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Alabama AG Uses Contingency Fee Agreements to Sue Drug Manufacturers

By E. Berton Spence

Alabama Attorney General Troy King is one of numerous state attorneys general who has turned to the private, contingency-fee plaintiff's bar to prosecute actions on behalf of the state.

In 2005, King filed suit against over 70 drug makers, alleging charges in excess of the "average wholesale price" (AWP) index Medicaid agencies generally rely on to reimburse pharmacists who dispense prescription drugs to eligible participants.[1] As of this writing, the latest case to go to trial is one against Watson Pharmaceuticals.[2] In this and the other cases, Alabama is represented by noted plaintiff's counsel Jere Beasley of the Beasley, Allen firm in Montgomery, Alabama.

With Beasley at the helm, Alabama has collected for its general fund well over $100 million in settlements, and has scored verdicts topping $350 million—though all verdicts have been appealed. According to an Associated Press report on July 3, 2008, by writer Bob Johnson (who has followed the AWP litigation with numerous stories), Beasley predicted that the total amount in verdicts and settlements could exceed $1 billion when all the actions are concluded.

According to a May 29, 2009 Associated Press report, six pharmaceutical companies, Aventis, Schering-Plough, Abbot, TEVA, Forest and Baxter, have all entered into settlements with Alabama. These settlement amounts are, however, protected by confidentiality agreements despite the fact that the plaintiff is a sovereign entity and the funds collected are going into the state's general fund.

The Beasley firm obtained a $160 million judgment—reduced from a larger verdict—against Astra-Zeneca, $120 million of which was for punitive damages.

According to an Associated Press story by Desiree Hunter, dated July 9, 2009, Beasley asked the jury in closing arguments during the Watson case to award approximately $23 million in compensatory damages, and "three times or five times that amount as the punitive damage award" on the basis of the claim that Watson had been cheating the state for years by charging more than the AWP. The State of Alabama enacted tort reforms beginning in the mid-1980s, and has a punitive damages statute (Ala. Code § 6-11-21) that limits awards to three times the compensatory damages; part of that statute precludes juries being told of its existence. Another part of that statute precludes any punitive award going to the state, though that section was written into the law in order to prevent the state from capturing punitive damages recoveries made by private litigants. Thus, the State of Alabama is free to ask the jury to award more in punitive damages than an Alabama appellate court can legally affirm.

Attorneys for Watson argued that the company never promised to abide by the AWP and never hid that fact from the state.

According to a January 28, 2005 article in *The Birmingham News*, written by Kim Chandler, these cases were originally assigned by the state to the Hand, Arendall firm, primarily considered a defense firm, on a 14% contingency arrangement. Chandler was unable to find any information regarding the switch to the Beasley firm, or of the specific arrangement between Beasley, Allen and the State of Alabama. According to a June 14, 2007 article by Nora Lockwood

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Tooher in the *Oklahoma City Journal Record*, Beasley partner Dee Miles, head of the firm's consumer fraud group, said the firm has used its position on the Alabama cases to land assignments from AGs in Alaska, Hawaii, Mississippi and South Carolina.

Tooher quoted Miles as stating that the Beasley firm was the architect of the plan to sue the drug companies: "[w]e initially got involved in the Alabama case because that's where we're from," Miles said. "We read about it, and started researching the law and our Medicaid program and asked our attorney general and governor if we could investigate for them. We did, and we found there were pricing discrepancies."

Numerous state AGs have brought such actions. According to Tooher, all of them, except Texas, have hired outside firms, usually on contingency contracts.

The AWP litigation is hardly the first instance of state AGs partnering with contingency-fee firms. With roots in the tobacco litigation, this practice drew much publicity during the "public nuisance" cases leveled at numerous product manufacturers, most recently the lead paint industry. The Rhode Island Supreme Court, in *State of Rhode Island v. Lead Industries Ass'n, Inc., et al.*,[3] dampened expectations of success in this area when it substantively ruled that "public nuisance" theories were inapplicable in that context, but in that opinion it also ruled that Rhode Island Attorney General Patrick Lynch was within his authority in engaging contingency-fee counsel so long as he remained "in control" of the litigation.

According to John O'Brien, writing on October 3, 2008 for *Legal Newsline*, fifteen state attorneys general (and one from the Territory of Guam) supported Lynch on that point: Vermont's William Sorrell; Maine's Steven Rowe; Arkansas' Dustin McDaniel; New Mexico's Gary King; Delaware's Beau Biden;[4] Oklahoma's Drew Edmondson; Florida's Bill McCollum; Oregon's Hardy Myers; Guam's Alicia Limtiaco; Tennessee's Robert Cooper; Hawaii's Mark Bennett; Utah's Mark Shurtleff; Kentucky's Jack Conway; West Virginia's Darrell McGraw; Nevada's Catherine Cortez Masto; and then-Ohio Attorney General Marc Dann.

There have been criticisms of this practice, usually falling into three categories: (1) that in hiring contingency-fee attorneys, the attorneys general are bypassing any need for legislative appropriation of funds for prosecuting the suits, effectively bypassing any check or balance on their power; (2) that handing out the chance for lucrative fee awards to private attorneys is likely to be rewarded by campaign contributions to the AGs making the assignments; and (3) that by handing over strategy and effective control of the cases to attorneys who stand to make more money based on larger verdicts and settlements, public judgment is replaced by simple maximization of personal reward. Indeed, in *Clancy v. Superior Court*,[5] California announced a rule against such contingency-fee arrangements based on public policy concerns.

A former Alabama Attorney General, Bill Pryor (now a judge on the U.S. Court of Appeals for the 11th Circuit), once expressed concern that "[t]hese contracts... create the potential for outrageous windfalls or even outright corruption for political supporters of the officials who negotiated the contracts." The next wave of settlements might further intensify debate over this issue.

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Endnotes

1 The AWP index has been phased out and will not be used for Medicaid reimbursements going forward.

2 On July 13, 2009, a mistrial was declared based on a hung jury. The case was then expected to be retried in September of 2009.

3 No. 2004-63-M.P.; No. 2006-158-Appeal; No. 2007-121-Appeal, 2008 WL 2605396 (R.I. July 1, 2008)

4 Son of U.S. Vice President Joe Biden.

5 (Cal. 1985).

6 *See* Andrew Spiropoulos, *State AGs Hiring Private Attorneys to Assist in Government Lawsuits*, Jan. 10, 2008, *available at* http://www.fed-soc.org/publications/pubID.473/pub_detail.asp.