

DANGEROUS LIAISONS:

SOME STATE ATTORNEYS GENERAL OFFER CONTINGENCY FEE CONTRACTS TO POLITICALLY SUPPORTIVE OUTSIDE COUNSEL

As reiterated throughout, this report primarily focuses on judicial decision making and court practices that unfairly tip the scales of justice against civil defendants. But the actions of a handful of state attorneys general also contribute to growing concerns in the business community about the ability of defendants to receive fair trials. This happens when what are essentially private lawsuits are filed, often in a plaintiff-biased local court, with the backing of the state government and a strong incentive to obtain the highest monetary award possible. It's a system of legal kickbacks known as "pay to play," wherein lawyers who contribute to the campaigns of the state's highest ranking attorney can then get a contract for a piece of the action and, in some cases, develop the action themselves and get a go-ahead to pursue it in the state's name.

The practice began in May 1994 in the Chancery Court in Jackson, Mississippi, when then-Mississippi Attorney General Mike Moore filed a revolutionary lawsuit that would change the relationship between the offices of attorneys general and the plaintiffs' bar in virtually every state.³⁵⁵ The lawsuit was brought against the manufacturers and other entities comprising the tobacco industry and sought to recover monies allegedly spent by the state of Mississippi providing health care to residents injured by tobacco use.

But that's not what was unique about this lawsuit. The lawsuit was filed in Chancery Court. According to the state of Mississippi's Web site, "Chancery Courts have jurisdiction over disputes in matters involving equity; domestic matters including adoptions, custody disputes and divorces; guardianships; sanity hearings; wills; and challenges to constitutionality of state laws. Land records are filed in Chancery Court."³⁵⁶ Chancery courts are not typically the courts where lawsuits potentially worth several hundred million dollars are filed.³⁵⁷

The State of Mississippi also pioneered an important new litigation model for legal representation with this lawsuit; Moore's office hired outside counsel to represent the state, including his close friend and campaign contributor, Richard "Dickie" Scruggs (who has since been disbarred and is serving a federal prison sentence for an unrelated conspiracy to bribe a Mississippi judge). Scruggs and others agreed to take the case on a contingency fee basis. In the event that Mississippi settled or won its case, Scruggs would take a percentage. If the state got nothing, he would get nothing.³⁵⁸

Today, the history of that litigation, parallel actions filed in other states, the ensuing Master Settlement Agreement (MSA) and additional state settlements is well known. Less well-known

is the application of the model that it pioneered; a model that has created a corrupt and corrosive cronyism between some state attorneys general and outside counsel.

Hired on a contingency fee basis, outside counsel have won many billions of dollars in fees for their litigation work against a variety of industries.³⁵⁹ They also have been generous supporters of their chief clients' reelection campaigns; thereby ensuring that the model provides financial benefits to both the elected official doing the hiring and the personal injury lawyers performing the work.

Today several attorneys general are involved in relationships with outside counsel in high-profile litigation that exemplifies the need for comprehensive reform. Here are four examples.

MISSISSIPPI

If former Mississippi Attorney General Mike Moore pioneered the model wherein personal injury lawyers are hired by the AG and, in turn, reward his or her campaign with cash, then credit goes to his successor Jim Hood for perfecting it.

In a five-year span Hood's office retained 27 law firms to represent Mississippi in 20 separate lawsuits. Partners in the firms selected by Hood contributed \$534,900 to his reelection campaigns over a two-cycle period.³⁶⁰ The list of Hood contributors included Moore's old friend Richard "Dickie" Scruggs to the tune of \$30,000 (see Rogues' Gallery, p.36), and fellow plaintiffs' counsel Joey Langston, who, like his former associate Scruggs, has also recently pled guilty of conspiring to bribe a judge. Langston's firm gave Hood \$130,000. And that investment in Hood's campaign seems to have paid off. In 2005 as part of the state's \$100 million settlement with MCI/WorldCom, Langston's firm split \$14 million in fees.³⁶¹

Considering his propensity for hiring future felons to perform legal work on behalf of Mississippi citizens, Jim Hood understandably remains a steadfast opponent of laws that would provide for competitive bidding and public scrutiny of the contracts into which his office enters.³⁶²

OHIO

Former Ohio Attorney General Marc Dann was forced to resign in disgrace in May 2008 in the face of an impeachment vote, after an investigation into the management of his office made numerous

findings of “inappropriate staff-subordinate relationships, heavy drinking and harassing and threatening behavior by a supervisor.”³⁶³ While these sad events ultimately drove Dann from office, they were hardly the only instances in which his office was singled out for criticism and scrutiny.

