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# **PUBLIC INTEREST AND PRIVATE LAWYERS: TOWARD A NORMATIVE EVALUATION OF *PARENS PATRIAE* LITIGATION BY CONTINGENCY FEE**

*David A. Dana\**

## INTRODUCTION

In the recent tobacco litigation, most state attorneys general (AGs) retained private lawyers on a contingency fee basis. While retention of outside counsel on a contingency fee basis by states is not unprecedented, the retention of them in such a politically charged and lucrative litigation does break new ground. Thus, the plaintiffs' lawyers' role in the tobacco litigation has understandably given rise to talk of a new alliance between AGs and the plaintiffs' bar in which AGs rely on contingency fee lawyers to pursue *parens patriae* claims against allegedly injurious but, as a matter of legislation and regulation, perfectly lawful industries. Is such an alliance, assuming it existed in the tobacco context and will now reappear in other contexts, a good thing? This paper does not seek to answer that complicated question definitively, but rather has three modest aims: (1) to introduce some helpful distinctions in the debate; (2) to identify the weaknesses in the "democracy" claims of both critics and defenders of the AG-plaintiffs' bar alliance; and (3) to direct more attention to the conflicts and agency problems presented by the use of contingency fee lawyers in *parens patriae* litigation along the model of the tobacco litigation.

## II. THREE DISTINCTIONS

As a preliminary matter, it may be helpful to sort out the normative concerns raised by critics of the AG-plaintiffs' lawyers alliance. In particular, three distinctions should be, but to date often have not been, kept in mind when addressing the alliance. The first distinction is between the normative question of whether it is desirable for the AGs to aggressively prosecute tort actions in *parens patriae* against the tobacco and other arguably "harmful" yet "lawful" industries, such as gun manufacturers, and the normative question of whether such aggressive tort actions, to whatever extent they are desirable,

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ought to involve the services of private lawyers. At least in theory, these are wholly distinct questions. One might think that the AGs' use of the tort system is an excellent corrective to the industries' capture of state legislatures, but one might be troubled by the role of private lawyers in the tort litigation. Alternatively, one might disapprove of what may be characterized as the AGs' usurpation of the legislative role in industrial regulation, but one might be agnostic as to whether the AGs proceed on their own or with the aid of private lawyers.

A second important distinction is between the decision by AGs to retain outside counsel, rather than proceed only with government lawyers, and their decision to retain outside counsel on a contingency fee basis. The normative evaluation of these two decisions could differ. One might argue that the AGs could, and should, proceed with tobacco-like litigation using only government lawyers but conclude that the use of outside lawyers on a contingency fee basis is no more problematic than the use of them on an hourly or flat fee basis. Alternatively, one might not object to the use of outside counsel but object to the retention of them on a contingency fee basis.

A final helpful distinction is that between the use of the tobacco litigation as an example of what *parens patriae* tort litigation might look like in the future in different contexts and the use of the tobacco litigation as ostensible proof of what future litigation necessarily will look like. Obviously, the tobacco experience is instructive: it represents the first monetarily successful *parens patriae* litigation by the states against an industry that is perceived as producing significant social harms but has remained largely free of legislative restriction or penalty. But precisely because tobacco litigation was the first major litigation of its kind and AGs proceeded with limited experience, as well as little public scrutiny of their relationships with outside counsel, tobacco litigation may not be representative of what would happen in future *parens patriae* tort litigation. Some of the more controversial aspects of the private lawyers' role in the tobacco litigation—the sheer size of the fees, and the alleged financial connections between some AGs and the private firms they hired—may not reappear in subsequent litigation because the AGs may be more circumspect and constrained by more external safeguards than during the tobacco litigation.<sup>1</sup>

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1. The public reaction to the large fee awards in the tobacco litigation has spawned legislation in several states. See, e.g., *3 States Consider Bills Aimed At Limiting Outside Counsel*, *LIENS*, MEALEY'S LITIGATION REPORTS, Mar. 2, 2000. The American Tort Reform Association has proposed a model state bill that would require substantial pre-retention disclosure and legisla-

III. "DEMOCRACY" AND THE STATE AG-PRIVATE PLAINTIFFS'  
BAR ALLIANCE

A good starting point in evaluating a phenomenon is often why it exists. Why did the AGs use contingency fee lawyers in the tobacco litigation, and why would they use them in similar future *parens patriae* litigation? After all, AGs are invariably lawyers, and their offices are staffed by lawyers, in some cases quite a large number of them. In fact, a few states did rely principally on staff lawyers in the tobacco litigation, although none of the path-leading states did.

