

THOMAS J. MILLER  
ATTORNEY GENERAL



1305 E. WALNUT ST.  
DES MOINES, IA 50319  
P: 515-281-5164  
[www.iowaattorneygeneral.gov](http://www.iowaattorneygeneral.gov)

IOWA DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL

January 25, 2018

Victoria Newton  
Executive Secretary  
Iowa Executive Council  
State Capitol  
L-O-C-A-L

Re: Retention of Special Counsel

Dear Ms. Newton:

Pursuant to Iowa Code section 13.7, the Attorney General requests the Executive Council to authorize employment of Special Counsel on a contingency basis to represent the State of Iowa ("State") and the Treasurer of State ("Treasurer") in United States Savings Bonds litigation. The Attorney General's Office ("Office") lacks the legal resources to pursue this litigation and, if the State and the Treasurer are to pursue litigation of this nature, Special Counsel is necessary.

#### BACKGROUND OF SAVINGS BONDS LITIGATION

A description of the Savings Bonds Litigation is contained in a letter sent to the Attorney General by the Treasurer. The letter is enclosed.

For the reasons outlined below, the Office does not believe that it has the expertise and resources to conduct Savings Bonds Litigation. To this end, the Attorney General is seeking authorization of employment of Special Counsel on a contingency fee basis to represent the State and the Treasurer in Savings Bonds Litigation.

#### DETERMINATION CONCERNING CONTIGENCY FEE REPRESENTATION

Before employment of Special Counsel may be authorized by the Executive Council under Iowa Code section 13.7(1), the Attorney General must make a sufficient showing, in writing, that the Office cannot perform the legal services required.

In 2012, the legislature enacted Iowa Code chapter 23B, the Transparency in Private Attorney Contracts Act ("Act"). Before entering into a contingency fee contract with Special Counsel, section 13.7(2) requires compliance with the Act. Section 23B.3(1) of the Act requires the Attorney General to go further than the showing required in section 13.7(1). Section 23B.3(1) reads as follows:

***23B.3 Contracts for legal services.***

*1. The state shall not enter into a contingency fee contract with a private attorney unless the attorney general makes a written determination prior to entering into such a contract that contingency fee representation is both cost-effective and in the public interest. Any written determination shall include specific findings for each of the following factors:*

*a. Whether sufficient and appropriate legal and financial resources exist within the attorney general's office to handle the matter.*

*b. The time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill required to perform the attorney services properly.*

*c. The geographic area where the attorney services are to be provided.*

*d. The amount of experience desired for the particular kind of attorney services to be provided and the nature of the private attorney's experience with similar issues or cases.*

The Attorney General believes a contingency fee contract with Special Counsel to conduct the Savings Bonds Litigation is both cost effective and in the public interest for the following reasons:

(a) Sufficient and appropriate legal and financial resources do not exist in the Office to handle this litigation. The Office does not have attorneys available to do the substantial volume of legal work required in this case. The Office has been subject to substantial General Fund budget cuts over the years. As a result, the Office must carefully devote its General Fund resources to pay for attorneys conducting core functions for the State, including assisting county attorneys in the most serious crimes, defending all criminal prosecutions in the appellate courts, and defending the State against tort claims and other actions.

Furthermore, the Office does not have the available resources to pay for extensive expenses which would be incurred in this litigation, including costs of notice, travel, discovery and experts.

(b) This litigation will involve significant time and labor, including extensive legal research; preparation of briefs, motions, letters, and other documents; communications and negotiations with the United States; discovery; and planning and execution of notices to bond holders.

This is novel litigation. Only a hand full of states have brought this type of case. The litigation will present novel legal theories, including novel constitutional arguments.

The legal questions involved in the litigation are complex. The law involved is technical and open to differing interpretations. Of particular concern is the highly complex set of federal Treasury regulations governing Savings Bonds.

The difficulty of this litigation is evident. The amount of money at stake nationwide is huge. The United States government, with immense resources, has a very strong interest to protect the federal fisc by fending off state lawsuits of this nature. Few states have brought these actions because of the difficulty and the risk of spending significant resources with great uncertainty of success.

(c) The geographic area where the attorney services are to be provided is largely in Polk County, Iowa, since the Office and the Treasurer are both based there. This proximity will allow for the Office's control of the Savings Bonds Litigation described below.

