

# DA's Deal With Law Firms Is Illegal, Skeptical 9th Circ. Told

Law360, San Francisco (November 17, 2017, 8:08 PM EST) -- A bank argued Friday that Baron & Budd PC, Carter Wolden Curtis LLP and Golomb & Honik PC couldn't legally prosecute, on behalf of a district attorney, allegations it tricked customers into buying credit card protection plans, prompting a Ninth Circuit panel to note that private individuals prosecute public matters all the time.

During oral arguments Friday, the panel seemed unconvinced by American Bankers Management Co. Inc.'s argument that the District Attorney's Office in Trinity County, California, was "outsourcing private justice for public gain." Judge Michelle Friedland pointed out that whistleblower actions offered payouts for private citizens suing on behalf of the government, and Judge Richard Clifton told ABMC attorney Brian Perryman of Carlton Fields, "Welcome to the state of California," adding, "there's private attorneys general all over the place."

But Perryman said District Attorney Eric Heryford had offered law firms a 30 percent contingency fee on claims that AMBC, Discover Financial Services and others violated California's Unfair Competition Law by signing customers up for identity theft and payment protection plans without obtaining meaningful consent. Perryman said California courts had found the UCL was "more akin to a criminal action," and that meant the private attorneys were acting as prosecutors, yet were illegally influenced by a financial motive.

"Courts have said in certain classes of civil litigation there can not be a direct pecuniary interest in the outcome of the case," he said. "If the point of the lawsuit is to punish the defendant, that makes the case sufficiently analogous to a criminal action."

In 2015, Heryford sued Discover, Citigroup, First Premier Bank, Alliance Data Systems Corp. and ABMC over allegedly deceptive marketing and sales practices. He said the companies used a tactic known as "slamming," enrolling consumers in ancillary products without obtaining explicit approval.

Heryford claimed that the companies' plans prey on senior citizens as well as people with disabilities. On top of asking the court to impose civil penalties of \$2,500 for each act of alleged unfair competition, Heryford sought additional penalties of up to \$2,500 for each act of unfair competition perpetrated against a disabled or elderly person.

In 2016, ABMC fired back with a suit of its own, arguing a public action that promised private counsel a percentage contingency fee violated the company's due process rights. The bank claimed Heryford had publicly boasted the firms' contract wouldn't cost Trinity County any money or interfere with his office's caseload.

That was, for Judge Clifton, the central question of the appeal. He said he believed the county wouldn't have filed the case without outside help, telling Baron & Budd PC attorney Roland Karim Tellis, "Your firm brings lots of resources to bear."

"The question for me is, does it constitute a due process violation if it's made easier for the county to bring a lawsuit that it otherwise wouldn't bring?"

Tellis said it did not, noting the case would still be adjudicated by an impartial judge, and that it had to have merit.

"I don't think that raises a concrete deprivation of a liberty interest that's not conjectural or hypothetical," he said.

But the private attorneys' pay would be determined by how steep the penalties are, and Judge Friedland asked him how that was different from a prosecutor being offered a bounty for felony convictions.

Tellis said that only part of the fee went to the attorneys, and there was nothing wrong with incentivising their "zealous" advocacy. He added that Heryford was still overseeing the case and stood to gain nothing personally from it.

Judges Michelle Friedland, Richard Clifton and Sharon Gleason sat on the panel.

The law firms were represented by Roland Karim Tellis of Baron & Budd PC.

American Bankers Management Co. Inc. was represented by Brian Patrick Perryman of Carlton Fields Jordan Burt PA.

The case is American Bankers Management Co v. Eric Heryford, case number 16-16103, in the U.S. Court of Appeals for the Ninth Circuit.