IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1506 CD 2016

COUNTY OF BUTLER,

Appellant,

v.

CENTURYLINK COMMUNICATIONS, ET AL.,

Appellees.

BRIEF FOR THE PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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PRELIMINARY STATEMENT

Butler County (the "County") alleges that Defendants-Appellees have violated their obligations under 35 Pa. C.S.A. § 5301, *et seq.* (the "911 Act"). The 911 Act governs Pennsylvania's 911 services and establishes a scheme for funding Pennsylvania's 911 emergency response system. Under the 911 Act, telecommunication companies must collect a "contribution" tax from their customers. The County does not allege that the telephone companies enriched themselves by improperly keeping money collected from their customers. Rather, relying on a variety of common law tort theories, the County alleges that the Defendants-Appellees have violated the 911 Act by *under-collecting* 911 taxes from their phone subscribers—*i.e.*, by not charging the consumers enough.

The Court of Common Pleas of Butler County (the "Trial Court") correctly ruled that the 911 Act does not grant authority to any county to enforce the statute against telecommunication companies. Instead, the 911 Act grants exclusive enforcement authority to a state agency, the Pennsylvania Emergency Management Authority ("PEMA"). Trial Court Op., at R. 5a-6a, 10a (citing 35 Pa. C.S.A. §§ 5303(a)(12), 5311.13). In contrast, the statute does not give counties any enforcement rights with respect to telephone companies, and the only enforcement right that the 911 Act gives to counties is the right to collect unpaid charges from *subscribers*—not from the telephone companies themselves. *Id.*, R. 8a (citing 35

Pa. C.S.A. §§ 5307(e)(1)). The 911 Act itself does not provide a right of action against telephone companies, *id.* at R. 6a-7a, and the County should not be permitted to use the common law as an end run around the legislature's decision not to provide such a right of action to counties. 1 Pa. C.S.A. § 1504; *White v. Conestoga Title Ins. Co.*, 53 A.3d 720, 733 (Pa. 2012) (under Pennsylvania's Statutory Construction Act, "[w]here a statutory remedy is provided, the procedure prescribed therein must be strictly pursued to the exclusion of other methods of redress . . . .").

To hold otherwise would not only contradict the considered judgment of the legislature and violate the Statutory Construction Act but would also have two negative policy outcomes. First, finding an implied right of action against telephone companies participating in the 911 Act system would upend the expectations of businesses that are, pursuant to the legislature's wishes, collecting and remitting the funding for important 911 call services. Second, and more broadly, finding an implied right of action—despite the lack of such right in the express statutory scheme—would create risk and apprehension that would dissuade companies from participating in public-private partnerships to effectuate legislative goals in an array of statutory programs that are meant to foster such cooperation.

In addition, this litigation raises serious policy and constitutional concerns because the litigation is a product of a contingency fee consultant that has been soliciting plaintiffs to bring lawsuits across the country, and the County is represented not by governmental lawyers—who should be free of conflicts of interest and whose exclusive role is to serve the *public*'s interests—but rather, the County is represented by contingency fee counsel, who are motivated to serve *their own* financial interests. *Amici*'s members are being targeted with increasing frequency by private contingency fee lawyers prosecuting civil-penalty and other enforcement actions on behalf of state and local governments across the country. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Privatizing Public Enforcement: The Legal, Ethical and Due-Process Implications of Contingency-Fee Arrangements in the Public Sector* 3–5 (2013). Contingency fee-driven enforcement litigation, such as these 911 Act cases, comes with substantial costs to the public generally and undermines the government's role in neutral enforcement.

That is precisely the concern that led Pennsylvania's Supreme Court to question a public agency's use of private contingency fee counsel. *See Commonwealth v. TAP Pharmaceutical Prods., Inc.*, 94 A.3d 350, 363 n.19 (Pa. 2014) (noting that there is substantial concern about the Commonwealth's use of

private counsel with personal financial incentives in litigation pursued on behalf of public agencies).

STATEMENT OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Chamber of Business and Industry (the "PA Chamber") is the largest broad-based business association in Pennsylvania. Thousands of members throughout the Commonwealth employ greater than 50 percent of Pennsylvania's private workforce. The PA Chamber's mission is to improve Pennsylvania's business climate and increase the competitive advantage for its members.

Founded in 1912, the Chamber of Commerce of the United States of America (the "U.S. Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. Many of the U.S. Chamber's members are based or do business in Pennsylvania. More than 96 percent of the U.S. Chamber's members are small businesses with 100 or fewer employees. An important function of the U.S. Chamber is to represent the interests of its members in matters before state and federal courts.

