



Transparency in Private Attorney Contracting

The Issue

Consider the following: \$2.3 billion – that was the amount lawmakers needed to cut from the state budget during this year’s special session to cover Florida’s deficit;¹ \$3.4 billion: this was the money Florida spent to indulgently compensate private attorneys for litigation on behalf of the state against tobacco corporations less than ten years ago.² State suits instituted against tobacco companies on behalf of the attorney general, seeking reimbursement of Medicaid costs, commenced a wave of grossly high awards of attorneys’ fees,³ totaling up to \$112,000 per hour,⁴ all at the expense of taxpayers.

State attorneys general, including the Florida Attorney General, have the power to hire private attorneys to sue on the state’s behalf, and have the authority to compensate these attorneys through the use of contingency fee agreements. This compensation comes out of the state’s coffers without first going through an appropriations process,⁵ and is subtracted from judgments awarded to the state for damages incurred by the people of Florida. Contingency fee contracts between the Attorney General and private attorneys impermissibly “permit the power of the state to be exercised by attorneys with a direct financial stake in the exercise of that power.”⁶

Background

Allowing private attorneys to sue on behalf of a state’s attorney general shifts the power of the state into the hands of private attorneys, who are then given a pecuniary interest in the outcome of the litigation.⁷ Scenarios such as Florida’s tobacco litigation, where lawyers received the

¹ *Florida lawmakers call special session to address \$2.3 billion budget deficit*, Florida Capital News—Tallahassee Democrat, <http://floridacapitalnews.com/apps/pbcs.dll/article?AID=/20081216/CAPITOLNEWS/812160323&theme=>.

² *Lawyers in Early Tobacco Suits to Get \$8 Billion*, The New York Times, December 12, 1998.

³ Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, But Critics Still Focus on Arguments of the Past*, 31 U. Dayton L. Rev. 173, 176-77 (2006).

⁴ Robert Levy, *The Great Tobacco Robbery: Lawyers Grab Billions*, Legal Times, February 1, 1999.

⁵ Brooke Jones Bacak, *The Case for Regulation of Private Attorney Retention by the State of Alabama*, 29 J. Legal Prof. 179, 183 (2004-2005).

⁶ *Id.* citing James V. Grimaldi, *Lawyers Could Get Billions in Tobacco Deal—Attorneys Assumed Huge Risk in Taking Suits; Agreements Give Them from 3 to 30 Percent*, SEATTLE TIMES, October 5, 1997 quoting Robert King (attorney representing the tobacco industry).

⁷ David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles*, 50 DePaul L. Rev. 743 (2000).

most contingency compensation in history,⁸ must be seriously curtailed so as not to “[enable] a state employee to profit from his position of power in the government.”⁹

In addition to circumventing the legislative appropriations process, the Attorney General is not required to submit to an open and competitive bidding process when hiring these attorneys. Attorneys general in other states have abused this privilege by employing their friends and associates in lieu of seeking out the most competent and reasonably priced attorneys.¹⁰ Florida requires open and competitive bidding for a range of things, from construction contracts¹¹ and the purchase of bonds¹² to the sale/lease of property¹³ and the sale of forest products.¹⁴ As such, if the Attorney General wishes to hire private attorneys, the Legislature should take measures to prevent potential pay-to-play scandals by requiring that the process be open and competitive.

Further, it is important to note the incongruity that exists when a department consisting almost entirely of attorneys—the Attorney General’s office—hires other attorneys to pursue legal remedies for the state. California, Colorado, New Hampshire, and Missouri all sued the tobacco industry using their respective in-house resources, thereby obviating the need to compensate private attorneys.¹⁵ There are also constructive solutions for states that wish to hire outside counsel, but desire to prevent exorbitant payments to private attorneys. For example, some states have moved to an hourly payment system, and others have considered imposing caps on hourly and/or aggregate fees.¹⁶ All of these proposals prevent the kind of wasteful distribution of state funds that has occurred in years past.

The Solution

State agencies must use an open and competitive bid process when retaining private attorneys. The Legislature also needs to exercise sound oversight over compensation contracts to prevent egregious amounts of taxpayer dollars from being redirected to private attorneys.

After the tobacco settlements, Newt Gingrich, Former Speaker of the U.S. House of Representatives, noted that the billions going to attorneys “could [have been] spent on health in general and on children’s health in particular rather than enriching a small group of trial lawyers.”¹⁷ In Florida’s case, that money could have also been used to cure this year’s budget deficit in full, likely with money left over from interest.

⁸ *Id.* at 777.

⁹ *Id.* 780-81.

¹⁰ Mark A. Behrens & Andrew W. Crouse, 31 U. Dayton L. Rev. at 180-82.

¹¹ *Fla. Stat.* §§ 159.32, 189.441.

¹² *Fla. Stat.* §§ 215.68, 243.61.

¹³ *Fla. Stat.* § 189.442.

¹⁴ *Fla. Stat.* § 591.21.

¹⁵ Dahlquist, 50 DePaul L. Rev. at 789.

¹⁶ Bacak, 29 J. Legal Prof. 179, 186.

¹⁷ Dahlquist, 50 DePaul L. Rev. at 788-89 citing James V. Grimaldi, *Lawyers Could Get Billions in Tobacco Deal*, Seattle Times, Oct. 5, 1997.

Contracts for the compensation of private attorneys consist of “money taken directly from the pockets of every American taxpayer,”¹⁸ and have deprived Florida of significant resources. As stewards of the taxpayer’s money, Florida lawmakers should implement prudent measures, such as transparency in private attorney contracting, to conserve and protect the money of hard working Floridians.

Fortunately, the Attorney General has recently introduced legislation this session. Senate Bill 1370 sponsored by Sen. Mike Fasano and its companion, House Bill 215, sponsored by Rep. Eric Eisnagle, provides a framework for ensuring transparency and accountability in how the Office of the Attorney General contracts with outside legal counsel for contingency fee-based litigation. Specifically, the legislation:

- Requires that prior to entering a contingency fee contract with a private attorney, the Attorney General must make a written determination that the representation is both cost-effective and in the public interest.
- Recognizes that a contingency fee arrangement with the Attorney General is appropriate in circumstances when there are not sufficient and appropriate legal/financial resources within the department to handle the matter.
- Requires that private legal services engaged on a contingency basis be competitively procured, if feasible.
- Requires private legal counsel to keep contemporaneous time records of work performed.
- Imposes modest limitation on the contingency fee percentages to be applied to the damages award, as well as a maximum fee amount; aggregate contingency of 25% of any recovery up to \$10 million; plus 20% of the next \$5 million in recoveries; plus 15% of the next \$5 million in recoveries; plus 10% of the next \$5 million in recoveries; plus 5% of any portion of the recovery that exceeds \$25 million.
- Establishes a ceiling for awards at \$50 million in contingency fees.
- Provides transparency to contingency fee-based contracts with outside legal counsel by making copies of the contracts and the written determinations available for public inspection on the Attorney General’s website five days after the date of the execution of the contract and remain for the duration of the contract.
- Requires payment of contingency fees to be posted on the Attorney General’s website within 15 days and remain posted on the website for at least 180 days.

In this time of financial shortfall, the Legislature has ability to adopt measures preserve the State’s resources and its ability to provide for Floridians, instead of cutting budgets that are already seriously deflated. House Bill 215 is a bill that promotes fairness, transparency, prudence, and accountability.

¹⁸ *Id.* at 789 citing *Smoke Clouds: Designated Spending, Legal Fees Cheapen Morales’ Victory*.