One easy response to this question is that many AGs simply did not have the time to build and train the staff necessary to engage in the tobacco litigation, so they naturally relied on already well-trained, poised-to-litigate private lawyers, some of whom had been involved in other tobacco litigation. But even assuming that AGs lacked the capacity to build the in-house expertise and staff to undertake the tobacco litigation, they now could build such in-house capacity in anticipation of future litigation along the tobacco model. One possible reason AGs might not try to build such internal capacity is the unpredictability of future resource demands. The development and maintenance of a staff of permanent plaintiffs' tort lawyers in government would make sense for states only if they anticipated constant involvement in tobacco-style litigation, and it is far from clear whether that will be the case. Even if state government officials assumed that the tobacco litigation would be followed by similar litigation against other ostensibly injurious but lawful industries, they would be hard pressed to predict the staff resources that would be needed to pursue such litigation and exactly when such resources would be needed. By relying on outside experts, states avoid the waste that might attend developing a permanent staff of tort lawyers and then underemploying them, paying them to be idle, or finding them alternative work.

The desirability for flexibility in legal staffing, however, cannot explain why AGs would choose to hire outside tort counsel *on a contingency fee basis*. The classic justification for contingency fees is that they facilitate access to the judicial system for individuals who lack the

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tive approval whenever an AG seeks to use contingency fee counsel in cases involving claims of \$100,000 or more, and that would limit compensation for contingency fee counsel to \$1,000 per hour in most cases. See Prepared Statement of Victor E. Schwartz, Esq., on behalf of the American Tort Reform Association before the Senate committee on the Judiciary Regarding Government-Sponsored Litigation, FEDERAL NEWS SERVICE, Nov. 2, 1999 (describing model "Private Attorney Sunshine Act").

means to pre-pay legal expenses.<sup>2</sup> The standard rationale for contingency fees does not apply when states are plaintiffs, as the financial wherewithal of states more closely resembles that of multinational corporations than average individuals. Some states are richer than others, but none lack options in financing litigation. For example, if they do not have uncommitted surplus funds, states can divert funds from existing programs or raise money through taxes and/or debt. As long as states have funds for litigation, they do not need to resort to contingency fee agreements, because they can secure top-flight representation by paying a top-flight hourly fee similar to that paid by corporate defendants, such as the tobacco companies.<sup>3</sup> Thus, the real question about the use of contingency fees is why AGs would resort to using contingency fees in *parens patriae* litigation, rather than securing state funds to pay outside counsel on an hourly fee basis.

Two of the answers to this question suggested by critics of the tobacco litigation are that AGs are passive/unsophisticated or, alternatively, corrupt/self-serving. According to the first explanation, AGs were successfully pitched the tobacco litigation by greedy contingency fee lawyers, and the AGs were not thoughtful or energetic enough to consider alternatives to contingency fee arrangements or to negotiate favorable contingency fee agreements. This account is largely unpersuasive. The AGs who negotiated contingency fee arrangements regarding tobacco were, as far as one can discern, quite sophisticated lawyers. The significant variation in the contingency agreements suggests that the agreements were actually negotiated, rather than pas-

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2. See generally, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995).

3. The classic justification for the allocation of a relatively high percentage of recovery to lawyers, typically one-third, is that tort litigation entails risk of loss and hence the risk that the lawyers will be left with nothing in the hole. To compensate for that downside risk, plaintiffs' lawyers need the upside incentive of a substantial share of any tort proceeds, even though that share may well exceed what would have been paid to well-compensated lawyers on a standard hourly basis. The risk of an unfavorable outcome in public tort litigation along the tobacco model, however, may not always, or even generally, justify the fee percentages customarily used in private tort actions. To consider the tobacco example, the lawyers for the lead plaintiff states did assume some substantial risk because, at the time they began the litigation, the prospects for that litigation remained very much in doubt. Once Liggett made clear its intention to settle and did in fact settle, however, it was clear the other industry defendants would follow, and hence the risks for private lawyers entering the litigation declined markedly. Most states, and most contingency fee counsel, only became involved in the tobacco litigation once some sort of settlement seemed to be the most likely outcome. See Comments of Richard Scruggs, DePaul University College of Law Clifford Symposium on Tort Law & Social Policy. For a brief history of the tobacco litigation, see Maria Gabriela Biancini, *The Tobacco Agreement That Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 709-713 (1999).

sively agreed to by all of the AGs.<sup>4</sup> Moreover, even if some AGs were unsophisticated in dealing with aggressive, business-seeking plaintiffs' lawyers in the context of tobacco, the substantial political fallout regarding the tobacco fees presumably will provide AGs with the incentive to be more circumspect in considering how to finance future litigation.

