

Law Firms Can Prosecute On Behalf Of DA, 9th Circ. Rules

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Law360 (March 15, 2018, 9:18 PM EDT) -- The Ninth Circuit on Thursday refused to revive a bank's contention that a California district attorney can't hire Baron & Budd PC and other firms to prosecute allegations of customer deception, ruling for the first time that the government can pay private counsel to pursue civil penalties.

American Bankers Management Company Inc., which was sued by Eric Heryford, the district attorney of Trinity County, California, over allegedly deceptive marketing and sales practices targeting the elderly and disabled, **had told the appellate court** the prosecutor was "outsourcing private justice for public gain" by hiring the firms, claiming the financial motive was illegal.

But the three-judge panel ruled Thursday that the financial incentive in this case is no different than that provided to qui tam relators who help the government bring False Claims Act suits, affirming the lower court's dismissal.

"Heryford's retention of private counsel to pursue civil penalties under state law cannot be meaningfully distinguished from a private relator's pursuit of civil penalties under the qui tam provisions of the False Claims Act, an arrangement that we have already held does not violate due process," the panel ruled.

Baron & Budd's Roland Tellis, who represented the DA, said in a statement Thursday that he was very pleased the Ninth Circuit put an end to the bank's "delay tactics."

"The court unequivocally rejected the notion that our contingent fee representation of the district attorney ... raises a constitutional due process concern," he said. "We look forward to getting the case against American Bankers back on track."

Heryford, the top prosecutor of the small northern California county, had filed a suit under California's Unfair Competition Law in 2015 against Discover, Citigroup, First Premier Bank, Alliance Data Systems Corp. and ABMC for allegedly using a tactic known as "slamming" to enroll 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.

Listed on the complaint were attorneys from Baron & Budd and Carter Wolden Curtis LLP, which the DA had retained along with Golomb & Honik PC to assist in the investigation and prosecution of the UCL suit against ABMC. The agreement said the firms would work under the DA's direction and entitled them to 30 percent of recovered funds.

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 that the firms' contract wouldn't cost Trinity County any money or interfere with his office's caseload.

After a district court dismissed its case, ABMC appealed to the Ninth Circuit, arguing that the law firms in the case - _____ as "special assistant district attorneys" - will have prosecutorial tools that qui tam plaintiffs in FCA suits lack and could potentially use state powers like wiretapping to obtain evidence in Heryford's action.

But the panel said Thursday that the contingency fee agreement clearly states the law firms will not have the power to employ the full machinery of the state against ABMC; the law firms will themselves hire any necessary personnel and front the costs of the litigation.

The panel also said federal and California laws would prevent any wiretapping efforts and cited a 1980 Supreme Court decision that said prosecutors "are necessarily permitted to be zealous in their enforcement of the law" as proof its conclusion aligns with the high court's previous findings.

Heryford's UCL suit remains pending in California federal court, court records show. Circuit Judges Michelle Friedland, Richard Clifton and Sharon Gleason sat on the panel for the Ninth Circuit. Counsel for AMBC did not immediately respond to requests for comment on Thursday. The law firms are represented by Roland Karim Tellis of Baron & Budd PC.

American Bankers Management Co. Inc. is represented by Brian Patrick Perryman of Carlton Fields Jorden 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.

The UCL suit is Heryford v Discover Financial Services, et al., number 2:16-cv-00468 in the U.S. District Court for Eastern California.

--Additional reporting by Cara Bayles. Editing by Alanna Weissman.