Amici PA Chamber and U.S. Chamber regularly file *amicus curiae* briefs in cases that raise issues of vital concern to the business community. This litigation is

one such matter. *Amici*'s members include telecommunication companies that have long supported public-private partnerships to strengthen 911 emergency response systems throughout Pennsylvania and across the nation. Despite such longstanding support of and investment in 911 emergency response systems, these companies now face dozens of similar lawsuits filed by or on behalf of local government entities in states across the United States, accusing the companies of under-billing 911 taxes that the governments allege are owed by consumers under the statutes. In virtually all these cases, the governing statutes never provided for a right of action by counties against the companies. In addition to the costs and public policy harms that would flow from implying a right of action against the telecommunication companies in this context, *Amici* and their members have a strong, general interest in the rejection of the improper judicial expansion of causes of action. Indeed, the kind of meritless lawsuits besetting the telecommunications sector could be transplanted tomorrow to another sector engaged in similar public-private partnerships. That is, although the lawsuits presently before the Court involve telecommunications companies, the pattern they represent are not unique or endemic to that industry sector.

Moreover, this recent wave of 911 litigation has primarily been driven a contingency fee consultant that has solicited government entities throughout the

country to bring lawsuits on a contingent-fee basis, as is the case here. *See* Tom Victoria, *County's $10.9M lawsuit on hold*, Butler Eagle, July 3, 2016, at 2 (noting that the law firm Dilworth Paxson is representing Butler County on a contingency fee basis).[1] Prosecution of civil enforcement actions by contingency fee lawyers raises serious constitutional and policy concerns.

Amici urge this Court to affirm the dismissal of the County's complaint, on the basis that the County lacks standing under the 911 Act to pursue remedies for the alleged statutory violations.

ARGUMENT

I. This Court Should Reject the County's Invitation to Craft a Common Law Right for Counties to Enforce the 911 Act.

It is axiomatic under Pennsylvania law that statutes must be construed to "effectuate the intention of the General Assembly." 1 Pa. C.S.A. § 1921(a). To ascertain the legislature's intent, courts must look to the plain language of the statute. *See Commonwealth v. McCoy*, 962 A.2d 1160, 1166 (Pa. 2009). The trial court correctly held that under the plain language of the 911 Act, the General

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[1] Indeed, the same law firm prosecuting this case on behalf of Butler County has pursued contingent-fee cases against a number of other counties. For example, Delaware County entered into contingent fee agreement that provides up to 40% in contingency fees to the same contingent fee consultant, "PRS," and the same law firm, Dilworth Paxson, that are involved in this case. *See* Exhibit A.

Assembly intended PEMA to have "exclusive enforcement power and duty to regulate and enforce the 911 Act against service providers" for violations of the statute. Trial Court Op., R. 10a. Defendants-Appellees persuasively defend the trial court's decision to dismiss the County's claims on that basis, and *Amici* will not rehash fully those arguments.

Instead, *Amici* stress that the Court should reject the County's attempt to invoke common law tort principles to effectively imply a right of action in the statute where the statute itself provides none. Opening the door to county-by-county litigation of the 911 Act would expose telecommunication companies to a patchwork of potentially inconsistent rulings, rather than the uniform regulatory and enforcement efforts of the single state agency to which those duties were entrusted by the legislature. Allowing such scattershot enforcement proceedings would undermine the Commonwealth's 911 emergency service program.

A. Pennsylvania Common Law Cannot Displace the Legislature's Decision to Vest PEMA with Exclusive Enforcement Authority.

As the trial court recognized, the 911 Act grants PEMA, not the counties, the exclusive power to enforce the 911 Act against service providers. Trial Court Op.,

R. 5a-6a (citing 35 Pa. C.S.A. § 5303).[2] Likewise, the "Enforcement" section of the 911 Act gives authority to "the agency"—*i.e.*, PEMA —to "institute injunction, mandamus, or other appropriate legal proceedings to enforce this chapter and regulations promoted under this chapter." *Id.*, R. 6a (quoting 35 Pa. C.S.A. § 5311.13).

In contrast, as the trial court correctly explained, Section 5304 does not grant *any* enforcement power to *counties*. R. 6a. Section 5304 details the counties' powers and duties under the 911 Act, and enforcement is not among the counties' enumerated powers. *Id.*; 35 Pa. C.S.A. § 5304. Likewise, the "Enforcement" provision that empowers enforcement by PEMA gives no such power to the counties. 35 Pa. C.S.A. § 5311.13.

The County relies exclusively on Section 5307(e)(1) as the supposed basis for authorizing counties to sue under the 911 Act, but Section 5307(e)(1)'s plain terms belie the County's twisted interpretation of it. *See* Trial Court Op., R. 7a. Section 5307 is entitled "Collection and disbursement of contribution," and Section 5307(e)(1) confers a limited right on counties to collect 911 taxes from non-paying customers—***not*** from telephone companies. As the Trial Court rightly

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[2] All references to the 911 Act are to the version that was in effect before amendments that became effective on August 1, 2015. A copy of the statute as it was in effect before August 1, 2015 appears in the Record at R. 107a-167a.

recognized, "the only defined county enforcement authorization is at Section 5307(e)(1), which empowers counties to pursue legal action to enforce collection of any charges imposed under the chapter. Again, no charges are assessed against service providers under the 911 Act, *only against subscribers*." *Id.*, R. 8a (emphasis added). The statute does not give counties any right to sue telephone companies at all—and certainly not to bring damages actions for alleged errors in subscriber billings. By declining to provide counties with a right of action against telephone companies, the 911 Act closes the door on the right of action that the County now asserts.

