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Philip Morris, Inc. v. Glendening

The Court of Appeals of Maryland held that the Attorney General, upon obtaining the approval of the Board of Public Works, has the power to enter into contingency fee contracts with private law firms to secure representation for the State of Maryland. *Philip Morris, Inc. v. Glendening*, 349 Md. 660, 709 A.2d 1230 (1998). The Attorney General may deduct a percentage of the money recovered by the state in litigation, and use that percentage as a contingency fee payment to a private law firm, without offending Maryland statutory law or constitutional principles concerning legislative appropriation. The court also ruled that contingency fee contracts in which private law firms have a financial interest in the outcome of state litigation do not violate due process or public policy. In so deciding, the court extended to the Attorney General the ability to secure contingency fee based representation for tobacco litigation.

The Attorney General of Maryland entered into a contingency fee contract ("contract") with a private law firm ("outside counsel") to secure representation for the State of Maryland in tort litigation against tobacco manufacturers. The purpose of the litigation was to seek reimbursement for the State Treasury for past tobacco-related expenditures. Due to the large

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By Kimberly C. Pace

amount of state financial resources and personnel that would be necessary for successful litigation, coupled with the wealthy and powerful nature of tobacco companies, the Attorney General determined that this was an extraordinary situation and that outside counsel was necessary for successful litigation. The resulting contract with outside counsel provided for a twenty-five percent contingency fee to be paid to outside counsel from any money recovered by the state. The Attorney General sought and obtained the express written approval of the State Board of Public Works for the contingency fee contract.

Philip Morris, Inc., ("Philip Morris") one of the defendants, challenged the contract in the Circuit Court for Talbot County contending that the Attorney General lacked the authority to enter into the contract with outside

counsel. Both Philip Morris and the Attorney General moved for summary judgment. The trial court denied Philip Morris' motion and ruled in favor of the Attorney General. Philip Morris appealed to the Court of Special Appeals of Maryland, but before the court could consider the case, the Court of Appeals of Maryland issued a writ of certiorari *sua sponte*.

The court of appeals began its analysis by examining the powers granted to the Attorney General by the Maryland Constitution and the enactments of the General Assembly of Maryland. *Philip Morris*, 349 Md. at 674-75, 709 A.2d at 1237 (citing *State v. Burning Tree Club*, 301 Md. 9, 32, 481 A.2d 785, 797 (1984)). Among these powers, the court stated that, "the Attorney General, with the written approval of the Governor, may employ any assistant counsel that the Attorney General considers necessary to carry out any duty of the office in an extraordinary or unforeseen case." *Id.* at 675, 709 A.2d at 1237. (citing MD. CODE ANN., STATE GOV'T § 6-105 (1997)). The court noted that the Attorney General and the Governor had determined that the tobacco litigation fell within the meaning of an "extraordinary" case, based on the nature of the litigation. *Id.* at 676, 709 A.2d at 1238. The court concluded that because Maryland law gives the Attorney General discretion to determine

whether a case is extraordinary under section 6-105(b), the court must accept the Attorney General's determination of the need for outside counsel. *Id.* at 678, 709 A.2d at 1239. (citing *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940)). The court cautioned, however, that it is not clear whether state funds recovered from litigation could compensate outside counsel pursuant to a contingency fee contract. *Id.* at 679, 709 A.2d at 1239. Although the court found no statutory prohibition in section 6-105(b) on the ability of the Attorney General to enter into such a contract, the issue of constitutionality was more complicated. *Id.* at 680-81, 709 A.2d at 1240. The focus was therefore shifted to whether the contingency fee arrangement violated the Maryland Constitution prohibition against the payment of state funds without legislative appropriation. *Id.* at 681, 709 A.2d at 1240. (citing MD. CONST. art. III, § 32). Pursuant to section 6-213 of the State Finance and Procurement Article of the Annotated Code of Maryland, the Attorney General is required to deposit recovery money into the state treasury within one month of its receipt. *Id.* After deposit, the state money may not be withdrawn to pay a contingency fee unless there is a legislative appropriation authorizing the withdrawal. *Id.* (quoting *Dorsey v. Petrott*, 178 Md. 230, 13 A.2d 630 (1940)). There were no provisions made by the state for the appropriation of

the contingency fee because the contract allocated the contingency fee out of the gross settlement, before any money was deposited into the State Treasury. *Id.* at 666-67, 709 A.2d at 1233. The issue then became when the recovery becomes state funds; at disbursement or upon deposit into the state treasury. *Id.* at 682, 709 A.2d at 1241.

The court resolved the appropriation issue by distinguishing between money already deposited into the state treasury and a gross settlement that has yet to be deposited. *Id.* According to the court, Article III section 32 of the Maryland Constitution does not apply to the gross settlement recovered from litigation. *Id.* Therefore, money may be taken from the gross settlement before it must be deposited into the State Treasury. *Id.* The court reasoned that since the contract specifically provided that the state would not collect any money from the lawsuit until outside counsel had received their contingency fee, the contingency fee money did not constitute state funds subject to legislative appropriation until the state had fulfilled its obligations under the contract. *Id.* The court reserved the determination of whether the Attorney General has the power under section 6-105(b) to enter into a contingency fee contract without the approval of the State Board of Public Works. *Id.* at 681, 709 A.2d at 1240. It was not at issue in this case since the Attorney General had the express

consent of the Board of Public Works. *Id.*

The court then moved on to discuss the secondary issues of due process and public policy and how they affect the ability of outside counsel to work on behalf of the state in a case in which they have a financial stake. *Id.* at 684, 709 A.2d at 1242. The court determined that due process does not necessarily preclude an attorney from representing the state in cases in which they have a financial stake. *Id.* at 687-88, 709 A.2d at 1243. (citing *Marshall v. Jerrico*, 446 U.S. 238 (1980) (finding that State administrators do not need to be completely detached and neutral in an adversarial system.)) The court thus determined that outside counsel's financial interest in the tobacco litigation was within reasonable limits, given the holding of the Supreme Court in *Marshall*. *Id.* at 688, 709 A.2d at 1244.

The court's holding in the instant case permitting the Attorney General to enter into contingency fee contracts with private law firms is consistent with Maryland law, public policy, and due process. Given the nature of current tobacco litigation, the court's ruling is beneficial to the State of Maryland because it will ensure that the litigation receives the attention it deserves. This case, however, constitutes a large setback to the tobacco companies involved in both current and future litigation. Had the court ruled that the State's contingency fee

contract was unauthorized, a tobacco company's extensive financial resources would have given it a distinct advantage over the low funding and high workload of the Attorney General's office.