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"When Smoke Gets in Your Eyes": Myth and Reality about the Synthesis of Private Counsel and Public Client

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"WHEN SMOKE GETS IN YOUR EYES": MYTH AND REALITY ABOUT THE SYNTHESIS OF PRIVATE COUNSEL AND PUBLIC CLIENT

John C. Coffee, Jr.

INTRODUCTION

A recurring fallacy in any debate over legal ethics or public policy is to assume that the particular problem under examination is unique and unprecedented. Expand one's field of vision, and precedents and analogs quickly turn up. This rule applies with special force to the debate over retention by state attorneys general of private counsel to represent them on a contingent fee basis in the recent litigation against the tobacco industry.[1] Because this litigation produced a highly successful outcome, while most private litigation against the tobacco industry has not, some are led to the conclusion that this combination of private counsel and public client is potent, unique, and probably troubling – or, at the least, new and noteworthy.

A wider-angled perspective on contemporary complex litigation suggests, however, that this newness is illusory. Although there are likely efficiencies associated with this combination (as with most other bargains struck in the market between sophisticated parties), the party most likely to be injured or short-changed by this relationship is not the defendant, but rather the state as a client. Thus, although this brief comment disputes the contentions made by others in this symposium that the combination of private counsel and public client circumvents legislative authority or distorts prosecutorial discretion, it does conclude that there are high agency costs associated with this relationship and that these agency problems justify enhanced ethical restraints.

Two preliminary observations are necessary at the outset. First, the state attorneys general tobacco litigation (SAG tobacco litigation) did generate one major innovation, but it was substantive, rather than procedural. This was the acceptance, at least for purposes of the to-

1. In 1998, some 46 states entered into a Master Settlement Agreement with the tobacco industry that provided for payments of $206 billion to be made to the states over a period of years. *See* McClendon v. Ga. Dep't of Community Health, 261 F.3d 1252 (11th Cir. 2001) (discussing terms of settlement).

bacco settlement, of state standing to sue for recoupment of expenses incurred by the state as the result of injuries suffered by its citizens. When private parties (such as unions and health maintenance organizations) have asserted similar claims, they have been judicially rebuffed on the ground that their injuries were too remote.[2] Hence, tobacco litigation did result in the implicit recognition of a new substantive principle of law that could be extended to related dangerous products (such as handguns or lead paint). Yet, the early evidence is that this principle has encountered stiff judicial resistance outside the context of state tobacco litigation.[3]

Second, on the procedural side, the state tobacco litigation involved the hiring of private counsel on a contingent fee basis by a majority of the state attorneys general. Although some may view this as either ethically dubious or politically dangerous, the one thing it cannot fairly be called is novel. Similar combinations of public and private counsel regularly form in other functionally similar litigation contexts. For example, in the context of federal securities litigation, the Private Securities Litigation Reform Act of 1995 (PSLRA) has given control of securities class actions to a "lead plaintiff," who is defined by the statute to be the person or entity with the largest financial interest in the action.[4]

Increasingly, the lead plaintiff proves to be a state pension fund, which in turn hires a private law firm (indeed many of the same law firms as appeared for plaintiffs in the SAG tobacco litigation) on a contingent fee basis. While federal securities class action litigation is the best example of this union of public entities with private litigation counsel, it is far from the only example. One of the largest and most discussed cases of recent years has been the Justice Department's antitrust litigation against Microsoft Corporation. Not only did the Justice Department hire David Boies as their trial lawyer,[5] but when some of

2. *See e.g.*, SEIU Helath & Welfare Fund v. Phillip Morris, Inc., 249 F.3d 1068 (D.C. Cir. 2001); Ass'n of Wash. Pub. Hosp. Dists. v. Phillip Morris, Inc., 241 F.3d 696 (9th Cir. 2001); Allegheny Cen. Hosp. v. Phillip Morris, Inc., 228 F.3d 429 (3rd Cir. 2000) (finding plaintiffs to lack standing to sue tobacco industry for expenses incurred by them relating to medical and health costs).

