Michigan Law Review

Volume 121 | Issue 1

2022

Public Client Contingency Fee Contracts as Obligation

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https://doi.org/10.36644/mlr.121.1.public

COMMENT

PUBLIC CLIENT CONTINGENCY FEE CONTRACTS AS OBLIGATION

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Contingency fee contracts predicate an attorney's compensation on the outcome of a case. Such contracts are widely accepted when used in civil litigation by private plaintiffs who might not otherwise be able to afford legal representation. However, such arrangements are controversial when government plaintiffs like attorneys general and local governments retain private lawyers to litigate on behalf of the public in return for a percentage of any recovery from the lawsuit. Some commentators praise such public client contingency fee contracts, which have become commonplace, as an efficient way to achieve justice. Critics, however, view them as corrupt, undemocratic, and unethical.

This Comment contributes to this debate by arguing that public client contingency fee contracts are not only permissible, as some have argued, but that certain legal doctrines obligate government entities to form these contracts. First, this Comment contends that the principle that government litigators have a special duty to "seek justice" obligates government actors to enter into public client contingency fee contracts. The obligation to form such contracts is triggered when civil justice requires enforcement, but constraints prevent government attorneys from pursuing litigation. This contention undermines critics' claim that the "seek justice" principle means public client contingency fee contracts are impermissible. Second, this Comment argues that the public trust doctrine also obliges government entities to form public client contingency fee contracts in some instances. These arguments undermine attacks on public client contingency fee contracts and demonstrate the existence of a heretofore ignored obligation in public civil litigation.

TABLE OF CONTENTS

* J.D. Candidate, May 2023, University of Michigan Law School. I am indebted to Professor Maureen Carroll for her guidance and feedback throughout the writing process. Thanks, as well, to the Notes Editors of Volume 120 of the *Michigan Law Review*, in particular Bailey Tulloch, for helpful edits and comments, as well as to the entire *MLR* community for their work on this piece. I am also thankful to Professor Eli Savit for discussing these issues with me. As always, I am grateful to Italia Patti—for her thoughtful feedback on my scholarship and for her support and encouragement. This Comment is dedicated to Rosa.

 doi:10.36644/mlr.121.1.public

INTRODUCTION

Thousands of plaintiffs, including states, counties, and cities, have joined the sprawling litigation against companies that manufactured, distributed, and sold opioids, seeking damages for a crisis that has caused hundreds of

thousands of deaths.[1] Many of the government entities bringing suit have retained private counsel on a contingency fee basis.[2] Some critics decry governments' use of such contingency fee contracts as creating conflicts of interest, duplicative litigation, and obstacles to settlement, among other things.[3] Others suggest these contracts empower under-resourced governments to bring complicated lawsuits that are in the public interest.[4] At least since the tobacco litigation of the 1990s, where government officials also relied upon contingency fee agreements with private attorneys, such arrangements have been controversial.[5]

Public client contingency fee contracts, as this Comment will term them, involve private attorneys agreeing with public officials like state attorneys general to litigate on behalf of the public in exchange for payment.[6] As with many contingency fee agreements, their payment is usually a percentage of any monetary relief these private attorneys recover during the litigation, though government actors can cap or otherwise regulate such fee arrangements.[7]

Public client contingency fee contracts have been the subject of legal and political dispute. For instance, legislators in Minnesota unsuccessfully tried to ban these agreements when an outside firm earned $125 million after recovering $900 million for the state in a water contamination lawsuit.[8] Similarly, the West Virginia attorney general unsuccessfully litigated against private lawyers hired by his predecessor in an attempt to reduce their contingency fees.[9] At the federal level, President George W. Bush imposed a ban on public

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1. Valerie Bauman, States, Cities Eye $26 Billion Deal: Opioid Litigation Explained, Bloomberg L. (July 26, 2021, 5:31 AM), https://news.bloomberglaw.com/health-law-and-business/states-cities-eye-26-billion-deal-opioid-litigation-explained [perma.cc/JF5V-Y6XM].

2. *See* Jan Hoffman, *Opioid Settlement Talks Stumble with Trial Set for Monday*, N.Y. TIMES (Oct. 18, 2019), https://www.nytimes.com/2019/10/18/health/opioids-settlement-talks.html [perma.cc/PFJ4-YG9S].

3. *See* Steven M. Sellers, *U.S. Chamber Warns That Cities Are Litigating Too Much (1)*, BLOOMBERG L. (Mar. 7, 2019, 10:45 AM), https://news.bloomberglaw.com/us-law-week/u-s-chamber-warns-that-cities-are-litigating-too-much-1 [perma.cc/66QS-LP6C].

4. *Id.*

5. Barry Meier, *Lawyers in Early Tobacco Suits to Get $8 Billion*, N.Y. TIMES (Dec. 12, 1998), https://www.nytimes.com/1998/12/12/us/lawyers-in-early-tobacco-suits-to-get-8-billion.html [perma.cc/J798-AYVG] (quoting several critics of fees paid to private attorneys in public tobacco litigation).

6. David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 315–16 (2001).

7. *See id.* at 321.

8. Eric Rasmussen & Joe Augustine, *AG Did Not Fully Disclose Campaign Contributions from Firm Tapped to Lead Fight Against JUUL*, KSTP (Jan. 10, 2022, 3:12 PM), https://kstp.com/5-investigates/ag-did-not-fully-disclose-campaign-contributions-from-firm-tapped-to-lead-fight-against-juul [perma.cc/H2VE-ZSW4].

9. Eric Eyre, *Morrisey's Office Turns Against Its Appointed Lawyers in Fee Disputes*, CHARLESTON GAZETTE-MAIL (Nov. 21, 2017), https://www.wvgazettemail.com/news/morrisey-s-office-turns-against-its-appointed-lawyers-in-fee-disputes/article_65be4315-eeee-5144-9f65-422c4dd8ac08.html [perma.cc/QX8M-XGXC].

client contingency fee agreements via executive order.[10] More recently, the Supreme Court denied certiorari when an opioid manufacturer objected to a lawsuit by New Hampshire because the state had relied on private contingency fee lawyers.[11]

Critics attack public client contingency fee contracts as undemocratic, unethical, contrary to the separation of powers, abusive, and threatening to public authority, among other things.[12] By contrast, proponents hail them as crucial to achieving civil justice in an era of hostility toward litigation on behalf of plaintiffs.[13] This Comment goes beyond previous defenses of public client contingency fee contracts: it argues not just that they are permissible but that, in some circumstances, attorneys general and other public officials are actually ethically obligated to form them.

One major criticism of such agreements rests on a comparison between the ethical obligations of government civil litigators and those of criminal prosecutors.[14] It is a fixed point in legal ethics that criminal prosecution for profit is unethical.[15] Some argue the prohibition on prosecution for profit is based on criminal prosecutors' broader duty to "seek justice." Specifically, they contend that these obligations, which demand that criminal prosecutors embody neutrality, extend to government civil litigators as well.[16] Empowering a private attorney to earn a contingency fee by winning monetary relief on behalf of the government in civil litigation undermines that neutrality, they contend.[17] Critics worry profit-driven motivations may warp a private attorney's decisionmaking, leading them to deviate from making the kind of litigation choices someone representing the public is obliged to make.[18] In short, critics fear that private attorneys will not honor—or at least will not appear to honor—the obligation to "seek justice" that arguably applies to government attorneys.[19]

This argument cuts in both directions, however. As this Comment will explain, the "seek justice" principle relied upon by critics to condemn public

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10. Exec. Order No. 13,433, 72 Fed. Reg. 28,441 (May 16, 2007).

11. State v. Actavis Pharma, Inc., 167 A.3d 1277 (N.H. 2017), *cert. denied*, 138 S. Ct. 1261 (2018).

12. *See, e.g.*, Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77 (2010); Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 576–78 (2016).

13. *See, e.g.*, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U. CHI. L. REV. 623, 668–70 (2012).

14. *See, e.g.*, Redish, *supra* note 12, at 89–90.

