

The Expert's Corner

PRIVATIZING GOVERNMENT LITIGATION: DO CAMPAIGN CONTRIBUTORS HAVE AN INSIDE TRACK?

William B. Rubenstein*

In June's column, I wrote about monitoring arrangements between plaintiffs' firms and public pension funds in the context of securities fraud class actions. According to these arrangements, the firms monitor the fund's investments and bring litigation proposals to the funds; the hope is that the firms will encourage the funds to step forward as lead plaintiffs under the PSLRA and, in turn, choose the firm to be lead counsel. These arrangements have come under scrutiny as it was discovered that the monitoring firms had – hold the presses – contributed heavily to the campaign coffers of the state officials who oversaw the pension funds, raising pay-to-play allegations.

This month's column involves similar players involved in similar allegations. In late October, the Pennsylvania Supreme Court heard arguments in a case questioning whether the attorney general and the governor can hire a private law firm on a contingency fee basis to sue a drug manufacturer on behalf of the Commonwealth. As with the securities issue, the same plaintiffs' firm that has been chosen by the governor's

office to prosecute the case had also made significant contributions to the governor's re-election campaign at the time the contingency-fee contract was being negotiated. Once again pay-to-play allegations are afoot.

I explain the Pennsylvania situation below and then address some of the concerns it raises, including:

Should the state be able to privatize its own legal work by farming it out to non-governmental attorneys?

Should those attorneys be permitted to be compensated on a contingent fee basis?

Should political contributors be regulated in some distinct fashion?

Should the state be able to privatize its own legal work by farming it out to non-governmental attorneys? If so, should those attorneys be permitted to be compensated on a contingent fee basis? And if private lawyers are doing the government's legal work for profit, should those who contributed to the relevant politician's political campaign be

regulated in some distinct fashion? If so, how?

The Pennsylvania Arrangement...

The lawsuit that prompted the arrangement at issue concerns the off-label marketing of the antipsychotic drug Risperdal, produced by Janssen Pharmaceuticals, for uses not approved by the FDA. Specifically, the Commonwealth of Pennsylvania seeks to recover expenses paid through its state-subsidized healthcare programs for medically unnecessary prescriptions.

Though cases such as this one would typically be handled by the Commonwealth attorney general's office, in May 2006, Pennsylvania Governor Ed Rendell requested that the case be delegated to the Governor

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and the Office of General Counsel for prosecution, a request which the Attorney General granted in routine fashion several weeks later. Two months later, in August 2006, the Governor's Office of General Counsel signed a contingency-fee contract with the Houston-based plaintiff's firm, Bailey Perrin Bailey, to prosecute the case. The agreement between Bailey Perrin Bailey and the Governor's office provides that Bailey Perrin Bailey will represent the Commonwealth on a contingency-fee basis and will be eligible to receive up to 15% of any settlement or judgment. What's more, the contract prohibits the lawyers from settling for non-monetary relief, unless the settlement includes terms for a reasonable fee award for Bailey Perrin Bailey from Janssen.

While it is not unusual for a state to farm-out the pursuit of a case to a private firm (perhaps because it lacks the expertise, the funds, or the will to pursue the lawsuit itself), the details surrounding this particular arrangement merit a closer look. During the months leading up to the Governor's request for delegation of the case in May 2006, F. Kenneth Bailey, one of the founding partners of Bailey Perrin Bailey, donated \$50,000 to Governor Rendell's election campaign, in addition to making his private jet available for use by the campaign, a contribution valued at \$9,200. In the months after the delegation of the case to the Governor's Office and before his firm signed the contingency-fee agreement, Bailey contributed an additional \$25,000 to the Democratic Governor's Association, an organization which contributed a total of \$1 million to Governor

Rendell's re-election campaign. All told, F. Kenneth Bailey contributed more than \$90,000 to Governor Rendell's 2006 re-election campaign. The Governor's office denies that the contributions had any influence on the selection of Bailey Perrin Bailey to prosecute the suit against Janssen on behalf of the Commonwealth. The Governor's spokesman cites Bailey's extensive experience in litigating these types of cases, not its contributions to the Governor's campaign, as the motivating factor behind the state's retention of the firm.¹

