



Private Lawyers on Contract to Represent States: Is That Fair?

September 07, 2011

What do a medical malpractice victim and the Kentucky Attorney General have in common? The same lawyer representing them.

A fact little known to the public is that a growing number of state government enforcement actions are not being litigated by state-employed attorneys but rather by private lawyers working for the state on contingency fee bases. While the stakes may not seem as high as in a criminal matter, an attorney with the color of state authority, and with a direct financial interest in the outcome of a case, can be daunting. Though challenged by some private parties, this reality is likely to continue.

The arrangement has been well-received by many states, including Oklahoma, Louisiana, Maryland, Mississippi, West Virginia, Rhode Island, South Carolina and Kentucky, to name just a few. But is it a good arrangement? Is it fair?

A state attorney is charged with enforcing laws and protecting the public safety. The same is not true for a private attorney wearing the hat of a public enforcer. That person's motivation is making money. There is a strong incentive not to stand down, even if it ultimately appears that the defendant company did nothing wrong. If government attorneys were litigating the matter, there is a greater likelihood that a showing of paltry or no evidence of wrongdoing would lead to a voluntary dismissal. After all, the government's role is to punish wrongdoers, not to dive into deep pockets for the sake of its own livelihood. (Of course, we may have that last part completely wrong.)

Several defendants have raised issues of unfairness, mainly due process violations, when they have found themselves opposite personal injury lawyers cum state attorneys. One of the latest is drug maker Merck & Co. A subsidiary of Merck recently filed suit against the Kentucky Attorney General claiming due process violations. The case is based upon an action brought by Kentucky – through private attorneys – against Merck in 2009. The underlying action has been litigated by Kentucky personal injury law firm Garmer & Prather, which contracted with Kentucky to litigate it on a contingency fee basis.



Merck argues that the fee arrangement “amounts to a biasing influence” that increases the risk of overzealous prosecution. We agree. The private attorneys have a definite interest in finding Merck liable for as much money as possible. That’s how they get paid. Merck also argues that the Kentucky Attorney General is statutorily tasked with looking after both the consumer public and ethical sellers. The state has an obligation “to see that justice is done for all, including persons, like Merck, that have been targeted for prosecution.”

The chances of Merck prevailing are slim. Drug maker Eli Lilly unsuccessfully brought a similar action in South Carolina a few years ago. The due process claims were dismissed summarily as the South Carolina court rejected the notion that attorneys representing the government must be neutral. Citing a 1980 U.S. Supreme Court decision, it noted that “prosecutors ... are necessarily permitted to be zealous in their enforcement of the law.” It also upheld contingency fee arrangements and determined that, if there were any constitutional issues with using private lawyers, there would have been a more definitive ruling on the matter by now (what exhaustive legal reasoning!?).

Regardless, there is sound reason to be concerned with these arrangements. Sample major issue: kickbacks and/or revolving doors. Imagine this: private lawyer funds attorney general’s political campaign; private lawyer is then hired by attorney general to litigate a cash cow case.

A quick search on the Kentucky Registry of Election Finance shows that William Garmer (of Garmer & Prather, the firm handling the Merck matter on behalf of KY) donated money to both the Kentucky Attorney General’s and the Kentucky governor’s 2007 political campaigns.

Crime in the Suites is authored by the Ifrah Law Firm, a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!