While the County tries to pivot and suggest that, if Section 5307(e)(1) does not create a right of action, then the County nonetheless has a common law right of action (Appellant's Br., Argument § II), the County ignores that once the legislature has decided not to create a right or remedy, the judicial branch may not create or recognize such a cause of action under common law. *See Weaver v. Harpster*, 601 Pa. 488, 517 (Pa. 2009) (declining to create a private right of action for enforcement of state employment law against small employers where the legislature did not expressly create such a right); *id.* at 512 (stressing that courts "are bound by the terms of" the statute in question and that "[e]xtending protections afforded by a statute beyond its explicit limitations would require the

courts to act as a super-legislature."). And the mere fact that the County has an interest in how the 911 Act is enforced does not give the County a right of action to enforce it. *Estate of Witthoeft v. Kiskaddon*, 557 Pa. 340 (1999) ("The violation of a statute and the fact that some person suffered harm does not automatically give rise to a private cause of action in favor of the injured person."). Indeed, it is well-established—both in Pennsylvania and across the country—that the common law cannot be used as a means of enforcing statutory requirements where no right of action exists. *See, e.g.*, *Conestoga Title*, 53 A.3d at 731, 735 (Supreme Court determining that plaintiff was precluded from pursuing its common law claims because the remedial provisions of the Insurance Department Act constitute an exclusive remedy under 1 Pa. C.S.A. § 1504); *Petty v. Hospital Service Association of Northeastern Pennsylvania*, 23 A.3d 1004, 1013 (Pa. 2011) (plaintiffs lacked standing to pursue common law claims based on the accrual of an "excessive surplus" beyond the profit permitted by the Nonprofit Act, where the Nonprofit Act's plain language indicated that the legislature did not intend to permit general consumers to challenge such corporate actions); *see also Astra USA, Inc. v. Santa Clara Cty.*, 563 U.S. 110, 118 (2011) (plaintiff county cannot use federal common law to enforce § 340B of the Public Health Services Act where no right of action exists); *MM&S Fin., Inc. v. National Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 912

(8th Cir. 2004) ("Any attempt by MM&S to bypass the [statute] by asserting a [common law] claim for violations of [the statute] is fruitless."); *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) ("Since . . . no private right of action exists under the relevant statute, the plaintiffs[']s efforts to bring their claims as state common-law claims are clearly an impermissible 'end run' around the [statute].").

This rule rests on the common-sense proposition that when a plaintiff seeks to enforce a statutory requirement using common law claims, the plaintiff's claim is simply an implied right of action by another name. And in those instances where a right of action can be implied, such implication must arise from interpreting the statute itself, not from the common law. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (noting that a right of action to enforce a statutory requirement must be derived by "interpret[ing] the statute Congress has passed"); *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 855-56 (Tenn. 2010).

B. Implying a Common Law Right for Counties to Enforce the 911 Act Would Have Harmful Consequences for Businesses and for the 911 Emergency Response Regime the Legislature Crafted.

Even if it were permissible for the courts to imply a common law right of action for the County that the 911 Act did not provide, recognition of such a right of action here would not advance the statute's objectives. The *counties* are not the

intended beneficiaries of the 911 Act; the intended beneficiary of the statute is the *public*—whose access to critical emergency services is the 911 Act's focus. Implying a right of action would undermine the statute's goal of establishing a uniform 911 system to ensure efficient provision of emergency services. *See* Trial Court Op., R. 7a-8a (stressing that a "single source for guidance is appropriate" so that "[c]onsistency and predictability in regulation and in communications" would exist "for all service providers, subscribers, and counties within the state"). In contrast, county-by-county enforcement would result in piecemeal litigation and potentially conflicting interpretations of the 911 Act. Sensibly, then, the legislature gave enforcement authority to a single, experienced administrative agency: PEMA.

Moreover, the County's common law theory in this case could apply to *private* plaintiffs, as well. Permitting private plaintiffs to bring suit to enforce statutory requirements through an implied right of action or under common law would have harmful consequences for the thousands of companies that do business with state and local agencies. If adopted by this Court, the County's approach threatens not only to impose substantial costs on those companies, but also to harm the interests of Pennsylvanians who benefit from public-private relationships of the type at issue here.