The corruption explanation is also unpersuasive. In this account, the contingency fee agreements are lavish, relatively hidden rewards of state money to private lawyers in return for some personal, illicit benefits to the AGs, such as campaign contributions or future sinecure employment. Supporters of this account rely heavily on the experience of two states with tobacco litigation—Texas, where the former AG was accused of demanding one million dollar campaign contributions as a *quid pro quo* for including private firms in tobacco litigation, and Mississippi, where the AG retained his largest campaign donor.<sup>5</sup> However, not all AGs are elected, so at least the campaign contribution concern may be limited in geographic scope.<sup>6</sup> Moreover, the Texas AG has lost office and is now under criminal investigation, which suggests that AGs will now expect to experience some political and perhaps legal punishment if they allocate what turn out to be extremely large contingency fees to known political allies. Finally, in the wake of tobacco litigation, it seems likely that the retention of private contingency fee counsel will be subject to new *ex ante* controls, such as public disclosure and competitive bidding. Thus, contingency fee agreements in the future are not likely to be a particularly easy or low-cost means for AGs to secure illicit benefits, even assuming this was previously the case.<sup>7</sup>

The most persuasive explanation for why AGs would retain contingency fee counsel is that the AGs perceive a need to bypass state legislatures. Both critics and defenders of the AGs' use of contingency fee

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4. See *Attorney's Fees & The Tobacco Settlement: Hearing on H.R. 2740 Before the House Comm. on the Judiciary*, 105th Cong. 36 (1999) (statement of Lester Brickman, Cardozo School of Law) (stating that "[i]n 36 States, the attorneys general have entered into contingency fee agreements ranging from 3% to 33 1/3% with 89 law firms."). On the other hand, the agreements do bear some striking resemblances, a fact that may be attributable to the reportedly high level of nation-wide coordination among plaintiffs' lawyers in the tobacco litigation.

5. See Robert E. Levy, *Up In Smoke: Coming to Terms With the Legacy of Tobacco*, 2 J. HEALTH CARE L. & POL'Y 45, 52 (1998).

6. But it is true that elected AGs were at the forefront of the tobacco litigation.

7. The point is not that contingency fee agreements never entail payoffs or implicit *quid-pro-quos*—any allocation of government business can. But for the corruption explanation to make sense, contingency fees must provide AGs with a less overt, and hence lower cost, means of securing future favors than the other alternatives (e.g., hiring lawyers on an hourly basis or hiring staff associated with powerful people along the patronage model).

agreements concur that had the AGs sought legislative funding to hire a staff to prosecute the tobacco litigation or to pay outside lawyers on a pay-as-you-go, hourly basis, they would have been rebuffed.<sup>8</sup> Indeed, it appears that some governors and AGs were so rebuffed.<sup>9</sup>

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8. Compare Schwartz, *supra* note 1 (criticizing the tobacco settlements as violative of “a bed-rock principle of our Government [not] to give up on the legislature because you cannot get your way”) with Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 961 (1999) (stating:

[A]fter nearly forty years of political and legal inactivity, the attorney general litigation represents the first significant progress in holding manufacturers accountable (financially and otherwise) for the undisclosed and undertested hazards of cigarettes. To conclude that the attorney general litigation is on balance a bad thing, then, one also has to accept the fact that without it the manufacturers may very well have remained largely unaccountable for the undisclosed hazards of cigarettes.).

Professor Coffee suggests that even if the AGs could have secured legislative funding, they would not have wanted it since the political risk of spending millions of public funds on litigation and then losing would be too great. Coffee suggests that the use of outside counsel allows AGs to have their cake and eat it too: if the litigation succeeds, the AGs can trumpet its success as their own, but if the litigation fails, they do not have to take the blame for any of the costs of litigation. The use of outside contingency fee counsel is thus a sort of protective device for ambitious, but risk-averse attorney generals. See John C. Coffee, Jr., “*When Smoke Gets in Your Eyes*”: *Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241 (2001).

