Not just defendants anymore: Public entities are plaintiffs, too

Public entities have actively joined the fray to protect themselves from fraud and wrongdoing.

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As plaintiffs' lawyers, we vigorously represent victims of fraud and consumers who have been injured by someone else's wrongdoing. We protect the rights of the individual against businesses and organizations with significantly more money, more resources, and, sometimes, formidable political connections. However, what are often neglected are the rights of public entities in being protected against fraud, negligence and other forms of malfeasance, particularly corporate malfeasance. Although plaintiffs' attorneys often think of public agencies and local governments as potential defendants, some of the largest and most vulnerable victims are public entities and all of us, the taxpayers that ultimately pay the penalties for corporate fraud.

Like any plaintiff, public entities need experienced, competent counsel to represent them to protect their rights. Because public entities carry out significant governmental functions (*e.g.*, building schools, providing access to public utilities, and protecting citizens from environmental toxins), public entities are increasingly becoming the victims of corporate fraud and wrongdoing. As a result, affirmative litigation by public entities is becoming increasingly common in today's legal environment.

Recent examples of cases where public entities have been plaintiffs

Some recent examples of litigation in which public entities were plaintiffs include:

- ***Lead Paint:*** In 2000, Santa Clara County Counsel Ann Ravel and San Francisco City Attorney Dennis Herrera, along with a number of other cities and counties, sued the manufacturers, distributors and promoters of lead paint because of its harmful impact. The public entities sought damages to abate the lead paint from private and public homes, buildings and property located throughout the state. (*See, County of Santa Clara, et al. v. Atlantic Richfield Co., et al.*, 2008 Cal. Lexis 9073, July 23, 2008 filed, currently pending before the California Supreme Court.)
- ***Natural Gas:*** In 2004, Alameda County sued the producers, marketers, and distributors of retail natural gas. The complaint alleged that the defendants intentionally and falsely reported natural gas prices and trading information and engaged in sham sales and artificially inflated retail natural gas prices to benefit defendants financially. Alameda County sought damages for defendants' conduct due to the exorbitant costs the County incurred from defendants' unlawful and unfair price manipulations. (*See, County of Alameda v. Sempra Energy, et al.*, Alameda County Superior Court, case number RG04182878, then transferred to San Diego County Superior Court and consolidated under JCCP Cases #4221, 4224, 4226, 4228-Natural Gas Anti-Trust Cases I, II, III & IV. On March 11, 2008, the Alameda County Board of Supervisors settled with Defendant Duke Energy. The remainder of the case is still pending.)
- ***Zyprexa:*** In September 2006, Mark Burton of Hersh & Hersh, along with several other plaintiffs' attorneys, represented the State of New Mexico in a lawsuit against Eli Lilly & Company, manufacturer of the antipsychotic medication Zyprexa. The complaint alleged that Eli Lilly falsely described and promoted the benefits of its drug Zyprexa, while failing to disclose the significant medical risks incurred by taking it, including hyperglycemia, diabetes and ketoacidosis. (*See, Madrid v. Eli Lilly & Co.*, originally filed in New Mexico state court and removed by Eli Lilly to the United States District Court for the Eastern District of New York, case number 07 CV 1749. The case is still pending.)

Another example occurred in November 2004, when former San Francisco Deputy City Attorney Ingrid Evans and John Stoia represented Santa Clara County, the San Francisco Unified School District, and the San Francisco Community College District and a number of other California public entities in a lawsuit against insurance brokers Driver Alliant Insurance Services, Inc. and Keenan & Associates.

The complaint alleged that the insurance brokers breached the fiduciary duty they owed their public sector clients, put their own financial interests ahead of their public sector clients, and illegally profited from the insurance sold to public entities by getting kickbacks from the insurance companies.

The facts of this case arose from the following: During the 1980s, a crisis in the insurance market forced public agencies to pool their resources together to form groups known as Joint Power Authorities (JPAs) in order to obtain affordable insurance coverage. Insurance

brokers, seizing upon this rare opportunity, eventually established "super pools" comprised of numerous public agencies to obtain group insurance coverage.

As a result, representatives of the insurance brokers and insurance carriers soon managed the "super pools." As these representatives assumed leadership roles, they soon began to administer and manage the JPAs and "super pools." Eventually, the insurance brokers and insurance carriers made insurance purchasing decisions and censored the flow of information to the individual public entity members of the super pools.

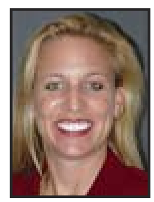
Having centralized control over a huge number of insurance purchasers allowed brokers to "steer" pools of public entities to those insurance companies that paid the largest commissions to the brokers or to insurance companies in which the brokers held ownership interests. This was the undisclosed conflict of interest between the insurance brokers and their public entity clients.

Individual public entities used to scrutinize the insurance brokers' offerings and assess individual insurance policies. However, with all of the decision-making going to the insurance brokers managing the super pools, all the public entities were able to do was write checks paying for the insurance. Because they were removed from any leadership positions managing the super pools, they had no way of learning about the insurance brokers' self-dealing or secret commissions. Attorneys filed the Santa Clara County complaint to remedy the substantial financial injury defendants caused to the state, its cities and its counties; and to address the fundamental defects in the way public entities must currently purchase insurance.

Other states have also sued insurance brokers for illegal kickbacks, fraud and related conduct. In 2004, the New York Attorney General uncovered widespread fraud and corruption within the insurance industry. The Attorney General's office issued a number of subpoenas and investigated the practice of insurance brokers receiving "contingent commissions" from steering clients to certain insurance companies. From the investigation, it was apparent that paying kickbacks (or contingent commissions) was common in the insurance industry and that various insurers were happy to pay kickbacks to guarantee that they would get the business. Not surprisingly, the insurance brokers never disclosed these "contingent commissions" to their public entity clients. New York State subsequently sued Marsh & McLennan Companies and Marsh, Inc., two of the largest insurance brokers in the world, in addition to various insurance companies for paying and receiving contingent commissions, steering, "tying," (the practice of the broker placing policies with a particular insurer contingent on the insurer using the broker for the placement of reinsurance) and "bid-rigging" (price-fixing or solicitation of fake bids). Because of the investigation and lawsuit, numerous insurance company executives pled guilty to crimes and Marsh agreed to pay $850 million to settle the New York lawsuit.

Given the current trend in litigation, one thing is clear: public entities are no longer content to devote their efforts and resources to defending lawsuits. Current efforts in California and other parts of the nation, including the lawsuits described above, have increasingly been brought by public agencies to enjoin fraudulent, deceptive and inappropriate conduct by corporations and to restore money to public entity clients victimized by corporate misconduct.

Ultimately, it is in everyone's best interest for public entities to be well represented when dealing with corporate players, who, regardless of their client, are out to earn a profit. Most assuredly, it is consumers and taxpayers that will bear the burden of these fraudulent practices and end up footing the bill for corporate malfeasance if plaintiffs' attorneys do not protect our public entities by initiating affirmative litigation where necessary.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