IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 16 MAP 2017

COMMONWEALTH of Pennsylvania,
Acting by Attorney General Josh Shapiro,
Appellant,

v.

GOLDEN GATE NATIONAL SENIOR CARE LLC, *et al.*,
Appellees.

AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF GOLDEN GATE NATIONAL SENIOR CARE LLC, *et al.*

Appeal from the March 22, 2017 Order of the Commonwealth Court of Pennsylvania, at No. 336 M.D. 2015.

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business organization, representing more than three million companies and professional organizations of all types and sizes. More than 4,000 Chamber members are located in Pennsylvania, and countless others engage in business activity in the Commonwealth and are directly affected by its legislative enactments and judicial precedents. The Chamber regularly files amicus briefs in state and federal courts across the nation, addressing issues of vital importance to the nation's business community.

The Chamber is filing this brief to assist the Court in considering one of the central issues presented on appeal: whether the Commonwealth is a "person" entitled to seek "restoration" under Pennsylvania's Consumer Protection Law, 73 Pa. Stat. § 201-4.1. For reasons explained below, the plain statutory text and this Court's decisions make clear that the Commonwealth is not a "person" within the meaning of the statute. Sound policy considerations also weigh strongly in favor of enforcing the statutory text as written.

INTRODUCTION

Pennsylvania's Consumer Protection Law provides that "[w]henever any court issues a permanent injunction to restrain and prevent violations of this act . . ., the court may in its discretion direct that the defendant or defendants restore to any *person* in interest any moneys or property, real or personal, which may have been acquired by means of any violation of this act . . . ." 73 PA. CONS. STAT. § 201-4.1 (emphasis added). As the Commonwealth Court correctly concluded in its decision below, because the sovereign Commonwealth is not a "person" within the meaning of the statute, it does not have authority to recover the restoration remedy that the statute provides for consumers. That conclusion is supported not only by the statute's plain text, but also by this Court's decision in *Meyer v. Community College of Beaver County* (*"Meyer II"*), which conclusively held that the Consumer Protection Law's definition of "person" does not include the government. 93 A.3d 806, 815 (Pa. 2014).

The Commonwealth has no meaningful response to either the plain statutory text or this Court's precedent. Instead, its position amounts to a request that this Court, through the raw exercise of

judicial power, deem the statute-wide definition of "person" to change in meaning depending on whether the Commonwealth is suing as a plaintiff or being sued as a defendant. The Commonwealth cites no case supporting that suggestion. Nor is there is any indication that the General Assembly wanted the Commonwealth to claim for itself money and property that the statute intended to be returned to consumers. When the General Assembly wanted the Attorney General to be able to sue on the Commonwealth's behalf, it said so explicitly — for example, by giving the Attorney General express authority to seek injunctive relief or to seek civil penalties in specified circumstances. *See* 73 PA. CONS. STAT. §§ 201-4, 201-8(a). It did not give the Attorney General authority to seek restoration for the Commonwealth.

Accepting the Commonwealth's position would not protect consumers or further the purposes of the Consumer Protection Law, but it would undermine consumers' interests and create incentives for abusive litigation. The Attorney General's attempt to rewrite the Consumer Protection Law coincides with his decision to retain outside private counsel under a controversial contingency-fee arrangement that incentivizes his private lawyers to seek massive monetary recoveries,

regardless of consumers' best interests. The Court can and should constrain that unseemly practice by enforcing the Consumer Protection Law as written. In short, it should hold that because the Commonwealth is not a "person" within the meaning of the statute, it is not authorized to recover restoration. The Commonwealth Court's decision sustaining the preliminary objection on this issue should be affirmed.

ARGUMENT

I. The Commonwealth Is Not A "Person" Authorized To Recover Restoration Under The Consumer Protection Law.

The Commonwealth is not a "person" within the meaning of the Consumer Protection Law. That conclusion is confirmed by the statute's plain text, this Court's earlier decision construing the same term in the same definitional provision, and the statute's overall structure of remedial provisions.