15. *See, e.g.*, Price v. Caperton, 62 Ky. (1 Duv.) 207, 208 (1864); State v. Lead Indus. Ass'n, 951 A.2d 428, 475 n.48 (R.I. 2008); Peter Lushing, *The Fall and Rise of the Criminal Contingent Fee*, 82 J. CRIM. L. & CRIMINOLOGY 498, 500 (1991).

16. Leah Godesky, Note, *State Attorneys General and Contingency Fee Arrangements: An Affront to the Neutrality Doctrine?*, 42 COLUM. J.L. & SOC. PROBS. 587, 589–90 (2009).

17. Redish, *supra* note 12, at 102–05.

18. *Id.* at 105.

19. *See, e.g.*, People *ex rel.* Clancy v. Superior Ct., 705 P.2d 347, 351–53 (Cal. 1985).

client contingency fee contracts, as well as other doctrines, actually creates an obligation to enact these contracts.[20] Criminal prosecutors' obligations involve exercising discretion about when not to bring cases, as well as when to bring them, depending on what justice demands.[21] If the same obligation to "seek justice" applies in both criminal and civil enforcement, government attorneys are similarly obligated to bring some civil enforcement actions.[22] Further, an additional ground affirmatively obligates public officials to bring suit in certain circumstances: the public trust doctrine.[23] Under this doctrine, the state holds certain resources in trust on behalf of the public and is sometimes obligated to sue in order to protect them.[24]

Despite these affirmative requirements to file some suits, resource constraints prevent government attorneys from bringing every required civil enforcement action.[25] In the nonideal, actual world in which civil enforcement operates, public client contingency fee contracts are sometimes the only realistically available route to discharging their obligations.[26] As a result, in cases where civil justice requires enforcement, but resource constraints prevent government attorneys from pursuing litigation, contracting with private attorneys can become an ethical obligation.[27]

Commentators do not universally agree that the "seek justice" principle applies to public civil litigation, and this Comment takes no position on this question.[28] Instead, by pointing to the "seek justice" principle and the public trust doctrine, it draws out the affirmative obligation to bring some public litigation, which, in turn, creates an obligation to form public client contingency fee contracts. Although a full theory of when an obligation to form such contracts is triggered is beyond the scope of this Comment, these arguments demonstrate the existence of a previously ignored obligation in public civil litigation contexts.

This Comment argues that when government officials are obliged to bring civil suits but lack the resources to do so, they have an affirmative obligation to form public client contingency fee contracts. Part I provides historical background about contingency fee contracts, the potential benefits such arrangements offer to public clients and their constituencies, and some of the risks

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20. *See* discussion *infra* Sections III.A–C.

21. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 619–20 (1999).

22. *See* discussion *infra* Sections III.A–B.

23. *See* discussion *infra* Section III.D.

24. *See* discussion *infra* Section III.D.

25. *See* Gilles & Friedman, *supra* note 13, at 668–69.

26. *See* discussion *infra* Section III.C.

27. *See* discussion *infra* Section III.C.

28. For one argument against applying the "seek justice" principle to public civil litigation, see Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991).

that have prompted calls to reform or limit public client contingency fee contracts. Part II explains why some commentators have argued that government litigators have an ethical obligation to "seek justice" that is inconsistent with the formation of public client contingency fee contracts. Part III counters these criticisms, arguing that, at least in some circumstances, the "seek justice" principle and the public trust doctrine indicate that public officials have an affirmative obligation to form public client contingency fee contracts.

I. PUBLIC CLIENT CONTINGENCY FEE CONTRACTS

This Part introduces public client contingency fee contracts and explains their general role in litigation, as well as some of the arguments that have been made for and against reliance upon them in the specific context of government civil litigation. Section I.A provides historical background on the role of contingency fee contracts and the reasons public clients have relied on them and viewed them as beneficial. Section I.B presents some critics' concerns about public client contingency fee contracts and evaluates the responses and reforms those criticisms have prompted.

A. *Public Client Contingency Fee Contracts and Their Advantages*

Public client contingency fee arrangements emerge from the broader usage of contingency fees in legal practice. Once controversial, contingency fees are now used widely in civil contexts—including in suits brought by public clients like attorneys general and city governments—but are banned in criminal prosecutions.[29]

1. The Evolution of the Legal Community's Attitude toward Contingency Fees

While English common law prohibited contingency fee contracts, categorizing them as illicit *champerty*, American courts ultimately accepted them in the nineteenth century as a legitimate way for clients without resources to retain civil representation.[30] Under contingency fee agreements, the client pays nothing unless their attorney secures a recovery through settlement or litigation; their lawyer effectively finances the suit and assumes the risk that it could

29. *See* Godesky, *supra* note 16, at 587–88; Lushing, *supra* note 15, at 500.

30. Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231, 231–34, 259 (1998). The shift away from English skepticism of contingency fee arrangements may have resulted from distinctive American political and religious dynamics. *Id.* at 248 ("[T]he selection of jurists by a political process resting on an increasingly broad-based franchise, coupled with the pervasive influence of evangelical thought, substantially explain the propensity of nineteenth century jurists to sanction contingency fee contracts.").

fail.[31] In doing so, the lawyer has an incentive to maximize the client's recovery, which is the source of their compensation.[32]

Despite their acceptance in civil litigation, courts and professional associations have firmly rejected contingency fee arrangements in the criminal law context.[33] Given the high stakes of criminal prosecution, the existence of a contingency fee would raise significant concerns about due process and prosecutorial bias. Prosecutors may be incentivized to pursue criminal convictions with the goal of monetary gain rather than justice.[34] The Supreme Court has explained that a prosecutor is "in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."[35] Criminal prosecutors' "primary duty . . . is to seek justice within the bounds of the law, not merely to convict," so encouraging them to systematically prioritize conviction through financial incentives is problematic.[36] The justification for contingency fees for criminal convictions is doubly untenable because the outcome of criminal cases determines someone's freedom, not the monetary relief that provides the source for contingency fees in civil suits.[37]

In sum, the legal profession and law in the United States welcome contingency fees for private plaintiffs' attorneys in civil contexts but strictly reject payment for criminal prosecutors based on convictions. Though some view contingency fee arrangements as a source of "frivolous" suits and windfalls for attorneys, the American legal community and broader public have long accepted them as a way to provide access to civil justice for those who otherwise could not afford it.[38]

2. Public Client Use of Contingency Fee Contracts

In civil litigation, the client agreeing to a contingency fee arrangement is sometimes a public or government client like an attorney general. Such arrangements began receiving increased attention during the highly visible litigation against tobacco companies in the 1990s when public clients

31. Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021, 1027 (2020). Although I focus on contingency fee arrangements that are a percentage of recovery, it is important to note that such agreements can take other forms. *See* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 757–61 (2002).

32. Dana, *supra* note 6, at 325.

33. *See* Lushing, *supra* note 15, at 503 (noting the restrictions on such contracts for both prosecutors and defense attorneys).

34. *See* Price v. Caperton, 62 Ky. (1 Duv.) 207, 208 (1864); State v. Lead Indus. Ass'n, 951 A.2d 428, 475 n.48 (R.I. 2008); *see also* Redish, *supra* note 12, at 80.

35. Berger v. United States, 295 U.S. 78, 88 (1935).

36. STANDARDS FOR CRIM. JUST. § 3-1.2(b) (AM. BAR ASS'N 2015) ("Functions and Duties of the Prosecutor").

37. *See* Lushing, *supra* note 15, at 511.

38. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 474 (1998).

successfully relied on them.[39] They remain a source of disagreement today in the ongoing opioid litigation.[40] As with private clients, when a public client hires a private attorney using a contingency fee contract, the private attorney is frequently paid out of the recovery from a suit—but until such a recovery is made, they receive nothing.[41]

In a further parallel to private clients' use of contingency fee arrangements, public clients rely on such arrangements to overcome limitations or challenges they face in civil suits. By contracting with private attorneys on a contingency fee basis, public entities can "bring suits . . . that would otherwise be impossible due to a lack of personnel resources, expertise, and money."[42] While state and local budgets for government attorneys are often inadequate for mounting complex lawsuits against monied corporate defendants with expensive counsel, the plaintiffs' bar regularly undertakes such cases.[43] Moreover, private firms offer unique talent and expertise in specialized areas of law when cases call for it, supplementing the knowledge, experience, and staffing numbers in government attorneys' offices.[44] As a result, contingency fee arrangements allow public clients to bring more cases with greater prospects of success than they otherwise would be able to. Such suits can involve a manifold of issues affecting the citizens on whose behalf governments litigate—issues as varied as data privacy, environmental harms, and product liability.[45]

While public clients could seek out pro bono attorneys for these cases or pay an hourly rate, public client contingency fee arrangements have several advantages that make them more common and, in some cases, the only real option available. Under such agreements, the government does not have to rely on the public budget to finance litigation.[46] This financing structure grants actors, like attorneys general, some independence from the legislature.

