Counsel's Advisory

Washington Legal Foundation
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2009 Massachusetts Avenue, NW
Washington, DC 20036
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Vol. 15 No. 4 June 8, 2007

EXECUTIVE ORDER BARS AGENCIES FROM HIRING CONTINGENT FEE COUNSEL

by
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Over the past decade many state and local governmental authorities have sued manufacturers of lawful products such as cigarettes and lead paint as a means of trying to recover governmental payments for health care and environmental clean up costs allegedly resulting from use of those products in their jurisdictions. In most of those suits, the governmental plaintiffs hired private trial lawyers on a contingency/percentage fee basis to manage and conduct the litigation. In virtually all instances, the plaintiff trial bar developed the idea for the litigation (often predicated on an expansive reading of public nuisance law) and then marketed it to government officials of various states as having the virtue of no downside risk for the government.

Recently, Judge Jack Komar, the California trial judge presiding in a public nuisance lawsuit brought by the County of Santa Clara against several lead pigment manufacturers, exposed the impropriety of contingency fee arrangements between public officials and private trial attorneys. In that case Judge Komar barred the governmental plaintiffs from being represented by private counsel in the litigation under any retention agreement in which payment of private counsel's fees and costs is contingent on the outcome of the litigation. *See County of Santa Clara v. Atlantic Richfield Company*, Superior Court of California, County of Santa Clara, Case No. 1-00-CV-788657; *see also* John S. Stadler, *Contingent Fee Lawyers' Representation of County Rejected by State Court*, WLF LEGAL OPINION LETTER, May 11, 2007 (http://www.wlf.org/upload/05-11-07stadler.pdf).

Judge Komar ruled that contingency fee arrangements between governmental entities and private counsel give the private counsel a stake in the ultimate outcome of the representation and, therefore, are antithetical to the standard of neutrality and impartiality that an attorney representing a governmental entity must meet under California law. Similar challenges to governmental entities' use of trial lawyers on a contingency fee basis are pending in several other states, including Rhode Island, Ohio, New Jersey, Missouri and Wisconsin. *See e.g., State of Rhode Island v. Lead Industries Association, Inc.,* 898 A.2d 1234, 1239 (R.I. 2006) (court deferred ruling on legality of contingency fee agreement between state attorney general and private law firms until appeal could be heard on full trial record after verdict, stating that such an agreement implicated "novel questions of constitutional law in this jurisdiction").

Recognizing the significant ethical and constitutional problems posed by public entities' hiring of private trial counsel on a contingency fee basis, on May 16, 2007, President George W. Bush issued an Executive Order prohibiting agencies of the United States government from entering into such agreements unless the Attorney General of the United States has determined that that the contingency arrangement is required by law. *See* Exec. Order No. 13433, 72 Fed. Reg. 28441 (May 16, 2007). The Executive Order also requires federal agency heads to notify the Attorney General, within ninety (90) days of the issuance

of the Order, of contingency fee agreements that were in effect as of May 16, 2007. This latter portion of the Executive Order will allow the Attorney General to scrutinize the terms and conditions of any contingency fee agreements previously entered into by federal agencies "to ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States". *Id.*

President Bush's action sends a powerful message to state Attorneys General and Governors that using private lawyers on a contingency fee basis to litigate governmental claims is inherently suspect and should be avoided as a matter of sound public policy.

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