...And Its Purported Problems

It is the defendant Janssen that first formally called into question the legality of the arrangement between the Houston firm and the Governor's office by filing a motion to disqualify Bailey Perrin Bailey. Janssen, undeterred by the trial court's denial of its motion, filed an Application for Extraordinary Relief with the Supreme Court of Pennsylvania on January 6, 2009, outlining the multiple problems it sees with the agreement, most importantly, whether the Commonwealth is even allowed to turn control of litigation over to a private firm. After entertaining several motions and replies from either side, the Pennsylvania Supreme Court took the unusual step of granting Janssen's application on June 30, 2009, setting oral arguments for October 21.

In its *per curiam* opinion setting oral argument, the Court certified four issues for briefing, including whether Janssen has standing to seek disqualification of Bailey Perrin Bailey, whether a contingency fee arrangement of this type is allowed under the state and federal constitution and state statute, and whether the firm should be disqualified because its arrangement

¹ Bailey Perrin Bailey's claim to extensive experience litigating in this area appears undeniable. The firm has prosecuted the same off-label use marketing claim against Janssen in at least six other states and has entered into a similar contract with New Mexico to prosecute that state's claims against Janssen (and the firm faces similar "pay-to-sue" allegations arising out of that New Mexico contract).

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was not previously approved by the legislature. *Commonwealth v. Janssen Pharmaceutical, Inc.*, 975 A.2d 1076 (Pa. 2009).

Though Janssen stops short of making explicit pay-to-play allegations, it claims the circumstances surrounding the arrangement with Bailey Perrin Bailey “rise to a manifest appearance of impropriety” and that the Governor’s decisions with regard to this lawsuit “have already been infected by impossible considerations.” Among its various arguments, one central one concerns a contractual provision about the attorney-client arrangement between the firm and the Office of General Counsel. The contract states that Bailey Perrin Bailey is obligated to consult with the Governor’s office, but it lacks a provision, standard in most contingent fee contracts previously negotiated by the Attorney General’s office, which states that control and management of the litigation remains with the AG.

Bailey Perrin Bailey maintains that the agreement provides for a necessary degree of control that any counsel should have over the direction of litigation and notes that nothing in the agreement prevents the Governor’s office from dropping the charges in the litigation or from personally entering into settlement negotiations without the firm, both of which would result in no compensation for the firm.

Is it really that bad?

The Pennsylvania case raises two sets of questions, one local and one more general. First, under the Pennsylvania Constitution and the Commonwealth Attorneys Act (and similar statutes in other states), is privatizing litigation authorized, and if so, on what

terms? Second, and more generally, should the state be able to farm out its causes of action, and if so, on what terms? I will leave the first question to the Pennsylvania courts as it involves interpretation of Pennsylvania-specific statutes and rules. Behind the specifics of this case, though, lie several more general and recurring questions.

First, should a state be able to hire private counsel to pursue its litigation?

I see no reason why they shouldn’t, particularly if the state retains the power, as client, to control the litigation and indeed control the terms of the attorney-client relationship. States do this in obvious situations – e.g., where its own lawyer, the attorney general, is conflicted perhaps because the legal claim is one about the attorney general herself or some other government official; this is the logic behind “special prosecutor”

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or “independent counsel” statutes such as those used in Presidential impeachment-type situations. States may also encourage private counsel to pursue the state’s claims because private counsel are better situated to do so – thus, most *qui tam* statutes enable a private litigant to step forward and represent the government in certain fraud scenarios,

with private counsel – paid a contingent fee – as her lawyer; typically, the *qui tam* relator has to give notice to the state, which can take over the case if it wants, but if it does not, private counsel pursues the matter. *Qui tam* litigation is generally encouraged because private litigants are better situated to discern and address fraud than the government’s own investigators given the sprawling nature of most public business. Many large class action suits can also be conceptualized as

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the privatization of public work, particularly in small claims cases. The rationale of such cases is generally not compensation of the class (since claims are so small) but deterrence of wrong-doing, generally a public/police-like function; class counsel are often referred to as “private attorneys general” precisely because private class action litigation performs this public function. Enabling the state to retain private counsel in these situations thus makes sense because it puts private resources to use for public benefits in situations where private counsel is likely less conflicted and/or more experienced – or where private incentives can be utilized to perform a function without the use of public resources.

