

IN THE CIRCUIT COURT OF WAYNE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel. DARRELL V.
MCGRAW, JR., ATTORNEY GENERAL,

Plaintiff,

CIVIL ACTION NO. 12-C-085

vs.

GLAXOSMITHKLINE, LLC, formerly
SMITHKLINE BEECHAM CORPORATION
d/b/a GLAXOSMITHKLINE,

Defendant.

FILED
CIRCUIT CLERKS OFFICE
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WAYNE COUNTY WV
BY *Shelby*

ORDER

On August 28, 2012, this matter came before the Court pursuant to Defendant's Motion to Disqualify Private Counsel with the Defendant, Glaxosmithkline, LLC (GSK), appearing by Michael J. Farrell, John F. Brenner and Ellen K. Scott and the Plaintiff, State of West Virginia, ex rel. Darrell V. McGraw, Jr., Attorney General, appearing by Paul T. Farrell, Jr., Frances A. Hughes, Chief Deputy Attorney General, Bill Robins, III and Laura Baughman.

The parties at the hearing agreed to submit the matter for decision by the Court upon the briefs filed by the parties. The Defendant was given time to submit a brief in reply to Plaintiff's brief in opposition to the motion.

The Defendant bases its Motion to Disqualify on the following:

1. That the Attorney General lacks statutory authority to use private attorneys to prosecute claims under the West Virginia Consumer Credit and Protection Act;

2. That private counsel retained by the Attorney General cannot be compensated through the attorneys' fees assessed against GSK because there is no statutory or common law basis for an award of fees;
3. That the Ethic Act prohibits public officers from using their office for private gain;
4. That the West Virginia Rules of Professional Conduct require disqualification due to a conflict of interest; and
5. That the fee arrangement with private counsel violates GSK's right to Due Process under the United States and West Virginia Constitutions.

After review of written pleadings addressing Defendant's Motion to Disqualify Private Counsel, the Court finds for reasons set forth in this order that Defendant's Motion to Disqualify Private Counsel should be **DENIED**.

Findings of Fact and Conclusions of Law:

1. On March 30, 2012, the Attorney General instituted this civil action seeking damages and penalties against the Defendant, GSK, for allegedly using false and deceptive practices in marketing Avandia. The complaint requests relief under various state statutes, as well as common law causes of action;
2. The Attorney General has entered into contracts with private counsel to aid the Attorney General in litigation of this matter. By letter, the Attorney General has granted authority to private counsel. The appointment letter provides that private counsel will receive no fee based upon any recovery by the State's Medicaid Program. The appointment letter contemplates that private counsel's fee would

come from "...a proper, reasonable and customary fee to be paid by the Defendant..." after an approval by the Court;

3. The Defendant's Motion to Disqualify is based upon the legal principle set out above;
4. Plaintiff opposes each legal assertion offered by the Defendant as a basis to disqualify private counsel. Additionally, Plaintiff argues a lack of standing by the Defendant and a historic exercise of retention of private counsel by the Plaintiff as a basis to deny Defendant's motion.

Lack of Authority Pursuant To West Virginia Consumer Credit and Protection Act:

1. Defendant asserts the West Virginia Consumer Credit and Protection Act, specifically West Virginia §46A-7-102(f), prohibits the Attorney General to retain private counsel. Defendant argues that since private counsel are not "...in his office..." the Attorney General lacks the authority to retain private counsel. The broad powers given to the Attorney General under the Act and the overall purpose of the Act to protect the citizens of the State of West Virginia cause the Court to reject Defendant's argument that the language of West Virginia Code §46A-7-102(f) limits the Attorney General's Authority to contract with private counsel;
2. In support of Defendant's argument that the Attorney General lacks authority to retain private counsel, Defendant claims the Attorney General has relinquished his authority by failing to supervise private counsel. The Court finds neither the letter authorizing private counsel nor the actions of the Attorney General in this proceeding would suggest that the Attorney General is not active in supervising this litigation.

Argument that Attorney Fees May Not Be Assessed Against Defendant:

1. Defendant contends the cause of action advanced by the State do not allow the Court to award reasonable fees. The Court finds that the Plaintiff's claim for Fraud and Abuse in the Medicaid Program and unjust enrichment provide a possible award of attorney fees.
2. Additionally, the Court need not determine whether attorney fees may be awarded against Defendants in this matter at this time and the Court makes no finding of the issue of attorney fees. Private counsel has an agreement with the Attorney General to represent the interest of the State of West Virginia. The determination of attorney fees will be made by the Court when requested by the parties according to principles of law.

Ethics Act and West Virginia Rules of Professional Conduct:

1. The Court finds the appointment letter authorizing appointment of counsel do not provide for a contingency fee. Furthermore, the Court finds that private counsel's fee arrangement does not violate the Ethics Act §63-1-1 et seq. and that private counsel do not have a conflict of interest pursuant to the West Virginia Rules of Professional Conduct.

Due Process Violations Under the United States and West Virginia Constitutions:

1. Defendant advances an argument that due process under the United State and West Virginia Constitutions is violated because private counsel has a financial stake in the proceeding based on a contingent fee and the Attorney General has allegedly delegated his decision making authority. As previously stated in this opinion, the Court finds that private counsel's agreement with the Attorney

General regarding fee is not a contingent fee and the Defendant has presented no facts to demonstrate that the Attorney General is not exercising his authority and control over this litigation.

Lack of Standing:

Plaintiff contends the Defendant lacks standing to pursue its Motion to Disqualify. In order to have standing:

First the party . . . [attempting to establish standing] must have suffered an 'injury-in-fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second, there must be a causal connection [between] the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court.

Findley v. State Farm Mut. Auto Ins. Co., 213 W. Va. 80, 94, 576 S.E.2d 807, 821 (2002) (cit. om.). Divesting the Attorney General of his authority to direct the State's legal representation could not possible redress any concrete, particularized, actual, and non-conjectural injury of GSK because the manner in which the Attorney General operates his office is not the subject of the case at bar.

Therefore, based upon the foregoing, the Court **DENYS** Defendant's Motion to Disqualify Private Counsel.

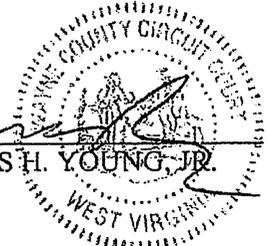
All to which Defendant objects and excepts.

All, accordingly, which is **ORDERED** and **DECREED**.

Enter this 18 day of September, 2012.

ORDER
ENTER:

James H. Young, Jr.
HONORABLE JAMES H. YOUNG, JR.



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