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39. *See* Redish, *supra* note 12, at 81–82.

40. *See, e.g.*, Todd Rokita, Opinion, *Cities at Risk of Losing Funding to Fight Opioid Epidemic*, DAILY J. (Aug. 24, 2021), https://dailyjournal.net/2021/08/24/todd-rokita-cities-at-risk-of-losing-funding-to-fight-opioid-epidemic [perma.cc/Z2ED-6YTR].

41. *See* Godesky, *supra* note 16, at 588.

42. *Id.*

43. *See* Gilles & Friedman, *supra* note 13, at 668–69.

44. *See* David B. Wilkins, *Rethinking the Public–Private Distinction in Legal Ethics: The Case of "Substitute" Attorneys General*, 2010 MICH. ST. L. REV. 423, 432.

45. For some examples of suits where attorneys general hired private counsel on a contingency fee basis, see MARK BRNOVICH, OFF. OF THE ATT'Y GEN., STATE OF ARIZ., WRITTEN DETERMINATION PURSUANT TO A.R.S. § 41-4802 (2021), https://www.azag.gov/sites/default/files/docs/procurement/AG18-0013-008_Gallagher_Kennedy_Assignment_to_CV2020-006219.pdf [perma.cc/6NJT-H5W3] (data privacy litigation); DEP'T OF ATT'Y GEN., STATE OF MICH., FEE AGREEMENT: PFAS ENVIRONMENTAL TORT LITIGATION (2019), https://www.michigan.gov/documents/ag/Michigan_PFAS_--_Fee_Agreement_signed_669437_7.pdf [perma.cc/HMM7-9LGQ] (environmental litigation); OHIO ATT'Y GEN., SECOND RENEWAL OF RETENTION AGREEMENT FOR FRONTIER COMMUNICATIONS LITIGATION (2019) https://www.ohioattorneygeneral.gov/Files/Legal/Outside-Counsel/Contingency-Fee-Information/Frontier-Communications-Litigation.aspx [perma.cc/2P7Z-GR6W] (consumer protection litigation).

46. Wilkins, *supra* note 44, at 432–33.

Without government budget constraints, an attorney general can bring a suit even if it is particularly expensive.[47] Although contingency fee arrangements can become a basis for political attacks, they also give public officials license to boast that they are protecting the public and saving money at the same time.[48]

An hourly billing arrangement would lack these advantages. Hourly billing can quickly become unaffordable, requiring direct public funding, in addition to failing to incentivize private attorneys to economize during litigation or maximize recovery.[49] In the majority of cases, pro bono arrangements are similarly infeasible because public officials cannot depend on attorneys to finance and work on costly, complex litigation with no prospect of compensation.[50] While some cases may work better if structured through an hourly billing arrangement, through some other fee structure, or on a pro bono basis,[51] contingency fee agreements will be superior when litigation costs are high, but there is a prospect of recovering high amounts in damages.[52] For example, the time- and resource-intensive opioid litigation involves both the risk of loss and the promise of significant recovery for cities, making it a prime candidate for public client contingency fee arrangements.[53] Given existent constraints in such cases, either the public entity enters into a contingency fee arrangement or bringing a suit may become effectively impossible.

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47. *See* Dana, *supra* note 6, at 319–20. Legislatures can also check this impulse if they wish. *Id.* at 321.

48. Wilkins, *supra* note 44, at 433–34.

49. *See id.* at 452–53.

50. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 116–35 (2004) (discussing the various material constraints and incentives that make it unlikely that both large corporate firms and smaller plaintiff-side firms will take on expensive cases challenging corporate actors on a pro bono basis).

51. For example, if the amount of time a legal project requires is predictable, but it yields little or no monetary recovery through litigation, an hourly rate may fit best. If a government needs outside help litigating a zoning dispute, for instance, they might hire an outside firm on an hourly basis. *See, e.g.*, *Government and Municipal*, VARNUM (2022), https://www.varnumlaw.com/industry/government-and-municipal [perma.cc/3DMG-KLVM]. Firms may represent governments pro bono in high-profile cases related to issues about which they have particular concerns. *See, e.g.*, *RSHC Prepared City of Chicago's Amicus Brief Against President Trump's Travel Ban*, RILEY SAFER HOLMES & CANCILA LLP (Mar. 16, 2017), https://www.rshclaw.com/news/news-detail/2017/03/16/rshc-prepared-city-of-chicago-s-amicus-brief-against-president-trump-s-travel-ban [perma.cc/BF9E-ANUS].

52. *See* Wilkins, *supra* note 44, at 432–34 (discussing how high-cost public civil litigation can offer a good opportunity for the use of contingency fee lawyers); 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, 246 (2001) (discussing how contingency fee attorneys are incentivized to focus on maximizing monetary relief to a greater extent than those who bill hourly).

53. *See* Jan Hoffman, *The Core Legal Strategy Against Opioid Companies May Be Faltering*, N.Y. TIMES (Nov. 11, 2021), https://www.nytimes.com/2021/11/11/health/opioids-lawsuits-public-nuisance.html [perma.cc/9PPH-7JDT].

3. *Parens Patriae* and Other Procedural Advantages of Public Client Litigation

Public clients can amplify their preexisting advantages in civil litigation by hiring private counsel. Frequently, public litigation is brought under the doctrine of *parens patriae*, which involves the state bringing suit on behalf of "a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."[54] This doctrine gives the state standing to sue, including if the alleged "injury is one that the [s]tate, if it could, would likely attempt to address through its sovereign lawmaking powers."[55] This doctrine empowers states to bring cases in order to pursue injunctive relief and damages on behalf of their citizens.[56]

By bringing such suits—either through government lawyers or private attorneys—states can help injured parties who might otherwise face insuperable hurdles to a successful lawsuit. Private plaintiffs have greater obstacles establishing standing than public entities in many cases.[57] They also are sometimes blocked from bringing suit by class action waivers and mandatory arbitration clauses in contracts.[58] Heightened standards for class action certification and challenges created by the Class Action Fairness Act (CAFA) impact private plaintiffs as well.[59] A public entity bringing a case under *parens patriae* does not generally face these obstacles.[60] For instance, CAFA imposes specific jurisdictional rules on class actions, among other things, but CAFA does not apply to *parens patriae* actions.[61] When public clients contract with private attorneys, the suits they bring still enjoy these advantages, meaning that public clients can combine their procedural advantages with the resources of private plaintiffs' firms.[62]

B. *Criticisms of Public Client Contingency Fee Contracts*

Despite these advantages, as this Section discusses below, some criticize public client contingency fee arrangements, claiming they threaten to corrupt

54. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

55. *Id.*

56. Gilles & Friedman, *supra* note 13, at 661.

57. Lemos, *supra* note 12, at 576.

58. *See* Gilles & Friedman, *supra* note 13, at 658–60, 664.

59. *Id.*

60. Lemos, *supra* note 12, at 576–77.

61. Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161 (2014).