Courts have long warned of the consequences of expanding private enforcement of statutes through judicial fiat. Where a statute does not expressly confer a right of action, the judicial recognition of such a right disrupts the expectations of would-be defendants, who are suddenly forced to grapple with "extensive discovery," "the potential for uncertainty and disruption," and other litigation-related burdens that substantially raise the "costs of doing business." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 163-164 (2008). In many cases, these burdens will be sufficiently onerous as to "allow plaintiffs with weak claims to extort settlements from innocent [defendants]." *Id.* at 163; *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (referring to litigation tactics that "'take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value'"). When the defendant is a business, moreover, the costs of defending against such litigation will be either absorbed (and thus borne by investors and employees) or passed on to consumers. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994).

Should this case be permitted to proceed, the Defendants-Appellees would potentially face years of litigation and costly discovery. For example, a dozen government districts in Tennessee (also represented by contingency fee counsel)

pursued similar challenges against a telecommunications company for the same alleged under-collection of 911 contributions, and there, as here, the plaintiffs relied largely on common law theories in the absence of an express statutory cause of action. *See, e.g.*, Reply Br. of Pls.-Appellants at 22, *Hamilton Cnty. Emergency Commc'n Dist. v. Bellsouth Telecommc'ns*, No. 16-5155 (6th Cir. May 31, 2016). The court eventually granted summary judgment in favor of the defendants, *see Hamilton County Emerg. Comm. Dist. v. BellSouth Telecomms.*, 154 F. Supp. 3d 666, 699 (E.D. Tenn. 2016)—but only *after* 18 months of discovery, including 52 depositions and the production of over 300,000 pages of documents, along with hundreds of gigabytes of data. Br. of Def.-Appellee at 9, *Hamilton Cnty. Emergency Commc'n Dist. v. Bellsouth Telecommc'ns*, No. 16-5155 (6th Cir. May 12, 2016). The County's approach here would similarly upend the reasonable expectations of the dozens of telecommunications companies that participate in the 911 program, and would disrupt the carefully calibrated framework that the Pennsylvania legislature established for the administration and enforcement of the 911 Act.

Allowing the County to pursue an implied right of action under the common law would have broader implications on a wide swath of companies that work with the state on other statutorily-governed public-private partnerships. Beyond the 911

context, local governments frequently turn to private companies to provide necessary goods and services in a cost-effective, high-quality, and reliable manner. Private companies, for example, manage public schools, run prisons, oversee welfare programs, provide drug-abuse counseling, and offer employment training. *See generally* Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229, 1231-1232, 1267 (2003). A rule that would permit plaintiffs to bring suit under the common law to enforce statutory obligations could apply whenever a statute permits or requires a private company to assist local governments in performing an important task on behalf of the public. The practical effect of such an approach would be to expose any company that assists local governments pursuant to a statute to costly and unanticipated litigation. Such uncertainty and risk of exposure would create a serious disincentive for companies to engage in business with local governments in the first place—to the detriment of municipalities and their residents and in frustration of statutes designed to facilitate such public-private cooperation. It is not the role of the judiciary to substitute its judgment for that of the political branches and to create a common law right of action that does not exist as a matter of statute. This Court should reject the County's arguments to the contrary.

II. Prosecution of Civil Enforcement Actions by Contingency Fee Lawyers Violates Due Process.

This litigation—and, indeed, the broader proliferation of virtually identical 911 litigation throughout the country—is troubling to *Amici* and their members for another reason: a contingency fee consultant, Phone Recovery Services ("PRS") has engaged in litigation shopping across the country, soliciting government entities to prosecute enforcement actions by way of contingency fee counsel. *See, e.g*. Roger Quigley, *Cumberland County commissioners agree to proceed with action to recover 911 fees*, PennLive.com, July 20, 2015 ("Counties all around the country are not receiving the money they're owed from the 911 surcharge tacked onto phone bills, the two companies [Dilworth Paxson and PRS] told the [Cumberland County] commissioners last week in a pitch to get them to sign" a 40% contingency fee agreement). Assuming *arguendo* that the County did have authority to enforce the 911 Act—which it does not—it would nonetheless be improper for the County to outsource that enforcement authority to a private law firm on a contingency fee basis.[3]

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[3] Of course, the serious constitutional and policy implications of the County's outsourcing of its enforcement authority would only be implicated if the Court were to hold that the 911 Act gives the County such enforcement authority. The Court could avoid grappling with these constitutional concerns by correctly holding that the 911 Act does not provide the County with that enforcement authority.

The Pennsylvania Supreme Court has already noted its substantial concern with the Commonwealth's use of private counsel with personal financial incentives in litigation pursued on behalf of public agencies. *TAP Pharmaceutical Prods.*, 94 A.3d at 363 n.19. Unlike private contingency fee lawyers, government lawyers are "the representative[s] not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Berger v. United States*, 295 U.S. 78, 88 (1935). As such, a government lawyer's interest is not that the government "shall win a case, but that justice shall be done." *Id*. For this reason, a government lawyer can never have a personal stake in the outcome of a case he or she prosecutes in the name of the sovereign.