Coffee does not explore the normative implications of this explanation, but in my view, his explanation raises the same sort of democracy concerns as the pure legislative bypass explanation. One could argue that by allowing AGs to cloud accountability for their actions, use of outside contingency fee counsel is undemocratic inasmuch as transparency and accountability are regarded as core democratic attributes. On the other hand, one might argue that AGs need to avoid full accountability precisely because they face organized retaliation from excessively powerful, monied business interests. Furthermore, any mechanism that in effect provides the AGs with insulation necessary to advance the public interest is pro-democratic, to the extent that advancement of a discernible “public interest” is regarded as a core democratic attribute.

Coffee’s explanation also has positive or descriptive limitations. On at least one account of bureaucratic behavior, bureaucrats strive to build up staff, turf, and budgets, because they translate into power. Although some AGs are elected, many are not, and even elected AGs rely on—and presumably are influenced by—semipermanent bureaucratic staffs. One might suppose that at least unelected members of AG offices and unelected AGs would welcome significant new funds and staff positions even if the latter were nominally dedicated to litigation that ultimately might amount to nothing. See Paul B. Stephen, *International Governance and American Democracy*, 1 CHI. J. INT’L L. 237, 249 (2000) (noting “social theorists, going back to Max Weber, have assumed that bureaucracies seek to maximize their power, whether expressed in larger budgets or greater discretionary authority over other people’s lives and property”). Moreover, there is a flipside to the argument that AGs gain political insurance by distancing themselves from litigation by using contingency fee counsel. For example, AGs also lose some opportunities for credit-claiming by using contingency fee counsel. At least risk neutral or risk preferring AGs might prefer to try to show the world that they secured justice (and money) for the public all on their own, and there is no reason to believe that AGs generally are risk averse.

9. See, e.g., Phil Brinkman, *Legal Bill Won’t Affect State Much: Although the Contract Was With the State, The Issue Is Really Between the Lawyers and The Tobacco Industry*, WISCONSIN STATE J., Mar. 21, 1999, at A1 (explaining AG Doyle’s defense of his use of contingency fee lawyers that “[t]here was little enthusiasm among legislators to spend state money on a lawsuit that some felt shouldn’t have been brought and others felt couldn’t be won” and that the gover-

The use of contingency fee counsel solves the AGs' funding problems because it requires no legislative funding or cuts in AGs' existing programs. The critics and defenders of the AGs also agree that AGs' bypassing of state legislatures implicates "democracy." What they disagree about is who has "democracy" on her side. For the critics of contingency fee arrangements, the legislative bypass is undemocratic and, hence, normatively objectionable. For defenders of the contingency fee arrangements, the bypass is democracy-enhancing because it effectuates a public will that rich industries have otherwise thwarted by buying the legislatures.

Both the critics' and defenders' "democracy" claims are overstated. To take the critics' claims first, it is not true that the AGs' use of contingency fees overrules or renders powerless the will of state legislators. Rather, the use of contingency fees simply changes the nature of the action that legislators must take to block *parens patriae* litigation. Where contingency fees are not an option, the legislature's refusal to move ahead or consider a litigation funding request by the AG's office might be sufficient to block the litigation. For legislators inclined to support the industry in question but worried about that industry's unpopularity, the failure to fund is an attractive option. The failure to fund generally would not require a vote, so it allows for ducking accountability, and it can always be justified on grounds of fiscal conservatism and frugality as opposed to obeisance to the industry's power as a campaign contributor. At the same time, the decision would please the cash-rich industry seeking to block the litigation. Where an AG can finance litigation through contingency fees, the legislators opposed to the litigation can still stop the litigation, but doing so may require very public, accountable action, such as passage of a bill, and there would be no cover justification of fiscal conservatism. Thus, the relevant question, in terms of "democracy," is whether it is more "democratic" to allow the legislature to *de facto* block the AGs' litigation efforts before they are really underway or, alternatively, to limit the legislature to intervening after the AG has launched a contingency fee-funded litigation effort.

The AGs' critics suggest the answer to that question is obvious because the legislature, as the elected representatives of the people, should be given as much authority as possible. What "democratic" and "democracy" mean, of course, is an enormously contested mat-

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nor had refused a funding request for all additional government employees to prosecute the litigation).

ter.<sup>10</sup> If democratic simply means duly elected, then it is not obvious that a state legislature has greater democratic legitimacy than a state AG. Some AGs are elected, and even when they are not, they are appointed by and follow the lead of an elected official, the governor.

