

## State Attorney General Class Actions Raise Concerns

*Monday, Oct 08, 2007* --- The fall of plaintiffs' class action lawyer William S. Lerach, who recently pled guilty to conspiracy to obstruct justice, reveals the irony that underlies most class action lawsuits. The lawyers who bring these cases profess to serve as "private attorneys general"—representing average Americans who want justice from bad corporations.

But it turns out that aggrieved clients did not hire Mr. Lerach to sue companies that treated them badly. This lawyer crafted those grievances himself, and then filed lawsuits in the name of stockholders who had previously sold him the right to sue on their behalf.

Mr. Lerach's demise is the latest step in a gradual reining-in of lawyers whose business model exploits business controversies by crafting a class action lawsuit, finding a plaintiff in whose name it can be filed, using the lawsuit to make life miserable for the corporate target, and finally agreeing to go away in exchange for a large fee award and token "relief" for their clients.

The Class Action Fairness Act of 2005 has made it harder for plaintiffs' lawyers to do this. Also, many judges are more rigorously scrutinizing class actions, and throwing more bad ones out.

The plaintiffs' bar is good at adopting new tactics when old ones wear out. As traditional class actions become a less reliable money machine, a new tactic for using litigation to attack business interests has emerged. Just as Mr. Lerach rented the names of individual stockholders to advance his litigation agenda, other class action lawyers are borrowing the prestige and power of some state attorneys general to pursue theirs.

The trend began in the 1990s, when several attorneys general filed lawsuits against the tobacco companies. Settlements generated multibillion dollar awards for the states, huge fees for the private lawyers who represented them, and political renown for the sponsoring attorneys general.

New York Governor (and former attorney general) Eliot Spitzer furthered the trend with his wave of enforcement actions against brokerage and insurance firms. The success of the tactic apparent, state attorneys general increasingly are rushing to file consumer fraud lawsuits against deep-pocketed and/or unpopular corporations.

The creators of these nominally governmental enforcement actions often are private class action lawyers. They think up the lawsuit and pitch the state attorneys generals to hire them to bring it on a contingency fee basis. It's not a bad tactic if you are a class action lawyer looking to inflict maximum

discomfort upon targeted corporations.

You do not have to persuade the judge to certify a class and put you in charge of it because you already hold the attorney general's power to sue on behalf of the state's citizens. The civil fraud and consumer protection laws that your attorney general client is uniquely authorized to invoke often establish vague standards of misconduct, making it easy for you to keep the case going all the way to trial.

Those laws also let you automatically collect a sizable fine or penalty if you prove even a technical violation of the law, so you need not necessarily prove that the defendant's conduct caused any harm. You will probably get to litigate the case in a state court, before an elected or appointed judge who has many incentives to favor the Attorney General of his state over an out-of-state corporation.

Best of all, when you ask the jury to award your client vast sums of money, you are not a greedy trial lawyer, but a "Special Assistant Attorney General" deputized to do justice for the citizenry.

Combining the profit-motivated tenaciousness of the private plaintiffs' bar with the immense legal and political power of state attorneys' general can lead to abuse. Many state law enforcement officials are now investing their prestige in lawsuits that, upon closer scrutiny, turn out to be the same old strike suits that have diminished public respect for the legal profession. Like Chicken Little, law enforcement officials who cry "wolf" too often eventually undermine their effectiveness.

Many private plaintiff/state attorney general lawsuits attack business activities that are, and should be, within the exclusive jurisdiction of federal regulatory agencies.

For example, if a federal regulatory agency has extensively studied the risks and benefits of a prescription drug and approved it for sale in the United States, it is unfair to the manufacturer and bad for consumers to let myriad state attorneys' general second-guess that federal regulatory decision, and punish the manufacturer for implementing it, by contending that selling the approved drug violates state consumer fraud laws.

Further, some of these lawsuits attempt to punish as "fraudulent" statements made by business that are protected from government prosecution under the First Amendment.

These lawsuits also raise troubling ethical issues. The private lawyers whom elected attorneys general hire to represent the state often are major financial contributors to their campaigns—a clear invitation to corruption.

Those private attorneys thereafter purport to act in the "public interest" as quasi-state law enforcement officers, but because they work under a contingency fee arrangement that promises them a share of any monetary

recovery, their conduct is really driven by their financial interests. The terms under which attorneys general hire private counsel to bring these cases often disregard state laws that limit the attorney general's budget and place exclusive control over the appropriation of state funds in the legislature.

State attorney generals have a sworn responsibility to wield their statutory authority in the public interest. Although protecting citizens from fraud surely serves this end, the increasingly common habit of hiring members of the plaintiff's bar to sue in the name of the state does not.

"Private attorneys general" are a bad idea. Profit-motivated trial lawyers should not be allowed to pretend they are cops. And real law enforcement officials should not lend their badges to vigilantes.

--By Brian Anderson and Amber Taylor, O'Melveny & Myers LLP

*Brian Anderson is a partner and Amber Taylor is an associate at O'Melveny & Myers LLP in Washington, D.C. They are both members of the firm's class actions, mass tort and aggregated litigation practice group, and regularly defend clients against class actions and private attorney general actions. O'Melveny & Myers LLP has more than 1,000 lawyers in 13 offices worldwide.*