62. Gilles & Friedman, *supra* note 13, at 660–61.

and undermine the deference courts tend to afford public litigation.[63] Nonetheless, courts have proven open to public clients' reliance on these arrangements, so long as they maintain proper oversight over the litigation.[64]

1. Corruption and Contingency Fee Contracts

Although public client contingency fee arrangements promise many advantages, their use has led to concerns about corruption. Worries about pay-to-play are especially salient given that private attorneys have sometimes donated to the public official with whom they formed public client contingency fee contracts.[65] In one case, the attorney general of Texas went to prison for trying to divert money from the tobacco litigation settlement to a friend.[66] He was also accused of soliciting "$1 million in political contributions from lawyers he considered hiring for the lawsuit."[67] If these corrupt dynamics are present, the criticism goes, then quid pro quo agreements, rather than the public interest, will shape the path of litigation.[68]

In reality, public client contingency fee contracts do not present a unique threat of corruption. For better or worse, government reliance on contracting has increased over time, encompassing everything from procurement of goods and services to policymaking by administrative agencies.[69] Concerns about corruption in government contracts are similarly longstanding; the phrase pay-to-play actually comes from large corporate defense law firms and banks using political donations to gain special access to the municipal bond market.[70] As Professor David Wilkins points out, "the banks and law firms that engaged in this practice had much more in common with the law firms

63. *E.g.*, Coffee, *supra* note 52, at 243–46 (discussing concerns about corruption); Lemos, *supra* note 12, at 578 (discussing concerns about undermining deference to public litigation).

64. *See, e.g.*, Cnty. of Santa Clara v. Superior Ct., 235 P.3d 21, 39 (Cal. 2010).

65. *See, e.g.*, Bobby Harrison, *Despite Controversy over AG's Use of Outside Lawyers, Most Attorney General Candidates Would Continue the Practice*, MISS. TODAY (June 28, 2019), https://mississippitoday.org/2019/06/28/despite-controversy-over-ags-use-of-outside-lawyers-most-attorney-general-candidates-would-continue-the-practice [perma.cc/9XDX-HEGT].

66. Clay Robison, *Prison Hasn't Silenced Former Attorney General*, CHRON (Jan. 12, 2004), https://www.chron.com/news/houston-texas/article/Prison-hasn-t-silenced-former-attorney-general-1975087.php [perma.cc/PT2A-AA9Y].

67. *Texas Ex-Attorney General Is Charged with Fraud*, N.Y. TIMES (Mar. 7, 2003), https://www.nytimes.com/2003/03/07/us/texas-ex-attorney-general-is-charged-with-fraud.html [perma.cc/XT8Y-4K87].

68. Andrew Spiropoulos, *State AGs Hiring Private Attorneys to Assist in Government Lawsuits*, THE FEDERALIST SOC'Y (Jan. 10, 2008), https://fedsoc.org/commentary/publications/state-ags-hiring-private-attorneys-to-assist-in-government-lawsuits [perma.cc/86HA-VH2X]; *see also* Lemos, *supra* note 12, at 569.

69. *See* Nina A. Mendelson, *Supervising Outsourcing: The Need for Better Design of Blended Governance*, *in* ADMINISTRATIVE LAW FROM THE INSIDE OUT 427, 427 (Nicholas R. Parrillo ed., 2017).

70. Wilkins, *supra* note 44, at 435.

that represent the parties who are objecting to hiring substitute attorneys general in these cases than the plaintiffs' lawyers who have typically been hired for this role."[71] There is nothing specific to public client contingency fee contracts that make them susceptible to corrupting influences, nor are there strong arguments that special responses to such contracts are necessary.[72]

Moreover, many state governments have already imposed reforms to avoid such corruption in public client contingency fee arrangements.[73] They have enacted rules requiring greater transparency and record-keeping, competitive bidding, and limitations on lawyers' fees.[74] Groups like the Chamber of Commerce and other organizations that lobby on behalf of corporate defendants have advocated for these proposals.[75] Ultimately, such reforms must be evaluated on a case-by-case basis, but if implemented so as not to obstruct public litigation, those who promote public client contingency fee contracts need not oppose any reforms that may discourage corruption.[76]

2. Public Litigation's Special Status and Contingency Fee Contracts

Critics object to more than just corruption in access to public client contingency fee contracts, however. Some contrast democratically supported, public-interested government litigation with lawsuits brought by the plaintiffs' bar, depicting the latter as motivated by private interest and lacking democratic legitimacy.[77] They worry that even if the decision to retain outside counsel is free of corruption and pay-to-play, public litigation, as well as courts' perception of it, will suffer because of the involvement of private lawyers.[78]

Some express unease that utilizing contingency fee contracts will lead courts to constrain public litigation in the same ways they have constrained private plaintiffs' lawsuits. Courts view litigation by public entities with greater deference and trust than suits by private parties.[79] The latitude public entities enjoy under *parens patriae* in the context of standing is just one example of that deference.[80]

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71. *Id.* at 435–36.

72. *Id.* at 436.

73. *See* Dana, *supra* note 6, at 316 n.1, 319.

74. BERNARD NASH ET AL., U.S. CHAMBER INST. FOR LEGAL REFORM, PRIVATIZING PUBLIC ENFORCEMENT 7–9 (2013), https://instituteforlegalreform.com/wp-content/uploads/2020/10/PublicInterestPrivateProfit_FINAL.pdf [perma.cc/H4D2-YHM2].

75. *See* Godesky, *supra* note 16, at 609–11.

76. *See* Gilles & Friedman, *supra* note 13, at 670.

77. *See* Lemos, *supra* note 12, at 570; Redish, *supra* note 12, at 96.

78. *See* Lemos, *supra* note 12, at 577–78.

79. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 518–20 (2007).

80. Lemos, *supra* note 12, at 576–78.

Professor Margaret Lemos argues that reliance on private attorneys through contingency fee agreements will undermine judicial deference to government litigation: "The stronger the resemblance between public and private actions, the harder it becomes to defend preferential treatment for government."[81] Behind this skepticism is a sense that reliance on the plaintiffs' bar cheapens public litigation through commodification, undermining its legitimacy. Lemos asks her readers to "[i]magine a criminal prosecution 'brought to you by McDonalds'" to convey her concerns, noting public litigation has "a certain gravitas that private litigation lacks."[82] If courts stop viewing government litigation as grounded in the public interest and start to view it as indistinguishable from profit-seeking, they may become dismissive of government actions.[83]

Putting aside the legitimacy of dismissing private lawsuits as mere pursuit of profit, courts have practiced precisely the deference to government attorneys Lemos describes, generally trusting them to supervise outside counsel.[84] In fact, when defendants challenge contingency fee contracts with public clients, courts tend to uphold such agreements.[85] Cases where courts have rejected public client contingency fee agreements are uncommon exceptions, indicating that Lemos's worries about contingency fee agreements undermining courts' attitudes toward public litigation are largely unfounded.[86]

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81. *Id.* at 578.

82. *Id.* at 566, 575.

83. Note, though, that a presumption that the government represents the public interest in litigation will be controversial in some cases, such as where a private party wants to intervene on the same side as the government to raise arguments the government is not making. *See, e.g.*, Victim Rts. L. Ctr. v. Rosenfelt, 988 F.3d 556, 561 (1st Cir. 2021), *cert. denied*, 142 S. Ct. 754 (2022). At the least, drawing a stark dichotomy between litigation on behalf of the public interest and litigation focused purely on private interests is far too simplistic and ought to be questioned. *See* Kathryn A. Sabbeth, *What's Money Got to Do with It?: Public Interest Lawyering and Profit*, 91 DENV. U. L. REV. 441, 443 (2014).

84. Arguably, public clients' hiring of private counsel parallels corporate in-house counsel's hiring of outside attorneys, so insofar as courts defer to in-house counsel in these matters, deference to public clients on these issues would be consistent and appropriate. *See* Godesky, *supra* note 16, at 617 (comparing governments to in-house counsel and describing in-house counsels' development of "best practices").

85. *See, e.g.*, State v. Lead Indus. Ass'n, 951 A.2d 428, 474–78 (R.I. 2008); Cnty. of Santa Clara v. Superior Ct., 235 P.3d 21 (Cal. 2010); State *ex rel.* Discover Fin. Servs., Inc. v. Nibert, 744 S.E.2d 625, 647–51 (W. Va. 2013); Merck Sharp & Dohme Corp. v. Conway, 947 F. Supp. 2d 733, 739–44 (E.D. Ky. 2013); City of Chicago v. Purdue Pharma L.P., No. 14 C 4361, 2015 WL 920719 (N.D. Ill. Mar. 2, 2015); Am. Bankers Mgmt. Co. v. Heryford, 190 F. Supp. 3d 947 (E.D. Cal. 2016), *aff'd*, 885 F.3d 629 (9th Cir. 2018); State v. Actavis Pharma, Inc., 167 A.3d 1277 (N.H. 2017).