3. *See e.g.*, Camed County Bd. of Chosen Feeholders v. Beretta U.S.A. Corp., 2001 U.S. App. LEXIS 24828 (3rd Cir. Nov. 16, 2001); Hamilton v. Beretta U.S.A. Corp., 264 F.3d 21 (2nd Cir. 2000) (dismissing causes of action against manufacturers of hand guns on grounds of standing, remoteness of injury, and lack of proximate causation).

4. *See* Section 21D (a)(3) of the Securities Exchange Act of 1934, 15 U.S.C. Sec. 78 u-4(a)(3)(B). *See also* In re Baan Co. Sec. Litig., 186 F.R.D. 214 (D.D.C. 1999) (explaining operation of lead plaintiff provision).

5. Mr. Boies's experience as a retained private counsel to the Federal government did not begin with the Microsoft litigation. Years earlier, he was retained in an action brought by the

the states refused to accept the settlement reached between Microsoft and the Department of Justice, the State of California retained Brendan Sullivan of Williams & Connolly to challenge the settlement, while the Department of Justice hired Phillip Beck of the litigation boutique, Bartlit, Beck, Herman, Palenchar & Scott, as their counsel.[6] In short, as the stakes got higher, all sides turned to outside counsel.

The point in making this comparison with securities litigation is not simply to challenge the assumption of uniqueness, but rather to identify a database that allows us to assess more cases over a longer time period in order to evaluate both the potential for conflicts and corruption and the performance of this new marriage of convenience between public officials and the private plaintiffs' bar. It also supplies a very different perspective on whether the use of contingent fee litigation is simply a mechanism for subverting legislative oversight and funding.

II. Conflicts of Interest Taxonomy

Conflicts of interests are as inevitable as death and taxes. That they exist only frames the real issue: How should they be dealt with? A brief review of the conflict issues that have been perceived as arising uniquely in SAG tobacco litigation shows that they have also arisen in post-PSLRA securities litigation.

A. *Conflicts Over Counsel Selection*

The most obvious potential conflict is probably that the state official will select the private counsel most willing to bribe him with either an under-the-table payment or a legally permissible political contribution.[7] The allegation that Texas Attorney General Dan Morales demanded a one million dollar bribe from the private counsel seeking to represent Texas in the SAG tobacco litigation has received prominent press coverage (and is the subject of an on-going criminal investigation), and it exemplifies this quintessential conflict.[8]

Federal Deposit Insurance Corp. against Drexel, Burnham Lambert and Michael Milken, in which Mr. Milken paid a settlement of $500 million. *See* Stephen Labaton, *"Counting the Vote: The New Gore Lawyer; A Man Who Vanquished Microsoft Takes on the G.O.P.,"* N.Y. Times, Nov. 14, 2000, at p. A-23.

6. *See* Jonathan Groner, "Sullivan Will Lead California Into Battle Against Microsoft," Nat'l L.J., Nov. 19, 2001, at p A-10.

7. *See* McCormick v. United States, 500 U.S. 257 (1991) (holding that a "quid pro quo is necessary for a conviction when an official receives a campaign contribution, regardless of whether it is a legitimate contribution.").

8. *See* Mark Curriden, *Morales Case May Be Done in January; A.G. in Tobacco Case Has Denied Wrongdoing,* The Dallas Morning News, Nov. 5, 2000, at 43A.