(d) Savings Bonds Litigation calls for Special Counsel with particular skill and experience. Most significantly, it would be ideal to have Special Counsel who has experience in Savings Bonds Litigation. This experience would include a thorough understanding of the case and the underlying research, familiarity with relevant Treasury regulations, relationships with Treasury and United States Department of Justice officials, and experience with the United States Court of Federal Claims.

#### SELECTION OF SPECIAL COUNSEL

The Treasurer has recommended that the Executive Council authorize employment of Mr. J. Brett Milbourn to represent the State and the Treasurer in the Savings Bond litigation. He is a partner in the law firm of Walters, Bender, Strohbahn, and Vaughan located at 1100 Main Street, Kansas City, Missouri 64105. Mr. Milbourn probably has more experience with this type of litigation than any other attorney in the United States. He has unique relationships with officials at Treasury and United States Department of Justice. He has relevant experience with the United States Court of Federal Claims. He has been retained to represent several states in similar litigation, including Kansas, Louisiana, South Dakota, Kentucky, Pennsylvania, Ohio, Mississippi, South Carolina, Florida, Indiana, and Georgia.

Most importantly, Mr. Milbourn has achieved important wins in Savings Bonds Litigation, as described in the Treasurer's letter.

The Attorney General concurs in the Treasurer's recommendation that Mr. Milbourn is qualified and suitable to represent the State and the Treasurer in this litigation.

In seeking Special Counsel on a contingency fee basis, the Act requires the Attorney General to follow the procurement process used by the Department of Administrative Services

("DAS"). See Iowa Code § 23B.3(2). The Attorney General has determined that a sole source procurement is justified under the administrative rules of DAS for several reasons: First, Mr. Milbourn is quite obviously the most qualified to perform this service. See 11 IAC 118.7(1)(a). Second, Savings Bonds Litigation is litigation of such specialized nature that Mr. Milbourn by virtue of his experience and expertise can most satisfactorily provide the service. See 11 IAC 118.7(1)(b). Finally, the State and the Treasurer are hiring the services of counsel to assist in the preparation of judicial proceedings. See 11 IAC 118.7(1)(d).

#### CONTINGENCY FEE

Mr. Milbourn has indicated that he would handle this litigation on a contingency fee based on the amount of recovery. Special Counsel will advance all fees, costs, and expenses of the litigation, including appeals. Neither the State nor the Treasurer will be liable for any expenses, fees, or costs, including those of local counsel or expert witness fees or consultant fees associated with the litigation.

The amount of the contingency fee will be negotiated with Mr. Milbourn, but will be capped at levels set in the Act:

#### ***23B.3 Contracts for legal services.***

*3.a. Except as provided in paragraph "c", the state shall not enter into a contingency fee contract that provides for a private attorney to receive an aggregate contingency fee in excess of the sum of the following:*

- (1) 25% of any recovery up to and including \$10 million, exclusive of reasonable costs and expenses.*
- (2) 20% of any portion of any recovery that exceeds \$10 million up to and including \$15 million, exclusive of reasonable costs and expenses.*
- (3) 15% of any portion of any recovery that exceeds \$15 million dollars up to and including \$20 million, exclusive of reasonable costs and expenses.*
- (4) 10% of any portion of any recovery that exceeds \$20 million up to and including \$25 million, exclusive of reasonable costs and expenses.*
- (5) 5% percent of any portion of any recovery that exceeds \$25 million, exclusive of reasonable costs and expenses.*

*b. Except as provided in paragraph "c", the aggregate contingency fee of any recovery shall not exceed \$50 million dollars, exclusive of reasonable costs and expenses, and regardless of the number of lawsuits filed or the number of private attorneys retained to achieve the recovery.*

*c. The attorney general may request a waiver from the executive council of the aggregate contingency fee limits in paragraphs "a" and "b" if the attorney general provides a thirty-day notice of the attorney general's intent to request a waiver. The executive council, upon unanimous consent, may grant such a waiver.*

#### ATTORNEY GENERAL CONTROL OF LITIGATION

The Act makes it clear that the Attorney General maintains complete control over all aspects of the Savings Bonds Litigation, including settlement and appeals. The standard addendum required by the Act will be incorporated in the contract negotiated with Mr. Milbourn:

##### ***Section 23B.3 Contracts for legal services.***

*4. The attorney general shall develop a standard addendum to every contract for contingent fee attorney services that shall be used in all cases, describing in detail what is expected of both the contracted private attorney and the state, including, without limitation, all of the following requirements:*