86. There are two uncommon exceptions worth mentioning. First, some defendants have made separation of powers arguments against public client contingency fee contracts, arguing that only the legislature has power over state finances, so attorneys general have no right to enter into contingency fee agreements with private counsel. Only Louisiana's supreme court has accepted this argument. *See* Meredith v. Ieyoub, 700 So. 2d 478, 481–83 (La. 1997). Most courts have rejected it. *See* Godesky, *supra* note 16, at 612 & n.147 (citing cases rejecting separation of powers arguments against public client contingency fee contracts). The other exception to

Government attorneys are often obliged to closely supervise attorneys working for a contingency fee, which further challenges the arguments Lemos raises.[87] While clients generally have an interest in overseeing the work done by an attorney they hire, some courts have legally required that government lawyers not cede control over litigation to hired private counsel but instead provide strict oversight.[88] Specifically, two state supreme courts have insisted that government attorneys maintain complete control over the case, including veto power over private attorneys' decisions and ongoing, personal involvement by a supervising government attorney throughout the litigation.[89] While some commentators are skeptical about the viability of such oversight as an actual means of controlling such litigation,[90] at least one judicial opinion summarily rejects such skepticism.[91]

Courts have largely accepted these agreements as part and parcel of their deference to government lawyers; public litigation's gravitas appears to remain intact.

II. THE "SEEK JUSTICE" OBJECTION TO PUBLIC CLIENT CONTINGENCY FEE CONTRACTS

In many circumstances, public client contingency fee contracts appear beneficial. Yet an important objection against these contracts is that they are in tension with what is sometimes known as the "seek justice" principle.[92] This principle of legal ethics uncontroversially applies to criminal prosecutors who have an obligation to act with a level of neutrality and to avoid overzealousness when pursuing cases.[93] Critics of public client contingency fee contracts broaden this principle's application, arguing that the "seek justice" principle applies to public civil litigation, not just criminal enforcement.[94] These critics argue that governments hiring outside counsel for a contingent fee violates this principle because doing so would mean that public civil litigation would be guided by the maximization of monetary recovery rather than justice.[95] If

courts' acceptance of these arrangements arises in specific public nuisance cases and in eminent domain contexts in California courts. The relevant decision—*People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985)—has been narrowed, however. *Cnty. of Santa Clara*, 235 P.3d at 35–36.

87. *See* Wilkins, *supra* note 44, at 440–44.

88. *See, e.g.*, *Lead Indus. Ass'n*, 951 A.2d at 475; *Cnty. of Santa Clara*, 235 P.3d at 38–41.

89. *Lead Indus. Ass'n*, 951 A.2d at 477; *Cnty. of Santa Clara*, 235 P.3d at 40.

90. *See* Godesky, *supra* note 16, at 615; Lemos, *supra* note 12, at 553.

91. *See Cnty. of Santa Clara*, 235 P.3d at 39 ("[W]e decline to assume that private counsel intentionally or negligently will violate the terms of their retention agreements by acting independently and without consultation with the public-entity attorneys or that public attorneys will delegate their fundamental obligations.").

92. *See, e.g.*, People *ex rel.* Clancy v. Superior Ct., 705 P.2d 347, 351–53 (Cal. 1985).

93. *See* Green, *supra* note 21, at 612–18.

94. *See* Redish, *supra* note 12, at 79–81.

95. *See id.* at 103–05.

these critics are correct, even if public client contingency fee contracts offer multiple benefits to government litigators and their constituencies, these arrangements are ethically objectionable.

Section II.A explains the "seek justice" principle, first by elucidating its traditional application in the context of criminal prosecutions before laying out why some believe it should also apply to public civil enforcement contexts. Section II.B articulates critics' argument that, in light of this principle, public client contingency fee contracts are improper. After exploring critics' concerns in this Part, Part III of this Comment will make clear that their objections are unsuccessful.

A. *Criminal Prosecution, the Obligation to "Seek Justice," and the Duties of Government Civil Litigators*

A criminal prosecutor's obligation to "seek justice" is firmly entrenched and widely accepted.[96] It has roots in Supreme Court precedent and in the ethical codes of professional organizations.[97] But its applicability to public civil litigation is more contested.[98]

1. Criminal Prosecutors' Role and Obligations

While the meaning of the obligation to seek justice is not obvious on its face, various authorities have agreed that, at a minimum, it prohibits the use of contingency fee arrangements for criminal prosecution.[99] In *Berger v. United States*, the Supreme Court sketched out the basic contours of a prosecutor's duties:

> [A prosecutor is the] representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[100]

When representing the government, a criminal prosecutor must not only avoid bending or breaking the rules to achieve victory at any cost but also operate as a representative of both the public and of a legal system aimed at doing justice.[101] To do that, the prosecutor must balance competing goals, including enforcing the law, avoiding conviction of the innocent, respecting the legal process, and acting to promote proportionality and equality.[102]

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96. *See* Green, *supra* note 21, at 612–18.
97. *Id.* at 614–16.
98. *See infra* Section II.A.2.
99. *See supra* Section I.A.1.
100. Berger v. United States, 295 U.S. 78, 88 (1935).
101. Green, *supra* note 21, at 633–34.
102. *Id.* at 634.

Criminal prosecution's role and its attendant ethical obligations differ from other roles in the legal system. Those who represent private parties in civil matters, for instance, do not often have roles defined in terms of the public interest, nor do they have the broad discretion prosecutors enjoy in criminal law.[103] Whereas the general counsel of a corporation can—within boundaries—litigate to further their employers' profitability and to undermine competitors, criminal prosecutors must act impartially and cannot be motivated by personal or political bias.[104] Their goal is not to prevail but to do justice, which is particularly relevant when those subject to criminal prosecution risk losing their liberty or even their life.[105]

2. Government Civil Litigators' Role and Obligations

Some courts and scholars have advanced the more controversial claim that public civil litigation also entails a duty to seek justice.[106] This Comment does not take a position on this issue. Instead, for the sake of argument, it grants this point to critics of public client contingency fee contracts in order to expose the tensions between the "seek justice" principle and the position these critics take.

Commentators point to the similarities between government lawyers in both criminal and civil contexts to support the application of the "seek justice" principle to public civil litigation. Public civil litigators, they contend, "represent[] a sovereignty whose interests include seeking justice, which seems no less true in civil than in criminal litigation."[107]

No firm line can be drawn between government litigators pursuing criminal actions and those pursuing civil actions, some argue. Criminal cases often involve weighty financial stakes and do not always implicate liberty, and civil cases can be intended to punish, making it hard to distinguish between them for ethical purposes.[108] According to this view, government lawyers ought to dismiss civil enforcement actions they view as unjust to pursue, even if they would be acceptable for an attorney to litigate on behalf of a private client.[109]

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103. Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 669, 671–74.

104. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940).

105. Green, *supra* note 21, at 612, 614–15.

106. *See, e.g.*, People *ex rel.* Clancy v. Superior Ct., 705 P.2d 347, 352 (Cal. 1985); Steven K. Berenson, *Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?*, 41 B.C. L. REV. 789 (2000); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235 (2000). For the opposing view, see Lanctot, *supra* note 28.

107. Green, *supra* note 106, at 277.

108. Redish, *supra* note 12, at 93.

109. *See* Green, *supra* note 106, at 246–48.