Securities litigation has followed a similar pattern, or at least similar allegations. In *In re Cendent Corp.*, which ultimately resulted in the largest class action settlement on record ($3.1 billion), one contender for the position of lead counsel charged that two of the lead plaintiffs (the New York State and New York City pension funds) had chosen as their co-lead counsel two law firms that had been major campaign donors to the elected official who had sole discretion over each fund.[9] In truth, both the New York State Pension Fund and the New York City Pension Fund were each subject to the exclusive control and direction of the New York State Comptroller and New York City Controller, respectively. Although the district court in *Cendant* refused to accept the contention that a quid pro quo was involved, it is at least curious why one of the two co-lead counsels in *Cendant*, a major Philadelphia plaintiff's firm, would otherwise wish to contribute to the political campaign fund of the New York State Controller.[10] Presumably, its desire to fund good government could have been satisfied closer to home.

While *Cendant* was a high profile case, it was not unique. A network of relationships exists between an increasingly national plaintiffs bar and those state officials who have actual control over state and municipal pension funds. A recent survey by one newspaper found law firms in New York and Philadelphia contributed not only to local state and municipal officials who could influence the choice of class counsel on behalf of their pension fund, but they also contributed to both sides in races for state treasurer in distant states.[11] But if the problem seems pervasive, the answers to it are obvious. First, one could select counsel through a competitive bidding process; this is in fact what the *Cendant* court did, although ostensibly at least for other reasons. Second, one could substitute a non-partisan board of trustees for the elected public official in order to minimize the role of political contributions over counsel selection. Interestingly, several of the states that are most active as lead plaintiffs in securities litigation have

9. *See In re* Cendant Corp., 182 F.R.D. 144, 146-148 (D.N.J. 1998); *see also* Diana B. Henriques, *Conflicts over Conflicts: Class Action Lawyers Defend Their Political Contributions*, N.Y. TIMES, July 30, 1998, at D-1.

10. *See* Kevin McCoy, *Campaign Contributions or Conflicts of Interest*, USA Today, Sept. 11, 2001, at 13 (finding that these law firms had contributed nearly $100,000 to campaigns for New York State Comptroller since 1999 and had been appointed class counsel in two major class actions in which New York state was serving as lead plaintiff).

11. *Id.* at p. 1B. For example, this survey found that the plaintiff firms in New York, Philadelphia, and Boston contributed $32,000 to the winner and $21,500 to the loser in the last election for Louisiana State Treasurer.

such non-partisan boards: California (CalPERS), Wisconsin (SWIB), and Florida.

Both of these solutions are open to criticism. Auctions are controversial and may dissuade state pension funds from serving as lead plaintiffs if they cannot choose their own counsel. Similarly, the suggestion that control by an elected official be replaced by a non-partisan board of trustees may sound overly prophylactic to some. Arguably, to insulate the pension fund in this fashion is far more anti-democratic than it is for an elected official to obtain funding from a non-legislatively approved source. Still, such insulation can be justified by analogy to unelected city managers and civil service bureaucracies on the ground that some governmental functions are inherently professional and non-political. If this principle is accepted, the administration of a pension fund is a clear example that would fall within it.

Nonetheless, the simplest solution may be an ethical one that does not seek to change the structural control over the litigation decision. The American Bar Association (ABA) has adopted the Model Rules of Professional Conduct, which contain Model Rule 7.6 (R.P.C. 7.6), which restricts "pay to play" practices and effectively bars attorneys and law firms from accepting government legal engagements if they made or solicited political contributions "for the purpose of obtaining the business."[12] This rule was largely modeled on an earlier rule imposed by the Securities and Exchange Commission on the municipal securities industry.[13] Yet, at least until this proposed rule becomes effective at the state level, there is reason to believe that "paying to play" is and will remain the norm in those jurisdictions where the state pension fund is subject to the direct control of elected officials. At present, the evidence suggests that state bar groups are steering clear of the ABA's new ethical rule on "pay-to-play" practices, and hence, a norm of "business as usual" presumably remains in effect in the legal marketplace. Even if the ABA rule were adopted by state bars, its language does not prohibit political contributions or bar the attorney

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12. *See* Model Rules of Professional Conduct, R. 7.6 (1983); *see also* Malcolm A. Heinicke, *The ABA Should Not Delay on Pay-to-Play: Regulating the Political Contributions of Lawyers to Government Officials Who Award Legal Contracts*, 49 Stan. L. Rev. 1523, 1526-27 (1997); Samantha M. Cohen, *Playing-to-Play Is the New Rule of the Game: A Practical Implication of the Private Securities Litigation Reform Act of 1995*, 1999 U. Ill. L. Rev. 1331 (1999).

