[J-97-2009]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, C/O OFFICE OF GENERAL COUNSEL,	:	No. 24 EAP 2009
Appellee	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County entered December 9, 2008 at 2181 January Term, 2008.
v.	:	
JANSSEN PHARMACEUTICA, INC., TRADING AS: "JANSSEN, LP",	:	
Appellant	:	ARGUED: October 21, 2009

DISSENTING OPINION

MR. JUSTICE SAYLOR

I respectfully dissent, as I believe Janssen has standing to raise constitutional claims, most notably, an assertion that its due process rights have been violated.

As the majority recites, Janssen argues that the Commonwealth's contingent-fee arrangement with Bailey Perrin violates its constitutional rights. The majority ultimately concludes, however, that Section 103 of the Commonwealth Attorneys Act, 71 P.S. §732-103, deprives Janssen of standing to question the propriety of the arrangement. Consistent with the foundational principle that the constitution is the supreme law of the land, see Pittsburgh Rys. Co. v. Port of Allegheny County Auth., 415 Pa. 177, 185, 202 A.2d 816, 820 (1964) (observing that "all acts of the legislature and of any governmental agency are subordinate to the Constitution, which is the Supreme Law of the land"

(internal quotation marks omitted)), I would not deem any legislative policy objective discernible from Section 103 to be germane to whether Janssen has standing to assert that the hiring of Bailey Perrin pursuant to the present contingent-fee contract violated its rights under the state or federal charters. Rather, I would resolve that question solely by reference to whether Janssen is aggrieved in the ordinary sense -- that is, whether it has an interest in the outcome of its disqualification motion that is cognizable for purposes of standing under ordinary, prudentially-based precepts. See In re Hickson, 573 Pa. 127, 136, 821 A.2d 1238, 1243 (2003) (indicating that standing exists "if the proponent of a legal action has somehow been 'aggrieved' by the matter he seeks to challenge").

In seeking to disqualify Bailey Perrin, Janssen contends, among other things, that the contingent-fee agreement violates the Due Process Clause of the Fourteenth Amendment.[1] In this respect, Janssen forwards a colorable argument that, to avoid

[1] Although the majority indicates that Janssen does not advance any constitutional challenge to Section 103's limitation on standing, see Majority Opinion, slip op. at 15 n.7, Janssen does argue that its due process rights are infringed by the contingency-fee arrangement, see Brief for Appellant at 27-41; see also id. at 13 ("By giving Bailey Perrin . . . a direct financial interest in the outcome of the litigation, the Governor's General Counsel violated Janssen's state and federal constitutional rights to due process."), and states further that "Section 103 [can] not constitutionally be read to prohibit a legal challenge to the constitutionality of the contingent fee arrangement." Id.; see also id. at 15 ("[N]othing in the Act stands in the way of Janssen's due process challenge to the Commonwealth's retention of private contingent fee counsel."); id. at 16 ("Indeed, the General Assembly could not, by limiting standing, preclude such challenges to constitutional violations."). These arguments, moreover, echo averments forwarded in the underlying petition. See Motion to Disqualify Plaintiff's Counsel ¶¶15-19, reproduced in R.R. 65a-66a. In this regard, it bears noting that reviewing courts have a duty to construe statutory enactments in a limited fashion where reasonably possible if a broader interpretation would render them constitutionally unsound. See Commonwealth v. Mastrangelo, 489 Pa. 254, 260, 414 A.2d 54, 57 (1980); see also 1 Pa.C.S. §1922(3). Thus, unlike the majority, I believe that the present discussion is fairly implicated by the substance of Janssen's challenge and salient legal principles.

actual impropriety or the appearance of partiality, due process requires the government's attorneys to be financially disinterested in the outcome of the litigation inasmuch as they are -- ostensibly, at least -- serving the public interest, and not their own personal financial interests. Accord People ex rel. Clancy v. Superior Court, 705 P.2d 347, 351 (Cal. 1985) ("Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole."). See generally Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1197 (1963) (clarifying that, although an attorney for the government is an advocate, his client's goal is not to prevail but to establish justice). Thus, for example, Janssen claims that such attorneys must be personally indifferent as between settlements that require large monetary payouts, and those that entail smaller payouts but involve other forms of relief to the government.[2] Again, the reasoning is that the public interest -- and not the lawyer's private pecuniary benefit -- should dictate which type of outcome the government ultimately agrees to. See Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 805, 107 S. Ct. 2124, 2136-37 (1987) (disapproving the appointment of private counsel to represent the government where such appointment raises "the potential for private interest to influence the discharge of public duty" (emphasis in original)); cf. Clancy, 705 P.2d at 351 ("In the case at bar, Clancy has an interest in the result of the case: his hourly rate will double if the City is successful in the litigation. Obviously this arrangement gives him an interest extraneous to his official function in the actions he prosecutes on behalf of the City.").

[2] Other forms of relief might include promises not to advertise or market the product in question in certain ways, or to undertake substantial efforts to educate the public about any dangers associated with use of the product.