Of course, democratic does not mean merely elected, but rather invokes the idea of meaningful public participation and reasoned public deliberation about the best measures to secure the general community interest.<sup>11</sup> From this civic-republican or deliberative conception of democracy, most state legislatures are probably unappealing. Much state and federal legislative action, including the handling of funding or budget matters, does not entail extensive, thoughtful public participation and deliberation.

The democracy arguments of the defenders of the AGs are also overstated. In the tobacco litigation, the AGs' retention of plaintiffs' lawyers on a contingency fee basis was not the result of an open deliberation about the public good. Nor is there much reason to suspect that future AG decisions, even if they are subject to more *ex ante* regulatory controls, will amount to any lofty ideal of deliberative democracy. Moreover, the invocation of legislative capture by the AGs' defenders does not, by itself, prove much. When the AGs' defenders argue that industries such as the tobacco or gun industry have captured state legislatures, they are, of course, claiming that such industries have too much influence. That claim, in turn, implicitly entails a normative claim about what is the right amount of influence for the tobacco or gun industry and their allies to have. Articulating and defending a baseline is no easy task, and no one has tried to do so in the debate regarding *parens patriae* litigation and the use of contingency fee lawyers. To the extent capture is simply a conclusory term that means too much influence based on some analytically unspecified baseline, one can as easily argue that the AGs are captured by plaintiffs' lawyers and public health advocates as one can argue that the state legislatures are captured by tobacco or other apparently injury-creating industries. In sum, the democracy claims of the critics and defenders of AGs' use of contingency fees are largely unhelpful.

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10. See generally, Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L.J. 795, 795 (1999) (stating "democracy is an essentially contested concept: there is not just one, but rather a plurality of competing conceptions of democracy, each of which emphasizes a different good commonly associated with democratic political regimes").

11. See generally, Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1539-1541 (1988) (arguing that the first principle of liberal republicanism is "deliberations in politics").

IV. CONFLICTS AND AGENCY COSTS: WHY THE STATE  
AG-PRIVATE LAWYER ALLIANCE IS PROBLEMATIC EVEN  
ASSUMING AWAY "DEMOCRACY" OBJECTIONS

Even if we assume that AGs' use of contingency fee lawyers was not stupid, corrupt, or undemocratic, it does not mean the practice is a good idea overall. The retention of contingency fee lawyers is problematic on two important grounds that have received little or no attention. First, the outside counsel that are most expert in suing injurious industries, and hence the most efficient for AGs to retain, invariably will have their loyalties divided between their private tort clients and their public clients. Second, the public interest that the AGs purportedly seek to advance in *parens patriae* litigation will not always be best served by maximizing the states' monetary relief. Sometimes public interest considerations dictate dropping litigation altogether or focusing on nonmonetary relief more than monetary relief. But contingency fee lawyers, perhaps unlike most government lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims, or some fraction of them, in return for nonmonetary concessions.

A. *The Private/Public Client Conflict*

Some of the contingency fee counsel retained by AGs in the tobacco litigation also represented alleged private victims of tobacco, either in individual or class action suits. This fact alone is not surprising. These lawyers were in the best position to persuade state officials to take on the tobacco litigation; indeed, it appears that the plaintiffs' lawyers who were litigating against tobacco companies in private law suits were instrumental in devising the theories behind the public litigation.<sup>12</sup> It would be natural for the AGs to be inclined to retain these lawyers, given their track record in aggressively pursuing difficult tort claims and their specific experience with and knowledge of tobacco. There is every reason to think that this general pattern—simultaneous or successive representation of private and public claims by contingency fee counsel—will remain in future litigation that follows the tobacco model, at least in the absence of some prohibition against such representation.

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12. See Panel Discussion: *The Tobacco Settlement: Practical Implications and The Future of Tort Law*, 67 Miss. L.J. 847, 876 (1998) (comments of Richard Scruggs).