In contrast, when a government hires private counsel on a contingency fee basis in order to prosecute civil-penalty or other enforcement actions, the private lawyers have a direct financial stake in the outcome in the proceedings. Under any "realistic appraisal of psychological tendencies and human weakness," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 252 (1980) (citation omitted), the personal pecuniary incentives to steer the litigation fatally undermine "the appearance and reality of fairness," *id.* at 242 (citations and quotation marks omitted).

The U.S. Supreme Court has long held that due process precludes any financial or other arrangement that might compromise a government actor's ability to faithfully discharge his or her duties in the judicial system. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523–24 (1927).[4] Prohibiting such structural conflicts of interest "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." Marshall, 446 U.S. at 242 (citations and quotation marks omitted). "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909 (2016). The contingency fee arrangement in the prosecution underlying this case—and in many others—endangers the possibility of fairness, actual and perceived.

Even after the initiation of an enforcement action, a contingency fee counsel's personal financial stake in a case threatens to improperly influence the

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[4] Indeed, the Supreme Court has held that arrangements in which pecuniary or other interests could undermine a judge's impartiality, *Tumey*, 273 U.S. at 523, or could distort a criminal or civil prosecutor's duty to pursue justice rather than personal interests, are categorically forbidden, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810 (1987) (plurality opinion). For similar reasons, a number of courts and legislatures have prohibited contingent-fee tax audits. *See generally* J. Lyn Entrikin, *Tax Ferrets, Tax Consultants, Bounty Hunters, and Hired Guns: The Property Tax Netherworld Fueled by Contingency Fees and Champterous Agreements*, 89 Chi.-Kent L. Rev. 289, 306-09 (2014).

myriad strategic and tactical decisions made during the course of a long-running prosecution. For instance, contingency fee prosecutors have the incentive to seek monetary relief, even if the public interest may be "better served by [forgoing] monetary claims, or some fraction of them, in return for nonmonetary concessions." David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DePaul L. Rev. 315, 323 (2001). And contingency fee agreements inevitably affect the decision whether to continue a prosecution. The interests of the public may warrant dropping a prosecution where, for example, the litigation process reveals the weakness of the government's theory of liability. "But it is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work." *Id.* at 326.

Furthermore, outsourcing government authority to contingency fee counsel threatens to diminish the public's faith in the fairness of civil government prosecutions. These arrangements frequently result in allegations that government officials are doling out contingency fee agreements to lawyers who make substantial political campaign contributions. *See* Editorial, *The State Lawsuit Racket: A Case Study in the Politician Trial Lawyer Partnership*, Wall St. J., Apr. 8, 2009, at A12 (reporting that named partner of a firm pursuing a contingency fee

contract with Pennsylvania made large campaign contributions); Editorial, *The Pay-to-Sue Business: Write a Check, Get a No-bid Contract to Litigate for the State*, Wall St. J., Apr. 16, 2009, at A14 (similar in Mississippi, New Mexico, Louisiana, and Arkansas); Am. Tort Reform Ass'n et al., *Beyond Reproach?: Fostering Integrity and Public Trust in the Office of State Attorneys General* (2010) (similar in Alabama, Mississippi, New Mexico, Louisiana, West Virginia, New York, and Missouri).

Contingency fee arrangements also create the appearance of giving private lawyers an undue windfall at taxpayers' expense. *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose,* N.Y. Times, July 9, 2007, at A10 (reporting controversy over government agreement to give contingency fee lawyers half of any recovery in public environmental suit against poultry companies); Manhattan Inst., Center for Legal Pol'y, *Trial Lawyers Inc.: Attorneys-General—A Report on the Alliance Between State AGs and the Plaintiffs' Bar* (2011) (discussing pay-to-play, ethical, and policy controversy over contingency fee agreements). As Judge William H. Pryor of the Eleventh Circuit, then the Alabama attorney general, explained:

> The use of contingent-fee contracts allows government lawyers to avoid the appropriation process; it creates the illusion that the lawsuits are being pursued at no cost to the taxpayers. These contracts also create

> the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts.

William H. Pryor, *Government "Regulation by Litigation" Must Be Terminated*, Legal Backgrounder (Wash. Legal Found., Wash., D.C.), May 18, 2001, at 4.

The appearance of impropriety has only increased in light of the recent explosion of contingency fee agreements with government entities. "[T]rial lawyers representing public clients on contingency fee are suing businesses for billions over matters as diverse as prescription drug pricing, natural gas royalties and the calculation of back tax bills." Walter Olson, *Tort Travesty*, Wall St. J. (May 18, 2007); *accord* Samp, Richard A., *Growing Concern Over Contingency Fee Arrangements Between Attorneys General and Private Attorneys*, Bloomberg BNA, Sept. 14, 2012, at *3 ("The debate over government use of contingency fee attorneys has heated up considerably within the past several years.").

