

Fiscal Impact Review

2018 General Assembly Session

Date: February 27, 2018

Bill number: SB 926 (Substitute); Special counsel; contingency fees for those employed by a state agency.

Review requested by: Chairman Bell, House Courts of Justice

JLARC Staff Fiscal Estimates

JLARC staff do not concur with the cost estimate in the Department of Planning and Budget fiscal impact statement for SB 926. The bill is likely to have no fiscal impact over the next biennium.

SB 926 would create rate caps for special counsel employed by state agencies under contingency fee contracts. The bill is likely to have no fiscal impact in the short term because Virginia uses contingency fee contracts only rarely and, in recent instances, the rates paid were close to or below the fee rates set by SB 926. In the longer term, there is a small chance that SB 926 would have a cost to the state, if the \$50 million dollar ceiling on fees discourages a private firm from contracting with Virginia on a very large lawsuit that would require thousands of hours of work and years of litigation.

An explanation of the JLARC staff review is included on the pages that follow.

Authorized for release:



Hal E. Greer, Director

Bill summary

SB 926 would impose rate limits on contingency fees in state agency contracts with private law firms. The limits range from a 27 percent contingency fee for the first \$10 million of a recovery, to five percent of the portion of recoveries that exceed \$25 million. The rate caps would be cumulative; the maximum fee would be 27 percent on the first \$10 million, *plus* 20 percent on the next five million dollars, and so on. For example, the maximum total fee for a recovery of just over \$25 million would be \$4.95 million, or about 20 percent. SB 926 would also set a maximum contingency fee of \$50 million for Virginia's share of the total fee paid in a case.

The fee limits would not apply to private law firms' costs and expenses (for example, costs of expert witnesses and travel); these would be paid from the recovery amount, before the fee limits applied.

Fiscal implications

SB 926 could produce cost savings for the state if the bill resulted in contingency fees lower than the fees that would have otherwise been paid.

In the long run, there is a small chance that SB 926 would increase costs for the state if qualified law firms were unwilling to accept the \$50 million fee ceiling for an especially large lawsuit.

Virginia's recent experience with contingency fee contracts

According to the Office of the Attorney General and the Virginia Retirement System (VRS), Virginia has paid contingency fees in only two cases over the past four years:

- (1) a class action lawsuit against MF Global in which VRS was co-lead plaintiff. The suit settled in 2015. Virginia's share of the recovery was \$2.56 million, and the contingency fee was 19 percent.
- (2) a legal action on behalf of Virginia Tech against Prosper Financial, Inc. in 2015. The amount recovered was \$783,000, and the contingency fee was 30 percent.

Since 2006, VRS has paid contingency fees only once, in a class action lawsuit against Escala Group. Virginia's share of the recovery was less than \$500,000, and the contingency fee was 22 percent.

In only one of these three instances, the case against Prosper Financial, did the contingency fee exceed the limits in SB 926. If a 27 percent limit had been in place, the state

would have saved approximately \$23,000 in legal fees. This modest savings, and the infrequent use of contingent fee payments by Virginia agencies, suggest that SB 926 is likely to have no short-term fiscal impact.

Other states' experience with contingency fee limits

At least a dozen other states limit contingency fee rates for state contracts with private law firms. In most of these states, the rate limits are similar to those imposed by SB 926. The limits have been in place for only a few years in most of these states, so evidence of fiscal impact is limited. But staff in the attorney general's offices in three states (Mississippi, Arkansas, and North Carolina) identified only one instance where fee caps hindered a state's participation in legal action because a private law firm declined to contract with a state that had fee caps. In that situation, the firm would have had to reduce its contingency fees from another state because of a "most-favored nation" clause that required the law firm to reduce its fees if it contracted with any other state for a lower fee.

Staff in one state's attorney general's office suggested that a \$50 million total limit on contingency fees, as in SB 926, could deter some private law firms in extremely large lawsuits that might require thousands of person hours and years of protracted litigation, such as the tobacco litigation of the 1990s.

Budget amendment necessary? No.

Agencies affected: Office of the Attorney General, Virginia Retirement System, and other state agencies

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