



FOR IMMEDIATE RELEASE

August 12, 2009

**COURT URGED TO CRACK DOWN ON
PAY-TO-PLAY CONTRACTING SYSTEM**
(Commonwealth of Pennsylvania v. Janssen Pharmaceutica, Inc.)

The Washington Legal Foundation (WLF) yesterday urged the Pennsylvania Supreme Court to crack down on pay-to-play bidding on public contracts, by disqualifying a prominent plaintiffs' law firm from representing the Commonwealth of Pennsylvania in a contingency fee case in which Pennsylvania seeks to recover funds paid for allegedly unnecessary prescriptions of drugs manufactured by the defendant.

In a brief filed in *Commonwealth of Pennsylvania v. Janssen Pharmaceutica, Inc.*, WLF charged that the law firm, Bailey Perrin Bailey (BPB), was awarded the right to represent Pennsylvania without public bidding and after F. Kenneth Bailey and others associated with him made huge donations to the political campaign of Governor Ed Rendell. WLF charged that the conclusion is inescapable that Bailey purchased the right to represent Pennsylvania in this case.

"This case takes pay-to-play contracting to new heights," said WLF Chief Counsel Richard Samp after filing WLF's brief. "The public interest is not well served when the Commonwealth awards a lucrative no-bid contract to a Texas law firm with no discernable connection to Pennsylvania – other than that those associated with the law firm suddenly made hundreds of thousands of dollars in political contributions to Governor Rendell," Samp said.

The lawsuit filed by BPB on behalf of Pennsylvania alleges that a pharmaceutical company improperly promoted its products for off-label uses, thereby causing Pennsylvania to incur allegedly unnecessary costs to reimburse patients for their purchases of the defendant's drugs. The defendant denies wrongdoing and asserts that off-label prescriptions for its drugs are legal and wholly appropriate. The issue before the Pennsylvania Supreme Court has nothing to do with whether there is any merit to the lawsuit; rather, the Court is considering whether BPB should be disqualified from the case.

The no-bid contract to represent Pennsylvania in this litigation was awarded to BPB in November 2006. Prior to the award, F. Kenneth Bailey and others associated with BPB and/or Bailey's prior law firm contributed in excess of \$200,000 to Governor Rendell's 2006 re-election campaign – the first occasion on which any of those individuals had contributed to a Pennsylvania political campaign. The contract award was made not by the Pennsylvania Attorney General (who normally oversees all litigation

in the name of the Commonwealth) but by the Office of General Counsel, an office that is under the direct supervision of Governor Rendell. Under the terms of the contract, BPB is working on a contingency fee basis, meaning that it will receive a fee based on a percentage of whatever funds are collected via the lawsuit.

In its brief urging the Court to disqualify BPB and Bailey, WLF argued that the due process clauses of both the U.S. and Pennsylvania Constitutions require disqualification. WLF argued that due process prohibits Pennsylvania from delegating the exercise of its sovereign powers to private counsel with a direct contingent financial interest in the outcome of the litigation. WLF noted that such private counsel will inevitably be guided by a litigation strategy designed to maximize financial recovery (so as to maximize the attorney fee) rather than by a desire to ensure that the most just outcome is achieved.

WLF also argued that disqualification is required because of the appearance of impropriety created by the award of a no-bid contract so soon after Bailey and associated attorneys made massive campaign contributions to Governor Rendell's election campaign. WLF argued that allowing that BPB to continue to represent Pennsylvania despite the obvious appearance of impropriety would throw into doubt the integrity of the Commonwealth's entire public contracting system.

WLF's brief was drafted with the *pro bono* assistance of James M. Beck and Sean P. Wajert, attorneys with the Philadelphia office of Dechert LLP.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. In particular, WLF works to protect the rights of the business community to speak freely on matters of public interest and to protect the integrity of government at all levels.

* * *

For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.