Based on these concerns, contingency fee arrangements with government entities have been widely condemned even within government as antithetical to fundamental fairness in judicial proceedings. The United States Executive Branch in 2007 banned the federal government from paying lawyers a contingency fee. *See* Protecting American Taxpayers from Payment of Contingency Fees, Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (May 16, 2007). Numerous states have enacted limitations on the state government's use of private contingency fee

counsel. *See Privatizing Public Enforcement*, *supra*, at 7–9. And former state attorneys general and other state government prosecutors, too, have criticized the use of private contingency fee lawyers. In addition to the former Alabama Attorney General, *see* Pryor, *supra*, the former Iowa Attorney General criticized these arrangements, stating that her office employed private lawyers exclusively on an hourly basis so that there would be "no doubt that prosecutorial neutrality prevails." Bonnie Campbell, *Penny-wise, Pound Foolish: Hiring Contingent-fee Lawyers To Bring Public Lawsuits Only Looks Like Justice of the Cheap*, LegalTimes.com, at 4, Aug. 18, 2003.

The constitutional and policy implications of the contingency fee prosecution of these particular 911 claims are all the more serious because these lawsuits are the direct result of "litigation shopping" by a contingency fee consultant and a contingency fee law firm, rather than the result of an independent audit by the counties. Even more troubling is that the contingency fee firms' promise of "risk-free money" for the counties is based on a new and unique (and, as Appellees explain their brief, completely erroneous) interpretation of how the 911 Act ought to apply to new technologies not expressly mentioned in the Act. To avoid having to grapple with the constitutional infirmities with the County's retention of contingency fee counsel, a concern that the Pennsylvania Supreme

Court has already raised, *see TAP Pharmaceutical*, 94 A.3d at 363 n.19, the Court should hold that the County lacks that enforcement authority.

CONCLUSION

Based on the foregoing, *Amici Curiae*, Pennsylvania Chamber of Business and Industry and Chamber of Commerce of the United States of America, respectfully ask this Court to affirm the trial court's dismissal of the County's claims, and grant the relief requested by the Defendants-Appellees.

Dated: February 28, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH PENNSYLVANIA RULE OF APPELLATE PROCEDURE 531(B)(3)

This brief complies with the word count limits under Pa. R.A.P. 531(b)(3) because, according to the word processing software used to prepare this brief, it contains less than 7,000 words.

Dated: February 28, 2017

/s/ *Jennings F. Durand*
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this, the 28th day of February 2017, I caused a true and correct copy of the foregoing Brief of *Amici Curiae* Pennsylvania Chamber of Business and Industry and The Chamber of Commerce of the United States of America to be served upon counsel of record via electronic filing and by email, by agreement of counsel for Plaintiff-Appellant County of Butler pursuant to Pa. R. App. P. 121.

Dated: February 28, 2017

/s/ *Jennings F. Durand*
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EXHIBIT A

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Timothy J. Carson
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November 20, 2014

Michael L. Maddren, Esquire
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Re: Engagement Letter

Dear Mr. Maddren:

The purpose of this letter is to set forth the scope of the proposed engagement of Dilworth Paxson LLP (the "Firm") as special legal counsel for Delaware County (the "County" or "you"), in connection with the recovery of certain uncollected and/or unremitted 911 and/or E911 fees due the County, to set forth the financial arrangements regarding our engagement and to verify our mutual agreement to the following:

1. Scope of Engagement.

You have asked us to represent you, as special counsel in connection with the recovery of certain 911 and/or E911 fees that should have been collected and/or remitted by telecommunication providers ("Provider(s)") to the County, either directly or indirectly for the benefit of the County through the Commonwealth of Pennsylvania or any of its officials or agencies (collectively, the "Commonwealth") during the period from January 1, 2009 through December 31, 2014 and any such additional periods for which recovery of such uncollected and/or unremitted fees may be practicable under applicable law (the "Services"). In conjunction therewith, the Firm shall work in collaboration with Phone Recovery Services LLC (also sometimes doing business as Expert Discovery, LLC) ("PRS") which has been concurrently retained by the County under a separate agreement to provide forensic telecommunications auditing services related thereto (the "PRS Agreement"). The amounts that are identified by PRS and the Firm as being payable but unpaid by a Provider to the County (or the Commonwealth, if applicable, for the benefit of the County) during this period are referenced herein as the "Fee Deficiency Amount(s)."

Our representation of you is limited to the matters noted above, and unless specifically agreed between us or as otherwise provided herein, our engagement will end at the conclusion of such matters. In the event of a successful recovery of a Fee Deficiency Amount, certain prospective services will be provided by the Firm as set forth in Section 4 below.