Concurrent representation of private and public tort plaintiffs is troublesome because public and private interests are potentially adverse. Private individuals and the states have an interest in maximizing their monetary relief. To the extent that the money available from defendants is limited to a set amount that they are willing or able to pay, more money for individuals means less money for the states; and vice versa. Thus, the lawyers' representation of individuals will materially impede their representation of the states, and their representation of the states will materially impede their representation of individuals. The proposed national tobacco settlement itself suggests this conflict. That settlement was negotiated in part by lawyers who previously or concurrently represented private individuals, and it arguably gave short shrift to those claims (i.e., imposed substantial limits on them) while allocating very substantial monetary relief to the states.<sup>13</sup>

One solution to the client conflict problem would be a requirement that lawyers for the states be prohibited from concurrently representing private claimants. One problem with such a requirement, apart from substantial difficulties of meaningful enforcement, is that, to the extent the requirement would eliminate experienced plaintiffs' lawyers from the pool of potential lawyers for the states, it would undercut one of the principal rationales for the states' retention of outside counsel—their specialized expertise.

*B. Contingent Fee Lawyers as Imperfect Agents of the Public Interest*

The lawyer-client relationship entails an agency problem. The lawyer is supposed to advance the client's interests, but when the lawyer's and client's interests diverge, the lawyer may prefer his or her own interests. This conflict, of course, also exists in the context of government lawyers. The client of the AG and her staff are the people of the state and their interests. Putting aside the difficult task of giving content to the concept of public interest, the government lawyer's interests will not always coincide with it. For example, an ambitious AG might pursue a splashy but weak criminal case even though the public interest in the fair administration of justice would support dropping the case. Retention of outside contingency counsel by AGs creates the possibility for a second-order agency problem. Even when the AG is a faithful agent of the public interest, the contingency fee lawyers

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13. See Biancini, *supra* note 3, at 16 (stating "the tobacco company defendants and the states benefited from the Proposed Settlement, but other bound interests appear not to have gained any benefits in exchange for what they have forfeited").

may not be faithful agents of the public-regarding AG. In the context of *parens patriae* litigation along the tobacco model, contingency fee lawyers' pursuit of their own private interests may lead them to engage in one or more of three troublesome courses of conduct: (1) favoring monetary relief over nonmonetary relief, even when public interest considerations support the nonmonetary relief; (2) endeavoring to have the government plaintiffs grant the defendant nonmonetary benefits in return for monetary recovery for the plaintiffs, even when doing so is not supported by public interest considerations; and (3) colluding with defendants to structure a settlement that couples illusory<sup>14</sup> nonmonetary relief with the defendants' commitment to support the plaintiffs' lawyers' requests for large fees based on an overstated money equivalent valuation of the nonmonetary relief. The proposed federal and state tobacco settlements arguably are suggestive of the first two courses of conduct.

### 1. *Bias Toward Monetary Relief*

The contingency fee arrangement for paying lawyers, of course, gives lawyers a strong incentive to obtain some settlement or award in a case and to have that settlement or award consist of as much money as possible. While plaintiffs' lawyers can and sometimes do seek money fees based on nonmonetary relief,<sup>15</sup> their claims to large sums of money as fees are most straightforward when they have produced even larger sums of money for the plaintiffs. It seems likely that the political opposition and legal challenges to the private lawyers' fee claims in the tobacco litigation would have been more intense had those lawyers been unable to point to the millions of dollars the states were collecting as a result of the settlements. Government lawyers and outside hourly fee attorneys do not have the same financial incentives because the government lawyers and hourly fee lawyers are paid the same regardless of the outcome of the litigation, although the hourly fee lawyers may have an interest in elongating the litigation and, hence, building their hours.

Contingency fee lawyers' incentives to maximize monetary settlements are more problematic in *parens patriae* litigation than in traditional private tort litigation. In traditional private tort litigation, where a single plaintiff is represented by contingency fee counsel, there is every reason to assume that both the client and lawyers are concerned with monetary recovery. Individual tort victims presuma-

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14. That is, no real or modest cost to defendants.

15. See *infra* notes 17-18 and accompanying text.

bly want cash, and so do their lawyers. But in the context of *parens patriae* litigation by the state, the public interest is not always purely monetary. For example, when the litigation process reveals that the state's theory of liability is factually weak or incorrect, the public interest would seem to dictate that the state should drop its case rather than waste more social resources on the litigation and potentially secure an unjustified recovery. Similarly, when public harm would be better redressed by nonmonetary relief, the public interest would seem to dictate that the contingency fee lawyer should trade nonmonetary concessions by defendants in return for reductions in monetary demands. But it is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work. Similarly, because contingency fee lawyers will invariably have the easiest time collecting fees based on monetary relief for the plaintiffs, it is difficult to imagine them advocating reductions in the plaintiffs' monetary demands in return for nonmonetary concessions. At least arguably, the proposed national tobacco settlement and the subsequent individual state settlements negotiated by plaintiffs' lawyers and the tobacco industry conformed to this pattern. As viewed by a number of commentators, the settlements did offer the states a considerable sum of money and, thus, offered the lawyers a considerable sum as well. However, the nonmonetary relief afforded the states, such as tobacco advertising restrictions, was filled with loopholes.<sup>16</sup>

