



GOVERNMENTS' HIRING OF CONTINGENT FEE ATTORNEYS CONTRARY TO PUBLIC INTEREST

by

Victor E. Schwartz, Kevin Underhill,
Cary Silverman & Christopher E. Appel

Should a state or locality be able to hire private attorneys on a contingency fee basis to pursue public enforcement claims? In 1985, the California Supreme Court said no, but a recent appellate court decision undermined that ruling. The opinion overlooked significant ethics and public policy issues. The California Supreme Court granted review of that controversial ruling on July 23, 2008. *County of Santa Clara v. Superior Court (Atlantic Richfield Co., et al.)*, No. S163681.

In the case pending review, several California counties hired private attorneys on a contingency fee to file a class action lawsuit in public nuisance against former lead paint and pigment manufacturers. This decision is at odds with the state high court's seminal ruling in *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), which rejected such fee agreements as against principles of ethics and fundamental fairness. *Clancy* is a seminal case addressing the inherent conflict of interest and unsound policy of permitting private lawyers to act as enforcers of state law when they have a strong financial interest in the case. This precedent's continued viability is particularly important as courts in states across the country consider the propriety of this practice, which state and local government have used with increasing frequency to target a wide range of industries.

In *Clancy*, the California Supreme Court recognized that the interests of government and private contingency fee attorneys are widely divergent, making such arrangements "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance claim." *Id.* at 353. Unlike cases brought for private plaintiffs, the Court recognized that enforcement actions "involve a balancing of interests" and a "delicate weighing of values" that "demands the representative of the government to be absolutely neutral." *Id.* at 352. The Court concluded that "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated," which "precludes the use in such cases of a contingent fee arrangement." *Id.* Recognizing the courts' authority to disqualify counsel when necessary in the furtherance of justice, the court found that a contingent fee

Victor E. Schwartz is chairman of Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. **Kevin Underhill** is a partner in Shook, Hardy & Bacon's San Francisco office. **Cary Silverman** and **Christopher E. Appel** are attorneys in the Public Policy Group. The authors appeared as counsel to *amicus curiae* Chamber of Commerce of the United States of America and American Tort Reform Association in the California Court of Appeal. They submitted a letter brief to the California Supreme Court in support of the petition for review in *County of Santa Clara*.

arrangement providing a private attorney representing the state with a financial stake in the outcome of the litigation unfairly prejudices the defendant and corrupts the duty of neutrality placed on government lawyers.

Based on this clear precedent and sound public policy, the Superior Court for the County of Santa Clara properly invalidated the contingency fee agreements in this case and ordered the counties to submit a new agreement, not based on a contingency fee, before permitting private counsel to further pursue public litigation. *See Order Regarding Defendants' Motion to Bar Payment of Contingent Fees to Private Attorneys, County of Santa Clara v. Atlantic Richfield Co.*, Case No. 1-00-CV-788657 (Cal. Super. Ct., Santa Monica Cty., Apr. 4, 2007). The Superior Court found unpersuasive the government's claim that it maintains control over the litigation, recognizing the inherent practical difficulty of monitoring the reality of such an arrangement:

[A]s a practical matter, it would be difficult to determine (a) how much control the government attorneys must exercise in order for the contingent fee arrangement with outside counsel [to] be permissible, (b) what types of decisions the government attorneys must retain control over, e.g., settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel. . . . Given the inherent difficulties of determining whether or to what extent the prosecution of this nuisance action might or will be influenced by the presence of outside counsel operating under a contingent fee arrangement, outside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys' and outside attorneys' well-meaning intentions to have all decisions in this litigation made by the government attorneys.

Id. at 3-4.

This rationale was abandoned by the California Court of Appeal, which distinguished *Clancy* on the premise that use of private contingency fee counsel “only to *assist*” the litigation, not to control it, upheld the standard of neutrality necessary to prosecute a nuisance action on the public's behalf. 74 Cal. Rptr. 3d 842, 848 (Ct. App. 2008) (emphasis in original). The appellate court grounded its decision in provisions of some, but not all, of the contingency fee agreements indicating ultimate control over the litigation remained with the state. Indeed, the court acknowledged that two of these agreements actually had to be disclaimed or re-worded after the fact because they expressly stated that the private counsel had “absolute discretion” in the case. *Id.* at 849. Thus, the Court of Appeal's decision significantly undermines *Clancy* because all a private attorney must do to overcome this precedent is to include a provision that final say over the litigation rests with the state.