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2. Fees.

a. Billing Criteria

Our billing practice is to charge for our services based on the criteria set forth in Rule 1.5 of the Rules of Professional Conduct. These criteria include the nature of the fee agreement, the time and labor required, the novelty or difficulty of a particular question involved, the level of skill requisite to proper performance of the services, customary fees for such services, the amount involved and the result obtained, special limitations imposed by the client, the nature and length of the professional relationship with the client, and the experience, professional reputation and ability of the attorney or attorneys performing the services.

b. Contingent Fee Arrangement

With respect to the matters covered by this engagement, you agree to pay the Firm for services rendered, a **contingent fee** as set forth below. Any money that the County receives in connection with any services or action covered by this engagement letter and/or the PRS Agreement, whether via settlement, Court award, or otherwise (the "Fee Deficiency Proceeds"), shall first be used to pay any litigation expenses that either PRS or the Firm has advanced in connection with any of the litigation matters covered by this engagement letter, pursuant to Section 3 below. The Fee Deficiency Proceeds minus such reimbursement amounts are referred to herein as the "Net Fee Deficiency Proceeds."

c. Recovery Prior to Commencement of Formal Litigation Proceedings

If a Fee Deficiency Amount is recovered prior to the commencement of litigation proceedings (including preparation of a Complaint), the compensation payable to the Firm with respect to its performance of Services hereunder shall be a contingent fee equivalent to 10% of the Net Fee Deficiency Proceeds. (An additional contingent fee equivalent to 30% of the Net Fee Deficiency Proceeds shall be payable in this situation to PRS under the terms of the PRS Agreement.) The County shall not owe or be obligated to pay the Firm any other amount for its work, operations, efforts or undertakings under this subsection of the Contract (other than the potential payment of certain reimbursable litigation expenses under subsection 2(b) above). In the event that recoveries are made from Providers in this situation, the full amount of the payments from the Provider shall be made directly to the County, and it shall pay (after reimbursement of certain litigation costs advanced) the 10% contingent fee amount to the Firm (as well as the 30% contingent fee due PRS) within thirty (30) days of the receipt of those funds.

d. Recovery after Commencement of Litigation Proceedings

If PRS is initially unsuccessful in collection a Fee Deficiency Amount, the Firm may be authorized by the County to undertake litigation proceedings. If the Firm is authorized to pursue litigation on behalf of the County, PRS shall assist the Firm in all aspects of such

litigation. In the event there is a recovery of a Fee Deficiency Amount, the Firm shall be entitled to receive a contingent fee calculated as follows:

- 13% of the Net Fee Deficiency Proceeds if the claims against any Provider(s) (the "Settling Provider(s)") are fully and finally settled after a Complaint is prepared but prior to the filing by the Provider(s) of an Answer or Preliminary Objections to such Complaint as filed;

- 16% of the Net Fee Deficiency Amount recovered if the claims against the Settling Provider(s) are fully and finally settled before the Firm completes and files its brief for the County on Preliminary Objections filed by the Provider(s);

- 24% of the Net Fee Deficiency Proceeds if the claims against the Settling Provider(s) are fully and finally settled after the Firm files its brief on Preliminary Objections and before the completion of discovery;

- 28% of the Net Fee Deficiency Proceeds if the claims against the Settling Provider(s) are fully and finally settled after completion of discovery and before the trial commences;

- 30% of the Net Fee Deficiency Proceeds if (a) the claims against the Settling Provider(s) are fully and finally settled once the trial has commenced, or (b) the County prevails at trial.

In no event shall the aggregate amount of the fee paid to the Firm and the fee paid to PRS exceed 40% of the Net Fee Deficiency Proceeds.

e. No Attorneys' Fees Payable Without Recovery; Lien on Recovery Proceeds

It is agreed and understood that the Firm's compensation for the Services rendered in the engagement described herein is upon a contingent fee basis. **If no Fee Deficiency Proceeds are recovered, the County shall not be indebted to the Firm for any attorneys' fees whatsoever.** The County understands that it could retain other attorneys to represent the County by compensating such attorneys at attorneys' regular hourly rates. The County expressly declines to do so, not wishing to incur such expense and chooses the terms set forth herein instead.

The County grants the Firm a lien on any settlement proceeds or proceeds of judgment after recovery to protect its entitlement to the attorneys' fees set forth in this agreement.

3. Litigation-Related Costs.

The Firm agrees to advance (without reimbursement until and unless such time as sufficient Fee Deficiency Proceeds become available to the County) all costs of litigation, except that PRS has agreed in the PRS Agreement to be responsible for advancing the payment of the following costs:

- Outside professional fees (including disbursements for expert witnesses, forensic accountants and other consultants);
- Transcription fees (including disbursements for outside transcribing agencies and courtroom stenographer transcripts); and
- Expenses incurred for preparation for trial presentations, including demonstrative exhibits.