## 2. *Selling Government Benefits/Concessions*

Contingency fee lawyers may be strongly tempted to advocate that their public clients should grant the defendants nonmonetary favors or benefits in return for enhancements in the agreed-upon monetary relief and, hence, the contingency fee. A trade-off of government benefits for more settlement money may be in theory appropriate in some circumstances, but because nonmonetary government concessions cost the contingency fee lawyers nothing and generate additional fee money, the contingency fee lawyers may be disinclined to scrutinize the public interest merits of any particular trade-off. The potential for this sort of agency problem does not arise in traditional tort litigation,

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16. For a discussion of the advertising restrictions in the proposed federal and late state A6 settlement, see Thomas W. Merrill, *The Constitution and The Cathedral: Prohibiting Purchasing and Possibly Condemning Tobacco Advertising*, 93 N.W. U. L. REV. 1143, 1143-1204 (1999). See also, Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive - Based Regulation*, 107 YALE L. J. 1163, 1178-81 (1998) (emphasizing the ineffectiveness of the restrictions on the tobacco industry contained in the proposed national settlement).

where plaintiffs simply do not have an array of nonmonetary benefits to offer the defendant for money, except perhaps settlement confidentiality and broadly worded releases from liability. By contrast, most firms that might become involved in *parens patriae* litigation as defendants could be helped in numerous ways by an array of government actions or promised nonaction. Notably, the proposed federal tobacco settlement, had it been finalized in the form of federal legislation, would have conferred substantial nonmonetary protections upon the industry, such as limitations on future FDA regulation and effective protection against new entrants/competitors. That is, at least in part, why Congress quickly rejected the agreement as inadequate. The subsequent settlements between the states and the tobacco industry arguably aid the major tobacco firms by creating de facto barriers to entry and competition by lesser-known brands and manufacturers of generic cigarettes. Furthermore, there is every reason to believe that is precisely what the major companies intended and why, in part, they were willing to enter into the settlements.<sup>17</sup>

### 3. Illusory Nonmonetary Relief as a Basis for Large Fees

The use of contingency fees in *parens patriae* litigation also could lead contingency fee lawyers to favor illusory, non-pecuniary relief over both meaningful, non-pecuniary relief and monetary relief. In a number of consumer fraud class actions, the lawyers negotiated deals, which some courts approved, in which class members received coupons of little real economic value, and the plaintiffs' lawyers received millions of dollars calculated based on the purely nominal value of the coupons. This kind of collusion, using essentially fictitious non-pecuniary relief, is also, some allege, characteristic of settlements in securities derivative litigation. One could imagine the problem of illusory or overvalued non-pecuniary relief also occurring in the *parens patriae* context. Imagine, for example, that defendant gunmakers agree to fund a study of violence with guns and a public program to advertise the hazards of guns. Also imagine that such relief actually will not

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17. See David Dana & Susan P. Koniak, *Bargaining In The Shadow of Democracy*, 148 U. PA. L. REV. 473, 473-523 (1999) (criticizing FDA provisions in the proposed tobacco settlement); *Distributors: Tobacco Deal Anti-competitive*, 18 NO. 1 PROD. LIAB. L & STRATEGY 1 (1999) (stating "A group of attorneys around the country is mounting a legal assault on the . . . [AGs'] tobacco settlement, claiming that it violates antitrust laws . . . . The major companies struck a deal, the plaintiffs say, to settle the case in exchange for the government's helping to protect their dominance of the market by controlling prices and market share"); Ian Ayres, *Using Tort Settlements To Cartelize*, 34 VAL. U. L. REV. 595, 599 (2000) (criticizing the tobacco settlements as blatantly anti-competitive but arguing that they are likely lawful under current federal antitrust doctrine).