13. Rule G-37 was adopted by the Municipal Securities Rulemaking Board in 1994. *See* Municipal Securities Rulemaking Board, Release No. 34-33868; File No. SR-MSRB-94-2, 59 Fed. Reg. 17621 (April 13, 1994); *see also* Jon Jordan, *The Regulation of "Pay-to-Play" and the Influence of Political Contributions in the Municipal Securities Industry*, 1999 Colum. Bus. L. Rev. 489 (1999).

from accepting the engagement—except and unless the contribution was made for the "purpose of obtaining" such engagement. Legal minds will have little difficulty finding this rule inapplicable to the facts of their case, based on the attorney's assertion that his or her motivation was not political.

Within this context, R.P.C. 7.6 will not eliminate conflicts regarding the selection of lead counsel. How serious a problem is this if our principal focus is on the performance of lead counsel? Some evidence suggests that securities class action settlements have been higher since the passage of the PSLRA. While it may be risky to attribute this increase to the lead plaintiff provision, it is noteworthy that the class action that received the greatest press attention for its "pay-to-play" practices (i.e., *Cendant*) also resulted in the largest class settlement in history. Cynical as it may sound, it seems fair to generalize that the attorneys who donate the most to the state controller of their choice are probably among the most able litigators who are most likely to maximize the state's recovery. "Paying to play" may be a barrier to entry and result in cases being filed that would not otherwise be brought, but it is far less clear that it results systematically in inferior counsel becoming class counsel. Moreover, when class counsel is compensated on the basis of a contingent fee calculated as a percentage of the recovery, class counsel's interests are fairly well aligned with those of the class members that they are seeking to protect. Thus, while contingent fees are often criticized as windfalls, the fairest generalization is that, when determined on a percentage basis, they act as an incentive to motivate the attorney to obtain a larger recovery, *and* they minimize the perverse incentive that can arise under the lodestar formula[14] to run up hours and then settle on a basis that benefits the attorney more than the class that the attorney represents.

B. Conflicts Between Public and Private Clients

Critics of the SAG tobacco litigation have raised the prospect that the private attorney will face a conflict between the interests of the attorney's private clients and his public clients. Why this might be so is far from clear, as the SAG tobacco litigation did not result in any recovery or other litigation benefits to individual plaintiffs. Nor, in my judgment, were there opportunities in the SAG tobacco litigation to trade off the interests of these two groups. In any event, the possibility of conflicts arising between private and public clients is not

14. *See* Lynn Hume, *No Action on Pay-to-Play ABA Rule Little Interest in States*, THE BOND BUYER, September 19, 2000, at http://www.bondbuyer.com.

unique to tobacco litigation. Indeed, by definition in securities class actions, the private attorney is representing both public and private clients. Inherently, this is precisely what a class action intends, which is the aggregation of the largest possible number of claimants in order to maximize the pressure on the defendant.

Two views are possible about the seriousness of this potential conflict. Those who see it as mild to trivial can point to the fact that the lead plaintiff runs the securities class action; hence, the other class members are subordinate to it. As a factual matter, the accuracy of this assertion is debatable because once the class is certified (and possibly before), the lead plaintiff probably owes a fiduciary duty to the class, and in any event, real control probably belongs to the class counsel. The case law makes clear that the class counsel can in effect fire the client who hired it and reach a settlement over its objections.[15] From the opposite perspective, it can be argued that a real and serious conflict between client and counsel exists as to whether the public entity should elect to serve as a lead plaintiff in a class action or whether it should instead opt out and sue in an individual suit. Here, the interests of the private attorney will clearly favor the class action because class counsel is typically rewarded handsomely by the court in successful class actions. If the typical fee award is somewhere around 30% in securities class actions today, this means that the larger the class (and hence, the larger the recovery), the larger the fee award to class counsel.[16] Yet large corporations and private institutional investors often opt out and sue individually in the belief that they will do better individually than when their interests are submerged within the class.