Ohio enacted a strong law designed to end a “pay to play” culture there by prohibiting the attorney general from hiring outside counsel that had contributed more than \$1,000 to his or her campaign. It was a law Mark Dann seemed determined to circumvent.³⁶⁴

In October 2007 the Wall Street Journal reported that Dann replaced the outside counsel in a lawsuit his office was pursuing against Fannie Mae with new counsel, William Titelman, who had no experience with the underlying litigation. Titelman made no contributions to Dann’s campaign himself, but his apparently civic-minded son wrote Dann’s campaign a \$10,000 check.³⁶⁵

Additional reports suggest that Dann rewarded contributors to the Democratic Attorneys General Association, which he reportedly hoped to lead one day, with lucrative state contracts to represent Ohio in pharmaceutical litigation. The Columbus Dispatch reported that these types of arrangements seemed specifically designed to circumvent strong “pay to play” laws, which are silent with respect to payments made to state parties.³⁶⁶

RHODE ISLAND

In 1999 then-Rhode Island Attorney General Sheldon Whitehouse (now a United States Senator representing the Ocean State) brought litigation against a handful of paint and pigment manufacturers alleging that the defendants violated Rhode Island’s public nuisance statute by contributing to lead contamination in Rhode Island homes. To represent Rhode Island, Whitehouse hired outside counsel from the storied personal injury law firm of Ness Motley (now known as Motley Rice LLC), which had earned millions in fees and presumably invaluable experience in the Master Settlement Agreement with the tobacco industry.

In the first attempt to try the defendants under the novel application of public nuisance law, the trial ended with a hung jury. A second attempt yielded a \$2.4 billion verdict, which was later set aside in a July 2008 decision from the Supreme Court of Rhode Island (see Points of Light, p. 28). That decision earned the high court a startlingly impolitic public rebuke by Motley Rice lawyers in an opinion-editorial in the Providence Journal originally titled, “R.I. High Court Dumps on Your Kids.”³⁶⁷

While the defendants in the case were estimated to have spent upwards of \$100 million fighting the lawsuit,³⁶⁸ Rhode Island itself fared little better and ultimately lost the case on final appeal back before the state’s high court. More effective and less speculative mechanisms for addressing the effects of lead paint exposure in children have arguably been delayed nearly a decade, and thus another generation of Rhode Island children have experienced higher risk.

WEST VIRGINIA

In West Virginia, longtime Attorney General Darrell McGraw uses the powers of his office and its relationships with outside counsel to serve as both the state’s chief law enforcement officer and an adjunct to its legislature. It’s a factor that’s contributed to the state’s continuing stature as a Judicial Hellhole (see Judicial Hellholes, West Virginia, p. 4).

In a 2004 settlement with Purdue Pharma for \$10 million, a third of the money went to outside counsel who worked on the case. While some funds went to state agencies, McGraw distributed the balance “to his own favorite institutions and projects, however unrelated to the case.” The University of Charleston, for example, received \$500,000 for a new pharmacy school.³⁶⁹

In another case, McGraw’s office settled with MasterCard and Visa for \$11.6 million. As part of the settlement, West Virginia residents were to receive a sales tax “holiday” on large appliances in, not coincidentally, an election year. Two West Virginia attorneys who contributed to McGraw’s election campaign will share in \$3.9 million in fees from the settlement with counsel from Seattle and Washington, D.C. That fee request is pending, in part because outraged citizens, such as Steve Cohen of West Virginia Citizens Against Lawsuit Abuse, petitioned Judge Ronald Wilson to carefully review the fee arrangement.

While many public officials might welcome judicial review of a settlement ostensibly in the public interest, Cohen’s petition instead drew a pointed threat from Deputy Attorney General Fran Hughes, who verbally assailed Cohen after the hearing concerning the settlement and fees.³⁷⁰



“In total, between just the two settlements... McGraw’s office pulled in \$22 million – and decided how to use it. Legislators could have used that money for any number of worthy causes. For example, that’s nearly the amount lawmakers had to put up to offer help to 19,100 teachers many of whom are worried about their retirement pensions. Wouldn’t an additional \$22 million have allowed the legislature to offer them an even better deal?”³⁷¹

—The Intelligencer: Wheeling News Register