A. The Commonwealth Is Not A "Person."

The term "person," in "common usage," "does not include the sovereign." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) (internal quotation marks omitted); *see also Clipper Pipe & Serv., Inc. v. Ohio Cas. Ins. Co.*, 115 A.3d 1278, 1283 n.5 (Pa. 2015)

(recognizing this principle). As a result, statutes that employ the word "person" are "ordinarily construed to exclude" the government and government agencies. *Will*, 491 U.S. at 64 (citations omitted); *see also Robinson v. City of Phil.*, 233 F.R.D. 169, 172 (E.D. Pa. 2005). That well-settled presumption applies unless there is an affirmative showing of statutory intent to the contrary. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 781 (2000); *see also Clipper*, 115 A.3d at 1283 n.6 (recognizing this principle). The Commonwealth has not come close to making that required showing.

The Consumer Protection Law's definition of "person" does not indicate any intent to deviate from common usage. 1 PA. CONS. STAT. § 1903(a) ("Words and phrases [in statutes] shall be construed . . . according to their common and approved usage"). The statute defines "person" as "natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities." 73 PA. CONS. STAT. § 201-2(2). The Commonwealth is not a natural person, corporation, trust, partnership, or association. *See, e.g.*, *Clipper*, 115 A.3d at 1282 (finding "unconvincing" the proposition that

governmental units are "associations"). Nor does it qualify as some "other" type of "legal entity."

The statute's reference to "other legal entities" should be interpreted in light of the enumerated examples that precede it and consistent with common understandings. *See Chamberlain v. Unemployment Comp. Bd. of Review*, 114 A.3d 385, 394 (Pa. 2015) ("the common and approved meaning of a word may be ascertained from an examination of its dictionary definition"); *McClellan v. Health Maintenance Org. of Pa.*, 686 A.2d 801, 806 (Pa. 1996) (describing the *ejusdem generis* canon). As dictionaries make clear, a "legal entity" is "an entity (as a corporation or labor union) having under the law rights and responsibilities and especially the capacity to sue and be sued." *Legal Entity*, MERRIAM-WEBSTER, available at https://www.merriam-webster.com/legal/legal%20entity; *see also Legal Entity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (a "legal entity" is "[a] body . . . that can function legally, sue or be sued, and make decisions through agents").

The Commonwealth does not fit that definition. Because the Commonwealth is a sovereign State, "it cannot be sued except with its own consent." *Kaufman Constr. Co. v. Holcomb*, 55 A.2d 534, 535 (Pa.

1947); *see also* 1 PA. CONS. STAT. § 2310. If the General Assembly had intended to include the Commonwealth in its definition of "person" — authorizing the Commonwealth to sue and be sued under the Consumer Protection Law — it could have easily done so by adding words to the statutory definition (as it has in other statutory provisions). *See, e.g.*, 35 PA. CONS. STAT. § 6021.103 (defining "person" to include "[a]ny . . . Commonwealth department, agency, board commission, or authority"); 35 PA. CONS. STAT. § 6026.103 (defining "person" to include "Commonwealth instrumentalities"). It did not do that here. There is no basis for interpreting the term "person" to include the sovereign.

These issues were previously addressed and resolved in *Meyer II*, which held that "the legislature did not intend" for the Consumer Protection Law's "definition of 'person' to include political subdivision agencies." 93 A.3d at 815. The Commonwealth tries to cabin *Meyer II*, contending that it only "addressed whether a government entity is subject to monetary damages under the Consumer Protection Law." Cmmwth. Br. 52. That is not a fair description of the decision.

Meyer II turned on this Court's interpretation of the statute-wide definition of "person" set forth in section 201-2(2). In construing that

provision, the Court left no doubt about the scope of its inquiry, noting that "this case concerns the single issue of whether" the Consumer Protection Law's "*definition* of 'person' — 'natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entities,' includes political subdivision agencies." 93 A.3d at 812–13 (emphasis added). The General Assembly did not purport to limit that definition to situations where only the government is being sued. Nor did this Court. Instead, the Court applied general principles of statutory construction and considered how the definition of "person" would impact the statute as a whole. *See id.* at 814–15 (analyzing 73 PA. CONS. STAT. §§ 201-8, 201-9, and 201-9.2). It then determined that, reading section 201-2(2) in context, the General Assembly "did not intend to define 'person' as including political subdivisions and their agencies." *Id.* at 814.

