

## TOBACCO LEGAL FEES

1. A metaphor for the degree of difficulty confronting the plaintiff's attorneys in Massachusetts, at the commencement of the tobacco litigation, is Lindberg planning to fly solo across the Atlantic. No one had ever done it and those that had tried died. Flying across the ocean seemed an insurmountable obstacle.

In December 1995, the same could be said for the idea of suing the tobacco companies for producing an inherently dangerous product. No one had collected a dime from the tobacco companies by way of a judgement or a settlement; and those that had tried died by an excruciating process of bleeding time and money.

The combined assets and cash flow of the major international tobacco companies were greater than the GNP of most countries in the world. The companies could outspend you, out litigate you and outwait you. No one had been able to figure out had to assemble a competing critical mass of talent and money "to take them on."

2. The present legal dispute between the private attorneys and the State is the amount of the contingency fee. The written contract provides that the legal fee shall be 25% of the amount recovered by way of settlement or judgment. The actual percentage amount in dispute is 15.6%. There is a set-off from the 25% in the contract for any money awarded by an arbitration panel and paid by the tobacco companies. The amount awarded by the arbitration panel for legal fees was \$775,000,000 payable over twenty five years; it equals 9.4% of the settlement money to be paid by the tobacco companies to the State over the same twenty five year period. The contingency fee percentage in dispute is actually 15.4% (25% minus 9.4% set-off = 15.4%). See the Master Settlement Agreement, Section 5. "No Effect on State outside Counsel's Fee Contract".
3. Reasons to uphold the contract terms:
  - The lawyers took a great risk: unlimited time, money and diversion of resources from other business. They would be paid only if they won.
  - There was no financial risk to Commonwealth. There was no need to appropriate tax money to fund a hopeless cause or to convince voters that the money for lawyers was being wisely spent. The lawsuit had

substantial obstacles and uncertainty. No one knew how much the case expenses would be or how long the litigation would take. The attorneys agreed to unlimited legal representation for an unlimited period of time. They also agreed to incur unlimited case expenses. If the Commonwealth lost its case it would have risked nothing.

- The contract is a written promise. This is a case of promises and what a promise means: what a promise is worth, what your word is worth, what a handshake is worth, what a contract is worth. Because that's what a contract is-a promise.

The contingency fee agreement was a meeting of the minds by sophisticated parties in an arm's length negotiation after all sides weighed the risks and the benefits. The Commonwealth was represented by the Attorney General-its highest law enforcement officer-after consultation with the Governor and the House and Senate leadership. The House and Senate enacted special legislation to permit the litigation to proceed. At the time, the agreement was heralded as a great solution to an intractable problem.

- A contingency fee agreement is a normal and appropriate contract to conduct personal injury litigation. It is the law in the Commonwealth and the current practice in the 50 states. The contract legal fee is based upon performance. The only reason it is being challenged, in this instance, is because the attorneys were *too successful in the recovery they obtained for the Commonwealth*. The larger the recovery the larger the contingency fee for the attorneys. If the recovery had only been one hundred million dollars instead of several billions it is unlikely that there would be a dispute.

4. The payment of the tobacco money to the Commonwealth will be over a 25-year period; and the legal fees will be paid on a periodic basis over the same 25-year period. The present value of the money is significantly less than the value of the money paid out over its 25 years.

5. What was the mindset of the Commonwealth's representative, Attorney General Scott Harshbarger, at the commencement of the litigation in December 1995? At the Statehouse library archives we have written documentation by him concerning his thoughts at the time. The following are excerpts from press releases in December 1995 and March 1996.
  - a. "The people of Massachusetts should know that this lawsuit is the start of what I expect will be a difficult fight against formidable and well-financed opponents. The tobacco industry has billions of dollars with which to wage an unrelenting, divisive and mean-spirited counterattack in the courtroom and the media. The suit will take years to resolve."
  - b. Referring to the State's legal representation: "No taxpayer monies will be used to underwrite litigation expenses. All of the private firms will handle the case on a contingent fee basis, and will be paid from the proceeds of any judgment or settlement. The firms will advance the funds necessary to pay the costs of the litigation."
  - c. "The other lawyers we have assembled will be paid only if the Commonwealth prevails. We have put a cap of 25 percent of the recovery, substantially below the standard 33 percent contingency fee."
  - d. "A case of this magnitude requires extensive legal resources. If we were to handle this case on our own, it would take the entire legal staff of the Attorney General's Office of Consumer Protection and Antitrust Division plus additional staff. Other important cases would grind to a halt. By appointing special counsel to work with us, we can continue to maintain our ongoing consumer and antitrust enforcement initiatives and bring this case... These lawyers and the law firms have great expertise in complex challenging litigation of this kind. We have assembled the best possible team to handle this type of case."
6. The precedent for the future legal needs of the Commonwealth is important. If the State reneges on its contract it will lose the benefit of availing itself of similar opportunities in the future when it is next confronted with an extraordinary public policy issue. The State's good-faith will be suspect because politicians did not keep their word in a binding contract. They tried to demagogue the issue to the public instead of performing according to the contract terms.

If hypothetically 10 years from now a terrible negligent mistake is made by the bioengineering industry, the consequences of which alter the healthy genes of millions of citizens, the ability of the Commonwealth to enter into a contingency fee agreement with private attorneys will be questionable. This dispute will have consequences for generations to come.

7. There is utility and common sense in upholding a fairly negotiated contract. Every homeowner who has sold his house for appreciably more than what he paid for it understands this concept. No one wants a situation where a purchaser can say to the seller, "I want my money back because I just saw a house down the street for less money." When we sell a house we also typically pay the broker a percentage of the purchase price: the higher the selling price the bigger the broker's commission. We hope, as a seller, that the broker gets the very highest price for the house because we know that what is financially beneficial to her is also good for us. Incentives work.
8. The Baltimore Sun Newspaper, on June 19, 2001, had an editorial supporting the contingency fee agreement of Maryland in the tobacco litigation. Peter Angelos and his law firm successfully represented the State of Maryland. "The State should pay Angelos the fee he fully deserves. It is easy to be critical of the legal fee Peter G. Angelos earned in the tobacco litigation...However, such critics conveniently forget the enormous risks that Mr. Angelos assumed when he undertook the case. Verdicts against tobacco companies now seem commonplace. But when Mr. Angelos agreed to take on the tobacco companies, the industry had never lost or settled a case."
9. This contract dispute is not unique to Massachusetts. There have been approximately half a dozen states that have confronted this issue. For example, in Texas, a Federal District Court judge wrote an opinion upholding the contingency fee agreement of Texas law firms in the tobacco litigation. The parties ultimately settled their differences.

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