

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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