Contingency Fee Arrangements for Public Entities
Setting Parameters Can Help Keep Government Neutral

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 it 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 the Supreme Court authorized this relationship, there still are many questions ripe for litigation and legislation regarding potentials for conflict of interests and ensuring the integrity and neutrality of the government is not jeopardized.

Contingency Fee Arrangements with Public Entities in California

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 in homes. 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.

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 of government. On July 26, 2010, the Supreme Court 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, it indicated that contractual provisions could be placed in the contingency fee arrangement to dictate the county retain absolute control over the litigation to ensure neutrality. The plaintiffs ultimately were awarded approximately $1.15 billion in damages against the paint company for abatement, which was appealed.

Just recently, the Sixth District Court of Appeal reduced the number of homes included in the potential litigation as well as the cost of abatement. Again, this decision will likely be appealed. In the meantime, while this case has been pending for more than 17 years, the homes that are included within this lawsuit have basically been labeled as "public nuisances." A November 15, 2017 article by Amanda Bronstad in *The Recorder* included the following quote from attorneys involved in the litigation: "The court has hung a scarlet letter around these property owners even if these properties had been well-maintained… If you're a resident in a rental property, or even a homeowner that lives in your own home, this is a pretty confusing time."

Recent Trends of Industries Targeted by Public Nuisance Contingency Fee Arrangements

Since the *County of Santa Clara, supra*, the County of Santa Clara has partnered with private law firms to file at least eight other lawsuits alleging public nuisance, including a recent lawsuit filed with Orange County against five opioid pharmaceutical manufacturers. The counties alleged that the drug manufacturers violated California's false advertising and unfair competition laws, and created a public nuisance by persuading doctors to prescribe opioids for long-term use even though the manufacturers knew the opioids were ineffective, addictive, and unsafe. On August 27, 2015, the presiding judge dismissed the case without prejudice.

In 2015-2016, the cities of San Jose, Oakland, and Berkeley, represented by a private law firm, filed a public nuisance lawsuit against Monsanto, a manufacturer of polychlorinated biphenyl (PCBs), alleging that Monsanto should have to pay for the cleanup of waterways and the San Francisco Bay due to PCB pollution. In August 2017, the federal judged stayed the case, ruling that the cities had failed to exhaust their administrative remedies with the California Commission on State Mandates.

In 2017, San Francisco and Oakland, represented by a private law firm, filed a lawsuit against several oil companies for damages

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resulting from climate change. The cities are hoping to recover significant damages to pay for rebuilding sea walls and updating sewer and stormwater systems.

Government's Use of Contingency Fee Arrangements – Good or Bad?

As demonstrated by the *County of Santa Clara, supra*, the public entity that seeks to use private attorneys through a contingency fee arrangement believes that such arrangements are in fact proper and necessary. Specifically, arguments in support include: 1) it enhances the public entity's limited budget by obtaining subject matter legal experts whom 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.

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, say Victor E. Schwartz, Kevin Underhill, Cary Silverman and Christopher Appel ("Government's Hiring of Contingent Fee Attorneys Contrary to Public Policy," in the *Legal Backgrounder).*

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," "[Last], 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."

Opponents to this type of 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 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.

Two attorneyus who specialize in public nuisance law, David Axelrad and Lisa Perrochet, outlined the use of contingency fee arrangements with government entities and highlighted several of these concerns, including the lack of neutrality as well as the potential for conflict, in a July 2011 article:

> *"Because the relationship between public and private counsel is shielded from effective oversight, the 'control exception' adopted in cases such as Santa Clara cannot guarantee the impartiality and neutrality of private counsel hired to litigate these cases. No matter how thorough the prosecutor's control may be, day-to-day decision-making, strategy calls, and the development and evaluation of facts are all necessarily influenced by the inescapable fact that private counsel with tremendous responsibility for litigating a public law enforcement action will not be paid unless there is a substantial monetary recovery. That profit motive necessarily influences the course of litigation in the direction of monetary solutions rather than nonmonetary or governmental solutions that may be available."* ("The Supreme Court of California Rules on Santa Clara Contingency Fee Issue – Backpedals on *Clancy*" in the *Defense Counsel Journal*.)

These legal experts also noted the potential for conflicts of interest to arise from contingency fee arrangements, such as when the public good would be served by obtaining nonmonetary relief, yet the contingency fee attorney who is compensated by obtaining the highest monetary relief pursues monetary damages. Author Julie Steiner explained this conflict with regard to environmental remediation: "The government attorney is a salaried official whose fee is not formally tied to the damage award. The environmental special counselor, on the other hand, derives a fee from the damage award and is thus interested in monetizing that award to maximize personal gain. Rather than planting trees or remediating a spill, the environmental special counselor is personally interested in the monetary value of that construct to draw a contingency fee." ("Should 'Substitute' Private Attorneys General Enforce Public Environmental Acts? Balancing the Costs and Benefits of the Contingency Fee Environmental Special Counsel Arrangement," W*estern New England University School of Law,* 2011, at 868.)

Another potential hiccup in the use of such arrangements is a conflict of interest when counterclaims are alleged by the defendant against the governmental entity and determining who defends the government on these claims. Normally, a contingency fee arrangement covers only the work performed to pursue a case against a defendant in exchange for a share of any monetary recovery. Counterclaims generally are not within the scope of the contingency fee arrangement. This wrinkle in the contingency fee arrangement with the governmental entity will presumably have to be addressed through a written agreement that identifies whether the local government internal counsel or the private attorney is responsible for defending the counterclaims. If it is the internal counsel, the financial benefit of utilizing outside counsel for such cases may diminish. If it is the outside counsel, the governmental entity may have to pay hourly attorney's fees or agree to providing the outside counsel with a larger share of any monetary recovery.

California Legislative Activity

Ten 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.

In 2016, Assemblymember Cheryl Brown (D-San Bernardino) introduced AB 2804, which would have required cities and counties utilizing contingency fee arrangements with private law firms to comply with bidding requirements to make the process more transparent to the public, as well as include specific contractual provisions in these contingency arrangements to try to ensure the governmental entity retains control over the litigation. AB 2804 did not move through the legislative process.

In 2017, Assemblymember Heath Flora (R-Ripon) introduced AB 1146, which originally was similar to AB 2804. It ultimately was amended to limit firms that have provided political contributions to cities or counties from representing those cities or counties in civil litigation through a contingency fee arrangement. AB 1146 did not move through the legislative process.

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 neither the neutrality of the government nor taxpayer money is jeopardized by such arrangements.

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