Courts in other states have demonstrated serious concerns with the propriety and constitutionality of this type of contingency fee contract. *See, e.g., Meredith v. Ieyoub*, 700 So. 2d 478, 481 (La. 1997) (finding contingency fee agreement between state and private firm violated the principles of separation of powers). The Rhode Island judiciary recently permitted the practice, but indicated “our views concerning this issue could possibly change at some future point in time.” *See Rhode Island v. Lead Indus. Ass'n, Inc.*, Nos. 2004-63-M.P., 2008 WL 2605396, at *39-40 & n.50 (R.I. July 1, 2008) (finding state use of contingency fee agreement permissible so long as the Attorney General has “absolute and total control over all critical decision-making,” including veto power over any decision made by outside counsel and a senior government attorney personally involved in all stages of the litigation, and appear to the public to be exercising such control).

The experience of other states that have engaged in the practice of entering contingency fee contracts demonstrates cause for concern as government-hired private attorneys are often political donors, friends, or

colleagues of the hiring government official – creating, at the very least, the appearance of impropriety. In case after case, such behind-closed-door contracts have seriously damaged the public’s faith in government. *See, e.g.*, Editorial, *All Aboard the Gravy Train*, ST. LOUIS POST-DISPATCH, Sept. 17, 2000, at B2; Assoc. Press, *Lawyer Fees Weren’t S.C.’s, Official Says*, CHARLOTTE OBSERVER, May 2, 2000, at 1Y; Glen Justice, *In Tobacco Suit, Grumbings Over Lawyer Fees*, PHILADELPHIA INQUIRER, Oct. 4, 1999, at A1; Robert A. Levy, *The Great Tobacco Robbery: Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999, at 27. Former Texas Attorney General Dan Morales, for instance, was sentenced to four years in federal prison for attempting to funnel millions of dollars worth of legal fees generated in tobacco litigation to a long-time friend who did little work on that litigation. *See* John Moritz, *Morales Gets 4 Years in Prison*, FT. WORTH STAR TELEGRAM, Nov. 1, 2003, at 1A.

While the tobacco litigation provides some of the most blatant examples of political favoritism, contingency fee contracts between states and private lawyers have raised controversy and concern in other areas as well, including environmental claims. *See, e.g.*, Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES, July 9, 2007, at A10 (discussing Oklahoma Attorney General Drew Edmondson’s hiring of three private plaintiffs’ firms to sue poultry companies for water pollution in an agreement that entitled them to receive up to half of the recovery).

Such government-endorsed lawsuits have predictably resulted in exorbitant fee awards at the public’s expense, siphoning off dollars that could otherwise be used to support public programs or reduce taxes. *See* John L. Peterson, *Attorneys for Kansas Collect \$55 Million in Tobacco Case, Stovall’s Ex-Firm Expects \$27 Million*, KANSAS CITY STAR, Feb. 1, 2000, at B1; Bruce Hight, *Lawyers Give up Tobacco Fight*, AUSTIN AMERICAN-STATESMAN, Nov. 20, 1999, at A1; David Nitkin & Scott Shane, *Angelos to Get \$150 Million for Tobacco Lawsuit*, BALTIMORE SUN, Mar. 23, 2002, at 1A. Deals between governments and private personal injury lawyers have spawned bitter fee disputes. *See, e.g.*, Alex Beam, *Greed on Trial*, ATLANTIC MONTHLY, June 1, 2004, at 96. These controversies force government officials to waste taxpayer dollars, divert their attention from other matters, and engage in unnecessary litigation.