There is no basis for the Commonwealth's suggestion that the meaning of "person" under section 201-2(2) should oscillate depending on what side of the "v." the Commonwealth happens to find itself. The Commonwealth cannot have it both ways. If the Commonwealth is not a "person" for purposes of defending against suit under the Consumer

Protection Law, it also cannot be a "person" for purposes of bringing suit. *See, e.g.*, *Watson v. Unemployment Comp. Bd. of Review*, 109 A.2d 215, 217 (Pa. 1954) (statutory terms should be given consistent constructions). As a federal district court has noted, it would be "troubling to give 'person' different meanings in different sections of the same statute, especially after" this Court "defined the term without explicitly limiting its meaning." *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liability Litig.*, No. 1358 (SAS), 2015 WL 4092326 at *5–6 (SDNY July 2, 2015); *Clipper*, 115 A.3d at 1283 n.6 (directing federal courts not to construe "general statutory terms such as 'person'" to encompass the Commonwealth).

The Commonwealth does not address this obvious void in its argument. Its amici scramble to find some defense, but their arguments only underscore that the Commonwealth's position is untenable. According to amici, although the Commonwealth is not a "person," it should still qualify as a "person in interest" under section 201-4.1 — on the theory that the words "in interest" somehow reflect a legislative intent to sweep in governmental bodies that are otherwise not "persons." Center for Advocacy Br. 28. But amici cite no case or

interpretive principle that supports that nonsensical reading. Nor is there anything in the statute indicating that the General Assembly intended such a result. The words "in interest" modify the word "person." If the Commonwealth is not a "person," it also cannot be a "person in interest."

B. The Commonwealth Is Not Authorized To Recover Restoration.

The plain meaning of "person," as interpreted in *Meyer II*, is further supported by the structure of the Consumer Protection Law's remedial provisions. The statute carefully distinguishes between remedies that the Attorney General may seek on behalf of the Commonwealth and remedies a court may award to restore money or property to consumers.

As noted above, section 201-4.1 authorizes courts to enter orders that "restore to any person in interest" money or property "acquired by means of any violation" of the statute. 72 PA. CONS. STAT. § 201-4.1. The plain meaning of "restore" is to "give back, return." *Restore*, MERRIAM-WEBSTER, available at https://www.merriam-webster.com/dictionary/restore. The Consumer Protection Law thus authorizes a "restoration" remedy to give aggrieved persons — the "rightful owners"

— the legal ability to get back money that was wrongfully obtained. Nothing in the statute indicates that the General Assembly thought that money belonging to consumers should instead flow into the government's coffers. There is no authority, for instance, for the Attorney General to seek disgorgement of a defendant's ill-gotten gains as a penalty for harm caused to the public at large. *Cf. Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017) (distinguishing between disgorgement remedies for violation of public laws, as opposed to specific remedies designed to remedy injuries to specific aggrieved individuals). The Consumer Protection Law's "restoration" remedy is for the benefit of consumers, not a penalty for the benefit of the Commonwealth (and its contingency counsel).[1]

When the General Assembly has intended to authorize the Commonwealth, through its Attorney General, to seek monetary

[1] At times in its brief, the Commonwealth suggests that in addition to collecting money paid by consumers it also wants to recover money paid through Medicaid. But it is not clear what amount of money (if any) was ever paid by the Commonwealth and there can be no doubt that most of the money it seeks to "recover" was money paid by consumers, not by the Commonwealth itself. In any event, the Medicaid Fraud Abuse and Control Act *criminalizes* Medicaid fraud and authorizes the Commonwealth "to institute a civil suit against such [fraudulent] provider in the court of common pleas for twice the amount of excess benefits or payments plus legal interest from the date the violation or violations occurred." 62 PA. CONS. STAT. § 1407(c)(1). There is no need to distort the language of the Consumer Protection Law to provide the Commonwealth with a remedy it already has.

penalties, it has done so explicitly. Section 201-4, for example, expressly authorizes the Attorney General to bring "an action in the name of the Commonwealth" against any person that is violating the Consumer Protection Law and to seek temporary or permanent injunctive relief. 73 PA. CONS. STAT. § 201-4. Similarly, section 201-8(b) expressly authorizes the Attorney General to seek a civil penalty if the statute is willfully violated. *Id.* § 201-8(b); *see also id.* § 201-8(a) (permitting civil penalties for violations of injunctions entered under § 201-4). Both provisions specifically refer to the Attorney General and define the scope of the Commonwealth's available remedies.

