

OPINION: AG Outsourcing Is A Threat To Public Interest

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Objectivity in government enforcement is critical to a lawful society. For that basic reason, it is against public interest for attorneys general to outsource their legal authority to private law firms. Nevertheless, this is precisely what occurred when Virgin Islands Attorney General Claude E. Walker hired an aggressive class action law firm to go fishing in the Caribbean and pursue a highly controversial lawsuit against Exxon.



Victor E. Schwartz

The core of the charges against Exxon is that it misled the public about the relationship between fossil fuel and climate change. Whether the claim is valid or not, it should never have been contracted out to private, profit-driven contingency fee lawyers. This is why.

Government imposes checks and balances on attorney generals. They take an oath to uphold the U.S. Constitution and to faithfully discharge the duties of their office. Attorneys general and their staffs are also subject to government ethics rules, which prevent conflicts of interest, profiting at the public's expense, and the appearance of impropriety.

Private lawyers brought on to do this work have none of these restraints; their goal is simply to obtain a settlement or judgment for as large of an amount as possible. They also have an incentive to pursue information that could potentially spawn more litigation.

For example, in the Virgin Islands case, the contingency fee firm issued far-reaching subpoenas that included probing into 88 different organizations. This plaintiff lawyer fishing expedition is cloaked in the mantle of government authority. It has caused unjust angst and imposed unfair costs on those served. If successful, the tactic could also chill the freedom of speech of those organizations.

It is legitimate for a contingency fee lawyer to push the law as far as he or she can toward a plaintiff's interest in a private lawsuit. But such a push may not be in the public interest in a government-sponsored action.

For example, in Rhode Island, a state attorney general placed almost complete responsibility for seeking the cost of removing lead paint from homes in the hands of a prominent contingency fee lawyer. The lawyer won in the trial court with a large verdict, but pushed the law of public nuisance over the brink.

The Supreme Court of Rhode Island, which is often sympathetic to plaintiff interests, dismissed the case.

In the end, this decade-long case was the classic sound and fury that signified nothing. If responsibility for that lawsuit had remained with the government, this waste of public time and money for the courts, jurors and litigants would likely not have occurred.

Ironically, a common justification for attorney general outsourcing of enforcement power is that it will save money. As the Rhode Island case showed, this is often not true. Of equal importance is that merely “saving money” may not serve the public interest.

For instance, the Virgin Islands might save money by having its department of motor vehicles let car dealers decide who obtains a driver's license. Would any rational person support such a measure? No. The reason such a delegation is against the public interest is that however qualified the car dealer might be to conduct driver's licensing tests, the dealer has a vested interest in everybody getting a license because it can sell more cars.

The same principle operates even more forcefully when an attorney general hands over a controversial lawsuit involving climate change where free speech and major public policy decisions are enmeshed in the litigation.

That is the fundamental reason why an executive order that has spanned both the George W. Bush and Barack Obama administrations prohibits the U.S. Department of Justice and other federal agencies from delegating their enforcement power to contingency fee lawyers.

State attorneys general are divided over the merits of the Exxon case. Some agree with the litigation and others believe such lawsuits suppress Exxon's freedom of speech. However a particular state comes down on this issue is something for the government, not contingency fee lawyers, to decide.

The threat to the public interest of delegating government power to self-interested private lawyers is one that has been considered by many thoughtful state legislatures. In recent years, 15 states have enacted laws that shine sunlight on a state attorney general's outsourcing of power to contingency fee lawyers and place reasonable constraints on such arrangements. Many of these laws are supported by state attorneys general themselves.

If these laws existed in the Virgin Islands, there would be safeguards against government investigations and enforcement being run by class action law firms instead of the attorney general. Lawsuit fishing in the Caribbean would be left to the government accountable for the fishing and not the “catch as many fish as you can” contingency fee lawyers.

—By Victor E. Schwartz, Shook Hardy & Bacon LLP

Victor Schwartz is a partner and chairman of the public policy group in Shook Hardy's Washington, D.C., office. He previously served as chairman of the Federal Inter-Agency Task Force on Product Liability, and the Federal Inter-Agency Council on Insurance at the U.S. Department of Commerce.

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