provision whatsoever authorizing its Attorney General to hire outside counsel in unusual cases. The only staff authorized by West Virginia law is that provided for in section 5-3-3 of the West Virginia Code, a section similar to subsection (a) of 6-105, but completely different from subsection (b), the provision relied on here:

The attorney general may appoint such assistant attorneys general as may be necessary to properly perform the duties of his office. The total

compensation of all such assistants shall be within the limits of the amounts appropriated by the Legislature for personal services. All assistant attorneys general shall serve at the pleasure of the attorney general and shall perform such duties as he may require of them. All laws or parts of laws inconsistent with the provisions hereof are hereby amended to be in harmony with the provisions of this section.

Moreover, the Maryland Governor has approved this outside counsel arrangement, as required under section 6-105(b). In West Virginia, the Attorney General had no such statutory authorization *and* faced the active opposition of the Governor.

In fact, contrary to the Tobacco Industry's assertion, Maryland law is much more analogous to Minnesota's, where the State court denied the industry's motion to invalidate the State's contingent fee arrangement with the outside law firm. *See* Exhibit F to Plaintiffs' Memorandum. Minnesota, like Maryland but unlike West Virginia, has express statutory authorization for the Attorney General to hire outside counsel. The Attorney General may "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." Minn. Stat. § 8.02. The trial court in Minnesota, ruling against the industry, relied on this dispositive statutory language and quoted it in full.⁵ The court went

⁵Omitting the Minnesota court's express reliance on this dispositive statute, the Tobacco Industry misleadingly informs this Court that "the Minnesota trial court failed to explain its decision other than noting that '[t]here exists a long history in Minnesota of Special Attorney Appointment utilizing percentage-based retainers.'" Plaintiffs' Memorandum at 13 n.6. The Tobacco Industry is also less than candid in suggesting that Minnesota cases would not be relevant because the Maryland Attorney General does not have common law powers. The very case they cite for this proposition, *State v. Burning Tree Club*, 301 Md. 9 (1984), makes clear that the Attorney General has extremely broad powers when acting at the direction of the Governor. *Id.* at 33.

on to explain that the industry had “failed to cite any statutes or case law which explicitly states that the attorney general is prohibited from utilizing contingent fee arrangements in the prosecution of civil matters.” Exhibit F to Plaintiffs’ Memorandum at 4. Likewise, here, the Tobacco Industry has cited no such legal constraints on the Maryland Attorney General. None exists.

E. The Contingent Fee Arrangement is Otherwise Legal.

The Tobacco Industry’s other complaints about the proposed arrangement are equally insubstantial. First, the claim that section 6-105(a)(3) prohibits a contingency fee contract, Complaint at ¶25, is readily disposed of. That subsection provides that Attorney General staff “appointed under this subsection” is “entitled to compensation as provided in the State budget” and, unless otherwise provided for in the budget, receives a salary “payable from the funds of the Office.” Of course, the contemplated arrangement would not be an appointment under subsection (a), which covers the Attorney General’s official staff, but rather an appointment under subsection (b), which covers “Special Employment,” i.e., attorneys employed “[i]n addition to any other staff appointed under this section.”

In alleging that the contemplated arrangement would violate Md. Const. Art. VI § 3(c), the Tobacco Industry misstates the meaning of the constitutional provision on which it relies. The assertion that Article V, Section 3(c) “directly prohibits the Attorney General and the lawyers of his staff from receiving a contingent fee” is a stark misrepresentation of the law. Complaint at ¶25. That constitutional provision speaks only of the Attorney

General's salary.⁶ It is completely silent on the compensation to be paid to the "lawyers of his staff"; nor does it say anything about compensation for assistant counsel that may be employed in unique cases. Equally fanciful is the contention that this same provision contains a direct prohibition against "any public servant from participating in a matter in which he has a personal or pecuniary interest." Complaint at ¶28. If that were the case, the State would not be able, for example, to engage any outside counsel at hourly rates in excess of the equivalent of what Assistant Attorneys General earn.

The Tobacco Industry also claims that the proposed contingent fee arrangement with outside counsel might violate its right to an impartial prosecution of the State's claims. Complaint at ¶28. In support of this claim, more fully explicated in the Plaintiffs' Memorandum, the Tobacco Industry relies primarily on cases in which the criminal prosecutors directing the prosecution had personal interests in the outcome of the prosecution.

The short answer to this contention is that the Attorney General will direct this civil litigation, and he has no personal or pecuniary interest in this matter. Any contract that might be reached with assistant counsel will provide that the Attorney General retains full control over all aspects of the litigation, with sole and unreviewable authority to make final decisions about all matters related to the litigation. *See* RFP at 1. It is self-serving

⁶That subsection provides: "The Attorney General shall receive for his services the annual salary as the General Assembly from time to time may prescribe by law, but he may not receive any fees, perquisites or rewards whatever, in addition to his salary for the performance of any official duty."

nonsense for the Tobacco Industry to suggest that the Attorney General's Office "will have little, if anything, to do with the day-to-day handling of the lawsuit." Plaintiffs' Memorandum at 5.

The main case on which the industry relies, *Sinclair v. State*, 278 Md. 243 (1975), is inapposite. In *Sinclair*, a criminal defendant complained that the State's Attorney and Deputy State's Attorney had a personal interest in a prosecution which might affect their decision to initiate and their conduct of a criminal prosecution. Critical to the court's analysis was the fact that the very public officials who were making the prosecutorial decisions themselves had a personal interest in the matter, which could reasonably be expected to affect the fairness of the the decision to charge and prosecute. As the court explained, "the controlling principle of the case" was that if a prosecutor has a personal or pecuniary interest in the criminal prosecution "which may impair his obligation in a criminal matter to act impartially toward both the State and the accused," then he is disqualified "from that criminal cause." *Sinclair*, 278 Md. at 254. Unlike the situation in *Sinclair*, this would be a civil action controlled by the Attorney General's office, which has no personal or pecuniary interest in this matter.

The only case the Tobacco Industry cites involving a civil enforcement matter is also readily distinguishable. In *People ex rel. Clancy v. Superior Court (Ebel)*, 705 P.2d 347 (Cal. 1985), *cert. denied*, 475 U.S. 1121 (1986), the California Supreme Court held that a private attorney, hired on a contingent basis to prosecute public nuisance abatement actions, must be disqualified because he did not meet the requisite standard of neutrality.

Acknowledging that “[c]ertainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case,” the *Clancy* court was careful to limit its holding to the unique facts of that case. Frustrated by an injunction against a city ordinance restricting the sale of “sex-oriented” materials, the city enacted a new ordinance, which was drafted by the private attorney Clancy, and on the same day hired Clancy on a contingent basis to prosecute under the statute, using the title “City Attorney” and acting without supervision by any official city attorney. 705 P.2d at 348-49. Surely, an isolated holding of the California Supreme Court on unique facts cannot establish a legal principle that would significantly curtail the constitutional power of the Attorney General and raise a host of other constitutional issues.

Conclusion

For the foregoing reasons, the Defendants respectfully request that this Court dismiss the Complaint against them or, in the alternative, grant summary judgment in their favor.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON
JOHN B. HOWARD, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7055

Attorneys for Defendants

Dated: February 23, 1996