Nothing in section 201-4.1 says anything about the Attorney General. The General Assembly's failure to mention the Attorney General in that provision — a conspicuous omission given the other provisions that specifically reference the office — is strong evidence that the General Assembly did not intend to grant the Commonwealth a right to seek the restoration remedy that section 201-4.1 provides for aggrieved consumers. *See Schock v. City of Lebanon*, 167 A.3d 861, 874 (Pa. 2017) ("where 'the legislature includes specific language in one

section of a statute and excludes it from another, it should not be implied where excluded'") (citation omitted).

That reading is reinforced by section 201-5, which applies when an alleged violator has provided "an assurance of voluntary compliance." 73 PA. CONS. STAT. § 201-5. Section 201-5 gives the Attorney General authority to "accept" an assurance of voluntary compliance, which must be in writing and "filed with the court." *Id.* The provision states that "[s]uch assurance may include a stipulation for voluntary payment by the alleged violator providing for the *restitution* by the alleged violator *to consumers*, of money, property or other things received from them in connection with a violation of this act." *Id.* (emphasis added). The provision thus distinguishes between the Attorney General, who can accept the assurance, and the protected consumers, who are entitled to seek restoration. The provision contains no suggestion that a "voluntary assurance" could include a stipulation to pay restitution to the Commonwealth itself. Section 201-5 thus further confirms that the General Assembly did not intend to authorize the Attorney General to seek a restoration remedy on behalf of the Commonwealth.

II. There Are Strong Policy Reasons To Enforce The Consumer Protection Law As Written.

There are also strong policy reasons not to accept the Commonwealth's request to rewrite the Consumer Protection Law. Enforcing the statute as written ensures that the Attorney General does not have any financial incentive to put the Commonwealth's monetary interests above the interests of consumers. In contrast, permitting the Attorney General to seek "restoration" would have the practical effect of enriching the Commonwealth (and its private lawyers) at the expense of the very consumers that the General Assembly sought to protect.

As noted above, the Consumer Protection Law provides the Attorney General with multiple means of protecting consumers: he can promulgate regulations, 73 PA. CONS. STAT. § 201-3.1, seek injunctive relief, *id.* § 201-4, pursue voluntary compliance, *id.* § 201-5, and even seek dissolution, suspension, or forfeiture of the franchise or right to do business of any person who has violated the statute, *id.* § 201-4.1. These enforcement mechanisms would be compromised if instead of acting to protect consumers, the Attorney General had a financial incentive to pursue large monetary payouts for the Commonwealth itself.

The potential for misaligned incentives is especially great where, as here, the Attorney General enters into a contingent-fee arrangement with private counsel. In this case, the Attorney General outsourced its authority, hiring Cohen Milstein Sellers & Toll to pursue the litigation and promising a portion of any proceeds recovered on the Commonwealth's behalf. Although the courts have held that private litigants do not have standing to challenge this arrangement, *GGNSC Clarion LP v. Kane*, 131 A.3d 1062, 1074 (Commw. Ct. Pa. 2016), *aff'd,* 152 A.3d 983 (Pa. 2016), the practice of creating unseemly liaisons between public-enforcement officials and private profit-motivated lawyers is a growing problem. *See, e.g.*, Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 Sup. Ct. Econ. Rev. 77, 80 (2010) (noting that "state governments have increasingly resorted" to the practice of hiring private lawyers "in their efforts to pursue 'big money' claims against alleged tortfeasors"). More immediately, it demonstrates the grave dangers of rewriting the Consumer Protection Law to provide the Commonwealth with a restoration remedy that the General Assembly never authorized.