There is a sense that even such public civil litigation is fundamentally different from private litigation, which means that different obligations are involved.[110]

Not everyone accepts this comparison, however. Professor Catherine Lanctot argues that even in difficult cases where it would seem most likely that a government lawyer's role would differ from a private attorney's role, they ultimately have the same obligations.[111] In an adversarial system, she argues, the government lawyer is not supposed to substitute their sense of fairness for the courts' judgment of the correct outcome of a case.[112]

Furthermore, the law draws numerous distinctions between criminal and civil litigation. Criminal punishment is generally not as focused on direct compensation of injured parties as is civil litigation.[113] While the Constitution guarantees a right to counsel in criminal cases, the Supreme Court has not read it to automatically confer such a right in civil contexts.[114] Criminal law requires a higher burden of proof than civil law.[115] The consequences of criminal cases, on balance, are far more severe than those of civil cases.[116] In light of all these differences, perhaps a duty to seek justice fits better in the more punitive and severe context of criminal law rather than in civil cases where compensation of injured parties is closer to the center of litigation.

Nonetheless, the idea that government lawyers—even in civil litigation—have heightened duties to the public interest is a widespread and fairly conventional perspective.[117] Again, this Comment takes no position on the duties of civil lawyers to the public interest. Instead, it focuses on how critics of public client contingency fee contracts draw the wrong implications from the "seek justice" principle.

B. *Public Client Contingency Fee Contracts and the Obligation to "Seek Justice"*

Relying on this widespread view that government lawyers must seek justice, prominent critics of public client contingency fee contracts, including scholar Martin Redish, allege that such arrangements conflict with the "seek

110. *See* Lanctot, *supra* note 28, at 955–57 (collecting sources attributing heightened duties to government lawyers in both civil and criminal contexts).

111. *Id.* at 957.

112. *See id.* at 958.

113. Paul H. Robinson, *The Criminal–Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996).

114. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); Turner v. Rogers, 564 U.S. 431 (2011).

115. *In re* Winship, 397 U.S. 358, 363 (1970).

116. *See* Robinson, *supra* note 113, at 203.

117. Lanctot, *supra* note 28, at 955; Berenson, *supra* note 106, at 789–90.

justice" principle.[118] The logic of the argument is relatively simple. Government lawyers have heightened obligations to seek justice.[119] Insofar as their powers are delegated to private counsel via public client contingency fee contracts, the obligations of government litigators must be applied to private counsel—otherwise government attorneys could circumvent their ethical obligations through these arrangements.[120] As a consequence, just as government attorneys must focus on the public interest rather than their "personal financial interests," so too must private attorneys working on behalf of the state.[121] Redish contends that "prophylactic" measures are important to protect against problematic incentives in government contexts.[122] The incentives in public client contingency fee contracts tempt lawyers "to make litigation choices that further their personal financial interests," leading them to maximize their monetary recovery rather than pursue justice.[123] They may be torn between their loyalties to concurrent private clients with interests in the public client's litigation, and they may prioritize monetary relief even when nonmonetary relief is more appropriate.[124] While a government attorney seeking justice might drop a case, seek an injunction, or pursue less than the maximum possible monetary settlement, a private attorney working for a contingency fee is incentivized to maximize recovery.[125]

If all these concerns are correct, as a prophylactic measure aimed at preserving government civil litigation's ethical integrity, public client contingency fee contracts should be treated as impermissible. Despite their apparent promise and the good they might accomplish, professional ethics foreclose these arrangements as an option, at least according to these critics. As Part III of this Comment will demonstrate, however, these objections to public client contingency fee contracts are misplaced.

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118. *See* Redish, *supra* note 12, at 79–81.

119. Berenson, *supra* note 106, at 789. This heightened obligation is often justified on the basis of the extraordinary power of litigators acting in the role of legal enforcers, as well as based upon government litigators' role as representatives of a sovereign with the goal of achieving justice. *See* Green, *supra* note 21, at 625, 633–34.

120. Redish, *supra* note 12, at 94–95.

121. *See id.* at 92.

122. *Id.* at 90–91.

123. *Id.* at 105.

124. Dana, *supra* note 6, at 323–28.

125. *See id.* at 323. These issues are not unique to public client cases litigated by private counsel, but they can also arise in private class actions where courts have developed tools to manage these conflicts. *See, e.g.*, *In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 330 F.R.D. 11, 30–31 (E.D.N.Y. 2019) (bifurcating a class action into an injunctive and a damages class with separate representation).

III. THE OBLIGATION TO FORM PUBLIC CLIENT CONTINGENCY FEE CONTRACTS

The opposite of Redish and other critics' conclusions is true: government attorneys are not only allowed to enter into public client contingency fee contracts but they are sometimes obligated to do so. Critics of these arrangements focus on negative obligations related to the "seek justice" principle and ignore the affirmative obligations the principle entails.[126] At the same time, they exaggerate the insuperability of the hazards public client contingency fee contracts present.[127] The very principles these critics rely upon undermine their arguments.[128]

Further, government litigators have duties under the public trust doctrine that are distinct from the obligation to "seek justice," and these duties also support affirmative obligations to initiate such contracts.[129] Under both of these doctrines, government litigators are sometimes obligated to enter into public client contingency fee contracts.

Section III.A explains that the "seek justice" principle—even in the criminal law context—not only involves the negative obligations critics of public client contingency fee contracts emphasize but also creates affirmative obligations to bring suit. In light of these points, Section III.B argues that if the "seek justice" principle applies in civil contexts, affirmative obligations to bring suit will arise there as well. Section III.C argues that discharging these affirmative obligations will, in some circumstances, create a corresponding obligation to form public client contingency fee contracts. Further, Section III.D contends that the public trust doctrine also generates obligations to form public client contingency fee contracts.

A. *Affirmative and Negative Obligations to "Seek Justice"*

For good reason, those who discuss the duty to "seek justice" emphasize the constraints this principle imposes on litigators. However, this focus leads them to underemphasize the principle's affirmative implications, including the obligation to bring suit under certain circumstances. This Section addresses both negative and affirmative obligations in the context of criminal law, setting up discussions of these obligations in civil litigation contexts in the sections that follow.

Criminal prosecutions present the horrifying risk of wrongful convictions, and overzealousness in any aspect of prosecution can have devastating

126. *See, e.g.*, Redish, *supra* note 12, at 95 (emphasizing concerns about insufficient limitations in public client contingency fee contracts); Godesky, *supra* note 16 (emphasizing neutrality as a limitation); Coffee, *supra* note 52, at 243–49 (emphasizing obligations related to limiting the occurrence of conflicts).

127. *See* Wilkins, *supra* note 44, at 460 (suggesting these issues may likely be addressed through lawyers' "ethics and identity" rather than "structures and rules").

128. *See infra* Section III.C.

129. *See infra* Section III.D.

consequences.[130] In light of this risk, the duty to "seek justice" is often associated with the negative duty to act impartially and to avoid exercising power and discretion in ways that might lead to unjust results.[131] When commentators consider this duty in civil contexts, they tend to emphasize the negative duty to refrain from the single-minded pursuit of "victory" over a defendant, in particular.[132] As a result, the Supreme Court's admonition in *Berger v. United States* not to let "innocence suffer" hangs heavily over conversations about public client contingency fee contracts.[133]

Yet in the same sentence, *Berger* states that the aim of prosecution is also that "guilt shall not escape."[134] That does not mean prosecutors are obligated to convict every person who commits a crime; proper prosecutorial discretion also involves choosing not to bring charges in many cases where a conviction might otherwise be obtained.[135] Instead, *Berger* suggests that an affirmative obligation to bring certain cases is implied in the "seek justice" principle, along with the negative duty not to convict the innocent. Justice Robert Jackson articulated a useful version of this idea when he was attorney general: "What every prosecutor is practically required to do is to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[136] The idea here is that some cases are so important and strong that they must be brought.

The controversies that can arise when prosecutors choose not to bring charges support the intuition that such an affirmative duty exists. One example stems from U.S. Attorney Alexander Acosta's entry into a nonprosecution agreement with Jeffrey Epstein, who was "accused of sexually abusing dozens of underage girls," in exchange for Epstein pleading guilty to less severe state charges.[137] The decision not to bring charges sparked outrage and later led to Acosta's resignation from a cabinet position.[138] Without evaluating the merits of Acosta's specific decision, the discourse surrounding it suggests the public recognizes an affirmative obligation to bring charges under some circum-

130. Melilli, *supra* note 103, at 671–72.

131. *See, e.g.*, Green, *supra* note 21, at 635–36. The exercise of discretion is particularly necessary due to the phenomenon of overcriminalization, which makes enforcement of every violation not just impossible but also against the public interest. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001).