Indeed, possibly the most noteworthy fact about the lead plaintiff selection process is that since the passage of the PSLRA, private institutional investors have virtually never volunteered for this role—while they do sometimes opt out and sue individually. Although there is little evidence as to how they do in these separate suits, a number of empirical studies suggest that the class in a securities class action typically receives only between 5% and 10% of their estimated damages

15. *See* Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999); *see also* John C. Coffee, *Class Action Accountability*, 100 COLUM. L. REV. 370, 407-410 (2000).

16. The leading studies of fee awards in securities class actions have been conducted by National Economic Research Associates (NERA), an economic consulting firm. Based on data prior to the passage of the PSLRA, NERA found that the average fee award in securities class actions was 31.71% and the median fee award was 33.33%. *See* Frederick Dunbar, Todd Foster, Vinita Juneja, Denise Martin, RECENT TRENDS III: WHAT EXPLAINS SETTLEMENTS IN SHAREHOLDER CLASS ACTIONS? (NERA, June 1995).

in a settlement.[17] There are understandable reasons for this (including exaggerated damage models that ignore the major problem of loss causation in securities litigation), but it is at least a realistic hypothesis that settlements in individual actions would award large claimants, represented by able counsel, much higher damages than the same plaintiffs would receive as their pro rata share of a class action.

Still, if the large client gains by opting out, the contingent fee plaintiff's attorney almost certainly loses. Suppose the public entity that might serve as lead plaintiff owns 10% of the stock purchase during the class period. At most, it will pay its attorney approximately one third of its recovery in an individual action and if it opts out, this is one third of ten percent (or 3-1/3%). Alternatively, if a large client stays in the class, the class counsel may receive one third of the entire class's recovery (i.e., one third of 100%, or 33-1/3% versus 3-1/3%). Therefore, if an individual suit is a realistic option, a real conflict emerges between the interests of the institutional investor who today serves as lead plaintiff and the interests of class counsel, which conflict "pay to play" practices aggravate.

C. *Conflicts Over the Decision to Sue*

As noted earlier, a stark contrast exists between the behavior of private institutional investors (who virtually never sue in a class action) and public pension funds (who have been the primary lead plaintiffs since the passage of the PSLRA). Who is right? Mutual funds and insurance companies view class litigation as a wasteful diversion of managerial time, a source of potential liability, and above all, a non-core business activity as to which they lack special expertise. Conversely, state pension fund officials believe they have a fiduciary duty to protect the assets in their pension fund and to sue to recover for fraud.

Exacerbating this difference of opinion is the factor of political contributions. If the State Controller received $200,000 in lawful soft money from law firm X, will the State Controller resist the request of that law firm to allow it to represent the state in a class action that the law firm wishes to file alleging securities fraud with the pension fund

17. The study finding that the average recovery is securities class actions amounts to only 5% of shareholder losses was conducted by NERA and submitted to Congress during the hearings preceding the passage of the PSLRA. *See* Frederick Dunbar & Vinita Juneja, RECENT TRENDS II: WHAT EXPLAINS SETTLEMENT IN SHAREHOLDER CLASS ACTIONS? *reprinted in Private Litigation Under the Federal Securities Laws: Hearings Before the Subcommittee on Securities of Senate Committee on Banking, Housing, and Urban Affairs*, 103rd Congress, 1st Sess. (June 17 and July 21, 1992) at 739–750. For a review and critique of these other studies, *see* James Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 501–506 (1997).

serving as lead plaintiff. Arguably, the political contribution is the price that the law firm pays to obtain a license to use the state's pension assets for litigation purposes. This incentive could imply that the volume of class litigation in the United States will be inflated by political contributions (i.e., suits that would otherwise not be brought will be brought).