Second, to say that the state should be able to retain private counsel begs the further question – on what terms?

Should private counsel be paid the same salary that an assistant in the attorney general’s office would make? An hourly rate more akin to that of the private market? Or a contingent fee, enabling significant profit? It doesn’t strike me that the presence of a contingent fee, alone, is a disqualifying term, nor that there is anything innately perverse about permitting counsel to take a percentage of the government’s recovery – we do it by statute in the *qui tam* setting. Contingent fees are the coin of the realm for class suits and to truly enlist private lawyers to do public cases, it may require this compensation form (rather than a straight lodestar). If the only carrot encouraging private counsel to pursue *qui tam* or other class suits were an AG-like salary or even a private-fee lodestar, few counsel would risk investing their own money in such matters as the pay-off would not make it worthwhile. Once the decision is made that private attorneys can make a contribution to the enforcement of public rights, the incentives have to be structured so that they step forward to do so. The contingent fee is one such incentive.

The lawsuit itself and its delegation to a private firm to pursue, even using a contingent fee arrangement, all seems somewhat unproblematic. Moreover, the delegation of the case to a campaign contributor is off-set here by the apparent expertise of the firm selected to do the work, the state’s supposed retention of control as client, and now, the Court’s oversight of the whole arrangement.

Third, saying the private lawyers can do cases for the government and on a contingent fee basis does not yet address the pay-to-play problem, though, if problem this be.

It is not that a campaign contribution by a law firm should alone be a disqualification from securing government work or that would (perhaps unconstitutionally) dissuade law firms from being involved in politics. Rather, what we worry about in the pay-to-play scenario is that a government official hired private counsel for the wrong reasons – as payback for the campaign contribution and not based on their qualities as lawyers – and then undertakes little oversight of them. These concerns can be addressed short of prohibiting privatization or campaign contributions with more specific rules such as:

- the government’s selection of private counsel should be open to competitive bidding;
- the government and bidders should have to reveal potential conflicts like campaign contributions, making the bidding process as transparent as possible;
- the government must retain control of the litigation as any client would;
- the court overseeing the litigation should be in the position to question the arrangement and ensure

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its legitimacy according to these (and other similarly appropriate) factors.

These bullet points help sort out the more and less problematic aspects of the Pennsylvania situation.

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selected to do the work, the state's supposed retention of control as client, and now, the Court's oversight of the whole arrangement. It is true that the initial hiring did not seem to be done through an open, competitive bidding process, a process that would have removed some of the doubt about the whole situation; and it is also true that the Court's involvement as overseer arose in a somewhat complicated format and is not set forth explicitly. Perhaps the ideal arrangement would be

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one like the PSLRA or Rule 23 framework in which, at the outset of a case or the certification moment, a court had to approve private lawyers as adequate and un-conflicted counsel for the government whenever the

government delegated its legal work to non-public employees. Such an approach could lead to the enactment of rules such as those suggested in the bullet points above. It is true that this approach imagines the judicial branch performing a tricky oversight role, policing the executive branch's own pursuit of the state's legal

rights. But it is a role judges already play in private class action litigation and one that would lend a degree of legitimacy to what might otherwise suggest, at the least, the appearance of impropriety.

It will be interesting to see if the Pennsylvania Supreme Court resolves this case on narrow grounds involving the particular rules at play in Pennsylvania or whether it reaches any of these broader questions. Stay tuned.