If no Fee Deficiency Proceeds are recovered, the County shall not be indebted to the Firm (or to PRS) for any of the litigation costs advanced or otherwise incurred whatsoever.

4. Prospective Services.

The County acknowledges that in the event it (with the efforts of the Firm and PRS) is successful in collecting a Fee Deficiency Amount(s) for prior audited years, that there is an ongoing revenue benefit realized by the County for the services rendered hereunder. The County further acknowledges a need for monitoring services to ensure that newly identified and formerly unrealized 911 and/or E911 fees continue, as well as for the institution of a compliance program ensuring proper and accurate receipt of future 911 and E911 fees. The Firm (with PRS) shall provide such services for the 2-year period following the settlement or resolution of claims against any Provider and, for such services, shall receive a fee equal to 5% of the Fee Deficiency Amount attributable to the calendar year ended December 31, 2013 for year one, and 5% of such Fee Deficiency Amount for year two.

5. Dispute Resolution.

The County and the Firm will each use good faith efforts to resolve any dispute or claim between them arising from the performance or failure to perform their respective obligations under this Agreement (a "Dispute"). In the event that the County and the Firm are unable to amicably resolve a Dispute, it will be escalated to the senior manager/official level of each party for consideration. If the Dispute cannot be resolved at the senior official level, The dispute resolution mechanism shall be litigation in a court that is located in Delaware County, Pennsylvania. If (i) either party should employ attorneys or incur other expenses in any legal action regarding a Dispute, and (ii) one party secures a final judgment before a court of competent jurisdiction or obtains other relief from an administrative body related thereto against the other party, the losing party will pay the

prevailing party its reasonable attorneys' fees and other reasonable expenses that are incurred in that action.

6. Withdrawal from Representation.

The attorney/client relationship is one of mutual trust and confidence. If you have any questions at all about the provisions of this engagement, we invite inquiries. We encourage our clients to inquire about any matter relating to our engagement or billing statements that are in any way unclear or appear unsatisfactory. Conversely, any failure on your part to meet your obligation of timely payments under this agreement will constitute authorization for the Firm to withdraw from representing you and to reveal this agreement and any other necessary documents to any court or agency if the same should prove necessary to effect withdrawal.

This engagement is also subject to termination by either party at its sole discretion, subject to the Rules of Professional Conduct and any applicable court rules. Upon such termination, however, you will remain liable for any unpaid fees earned by the Firm hereunder and costs incurred and reimbursable hereunder, whether or not billed.

7. Privacy.

In the course of providing you with legal services, we may receive significant nonpublic personal financial information from you or from other financial advisors at your specific instruction. All information that we receive from you or from others at your direction will be held in confidence and not released to people outside the Firm, except as required in the performance of our Services, as agreed to by you, or as required under an applicable law. In order to protect your nonpublic personal information we maintain physical, electronic and procedural safeguards. We consider all information relating to representation of our clients to be confidential, and it is treated accordingly, as required by the Rules of Professional Conduct.

8. Communications.

The Firm regularly communicates with its clients and with third parties, on behalf of its clients, through the use of landline, digital and cellular telephones, wireless email devices, unencrypted e-mail and telecopier machines. Each of these means of communication is practically and technologically susceptible to varying risks of interception by (or misdelivery to) unintended recipients. By executing this agreement, you consent to the Firm's utilization of the above-referenced means of communication.

If you are not fully versed in the risks inherent in each of the aforementioned means of communication, please contact the undersigned to discuss them before executing this agreement. If you would prefer that the Firm refrain from using one or more of the above-referenced means of communication please refrain from executing this agreement, communicate that preference to us in writing, and we will revise this agreement accordingly.

9. Acknowledgement of Terms.

If this letter correctly sets forth your understanding of the scope of the services to be rendered to you by the Firm, and if the terms of the engagement are satisfactory, please execute the enclosed copy of this letter and return it to us. If the scope of the services described is incorrect or if the terms of the engagement set forth in this letter are not satisfactory to you, please let us know in writing in order that we can discuss either aspect.

By executing this agreement, you acknowledge that there is uncertainty concerning the outcome of this matter and that the Firm and the undersigned attorney have made no guarantees as to the disposition of any phase of this matter. Any representation or expression relative to the outcome of this matter is only an expression of opinion and does not constitute a guarantee. The Firm shall not be responsible for the performance of any further legal services under this agreement until such agreement is returned to the Firm, whereupon our engagement by you is accepted per the stated terms.

We look forward to working with you and thank you once again for the opportunity to serve you.

Very truly yours,

Timothy J. Carson

Accepted and acknowledged:
COUNTY OF DELAWARE

BY: _____
Michael L. Maddren
Delaware County Solicitor

DATE: 1-7-15