How realistic is this danger? In the context of securities litigation, this scenario seems unlikely. Here, one must recognize that a law suit would probably have been filed in any event because even a 100 share shareholder can file and maintain a securities class action. All that is being disputed is the control of that litigation. Thus, what the political contribution really buys is voting control over litigation that would otherwise still be brought. But in the mass tort or consumer class action contexts, this scenario may be more valid. Finally, the context in which it is most legitimately arguable that political contributions may increase the volume of litigation is *parens patriae* litigation brought by state attorneys general in non-class action suits. This is the one form of action that could not generally be brought by someone else. But even here, there is one braking force on excessive litigation: the plaintiff's attorney is only compensated if the attorney obtains a recovery. Ironically, the contingent fee here becomes a virtue, not a vice, because it removes any incentive to induce the attorney general to bring an action that the private attorney would not bring at his own expense. In this light, the danger of excess litigation is greatest when the attorney is compensated on an hourly fee basis.

III. The Political Accountability Arguments

Both critics and supporters seem to agree that "the most persuasive explanation" for why state attorneys general retain private counsel on a contingent fee basis is the "need to bypass the state legislature."[18] Again, I tend to dissent to the extent that I see a more basic motivation. In the context of securities class action litigation, it becomes apparent that the legislature has had little objection to the now prevalent system of self-financing such litigation through contingent fees. The efficiency advantages are simply obvious and overwhelming.

A. *The Efficiency Advantages*

Let us consider the position of a state pension fund that has incurred losses because of securities fraud. In the alternative, assume

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18. *See* David A. Dana, *Public Interest and Private Lawyers: Toward Normative Evaluation of Parens Patriae Litigation By Contingent Fee*, 51 DePaul L. Rev. 315, 319 (2001).

that the pension fund has had one small loss of one million dollars on one investment, or that it has suffered a large loss of $50 million or more on another investment. In theory, in either case, the pension fund could call on the state attorney general to represent it or it could retain in-house counsel. In the case of the small loss, the retention of in-house counsel is clearly inefficient (either by the pension fund or the state attorney general). It would clearly take multiple lawyers several years to handle the action (or, at least, such is the current elapsed time to reach settlement in most securities class actions), and the one million dollar loss is too small to justify this cost. Hence, it is more efficient to aggregate the small losses of many claimants and sue on a class basis. Only if the pension fund expected a continuing series of small losses would it be sensible to hire an in-house expert on securities litigation, and, even then, the rate of fraud is likely to be highly variable, thus ensuring that there will be peaks and valleys and no continuing steady and even demand for the specialist's services.

The point here is that what makes the class action form and the use of outside counsel attractive is less the small size (and limited funds) of the typical class member than the small size of the typical losses. Ultimately, aggregation of small losses is efficient, and even if the large pension fund or other state agency could afford to sue, it is not efficient to do so.

Now let us consider a larger, more catastrophic loss. Conceivably, if it is not restored, the pension plan may become insolvent. If it is a defined benefit plan, this loss falls on the state, which is ultimately liable for the pension benefits that it has promised to its employees. Even if it were a defined contribution plan, it seems politically inconceivable that a state would not try to compensate such a loss, rather than see its former employees lose their expected retirement income. The state agency could, of course, retain a law firm on either an hourly basis or on a contingent fee basis. What it cannot do is handle the matter on an in-house basis with civil service lawyers who lack the requisite prior experience in a specialized field. This is a standard "make or buy" decision that all economic firms face, and the case for leasing talent from a specialist seems overwhelming here.