Spurred on by winner-take-a-substantial-percentage contingency fees, private attorneys general wield all the power of the Commonwealth in furtherance of their own self-interests — interests that are at odds with the interests of consumers. Instead of impartially administering justice, private attorneys general have an overwhelming incentive to maximize the Commonwealth's monetary recovery — even if the case is bereft of merit, even if consumers would be better off with a different remedy, and even if seeking a high-dollar recovery is in tension with the Commonwealth's public-interest role. *See* Leah Godesky, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 Colum. J.L. & Soc. Probs. 587 (2009); *Contingent Fees and Conflicts of Interest in State AG Enforcement of Federal Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 48 (2012) (testimony of James R. Copland, Director and Senior Fellow, Center for Legal Policy, Manhattan Institute for Policy Research).

Indeed, under the Attorney General's position, money that is supposed to be returned to consumers will be diverted to the Commonwealth and its private lawyers. Given this result, it is no

surprise that the Commonwealth is unwilling (or unable) to identify which specific consumers were allegedly deceived or explain when and how those alleged deceptions took place. *See* Cmmwth. Br. 44. That is not only a basic pleading failure, it is also indicative of the broader problems with this case. The Commonwealth is not trying to return money or property to individual consumers; instead, it is seeking to impose a penalty that serves only to transfer money into its own coffers and the pockets of its private lawyers.

This Court has previously noted the substantial concerns that have been raised over private-public contingent fee arrangements. *See Commonwealth v. TAP Pharm. Prods., Inc.*, 94 A.3d 350, 363 n. 19 (Pa. 2014) ("we note that substantial concern has been expressed about the use by public agencies of outside counsel, with personal financial incentives, to spearhead litigation pursued in the public interest"). And rightfully so. When governments outsource their responsibilities to private counsel through contingent-fee arrangements, they are prone to "take[] more risks and exercise[] less care." Dayna Bowen Mathew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. Mich. J. L. Reform 281, 282

(2007). Not surprisingly, courts have categorically prohibited these types of arrangements in the criminal and quasi-criminal context, recognizing that they give private lawyers a financial interest in litigation that is antithetical to the standards that an attorney representing the government is required to meet. *See, e.g., Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810–14 (1987) (prohibiting use of prosecutors who have a financial interest in prosecution); *People ex rel. Clancy v. Superior Court*, 705 P.2d 347, 353 (Cal. 1985) (rejecting use of private lawyers in public nuisance abatement action).

Moreover, permitting the Commonwealth and its private counsel to pocket the money that is supposed to be given back to consumers will necessarily divert resources away from protecting consumers. Private counsel have little incentive to pursue restoration on behalf of specific consumers, for if the consumers receive the money, there is nothing left from which the private lawyers can take a cut. Also, because the Attorney General is required to maintain "close supervision" over his private counsel, *TAP*, 94 A.3d at 363 n.19, the Attorney General will be forced to divert resources away from cases that benefit consumers to

cases that benefit its private counsel. With only finite resources, any increase in time, effort, and money expended on cases designed to put money in the Commonwealth's coffers will necessarily come at the expense of consumers.

The General Assembly could in theory decide to establish an upside-down system that, like the one the Attorney General envisions, authorizes the Attorney General to seek "restoration" remedies for the benefit of the Commonwealth and its private counsel at the expense of consumers. But that is decidedly not the system created by the Consumer Protection Law. There is no indication that the General Assembly intended the Attorney General to be able to pick and choose when the Commonwealth is "person" within the meaning of the Consumer Protection Law. As a result, the Commonwealth has not carried its burden to show that it is entitled to seek restoration.

CONCLUSION

The judgment of the Commonwealth Court should be affirmed.

October 30, 2017

Respectfully submitted,

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STATEMENT PURSUANT TO PENNSYLVANIA RULE OF APPELLATE PROCEDURE 531(B)(2)

Pursuant to Pennsylvania Rule of Appellate Procedure 531(b)(2), I certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Ashley C. Parrish

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF GOLDEN GATE NATIONAL SENIOR CARE LLC, *et al.* complies with Pennsylvania Rule of Appellate Procedure 2135 because it contains 3,655 words, excluding the parts of the brief exempted.

Ashley C. Parrish

CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2017, I filed the foregoing brief with Deputy Prothonotary for the Pennsylvania Supreme Court via U.S.P.S. Certified Mail.

I further certify that I served two copies of the foregoing brief on the following counsel by UPS Next-Day Air, which satisfies the service requirements of Pennsylvania Rule of Appellate Procedure 121.

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