*a. A government attorney shall retain complete control over the course and conduct of the case.*

*b. A government attorney with supervisory authority shall be personally involved in overseeing the litigation.*

*c. A government attorney shall retain veto power over any decisions made by the contracted private attorney.*

*d. A defendant that is the subject of such litigation may contact the lead government attorney directly, without having to confer with the contracted private attorney.*

*e. Decisions regarding settlement of the case shall be reserved exclusively to the discretion of the government attorney and the state.*

*f. A government attorney with supervisory authority for the case shall participate in all settlement conferences.*

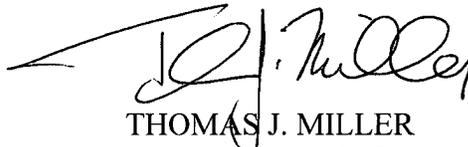
TRANSPARENCY AND ACCOUNTABILITY

Consistent with the Act, copies of any executed contingency fee contract, as well as the written determination to enter into a contingency fee contract, is required to be posted on the Attorney General's website. Payments made under the contract must be posted on the website for at least a year. *See* Iowa Code § 23B.3(5). Also, Special Counsel must maintain detailed records and make the records available under Iowa Code chapter 22. *See* Iowa Code § 23B.3(6).

These requirements will be incorporated into the contract for the Savings Bonds Litigation.

In conclusion, we believe Savings Bonds Litigation could provide great benefits to many Iowans and should be pursued. We recommend that the Executive Council authorize employment of Mr. Milbourn as Special Counsel to represent the State and the Treasurer.

Sincerely,



THOMAS J. MILLER  
Attorney General of Iowa

Enclosure



Telephone: (515) 281-5368  
Fax: (515) 281-7562

**Michael L. Fitzgerald**  
Treasurer of State  
Capitol Building  
Des Moines, Iowa 50319-0005

E-Mail: [treasurer@iowa.gov](mailto:treasurer@iowa.gov)  
Web: [www.treasurer.state.ia.us](http://www.treasurer.state.ia.us)

January 24, 2018

Honorable Tom Miller  
Iowa Attorney General  
2<sup>nd</sup> Floor Hoover Building  
L-O-C-A-L

Re: Retention of Special Counsel for U.S. Savings Bonds Litigation

Dear Attorney General Miller:

I am writing to request that you seek Executive Council authorization to employ Special Counsel to represent the State of Iowa ("Iowa") and the Treasurer of State ("Treasurer") in United States Savings Bonds litigation.

#### BACKGROUND OF LITIGATION

The United State Department of Treasury ("Treasury") began selling United States Savings Bonds ("Savings Bonds") in the 1930s. Savings Bonds have long maturity periods and many are not redeemed at maturity. The combined matured value of unclaimed Savings Bonds nationwide is now estimated to be more than \$23 billion. The combined matured value of unclaimed Savings Bonds, which were originally registered to individuals whose last known address was in Iowa, is estimated to be \$230 million.

Historically, Treasury has not notified Savings Bond owners when bonds mature nor has it made any meaningful attempt for decades to contact bond owners to allow redemption of the bonds—this, notwithstanding the fact that Treasury has addresses and identifying information and its admission that it is a debtor to the citizen creditors who purchased the bonds. As a result, tens of millions of dollars of matured Savings Bonds owned by Iowans remain abandoned, unredeemed, and unused.

In 2014, the Iowa Legislature enacted Iowa Code section 556.9B. Section 556.9B sets out a process by which the Treasurer can take action for a determination that long matured and abandoned Savings Bonds (including those that are lost, stolen, or destroyed) held or owning in Iowa by any person escheat to the State and the legal title to the Savings Bonds vests solely in the State. The process set out in section 556.9B includes specific notice provisions designed to give persons holding, or having an interest in, abandoned Saving Bonds an opportunity to claim the Savings Bonds or proceeds of the Savings Bonds.<sup>1</sup>

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<sup>1</sup> Iowa is one of 20 states that passed similar legislation to address the abandoned bond issue with the US Treasury.

There are two categories of abandoned Savings Bonds to which the State can take title under section 556.9B. First, there are Savings Bonds in the custody of the Treasurer. In February 2014, the calculated value of these matured bonds was approximately \$418,000. These bonds are referred to as "Bonds in Possession." The current value of all Bonds in Possession is over \$1 million. Second, there are Savings Bonds with the last known address of the bond holder being in Iowa that are not in the possession of the Treasurer because the bonds were lost, stolen, destroyed, or otherwise abandoned. The combined matured value of these bonds is estimated to be \$230 million. These bonds are referred to as "Absent Bonds."