Contingency fee awards are often misrepresented as coming at no cost to the public, with no need for government resources. But these contracts are not free. A fee paid to private lawyers as a result of the litigation is money that would otherwise fund government services or offset the public’s tax burden. For example, South Carolina Attorney General Charlie Condon was criticized by environmental groups as “giving away the house” after a contingency fee contract he entered into resulted in a \$1.48 million fee to two private lawyers. *See* John Monk, *Lawyers May Get \$1.48 Million from State; Controversial Fees is for Work S.C. Hired Them to Do in Wake of Reedy River Oil Spill in 1996*, THE STATE (Columbia, S.C.), Nov. 17, 2000, at A1.

Experience has proven that state and local governments can be equally effective without contracting with lawyers on a contingency fee basis, even when taking on the largest of adversaries. For example, even former New York Attorney General Eliot Spitzer, considered one of the most aggressive and activist state attorneys general, did not enter into contingency fee agreements with private lawyers. *See* Manhattan Inst., Center for Legal Pol’y, *Regulation Through Litigation: The New Wave of Government-Sponsored Litigation*, Conference Proceedings, at 7 (Wash., D.C., June 22, 1999) (transcript of remarks). Moreover, in the multi-state tobacco suits, the attorneys general of some states, such as Virginia, also opted not to hire contingency fee attorneys and instead pursued the litigation with available resources. *See* Editorial, *Angel of the O’s?*, RICHMOND TIMES DISPATCH, June 20, 2001, at A8. The federal government also pursues litigation without hiring lawyers on a contingency fee basis. *See* Executive Order 13433, “Protecting American Taxpayers From Payment of Contingency Fees,” 72 Fed. Reg. 28,441 (daily ed., May 18, 2007).

County or district attorneys are best suited to carry out the state’s responsibility, particularly when an action involves assertion of the state’s police powers. Unlike private attorneys, government lawyers in California, like those in other states, take an oath to support and defend the Constitution. CAL. CONST. ART.

XX, § 3. They are prohibited from having a financial interest in matters in which they make decisions, *see* CAL. GOV'T CODE §§ 87100, 87103, 87105. And, of course, they are paid through public funds to ensure that their loyalty is to the people of the State and their motivation is the public interest. These rules ensure that government officers and employees are independent and impartial, avoid action that creates the appearance of impropriety, protect public confidence in the integrity of its government, and guard against conflicts of interest. The very nature of a contingency fee is directly contrary to the letter and spirit of prohibitions applicable to public actions under the laws of California and other states.

Moreover, contracting out the state's enforcement power to private contingency fee attorneys facilitates what has been called "regulation through litigation." *See* Robert B. Reich, *Regulation is out, Litigation is in*, USA TODAY, Feb. 11, 1999, at A15. The strategy of the private contingency fee attorneys to select an industry and go after it through tort litigation – as opposed to through legislation – may result in an end-run around representative government. Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing With "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 258-59 (2000).

Despite the claims of most attorneys general that the tobacco litigation was a "unique" situation, states and localities have hired contingency fee lawyers to attack a wide range of manufacturers and service providers. *See, e.g.*, John J. Zefutie, Jr., Comment, *From Butts to Big Macs—Can the Big Tobacco Litigation and Nation-Wide Settlement With States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 SETON HALL L. REV. 1383, 1411-13 (2004). If the Court of Appeal's decision is allowed to stand, this alliance will no doubt expand because these "new style" cases give the state executive branch and local governments a new revenue source without having to raise taxes. These lawsuits also give government officials the chance to achieve a regulatory objective that the majority of the electorate, as represented by their legislators, may not support. *See id.*

In addition to offending the democratic process, contingency fee agreements by the state pose a danger to the business and legal environment in California and across the nation. They encourage lawsuits against "deep pocket" defendants that are often in industries viewed as unpopular by the public, making it difficult for them to receive a fair trial. This is particularly true when what is essentially private litigation is backed by the state's moral authority and seal of approval. Should the California Supreme Court permit this practice to continue, the political patronage and unwarranted payouts seen in other states can be expected in California, and such a decision may encourage other state courts to permit such practices. The exercise of state and local government power should be based on the public interest, not private profit. The California Supreme Court should reaffirm *Clancy* and ensure that the public interest remains protected.