

Contingent fees and local government

The California Supreme Court has expanded the options for government entities contracting with outside counsel



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Local Government

The California Supreme Court's decision in *County of Santa Clara v. Superior Court (Atlantic Richfield Co.)*, 10 C.D.O.S. 9363, clarifies the limits imposed on government entities' use of lawyers retained on a contingent-fee basis to prosecute public nuisance claims. The court's decision is not an unqualified affirmation of its prior broad prohibition against such arrangements, but it does impose important limits on the use of contingent-fee counsel. The court distinguished different types of public nuisance claims and concluded that the alleged public nuisance claim in the case before it (involving lead paint) was not the type of claim that required a complete bar on the use of contingent-fee counsel. Rather, the court outlined protections required in any contingent-fee agreement to ensure that the government's in-house attorneys maintain appropriate control over the litigation.

The court reviewed the appellate court's decision to vacate the trial court's order barring plaintiff government entities from paying their private counsel under

a contingent-fee agreement. The court of appeal had held that prior case law did not bar all contingent-fee agreements between government and outside counsel; they were permitted if government lawyers appeared with and supervise the contingent-fee counsel. The court of appeal found neutrality was upheld where government attorneys not motivated by financial interests controlled the litigation. It was not persuaded by the superior court's skepticism regarding either the extent of control government attorneys actually maintained in the case at hand, or the difficulty involved in actually determining that control, particularly in light of all the privileges surrounding the attorney-client relationship.

These issues have been debated since the 1985 California Supreme Court decision in *Clancy v. Superior Court*, 39 Cal.3d 740 (1985). *Clancy* held that government entities may not use contingent-fee lawyers to prosecute public nuisance claims. The *Clancy* court explained that public nuisance claims require a delicate balancing of interests: the public's interest in abating public nuisance and a private landowner's property rights. The court in *Clancy* placed public nuisance claims within the class of actions where the government is exercising its sovereign powers, thus requiring both the appearance of and actual neutrality of its attorneys. But contingent-fee arrangements between government and outside counsel may motivate counsel to pursue cases in a manner not in the public's best interest but rather in counsel's personal financial interest. Even if counsel is not so motivated, the public appearance of impropriety

calls into question the government entities' objectivity in pursuing these cases, thereby undermining public confidence in the system. Therefore, the *Clancy* court barred use of contingent-fee agreements in public nuisance cases.

Critics of *Clancy's* prohibition against contingent-fee arrangements argued that a "control/subordinate lawyer" exception existed latent in the *Clancy* rule and asked the California Supreme Court to recognize this exception in *Santa Clara*. This exception, they argued, should allow contingent-fee arrangements between government entities and outside counsel so long as the government entities maintain "total control" over all critical decisions and outside counsel serves only in a subordinate role. Courts outside of California — most notably the Supreme Court of Rhode Island — have recognized this exception, but until *Santa Clara*, the issue had remained undecided in California.

In *Santa Clara*, the California Supreme Court narrowed its holding in *Clancy*. It reasoned that while lawyers prosecuting public nuisance claims are subject to a standard of heightened neutrality, if certain safeguards are established, hiring contingent-fee counsel does not automatically compromise that standard in all types of public nuisance cases. The court noted that public nuisance claims fall somewhere in the spectrum between civil cases and criminal prosecutions, depending on the parties' underlying interests and the relief sought. If the qualitative interests in a public nuisance suit are closer to those involved in a criminal prosecution, absolute neutrality is required, and all contingent-fee arrangements are barred.

The *Santa Clara* court explained that *Clancy* was decided in the context of a government entity seeking an injunction to close an adult bookstore — a public nuisance action that threatened ongoing business activity, carried the threat of criminal liability, and possibly impinged on the defendant's and the public's First Amendment right of free speech. It found that the facts of *Clancy*, therefore, place it closer to criminal prosecutions than civil cases. Assessing the claim in *Santa Clara*, the court found that any ruling will only involve evaluation of past acts (the production and distribution of lead paint, which have been illegal since 1978) and how the effects of those past acts should be abated. The court also noted the remedy sought — expenditure of resources to abate a hazardous substance — was more like the remedy sought in an ordinary civil case, and that the statute of limitations on any criminal claim as a result of the alleged wrongful conduct had run. It concluded that “in cases where the government's action poses no threat to fundamental constitutional interests and does not threaten the continued operation of an ongoing business, retention of private counsel is permissible” if government attorneys control the litigation.

To practically ensure government entities' control over outside counsel, the court established the following minimum list of safeguards of objectivity that must be present in retainer agreements concerning public nuisance claims like those in *Santa Clara*: (1) decisions regarding settlement are reserved exclusively to the government entity's own attorneys; (2) any defendant in the litigation may contact the lead government attorneys directly, without having to confer with contingent-fee counsel; (3) the public-entity attorneys will retain complete control over the course and conduct of the case; (4) government attorneys retain a veto power over any decisions made by

outside counsel; and (5) a government attorney with supervisory authority must be personally involved in overseeing the litigation. The *Santa Clara* court found some of the agreements at issue deficient under the standards set forth above, and could not assess the sufficiency of others on the record presented. As a result, the court reversed the decision to vacate the motion to bar payment, and remanded the matter for further proceedings consistent with its opinion. The court also stated that the public entities may continue pursuing the litigation with the assistance of contingent-fee counsel if the retention agreements are revised to conform to the requirements of its opinion.

Other than in situations analogous to those in *Clancy*, government entities would be well-advised to follow the established standards in *Santa Clara* when using contingent-fee counsel to prosecute a public nuisance action.

How courts will treat public nuisance actions other than those specifically addressed in *Clancy* and *Santa Clara* remains unclear. To be sure, other than in situations analogous to those in *Clancy*, government entities would be well-advised to follow the established standards in *Santa Clara* when using contingent-fee counsel to prosecute a public nuisance action.

As a protection against contingent-fee lawyers attempting to improperly influence the case to further their own financial interests, the court's opinion in *Santa Clara* pro-

vides that settlement offers may be made directly to the government entity's in-house counsel. The concurring opinion of Justice Werdegar notes that this safeguard is limited since many government entities can only afford to pay private counsel by contingent fee, both public and private lawyers may have an incentive to settle for less rather than fight for an abatement order. This is especially true because private counsel's contingent fee can be paid out of the settlement proceeds, but if there is no settlement and the case is taken to trial and judgment, there must be an appropriation of public money representing the private attorney's share of the value of abatement.

Even though the court states that the newly established safeguards are subject to objective verification, the court's decision in *Santa Clara* will likely lead to increased litigation surrounding the extent of control government entities actually assert over contingent-fee lawyers. Every public entity seeking to hire a contingent-fee lawyer would do well to include at least those provisions outlined by the court in their retainer agreements and understand any unique circumstances that may require additional guidelines for effective supervision and control of a case. Further, government lawyers using outside contingent-fee counsel should ensure that government attorneys in fact remain involved in and retain control over the conduct of a case. It is not sufficient to simply hand over the reins to outside counsel. While including the required provisions in the retainer agreement is necessary, these provisions alone may not be sufficient to withstand claims that the standard of government entity control has not been met, and litigation over the propriety of the arrangement may result if there is reason to suspect that contingent-fee counsel is leading the case or is improperly influencing the case to further his or her own financial interests.

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