Highly summarized, subsequent to taking title to the Savings Bonds, the State would file a claim with Treasury for redemption of the Savings Bonds now owned by the State –both Bonds in Possession and the Absent Bonds. The State would seek an accounting of these Savings Bonds, including serial numbers, addresses, and other information that would identify Savings Bonds registered with last known addresses in the State of Iowa, as well as payment to the state. The Treasurer's office would do all it could to find the original owners or heirs and return the proceeds of these Savings Bonds to them through the Great Iowa Treasure Hunt. Proceeds that could not be returned would be deposited in the General Fund.

#### Recommendation for Special Counsel

To successfully recover both Bonds in Possession and Absent Bonds, I believe Special Counsel is necessary. This is novel litigation. The legal questions involved in the litigation are complex. The law involved is technical and open to differing interpretations. Of particular concern is the highly complex set of federal Treasury regulations governing Savings Bonds.

The amount of money at stake nationwide is huge. The United States government, with immense resources, has a very strong interest to protect the federal fisc by fending off state lawsuits of this nature. The litigation calls for Special Counsel with particular skill and experience. Most significantly, it would be ideal to have Special Counsel who has experience in Savings Bonds Litigation. This experience would include a thorough understanding of the case and the underlying research, familiarity with relevant Treasury regulations, relationships with Treasury and United States Department of Justice officials, and experience with the United States Court of Federal Claims.

With this in mind, I would recommend retention of J. Brett Milbourn to represent the State and the Treasurer in this litigation. He is a partner in the law firm of Walters, Bender, Strohbehn, and Vaughan located in Kansas City, MO. Mr. Milbourn probably has more experience with the type of litigation than any other attorney in the United States. He has unique relationships with officials at Treasury and United States Department of Justice. He has relevant experience with the United States Court of Federal Claims in the Savings Bond Litigation. Not only has he been asked to assist many of the states to write the escheat legislation, he has been retained to represent several states in the savings bond litigation, including Kansas, Louisiana, South

Honorable Tom Miller  
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Dakota, Kentucky, Pennsylvania, Ohio, South Carolina, Florida, Indiana, Mississippi, and Georgia.

Importantly, Mr. Milbourn has scored important wins in Savings Bonds Litigation. He successfully represented the above states, securing judgments thus far for Bonds in Possession of more than \$6,900,000 and Absent Bonds judgments of over \$2,971,300,000.

Even more notably, on August 8<sup>th</sup>, 2017, the judge, on the United States Court of Federal Claims ("CFC") where the Absent Bond litigation filed by Mr. Milbourn has been pending for several states, handed down a 37 page opinion following the parties' summary judgment briefing and oral argument on June 22, 2017. In an historic ruling and the first of its kind, the Court found in **favor** of Kansas (lead state) with respect to: its claimed title ownership of the "Absent Bonds"; and the government's liability for breach of contract. The Government's summary judgment motion seeking to dismiss all of Kansas' claims was denied in full. Kansas was the lead CFC case so the judge addressed that case first, staying all other state cases before her as they were identical or substantially identical in the claims made and relief requested. The Government has now sought an interlocutory appeal of the CFC's decision and the Federal Circuit Court of Federal Claims has yet to decide whether it will hear an appeal. The other pending state cases (*and thereafter, new state cases that are properly joined*) will await that decision and should the opinion be affirmed those remaining state cases will also be decided by dispositive motions with a similar result. The current case(s) will then move forward to the damage stage which will involve the retention of experts and significant investment by legal counsel of time and resources. In the interim, while the lead case is awaiting an appeal, given the favorable decision on liability, Mr. Milbourn will be exploring a possible resolution of the bond claims with the US Treasury for both their current state clients and for those additional states that retain his services and move promptly to take title per their escheat statutes. In sum, the results to date are an indication that the litigation strategy, expertise in this area of the law, and skills of Mr. Milbourn is the path by which Kansas and other states will continue to have the opportunity to redeem tens of millions of Absent Bonds for the benefit of their citizens.

I would respectfully request that you seek Executive Council authorization to employ Mr. J. Brett Milbourn as special counsel to represent the State and Treasurer in United States Savings Bonds litigation.

Sincerely yours,



Michael L. Fitzgerald  
Treasurer of State