The Expert's Corner

Contingent Fees For Representing The Government: Developments In California Law

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As entrepreneurial plaintiffs' attorneys seek new opportunities in a world with rising class action hurdles, representing governments for contingent fees has proven to be a fruitful path. The tobacco litigation proved, of course, the extreme example of this. But I have written recently of the benefits and pitfalls of other such opportunities. *See* Expert's Corner: *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 Class Action Att'y Fee Dig. 407 (October 2009).

This summer, the California Supreme Court issued a new decision setting out some rules concerning private counsel involvement in contingent fee cases on behalf of the government, *County of Santa Clara v. Superior Court*, No. S163681, 2010 WL 2890318 (Cal. 2010). The decision is an advance for the plaintiffs' bar because it limited the Court's previous holding in *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), which had seemed to proscribe private lawyers from working for the government on a contingent-fee basis in public nuisance actions. At the same time, the case announced a very specific rubric by which courts should evaluate contingent fee agreements between private counsel and public counsel in such actions. The rubric is likely to gain some traction because it is principled and issues from the highest Court in the most populous and, arguably, most plaintiff-friendly, forum in the country. Here's the story.

Plaintiff counties and cities in California brought a public nuisance claim against several companies that had produced and distributed lead paint many years earlier, seeking an abatement for contaminated buildings. The plaintiffs entered into several fee agreements with private attorneys in which payment was contingent on results achieved. After the plaintiffs won summary judgment, the defendants filed a motion to bar payment on the contingent fee agreements, arguing that the Supreme Court's prior decision in *Clancy* prohibited the California government from retaining private counsel in a contingent fee arrangement in any public nuisance action.

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The California Supreme Court first reviewed its decision in *Clancy*, which involved a public nuisance action brought against an adult bookstore. The Supreme Court noted that the *Clancy* court had stressed the importance of lawyerly neutrality (and hence for not privatizing the government's action) in that particular case for two main reasons: (1) the delicate balance between the interest of the people in freedom from obnoxious or dangerous conditions, on the one hand, and the First Amendment interest of the landowner in

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selling — and the public in having the opportunity to purchase — protected material, on the other; and (2) the possibility of criminal prosecution in a public nuisance abatement suit.

After reviewing *Clancy*, the California Supreme Court proceeded to narrow *Clancy*'s holding and to distinguish *Clancy* from the present case:

> [T]o the extent our decision in *Clancy* suggested that public-nuisance prosecutions *always* invoke the same constitutional and institutional interests present in a criminal case, our analysis was unnecessarily broad and failed to take into account the wide spectrum of cases that fall within the public-nuisance rubric. In the present case, both the types of remedies sought and the types of interests implicated differ significantly from those involved in *Clancy* and, accordingly, invocation of the strict rules requiring the automatic disqualification of criminal prosecutors is unwarranted.

Santa Clara, at *7. The Court found it dispositive that this public nuisance action implicated a different set of interests, interests not "substantially similar to the fundamental rights at stake in a criminal prosecution." *Id*. at *8. Specifically, the Court noted:

> This case will not result in an injunction that prevents the defendants from continuing their current business operations. The challenged conduct (the production and distribution of lead paint) has been illegal since 1978. Whatever the outcome of the litigation, no ongoing business activity will be enjoined. Nor will the case prevent defendants from exercising any First Amendment right or any other liberty interest. Although liability may be based in part on prior commercial speech, the *remedy* will not involve enjoining current or future speech. Finally, because the challenged conduct has long since ceased, the statute of limitations on any criminal prosecution has run and there is neither a threat nor a possibility of criminal liability being imposed upon defendants.

Id. at *9. Thus, the Court found that because (1) no liberty interest or business activity was at stake, and (2) the defendants faced no threat of criminal prosecution, *Clancy* did not bar representation based on a contingent-fee agreement in this case.

However, the Court did not end its analysis of the contingent fee issue there. Recognizing that representation of the public interest by private counsel on a contingent fee basis creates conflicts of interests, the Court limited the permissibility of contingent fee private representation to cases in which "neutral, conflict-free government attorneys retain the power to control and supervise the litigation." *Id*. at *11. The Court explained:

> All critical discretionary decisions ultimately must be made by the public entities' government attorneys rather than by private counsel — in other words, neutral government attorneys must retain and exercise the requisite control and supervision over both the conduct of private attorneys and the overall prosecution of the case. Such control of the litigation by neutral attorneys provides a safeguard against the possibility that private attorneys unilaterally will engage in inappropriate prosecutorial strategy and tactics geared to maximize their monetary award. Accordingly, when public entities have retained the requisite

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> authority in appropriate civil actions to control the litigation and to make all critical discretionary decisions, the impartiality required of governmental attorneys prosecuting the case on behalf of the public has been maintained.

Id. at *13.

The defendants argued that the concept of "control" is unworkable in practice; private attorneys will exert control over the litigation despite contractual language that provides for public attorney control. To address this issue, the Court stated that, "retainer agreements providing for contingent-fee retention should encompass more than boilerplate language regarding 'control' or 'supervision,' by identifying certain critical matters regarding the litigation that contingent-fee counsel must present to government attorneys for decision." *Id*. at *14. For example, the Court noted that in cases such as this one, where settlement was likely, the authority to settle involves a "paramount discretionary decision" and thus the retention agreement must stipulate that public attorneys have exclusive discretion over settlement decisions. *Id*.

The Court thus adopted specific guidelines, slightly modified from those set forth by the Supreme Court of Rhode Island[1]: *"contingent-fee agreements between public entities and private counsel must provide: (1) that the public-entity attorneys will retain complete control over the course and conduct of the case; (2) that government attorneys retain a veto power over any decisions made by outside counsel; and (3) that a government attorney with supervisory authority must be personally involved in overseeing the litigation." Id*. (emphasis added).

Using its new grading rubric, the Supreme Court assessed the contingent fee agreements in this case. The Court noted that five of the seven agreements in the record provided that the governmental counsel "retain final authority over all aspects of the Litigation;" declarations confirmed that the public counsel "retained and continue to retain complete control of the litigation," have been "actively involved in and direct all decisions related to the litigation," and have "direct oversight over the work of outside counsel;" private counsel also submitted declarations confirming that government counsel for the five retain "complete control" over the litigation. *Id*. at *15. Despite this language, the Court found that none of the fee agreements satisfied the "specific provisions regarding retention of control and division of responsibility" it set forth in the opinion. *Id*. The Court noted, however, that plaintiffs could continue to retain their private counsel on contingent-fee basis, as long as they revised their retention agreements to conform to the requirements in the opinion.

Bottom line? In limiting the prior decision in *Clancy* to the facts of that case, the *Santa Clara* decision opens up more opportunities for private lawyers to do contingent fee work for the government. At the same time, the decision sets out specific arrangements that must be in the contracts for the delegation to survive judicial scrutiny. While the Court clearly hoped for more regular public oversight, that aspiration alone is unlikely to stand in the way of increasing privatization of public litigation. The case is therefore a victory for the plaintiffs' bar and one that signals savvy plaintiffs' attorneys to continue to look for opportunities to represent their local government entities in contingent fee cases. Ω

1 *State v. Lead Industries, Ass'n, Inc*., 951 A.2d 428 (R.I. 2008).