

# Legislators Address the Growing Use of Contingent Fee Attorneys by State Officials

BY CHRISTOPHER E. APPEL

**A**s the practice of states hiring private lawyers has expanded to virtually every area of government enforcement, concerns have mounted as to whether such arrangements serve the public interest or are driven by private profit. Legislators have responded by adopting safeguards on the hiring, oversight, and payment of private attorneys by state officials. Following Florida's lead,<sup>1</sup> six additional states have adopted reform over the past three years.

These reforms have their genesis in the American Legislative Exchange Council's Private Attorney Retention Sunshine Act (PARSA) adopted in 1998. Soon thereafter, Colorado, Connecticut (via executive order), Kansas, Minnesota, North Dakota, Texas and Virginia adopted legislation based on the model policy. The most recent wave of states taking action includes Arizona, Indiana and Missouri in 2011,<sup>2</sup> and Iowa, Mississippi and Georgia (via administrative order) in 2012.<sup>3</sup>

Momentum continues to grow. Recently, West Virginia voters replaced long-serving West Virginia Attorney General Warren McGraw, Jr., who faced significant controversy due to his routine no-bid hiring of private lawyers, with Patrick Morrissey, who was elected on an ethics platform. Among the new Attorney General's first acts was to propose new procedures and guidelines outlining when and how the Office of the Attorney General should hire outside counsel to represent the State and its agencies in legal proceedings.<sup>4</sup>

## THE EXPANDING USE OF THE PRACTICE

Use of private contingency fee agreements first rose to prominence during the landmark state attorney general tobacco litigation of the 1990s. The Manhattan Institute has estimated that approximately 300 lawyers from 86 firms are projected to earn up to \$30 billion from the settlement of this litigation.<sup>5</sup> In most cases, the selection of outside counsel to pursue this litigation was not the product of an open or competitive bidding process, but rather occurred behind the scenes and went to political allies and large campaign contributors of the state attorney general.<sup>6</sup> The effective rates for the work performed on behalf of the state by some plaintiffs' attorneys has been calculated at tens of thousands of dollar per hour.

Although observers once viewed such arrangements as unique to tobacco litigation, plaintiffs' lawyers and some state attorneys general are now applying this model to virtually every area of litigation against numerous industries. Pharmaceutical manufacturers, financial institutions and insurers are among the most frequent targets.<sup>7</sup> Government officials in at least 21 states have hired plaintiffs' lawyers on a contingent fee basis to enforce state laws in recent years.

## A NEED FOR SAFEGUARDS

The history of contingent fee contracts between state attorneys general and private attorneys is replete with examples of unfavorable deals from the public's perspective and "pay-to-play" antics. Although state laws typically require use of an open and competitive process when contracting for goods and services, such good government procedures are not typically used when the state hires outside counsel. Experience has shown that plaintiffs' law firms often develop the theory for the litigation, then shop it around to state attorneys general to find an interested client, not the other way around. State officials have frequently hired law firms that contribute or are expected to contribute to their campaigns or have other political or personal con-

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nections to the hiring official. There is no assurance that the state is hiring the most qualified counsel and getting the best deal. In some instances, government lawyers may be perfectly capable of handling the litigation without outside assistance, which would avoid siphoning off a significant portion of the recovery, potentially millions of dollars that could reduce the tax burden or fund projects or programs, by a contingent fee.

Enforcement of state law through a contingent fee also raises serious ethical and constitutional concerns.<sup>8</sup> There is an inherent conflict of interest between the profit maximizing objective of a private attorney, whose compensation is based on the amount of damages or fines imposed on a company, and the state's most fundamental role of ensuring that the law is enforced in a fair and reasonable manner.



In some cases, the public interest may be best served through a remedy that is not financial in nature or the evidence may suggest that the government should discontinue litigation. Unlike cases brought for private plaintiffs, public enforcement actions “involve a balancing of interests” and a “delicate weighing of values” that “demands the representative of the government to be absolutely neutral.”<sup>9</sup> This is simply not the case where a private lawyer’s compensation depends upon the dollar amount of a judgment or settlement.

In examining this practice, the state supreme courts of Rhode Island and California have found that contingent fee agreements between government officials and private attorneys may be permissible in some circumstances but only where the government’s attorneys maintain full and complete control over the litigation.<sup>10</sup> A state may not abrogate its law enforcement powers to private lawyers.

In addition, by shifting litigation risks to outside counsel, states may be enticed to bring novel or speculative lawsuits (often at the invitation of the retained private counsel) that seek to expand the liability as opposed to enforce existing law.<sup>11</sup> The practice invites “regulation through litigation.”

