Contingency Fee Arrangements for Public Entities
Setting Parameters Can Help Ensure Government Neutrality

Summary

Civil litigation is a consistent concern amongst California businesses, given the cost, time and strain it creates. This concern is significantly enhanced when the State of California or another governmental entity is the party pursuing litigation, as government has more power, more authority, and potentially more resources than just a private plaintiff.

In 2010, this threat of litigation was exacerbated by the California Supreme Court decision in County of Santa Clara v. Atlantic Richfield Company, which held it was proper for a public entity to utilize private attorneys through a contingency fee arrangement to represent the entity in civil litigation. Although it is still unclear the extent to which a private attorney may be utilized through a contingency fee arrangement with a public entity, the Supreme Court has opened the door, leaving an area ripe for either litigation or the Legislature to set forth the parameters of such relationships to ensure the integrity and neutrality of the government is not jeopardized.

County of Santa Clara v. Atlantic Richfield Co.
In March 2000, the County of Santa Clara filed a class action against Atlantic Richfield Company that ultimately alleged a cause of action for public nuisance and abatement with regard to the defendant's use of lead paint. Throughout the litigation, the county was represented by private attorneys through a contingency fee arrangement, meaning the attorneys would be compensated for their time by receiving a percentage of any recovery obtained from the litigation. Contingency fee arrangements create an automatic financial incentive for the attorney in the litigation as the attorney has a personal stake in getting the highest award of damages possible.

The defendant filed a motion to bar the county from using a private attorney through a contingency fee arrangement on the grounds that such an arrangement eliminates the absolute neutrality of the representation required for the prosecution of a public nuisance action due to the private attorney's personal financial interest in the litigation. The defendant compared the relationship to paying a prosecutor a contingency fee based upon the number of convictions obtained, rather than protecting the public interest. The county disagreed, claiming such a fee arrangement was not a complete bar to private representation of public entities, thereby leaving the question to the California Supreme Court to answer.

On July 26, 2010, the Supreme Court issued its decision where it ultimately held there is no automatic bar to public entities hiring private attorneys through a contingency fee arrangement. County of Santa Clara v. Atlantic Richfield Co., 50 Cal.4th 35 (2010).

Although the court did not suggest that such an arrangement would always be acceptable, especially where criminal liability is involved, in this particular case the court deemed it OK. Unlike prior cases in which a contingency fee with a public entity was held as improper given criminal liability, loss of property or the interruption of business operations, the defendant in this case was not at risk of losing its property or business. Rather, the public nuisance claim was focused on the use of lead paint that was already illegal. Moreover, due to contractual provisions that could be placed in the contingency fee arrangement on remand, which would dictate the county retained absolute control over the litigation, the court determined that the fee arrangement with the county was not improper.

Although the defendant filed a petition for writ of certiorari with the U.S. Supreme Court, asking it to decide the constitutionality of such agreements, the U.S. Supreme Court denied review in July 2011.

Government Use of Contingency Fee Arrangements: Good or Bad?
As demonstrated by the County of Santa Clara, the public entity that seeks to use private attorneys through a contingency fee arrangement believes that such arrangements are in fact proper and necessary. Arguments in support include: 1) it enhances the public entity's limited budget by obtaining subject matter legal experts who the entity does not have to compensate until the litigation concludes; 2) it assists the public entity in matching the potential resources of a defendant corporation; and 3) contractual provisions maintain the neutrality necessary to advocate on behalf of the government.

Opponents to this arrangement, however, raise a number of concerns, including: 1) the loss of significant revenue to the government and therefore public programs from the payout of the contingency fee to a private
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attorney; 2) the inability to ensure that contractual provisions dictating who maintains control of the litigation are actually followed; and 3) the potential for corruption with regard to the public entity involved and the private attorney retained, especially when political contributions are involved.

There is no question that representing a public entity is a lucrative arrangement for a private attorney. The fee awards are significant, as the underlying damages are based upon representing the public rather than a single plaintiff, notes the Legal Backgrounder by Victor E. Schwartz, Kevin Underhill, Cary Silverman and Christopher Appel, “Government’s Hiring of Contingent Fee Attorneys Contrary to Public Policy.” An example of such awards are the tobacco litigation cases wherein the fees awarded to private attorneys that were hired in various states on behalf of the attorneys general ranged from $27 million to $150 million. Confirming this advantage, Douglas McMeyer, Lise T. Spacapan and Robert George state in “Contingency Fee Plaintiff’s Counsel and the Public Good”: “[l]ast, but certainly not the least benefit to the plaintiffs’ bar, is the likelihood that the private contingency fee lawyer can recover even greater awards when representing the state than he or she could when representing the corresponding private plaintiffs’ class.”

Representing the state can provide procedural advantages as well. McMeyer, et al., list several of these benefits in their article: 1) broader causes of action that are not well-defined and lead to more liberal interpretations, such as public nuisance vs. private nuisance; 2) some defenses applicable to private parties are not applicable to the state; 3) recovery is based upon public interest, not individual injuries; and 4) defendants, especially corporate defendants, are not likely to litigate against the state and will often settle, as “[f]ew corporations ‘are capable and willing to risk trial when the plaintiff is a state (or a consortium of state attorneys general operating in concert) that may collect billions of dollars as a result of harms allegedly suffered by millions of its residents.’”

**Legislative Activity**

Since the use of contingency fee agreements with government entities began in approximately 1980, the recognition of the potential conflict of interest between a private attorney and the government has motivated several states to take action. So far, 10 states have passed legislation regarding the use of private attorneys by government entities. Some of the enacted laws cap the hourly fee and total recovery to the private attorney, while other laws focus on transparency to the public of the arrangement and limitation of political contributions to government officials.

California has not enacted any laws on this issue, despite the growing trend in this state for local and state entities utilizing contingency fee arrangements.

**CalChamber Position**

Litigation with a government entity is daunting enough for any defendant without the fear of the litigation being influenced by the financial interest of a private attorney. If California continues to condone the use of private attorneys to represent government entities through contingency fee arrangements, there must be enhanced contractual requirements, ethical standards and required disclosures to ensure the neutrality of the government is not jeopardized by such arrangements, thereby placing the defendant at a completely unfair disadvantage.

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