132. *See, e.g.*, Redish, *supra* note 12, at 89–90.

133. 295 U.S. 78, 88 (1935).

134. *Berger*, 295 U.S. at 88.

135. Melilli, *supra* note 103, at 674; Stuntz, *supra* note 131, at 512–19.

136. Jackson, *supra* note 104, at 5.

137. Michael Balsamo & Eric Tucker, *Justice Dept.: 'Poor Judgment' Used in Epstein Plea Deal*, AP NEWS (Nov. 12, 2020), https://apnews.com/article/jeffrey-epstein-florida-e2a4431f7319afd037023d9a586aa291 [perma.cc/PH3U-7V5Z].

138. Annie Karni, Eileen Sullivan & Noam Scheiber, *Acosta to Resign as Labor Secretary over Jeffrey Epstein Plea Deal*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/us/politics/acosta-resigns-trump.html [perma.cc/M9T3-VLW7].

stances, which is also consistent with Justice Jackson's comments. Beyond Epstein, one can easily see how other prosecutors' decisions to ignore sexual violence or financial crimes committed by powerful actors might clash with the "seek justice" principle by virtue of failing to uphold the affirmative obligations it entails.[139]

For prosecutors, then, some cases are obligatory under the "seek justice" principle, just as some will be impermissible (when the defendant is known to be innocent, for example) and others will be subject to discretion (when guilt is clear, but a case involves a judgment call about how best to expend resources).

B. *The Affirmative Obligation to "Seek Justice" in Government Civil Litigation*

If, as critics of public client contingency fee contracts suggest, government civil litigators have heightened ethical obligations compared to private attorneys, then they too will have affirmative obligations under the "seek justice" principle akin to criminal prosecutors. The following hypothetical illustrates this point.

Imagine a situation where a statute empowers a state's attorney general to enforce certain consumer protection provisions, such as rules related to the use of consumer data.[140] A business intentionally and egregiously flouts these provisions, as clearly revealed in documents leaked by a whistleblower. Perhaps the business discriminates against consumers who exercise their privacy rights by opting out of data collection, charging them higher prices, or refusing to sell them essential goods like credit, housing, or utilities.[141] Maybe an app sells personal information about users without notice or an opportunity to opt out, potentially threatening their livelihoods.[142] Financial losses ensue,

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139. *See* Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequences of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 6 (2016); Gretchen Morgenson & Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. TIMES (Apr. 14, 2011), https://www.nytimes.com/2011/04/14/business/14prosecute.html [perma.cc/4QHC-ATH2].

140. *See, e.g.*, CAL. CIV. CODE § 1798.155 (West 2022); VA. CODE ANN. § 59.1-584 (Supp. 2022) (effective Jan. 1, 2023). Attorneys general can also be charged with enforcing laws against unfair or deceptive trade practices, including those related to issues like price gouging. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 445.903, 445.910 (West Supp. 2022); *see also* Christine Ferretti, *Nessel Warns Benton Harbor Residents to Watch for Price Gouging on Bottled Water amid Lead Crisis*, DET. NEWS (Oct. 15, 2021, 7:11 PM), https://www.detroitnews.com/story/news/local/michigan/2021/10/15/benton-harbor-bottled-water-price-gouging-dana-nessel-lead-pipes-crisis/8474925002 [perma.cc/5BQF-3D2B].

141. *See, e.g.*, CAL. CIV. CODE § 1798.125 (West 2022) (banning such discrimination).

142. *See, e.g.*, *id.* § 1798.120 (banning the sale of data without notice or the opportunity to opt out). Such issues are especially salient with respect to dating apps or other businesses that collect sensitive information. *See, e.g.*, Marisa Iati & Michelle Boorstein, *Case of High-Ranking Cleric Allegedly Tracked on Grindr App Poses Rorschach Test for Catholics*, WASH. POST (July 21, 2021, 10:17 PM), https://www.washingtonpost.com/religion/2021/07/21/catholic-official-grindr-reaction [perma.cc/7HYE-478L].

very seriously harming large numbers of people in a jurisdiction. As in Justice Jackson's formulation, it is appropriate to say, "the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[143] Perhaps the relevant statute does not allow private individuals to sue,[144] or users of the service are bound by forced arbitration waivers that make private lawsuits difficult, if not impossible.[145]

If the "seek justice" principle applies to litigators in this government agency, then absent compelling countervailing considerations, bringing this case is obligatory. Because this principle entails both negative and affirmative obligations, it is not merely permissible to bring such a case, but it is actually part of the ethical responsibility of someone representing the state in litigation.

C. *The "Seek Justice" Principle Creates an Affirmative Obligation to Form Public Client Contingency Fee Contracts*

Insofar as government civil litigators have an obligation to "seek justice" by bringing certain lawsuits, they will also be obliged, at times, to form public client contingency fee contracts. This result is likely to surprise commentators like Redish who rely on this principle to attack such contracts. Not only are critics wrong to claim that these agreements violate professional ethics, but they overlook the implication that the principles of professional ethics they cite actually *require* such agreements.

To see why, it is useful to slightly alter the facts of the hypothetical case from the previous Section. Imagine the same egregious violations are presented to the state attorney general. Given the scale of the case and their office's funding, staffing levels, and expertise in the area of law, however, they are wary of taking it on. Additionally, private law firms with greater resources regularly litigate cases against the industry implicated in the case. These law firms have adequate staffing, in addition to having superior expertise in this area of law. The government agency believes the case is strong and justifies a sizeable monetary settlement for the affected parties, but there are risks involved. The costs to bring the suit are high, and it is hard to predict how long the case will take, particularly since the alleged offender has made every indication they will litigate the case to the fullest extent possible.

In this instance, the government litigator has an obligation to bring the case but confronts a number of obstacles to doing so: resource scarcity, inadequate staffing and expertise, and uncertainty about the risks involved in undertaking the case. If they were to enter into a public client contingency fee

143. Jackson, *supra* note 104, at 5.

144. The Virginia Consumer Data Protection Act, for example, gives the state attorney general "exclusive authority" to enforce rules related to the use of consumers' personal data, meaning consumers have no private right of action. VA. CODE ANN. § 59.1-584(A) (Supp. 2022) (effective Jan. 1, 2023).

145. *See* Gilles & Friedman, *supra* note 13, at 626–30.

contract, they could feel assured that the lawsuit would be brought adequately. Without such an arrangement, they would be unable to proceed with confidence. As courts have recognized, "the ability of [a government litigator] to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable."[146] Meeting the affirmative obligation to "seek justice" therefore requires forming public client contingency fee contracts.

Importantly, this hypothetical is not some fantastical possibility but is a reality of government litigation. At least one commentator has described local governments in the opioid litigation as being in precisely this position.[147] Local governments have incurred serious costs and harms due to the opioid crisis, but they often face even greater budgetary constraints than states, making public client contingency fee agreements necessary for them to bring suit.[148] At the time of this writing, because of the assistance of private counsel paid through contingency fees, heavily impacted rural Texas counties have an opportunity to get direct access to pending settlements.[149] Contingency fee lawyers enabled this direct local access to settlement funds, a result that stands in contrast to the distribution of funds in the tobacco litigation, during which municipalities were minor players.[150] Instead of states spending settlement money on issues unrelated to the litigation, as they did in the wake of the tobacco litigation, here local governments will receive substantial funds to fight opioid addiction locally.[151]

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146. State v. Lead Indus. Ass'n, 951 A.2d 428, 475 (R.I. 2008).

147. Lance Gable, *Preemption and Privatization in the Opioid Litigation*, 13 NE. U. L. REV. 297, 322–325 (2021).

148. *See id.* at 310, 312–13; Nino C. Monea, *Cities v. Big Pharma: Municipal Affirmative Litigation and the Opioid Crisis*, 50 URB. LAW. 87, 96–97, 111 (2019).