This need to lease, rather than buy, specialized legal talent remains true even if the legislature is fully prepared to fund all necessary costs. Even a specialized legal agency, such as the Antitrust Division, recently recognized that "bet your company" cases require a legal superstar and not simply a competent bureaucrat by retaining David Boies in the *Microsoft* litigation.

To this point, the case for use of a contingent fee has not yet been made. But now add an additional factor to the example: successful litigation is a long-shot, possibly a ten-to-one. Now, a politically accountable official faces real risks of appearing to waste public funds on a "wing-and-a-prayer" lawsuit. Indeed, the risks would be even higher if the official had hired an in-house staff to bring the suit because upon its failure, the official would have to fire the now redundant employees and would face criticism for both the costs and the possibly mediocre litigation effort that was made. Predictably, opponents of the elected official would surface to voice these criticisms.

In this light, the greater attraction of a contingent fee contract is that it provides the elected official with a no-risk gamble: heads, we win and the state recovers its losses; tails, we lose, but we incur no out-of-pocket losses and we hired the best people available. Viewed this way, the contingency fee agreement is less an end run around the legislature than a risk sharing arrangement that allocates both economic and political risks from the elected official to the party most able to bear it: namely, the plaintiffs' attorney. Even if the plaintiffs' attorney is made a political scapegoat for the loss, he is better suited to bear this loss as a member of a nationwide bar than is a local elected official. In sum, the desire to avoid legislative oversight may sometimes be there, but the greater motive for use of the contingent fee is political insurance—avoiding the probability of a large one-time loss on longshot litigation.

The one respect in which the class action is different from state attorney general *parens patriae* litigation is that the contingent fee contract does not control. Rather, the state or federal court must determine a reasonable fee for the class. For the state attorney general, this is further and desirable political insurance. Indeed, to the extent that one believes state attorneys general will be overreached in the fee negotiation process, the argument could well be advanced that the state attorney general should only be able to sue on a contingent fee basis if the action is a class action in order to ensure judicial oversight.

B. *The Risk of Political Impasse*

Even if the legislature is circumvented by the use of contingency fees, it is not disabled. It can still act to block the *parens patriae* or recoupment litigation. The critical difference involves on whom the risk of impasse falls. If an appropriation is needed to bring suit, a minority faction in the legislature may be able to block it by any of a variety of tactics, from logrolling to a filibuster. Minority vetoes are a common fact of political life in the legislature. If, however, a legislative appropriation is not necessary, then opponents must assemble an affirmative majority to pass legislation. However, a legislature may still block legislation as the Louisiana Supreme Court recently ruled in upholding legislation that blocked an anti-handgun, *parens patriae* suit by the City of New Orleans.[19]

IV. Conclusion

In the new marriage of public client and private counsel, substance dominates procedure. This tour of securities litigation suggests that it is the substance of state *parens patriae* litigation, not its procedure, that should be controversial. Procedurally, the marriage of the private plaintiffs' bar and the state attorneys general makes sense and creates enormous synergy that is beneficial to both sides. The plaintiffs' attorney gains the legitimacy, credibility, and home field advantage that only the state can confer, while the state attorneys general gain specialized human capital that they could not otherwise afford. Most of all, the contingent fee means that the state is essentially compensating the private attorney with lottery tickets. This solves most, but not all, of the political risks for state officials and the residual risk is mitigated if courts must approve the fee as reasonable. Not all attorneys will want such compensation, but those willing to accept it become more motivated and have their interests better aligned with their clients. Even if imperfectly, the contingent fee system works to offset many of the dangers that "pay-to-play" practices otherwise would engender.

19. *See* Morial v. Smith & Wesson Corp., 785 So. 2d 1 (La. 2001) (upholding constitutionality of state legislation retroactively blocking lawsuit filed by City of New Orleans to recover costs incurred by the City as a result of citizen use of allegedly dangerous hand guns on the ground that legislation fell within state's police power).