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Regulation by litigation

by Mark A. Behrens

In 1998, coordinated Medicaid recoupment litigation against the tobacco industry by over forty state attorneys general, working with private contingency fee law firms, resulted in a landmark $246 billion Master Settlement Agreement with marketing restrictions on tobacco products. A new era of regulation through litigation was born, spawning problems ever since.

The state attorneys general tobacco litigation was transformational. As former Maine Attorney General Drew Ketterer, a past President of the National Association of Attorneys General, explained, for over 200 years attorneys general "defended the state in cases brought by outside parties, or gave opinions to the governor and lawmakers on pending bills… Nobody really knew who these people were…. AGs are now major political players and policymakers."

The tobacco litigation model has inspired state and local governments to advance policy preferences against firearms manufacturers, former manufacturers of lead pigment and paint, alleged contributors to global warming, gasoline refiners, health maintenance organizations, pharmaceutical manufacturers, and credit card and mortgage lenders, among others.

Policy-focused lawsuits give state executives the ability to bypass legislatures to achieve regulatory objectives that the majority of the electorate, as represented by their legislators, may not support. Clinton Administration Labor Secretary Robert Reich has called these lawsuits "faux legislation, which sacrifices democracy to the discretion of administration officials operating in secrecy." Former Alabama Attorney General William Pryor, Jr., now a federal appellate judge, has said that government-sponsored lawsuits are "the greatest threat to the rule of law today."

The involvement of private contingency law firms in Big Government lawsuits raises additional problems, including conflicts of interest

and perceived cronyism. For example, a lawyer working on a contingent fee will be motivated to inflict the largest monetary recovery possible, but in some instances the public interest may be best served through other relief. In addition, private lawyers are more likely to push the law into new and uncharted areas, arguing for expansions of liability that may yield a lucrative recovery, but may not serve the broader interests of the state and its citizens.

To address some of these problems, the Supreme Courts of Rhode Island and California have cautioned that when a state attorney general retains a contingency fee lawyer, it is essential that the government attorneys maintain control over the case. This is a sound recommendation, but challenging for courts to monitor and enforce without legislative guidelines.

Furthermore, the history of this type of litigation shows that state attorneys general often select law firms with close political, financial, or personal ties. In the state tobacco lawsuits, many state attorneys general negotiated contingent fee contracts behind closed doors with hand-picked private lawyers. Some of those lawyers earned astronomical fees as a result, while other plaintiffs' law firms were denied the ability to throw their hat into the ring.

In some instances, the citizens of a state might be better off financially if litigation is handled within the attorney general's office, without giving a substantial cut of any recovery to an outside law firm. State attorneys general have excellent and experienced staff; they can handle complex litigation without outside assistance.

Many states have enacted laws to improve the handling of policy-focused litigation involving private contingency fee lawyers. The first enactments occurred in the immediate wake of the Tobacco Master Settlement Agreement, when it was revealed that the plaintiffs' firms involved in that litigation would collectively receive billions of dollars in fees for their role. In 1999, Texas became the first state to enact such good government legislation. A second wave of enactments began after Florida passed a law in 2010 known as the Transparency in Private Attorney Contract (TiPAC) Act. TiPAC laws generally subject state contracts with private lawyers to public bidding, require posting of contracts on public websites, provide recordkeeping requirements, limit attorneys' fees to a sliding scale based on the amount of recovery, and mandate complete control and oversight of the litigation by government attorneys. Over a dozen states have followed Florida.

Now, about one-third of the states have rules in place to promote transparency and accountability in the contracting process. These laws do not ban government-sponsored lawsuits by private law firms, but they do move counsel contracts from behind closed doors. More states should adopt TiPAC laws to prevent the types of scandals that have been reported in the past and promote public confidence when an attorney general decides to wield the power of the state with outside help in a lawsuit.

Mark A. Behrens is a partner in the Washington, D.C., office of Shook, Hardy & Bacon L.L.P. and co-chairs the firm's Public Policy Group.