149. *See* Brandon Mulder, *Bastrop County to Join List of Plaintiffs Suing Opioid Makers*, AUSTIN AM.-STATESMAN (Aug. 29, 2019, 1:12 PM), https://www.statesman.com/story/news/local/bastrop/2019/08/29/bastrop-hays-caldwell-prepare-to-join-list-of-counties-suing-opioid-makers/4354108007 [perma.cc/F8NH-UXQ8] ("'We're all strapped for cash as it is,' said Caldwell County Judge Hoppy Haden. 'If it wasn't for being able to do it on a contingency fee basis, I can tell you certainly our county wouldn't have been able to enter into it, because we couldn't afford to pay.'"); Nate Raymond, *J&J Strikes $297 Million Texas-Specific Opioid Settlement*, REUTERS (Oct. 26, 2021, 3:50 PM), https://www.reuters.com/legal/litigation/jj-strikes-297-million-texas-specific-opioid-settlement-2021-10-26 [perma.cc/59K3-LS94].

150. *See* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1233–34 (2018).

151. Jan Hoffman, *States Clash with Cities over Potential Opioids Settlement Payouts*, N.Y. TIMES (Aug. 5, 2019), https://www.nytimes.com/2019/08/05/health/opioids-litigation-settlement.html [perma.cc/5TVM-FL2K] ("[M]uch of the [tobacco settlement] money went to discretionary funds of state legislatures. Especially in the wake of the 2008 financial crisis, hefty amounts were redirected to balancing budgets and fixing potholes, rather than to local prevention and treatment programs. Still bitter about those outcomes, communities whose coffers had been depleted by the opioid crisis decided to sign with private lawyers, circumventing the states."); Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons from the Tobacco Experience*, 67 U. KAN. L. REV. 1029, 1035, 1037 (2019). Notably, in the opioid litigation, both state and local plaintiffs are expected to reach settlements that require awards to be used for abatement purposes. *See* Nate Raymond, *U.S. State Officials Urge Support for Landmark*

D. *The Public Trust Doctrine Creates an Affirmative Obligation to Form Public Client Contingency Fee Contracts*

Not only does the "seek justice" principle create an affirmative obligation to form public client contingency free contracts, but the public trust doctrine also imposes this obligation on government litigators. State attorneys general and other government lawyers have affirmative obligations to bring suit based on the public trust.[152] This Section will show that these public trust-based obligations are sufficient to support an obligation to form public client contingency fee contracts. Though there may also be other foundations for this obligation, this Comment focuses on the "seek justice" principle and the public trust doctrine. The availability of both of these justifications is worth noting, given that this Comment is agnostic about whether the "seek justice" principle applies to government civil litigation. Instead, it grants this assumption to critics of public client contingency fee contracts in order to reveal how these critics' own premises indicate there is an obligation to form such contracts. The public trust doctrine, as discussed in what follows, further supports the existence of the obligation to form public client contingency fee contracts.

The public trust doctrine imposes duties to the public on state governments. In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court found the state holds certain types of property "in trust" for its people, such that the property must always remain under state control and protection, only to be conveyed to private parties consistent with that public trust.[153] This evolving doctrine has differing contours from state to state.[154] Commonly, the public trust doctrine applies to natural resources like navigable waterways and wildlife.[155] The doctrine is generally used by private citizens to restrict government action that is inconsistent with its public trust obligations, such as permanently giving certain natural resources away for the sole benefit of private interests.[156]

The public trust doctrine can provide a basis for the government to bring suit; state governments are obligated to protect certain resources, and the previously discussed doctrine of *parens patriae* enables them to discharge these obligations. *Parens patriae* means the state has a "quasi-sovereign interest" in these resources such that it has standing to sue, even when no single individual in the state enjoys such standing.[157] As one court put it, "if the State is deemed to be the trustee of the waters, then, as trustee, the State must be empowered

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$26 Billion Opioid Settlement, REUTERS (July 21, 2021, 2:26 PM), https://www.reuters.com/article/us-usa-opioids-litigation-idCAKBN2ER25S [perma.cc/X7JN-D8XT].

152. *See, e.g.*, State v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974).

153. 146 U.S. 387, 452 (1892).

154. Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENV'T L. & POL'Y F. 57, 70–71, 74 (2005).

155. *Id.* at 72.

156. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

157. *In re* Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980).

to bring suit to protect the corpus of the trust—i.e., the waters—for the beneficiaries of the trust—i.e., the public."[158] This obligation also extends to seeking damages on the public's behalf when, for example, pollution harms the wildlife or waters the state holds in trust.[159] While this doctrine can be read narrowly, its flexibility also affords it a broader reading. Arguably, the state's obligations go beyond navigable waters and other traditional categories to a broader array of resources, including perhaps even the atmosphere.[160]

Regardless of the public trust doctrine's breadth, it can generate a government obligation to sue independent from any obligation that the "seek justice" principle might impose. This obligation arises, at least in part, from the special position of the state as the only party that can seek a remedy to wrongdoing in some situations. In a case where an oil spill allegedly killed 30,000 birds, for instance, the court noted that the state was the only party in a position to sue: "no individual citizen could seek recovery for the waterfowl, and the state certainly has a sovereign interest in preserving wildlife resources."[161]

There are likely to be other scenarios in which the state occupies such a position, including cases where the public trust doctrine is not at issue. For example, if citizens are precluded from bringing a lawsuit by mandatory arbitration clauses, the state may nonetheless be able to sue on their behalf and thus may be the only party that has standing to bring such a suit.[162] Though the foregoing does not firmly establish an obligation to sue in such cases, the justifications for a state's obligations under the public trust doctrine suggest such obligations may also arise in other cases where the state is the only party positioned to sue.

At any rate, the state's obligations under the public trust doctrine may only be possible to honor by retaining outside counsel for much the same reasons previously discussed in the context of the "seek justice" principle. Sometimes acting as a fiduciary of the public trust and seeking damages in the wake of injury to public resources will demand more than the resources available to public civil enforcers.[163] As with the previous discussion in the context of the "seek justice" principle, there may be cases where suits for damages on behalf of the public trust require specialized expertise, more staffing, or greater financial resources than are available. In these cases, hiring an attorney based

158. Md. Dep't of Nat. Res. v. Amerada Hess Corp., 350 F. Supp. 1060, 1067 (D. Md. 1972).

159. *See* State v. City of Bowling Green, 313 N.E.2d 409, 411 (Ohio 1974) ("[W]here the state is deemed to be the trustee of property for the benefit of the public it has the obligation to bring suit not only to protect the corpus of the trust property but also to recoup the public's loss occasioned by the negligent acts of those who damage such property . . . ."); *Amerada Hess Corp.*, 350 F. Supp. at 1067.

160. *See* Sax, *supra* note 156, at 556–57; Kanner, *supra* note 154, at 82; Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T L. 43, 80–81, 83–84 (2009).

161. *In re Steuart Transp. Co.*, 495 F. Supp. at 40.

162. *See* Gilles & Friedman, *supra* note 13, at 658–68.

163. *See supra* Section III.C.

on a contingency fee may be, in effect, the only way to remedy harm to public resources.[164] The public trust doctrine obligates governments to hire contingency fee attorneys in some cases, in addition to any obligations the "seek justice" principle imposes.

CONCLUSION

In arguing against public client contingency fee contracts, commentators have overstated the problems associated with these arrangements and missed the ways their own commitments demand the use of such agreements. Governments have an obligation to retain contingency fee attorneys in some circumstances, given the two potential grounds discussed in this Comment: the "seek justice" principle and the public trust doctrine. There may also be other principles that trigger this obligation, though surveying every possibility goes beyond the scope of this discussion.

What is clear is that there are some cases that governments simply must bring either as a matter of justice or their fiduciary obligations under the public trust doctrine. In a world of limited budgets, it is inevitable that agencies with the power to litigate on behalf of the public must retain private counsel via contingency fee agreements to fulfill these duties. Such arrangements are not without risks, including corruption or general failure to further the public interest. Nonetheless, these risks are possible to mitigate, as courts have recognized. Not only that: in some circumstances, forming public client contingency fee contracts is obligatory.

164. *See* Kanner, *supra* note 154, at 59–60 (discussing the benefits of contingency fee arrangements in these contexts).