As applied here, Janssen maintains that the contingent-fee contract violates due process by granting the Commonwealth's counsel a financial stake in the resolution of the action, which constrains its ability to agree to outcome choices with regard to settlement. For example, the contract entered into by Bailey Perrin and the Office of General Counsel expressly precludes any compensation or indemnification of costs if no money is recovered from Janssen, see R.R. 80a, which would incentivize Bailey Perrin to disfavor settlements lacking a monetary component that would nonetheless be in the best interests of the citizens of Pennsylvania. In this regard, one commentator has explained, "Contingency fee lawyers' incentives to maximize monetary settlements are more problematic in parens patriae litigation than in traditional private tort litigation. . . . For example, when the litigation process reveals that the state's theory of liability is factually weak or incorrect, the public interest would seem to dictate that the state should drop its case rather than waste more social resources on the litigation and potentially secure an unjustified recovery." David Dana, Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee, 51 DEPAUL L. REV. 315, 325-26 (2001).[3] Janssen also points out that, even putting

[3] Other commentators have also expressed concerns about partiality regarding the terms on which a private contingently-paid law firm may be willing to settle the case on behalf of its governmental client. See, e.g., Dale Dahlquist, Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles, 50 DEPAUL L. REV. 743, 783-84 (2000) ("When a Special Assistant is bestowed with all the power and authority of the Attorney General, he has a corresponding duty to represent the state as would the Attorney General himself. . . . Those members of the plaintiffs' bar who serve as Special Assistants are now hopelessly conflicted, serving as government contractors with financial incentives proportionate to their hoped-for conquest. . . . How could such lawyers possibly evaluate with impartiality the prospect of a settlement, say, or the tradeoff between injunctive and monetary relief?" (brackets, footnotes, and internal quotation marks omitted)); Robert Levy, The New Business of Government Sponsored Litigation, 9 KAN. J. L. & PUB. POLICY 592, 598 (2001) (approving of hourly-fee contracts with outside (continued . . .)

problematic incentives aside, the express terms of the contingent-fee contract here preclude the government from agreeing to any settlement that provides only for non-monetary relief unless it also requires Janssen to pay Bailey Perrin for the latter's services to the Commonwealth, see Contract for Legal Services, Appendix C, ¶3, reproduced in R.R. 80a, a restriction that would presumably be unnecessary if Bailey Perrin were not being compensated on a contingent basis.

Finally, Janssen argues that the concept that the Office of General Counsel maintains tight control of Bailey Perrin is largely illusory, as the contingent-fee contract only dictates a nebulous duty of "consultation." See Contract for Legal Services ¶4, reproduced in R.R. 71a. Janssen asserts that this differs qualitatively from ordinary contracts entered into by the government with outside counsel, which "include a detailed provision for the [Office of General Counsel]'s 'Control and Management of the Litigation.'" Motion to Disqualify Plaintiff's Counsel ¶12, reproduced in R.R. 64a. Again, Janssen highlights the above-mentioned restriction on the Commonwealth agreeing to non-monetary relief as evidence that the government has voluntarily surrendered at

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(. . . continued)
counsel, but asserting that contingent-fee contracts are a "sure-fire catalyst for the abuse of power," and that it is difficult to "condone private lawyers enforcing public law with an incentive kicker to increase the penalties").

Bailey Perrin attempts to deflect these criticisms by observing that outside counsel paid on an hourly basis could also abuse their position by inflating their hours. See Brief for Appellee at 54. I find this argument flawed in at least two respects: first, it does not ameliorate the due process concerns identified above; second, although a possibility of overbilling may exist -- as indeed it may in purely private litigation -- this type of difficulty appears more readily subject to control via well-established criteria for determining reasonableness of hourly fees. See In re LaRocca's Estate, 431 Pa. 542, 546, 246 A.2d 337, 339 (1968). It is also worth noting that the justification for allowing contingent-fee contracts for private plaintiffs lacking the resources to bring a meritorious action is absent when the plaintiff-client is the government.

least some of its ordinary ability to control the litigation in the public interest. Cf. County of Santa Clara v. Superior Court, ___ Cal. Rptr. 3d ___, ___, 2010 WL 2890318 *14 (Cal. July 26, 2010) (holding that, to ensure that public attorneys exercise "real rather than illusory control" over contingent-fee counsel, contingent-fee agreements "must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation").

In my view, Janssen's allegations, if borne out, are sufficient to give it a substantial, direct, and immediate interest in disqualifying Bailey Perrin and precluding the Commonwealth from pursuing relief through similar contingent-fee contracts with outside counsel. Since Janssen alone stands to incur additional costs due to the contract under which Bailey Perrin was hired, its interest in the relief it seeks is substantial because it surpasses that of citizens generally in procuring obedience to the law.[4] As well, the causal relationship between the complained-of arrangement and Janssen's alleged harm is sufficient to render the interest direct and immediate. See generally Pittsburgh Palisades Park v. Commonwealth, 585 Pa. 196, 204, 888 A.2d 655, 659 (2005) (reciting that an interest is "direct" if the matter complained of caused harm to the party's interests, and it is "immediate" if the causal connection is not remote or speculative). Indeed, not only does Janssen aver that the Commonwealth's strategic litigation decisions are likely to be distorted to Janssen's detriment by Bailey Perrin's pecuniary interest in the outcome, but its allegations include a suggestion that this

[4] Here, the "law" is the Due Process Clause. See City of Phila. v. Commonwealth, 575 Pa. 542 n.7, 560, 838 A.2d 566, 577 n.7 (2003) (recognizing that, in the context of a constitutional dispute, the law at issue is the constitutional provision under which the objector brings its challenge).

particular litigation might not have occurred at all but for the aggressive efforts of Bailey Perrin in seeking to convince state officials to initiate it under a contingent-fee arrangement whereby the firm could expect to receive a substantial portion of any monetary payout. See Motion to Disqualify Plaintiff's Counsel ¶¶5-6, 9-12, reproduced in R.R. 61a-64a; cf. Brief for Appellant at 43 (recounting allegations regarding Bailey Perrin's involvement in commencing the present lawsuit, as well as Risperdal litigation in other jurisdictions).

Accordingly, I would hold that Janssen has standing to raise at least its claim based on the Due Process Clause.