cost the gun companies much, either in out-of-pocket expenses or lost sales, but collusively, the plaintiffs' lawyers and defendants agree to value the relief at 400 million dollars, find experts to support the valuation, and cooperate in seeking approval of a twenty-five percent, 100 million dollar fee payment by the gun companies directly to the lawyers. To my knowledge, there is no evidence of such questionable non-pecuniary relief being proposed as a basis for real monetary fees in *parens patriae* litigation, but it is notable that some of the state settlement agreements in tobacco litigation reference the possibility of in-kind or nonmonetary settlements and commit the parties to seek compensation for the plaintiffs' lawyers based on that value.<sup>18</sup>

#### 4. *Limiting Agency Problems*

One possible response to the special agency problems presented by the use of contingency fee lawyers would be to limit contingency fee *parens patriae* litigation only to monetary issues. Settlements could not include nonmonetary provisions, such as limits on future state or federal regulation or industry-financed studies along the lines of the previous gun hypothetical. A "cash only" limitation would address concerns about the "sale" of unjustified, real nonmonetary benefits to industries as part of settlements and the collusive selection of illusory nonmonetary relief for the public as a basis for large private fee awards. Such a limitation, however, would not address the case in which public interest considerations arguably dictate trade-offs between monetary and nonmonetary defendant or government/plaintiff concessions; for such trade-offs to occur, the litigation cannot be limited to money.

Another possible response to agency problems would be to maximize the active supervision of contingency fee lawyers by AGs and their staff and, in particular, their supervision of strategy sessions and settlement talks. But effective supervision requires resources, such as free staff time or training, and, as we have seen, one of the principal rationales for the retention of contingency fee lawyers in the first

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18. See, e.g., Engagement and Contingency Agreement between State of Iowa and Ness, Motley, provision II F (stating "In the event the litigation is resolved, by settlement or judgments, under terms involving the provisions of goods, services or any other "in-kind" payments, the parties here do agree to seek, as part of any such settlement, compensation for the Special Counsel equivalent to the contingency fee and expenses to which the Special Counsel fee would otherwise be entitled under this agreement.") (on file with author). Other agreements seem to limit private attorney recovery to a percentage of the state's monetary recovery. See, e.g., State of Minnesota, Office of the Attorney General, Special Attorney appointment. Exh. B, no.2 (stating "The contingency upon which compensation is to be paid is the recovery for The State of monies . . .") (on file with author).

place is the inability of AGs to secure resources from the legislature. Moreover, as long as contingency fee lawyers lead the litigation, these lawyers will invariably control the development and presentation of the “facts” to the AGs and their staff. Thus, even when the AGs are interested in securing the public interest, rather than focusing on an exclusive goal of obtaining the most amount of money, and when they devote resources to active supervision of the litigation, the AGs and their staff may lack the necessary information to shape litigation outcomes.

To the extent AG supervision is likely to be effective, it is most likely to be so in addressing the third agency problem, which consists of collusive settlements involving illusory nonmonetary relief. The AGs, whatever their limitations as supervisors, certainly are in a better position to review settlements for illusory nonmonetary relief than the members of consumer classes who are awarded valueless or low value coupons. Almost all of the members, in fact, are either unaware of the litigation altogether or have too small of a stake to invest in effective monitoring. Moreover, the courts justify the coupon cases by the fact that transactions costs, such as check processing costs, sometimes make it hard to devise workable monetary relief in mass tort cases involving small individual damage claims. These transaction costs arguments do not apply in, and hence would not justify court approval of, *parens patriae* cases involving large aggregate monetary claims by the states and other government actors. Thus, even if AGs themselves unwittingly or purposefully supported collusive settlements involving illusory nonmonetary relief, the courts might prevent such settlements from being finalized and implemented.

## V. CONCLUSION

The implications of *parens patriae* litigation, particularly the role of contingency fee counsel in such litigation, are not yet clear. But there is good reason to believe that AGs and contingency fee lawyers will continue to build upon the tobacco model in other contexts because the basic impulse behind the model, the AGs’ desire to circumvent legislative inaction and hostility to funding litigation vis-à-vis powerful, but on some level, unpopular companies and firms, remains. Furthermore, there remain difficult problems regarding potential conflicts of interest between private and public claimants, AGs’ personal interest and the public interest, and perhaps most important, contingency fee lawyers’ personal interest and the public interest, even when AGs are presumed to be committed to pursuing public, rather than personal, interests. As the preceding discussion suggests, the conflict/

agency issues presented by *parens patriae* contingency fee litigation may be even more complex than those entailed in private mass tort/class action litigation.