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HEADLINE: Tobacco Companies Assail State Suit as Unauthorized Industry Attacks Foundation of Maryland's Multibillion-Dollar Claim, Says Engagement of Angelos on Contingency Basis Violates Statute

BYLINE: By Gregory C. Baumann; Daily Record Opinions Editor

BODY:

The tobacco industry yesterday went to court arguing Maryland cannot use a contingency fee arrangement to press its $ 13 billion claim for Medicaid money spent treating smokers.

In a Talbot County courtroom, cigarette makers deployed one of the deans of Maryland's legal community, Benjamin R. Civiletti, to contend the attorney general had no legal power to enter the contingency deal with the Law Offices of Peter G. Angelos.

The state's top litigator, Evelyn O. Cannon, defended the agreement to hire the Angelos firm in exchange for a 25 percent cut of any recovery in the claim for Medicaid reimbursements.

Cannon characterized the cigarette makers' claim as a delaying tactic, telling Judge William S. Horne, "We're here once again because the tobacco industry is trying desperately to avoid its day of reckoning."

Civiletti, however, called the attorney general's arrangement with Angelos an "end-around the state legislature," claiming the deal's provision for paying the firm flouts the state's normal appropriations process.

Civiletti said any recovery in the suit would constitute state funds, and argued nothing in the state's laws or constitution allows the attorney general to commit state funds to pay counsel in a contingency case. "The attorney general should go back to the drawing board and seek . . . an appropriation or supplemental appropriation and determine to prosecute the case within the office," Civiletti said. Cannon countered, saying any payment to the Angelos firm would not come from state coffers because the firm's interest in the recovery would attach before the funds became state money.

But Horne's questions during the summary judgment hearing -- which was briefly delayed by a power outage -- focused on practical, rather than legal, issues.

In particular, he asked Cannon whether the state could end up on the hook for the litigation expenses incurred in the battle against an industry Attorney General J. Joseph Curran has said generates $ 40 billion each year.

The contract between Angelos and Maryland provides that the law firm pay all costs of litigating the case, "subject to reimbursement only in the event of a recovery."

Those costs could run far into the millions of dollars.

Angelos himself assessed the industry's willingness to fight, saying, "I think they'll do all they can to prevent the lawsuit from being successful. From the perspective of committing resources and pushing it to termination, I think they'll go to the limit."

Horne's questions centered on a provision of the contract providing that if Maryland terminates the contract for "convenience," the firm is entitled to reimbursement of the expenses it incurred litigating the Medicaid claim.

"It may come into being that the state would terminate the suit with a change in the next election," Horne said. "What if after he Angelos has expended millions of dollars, there's a change in circumstances and there's a 'Dear Peter' letter?"

He told Cannon that the attorney general's contract to reimburse Angelos for costs in such a situation would "put a gun to the legislature's head" to appropriate a payment to cover the law firm's costs.

But Cannon responded that if the governor put such an appropriation in the budget and the legislature refused to fund it, "Mr. Angelos is out of luck."

"It's called sovereign immunity," she said.

Deputy Attorney General Carmen M. Shepard, who coordinates the tobacco litigation for Curran, agreed. She said any legal judgment against the state ultimately must be funded by the legislature.

The tobacco industry is also claiming that the contingency arrangement creates an improper financial motive for a representative of the state -- in this case the Angelos firm -- that could result in an unfairness to the industry.

But Cannon brushed aside that proposition, saying the Angelos firm's prosecution of the case would only be as zealous as the attorney general directed.

Moreover, she said, it was the state's hope that the firm eventually wins a fat contingency award.

"The best thing that could happen to the citizens of the state of Maryland is that Mr. Angelos' firm gets $ 4 billion dollars," Cannon said.

Horne interrupted, saying, "Then maybe we could get some pitching."

Angelos owns the Baltimore Orioles.

Other states' courts have examined the authority of attorneys general to engage outside counsel on a contingency basis to sue the tobacco industry for Medicaid costs.

A West Virginia court blocked the use of contingency counsel, while a Minnesota court allowed it.

Yesterday, lawyers from both sides acknowledged neither of those cases had precedential value in the Maryland dispute.

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