#### **ADOPTION OF REFORM**

Although the legislation adopted varies significantly from state-to-state, the recent wave of state laws generally includes the following elements:

- The attorney general must analyze certain factors and make a written determination that contingent fee representation will be both cost-effective and in the public interest, prior to entering into a contract;
- The attorney general is required to request proposals from private attorneys, or make a written determination that such a request is not feasible under the circumstances;
- Contingent fees are subject to tiered limits and an aggregate cap of \$50 million, exclusive of reasonable costs and expenses;
- Contingent fees may not be based on imposition of fines;
- Certain requirements must be met throughout the contract to ensure government attorneys retain complete control over the litigation;
- Contingent fee contracts must include certain standard provisions reflecting what is expected of the government attorneys and contingent fee counsel;
- The contingent fee contract, payments made under the contract, and the attorney general’s written determination about the need for contingent fee representation are to be posted on the attorney general’s website. Other records relating to the contract are to be subject to the state’s open records laws. The private attorneys and paralegals are to maintain detailed contemporaneous time records for presentation to the attorney general on request; and

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The mechanism of the law that claims these higher premiums will be affordable comes in the form of tax subsidies paid for by raising taxes elsewhere. These taxes, however, will be passed down to consumers and, ironically, the federal government will indirectly tax itself and the states for the honor. On the other hand, Secretary Sebelius stated that the mechanism the law relies on to make insurance affordable comes from the market when insurers “compete for customers.”<sup>5</sup> 



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- 1 Louise Radnofsky, “Sebelius: Some Could See Insurance Premiums Rise,” Wall Street Journal Online, March 26, 2013, <http://blogs.wsj.com/washwire/2013/03/26/sebelius-some-could-see-insurance-premiums-rise/>.
- 2 Congressional Budget Office, “An Analysis of Health Insurance Premiums Under the Patient Protection and Affordable Care Act,” November 30, 2009 <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/107xx/doc10781/11-30-premiums.pdf>.
- 3 Michael J. Chow, “Effects of the PPACA Health Insurance Premium Tax on Small Businesses and Their Employees: An Update,” NFIB, March 19, 2013, <http://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/ppaca/health-insurance-tax-study-nfib-2013-03.pdf>.
- 4 John D. Meerschaert and Matieu Doucet, “PPACA Health Insurer Fee Estimated Impact on State Medicaid Programs and Medicaid Health Plans,” Milliman, January 31, 2012, <http://capsules.kaiserhealthnews.org/wp-content/uploads/2012/02/PPACA-Health-Insurer-Fee-Estimated-Impact-on-Medicaid.pdf>.
- 5 Elise Viebeck, “Premiums could rise under healthcare law, Sebelius concedes,” The Hill, March 27, 2013, <http://thehill.com/blogs/healthwatch/health-reform-implementation/290523-sebelius-says-some-could-see-insurance-premiums-go-up>.

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- The attorney general must submit an annual report to the legislature that describes the state’s use of outside counsel in the preceding calendar year.

Each of these laws, and earlier legislation adopted based on PAR-SA, shares the common goals of promoting transparency, curbing unseemly liaisons between public enforcement officials and private, profit-motivated lawyers, and protecting the public funds. Such re-

forms provide legislators with an effective means of safeguarding the public interest when the state enforces the law through use of private attorneys. 



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- 1 Fla. Stat. Ann. § 16.0155.
- 2 Ariz. Rev. Stat. § 41-4801; Ind. Code Ann. § 4-6-3-2; Mo. Rev. Stat. §§ 34.376, 34.378, and 34.380.
- 3 Iowa Code § 13.7, 23B.1 et seq.; Miss. Code Ann. §§ 7-5-1 to -8, 7-5-21, 7-5-39; Admin. Order, Attorney General Samuel L. Olens, May 29, 2012.
- 4 See Office of West Virginia Attorney General Patrick Morrissey, Outside Counsel, at <http://www.wvago.gov/outsidecounsel.cfm>.
- 5 See Manhattan Inst., Center for Legal Pol’y, Trial Lawyers, Inc.: A Report on the Lawsuit Industry in America 2003 6 (2003), available at <http://www.manhattan-institute.org/pdf/triallawyersinc.pdf>; see also Leah Godesky, State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?, 42 Colum. J.L. & Soc. Probs. 587, 588-89 (2009) (estimating that approximately \$14 billion of the settlement has gone to private attorneys).
- 6 See, e.g., Stuart Taylor, How a Few Rich Lawyers Tax the Rest of Us, Nat’l J., June 26, 1999; Robert A. Levy, The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza, Legal Times, Feb. 1, 1999, at 27.
- 7 See, e.g., Manhattan Inst., Trial Lawyers Inc.: Attorneys General: A Report on the Alliance Between State AGs and the Plaintiffs’ Bar 2011 (2011), available at <http://www.triallawyersinc.com/TLI-ag.pdf>; Pay-to-Play Examples, U.S. Chamber Institute for Legal Reform, at <http://www.instituteforlegalreform.com/featured-tool/pay-to-play-examples-0>.
- 8 See Martin H. Redish, Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications, 18 Sup. Ct. Econ. Rev. 77 (2010).
- 9 People ex rel. Clancy v. Superior Ct., 705 P.2d 347, 352 (Cal. 1985).
- 10 See Rhode Island v. Lead Indus. Ass’n, 951 A.2d 428 (R.I. 2008); County of Santa Clara v. Atlantic Richfield Co., 235 P.3d 21 (Cal. 2010).
- 11 See, e.g., Adam Liptak, A Deal for the Public: If You Win, You Lose, N.Y. Times, July 9, 2007, at A10; Editorial, The Pay-to-Sue Business, Wall St. J., Apr. 16, 2009, at A15.