COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

Court of Appeal No. H031540

COUNTY OF SANTA CLARA, *ET AL.*,

Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,

Respondent.

ATLANTIC RICHFIELD COMPANY, *ET AL.*

Real Parties in Interest.

Santa Clara County Superior Court No. CV 788657
The Honorable Jack Komar
Order Entered on April 4, 2007

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF OF PUBLIC JUSTICE, P.C., HEALTHY CHILDREN ORGANIZING PROJECT, AND WESTERN CENTER FOR LAW AND POVERTY IN SUPPORT OF PETITIONERS COUNTY OF SANTA CLARA, *ET AL.*

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TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to Rule 8.200(c)(1) of the California Rules of Court, the proposed *amici curiae* request permission to file the accompanying brief in support of Petitioners County of Santa Clara, *et al.*

THE *AMICI CURIAE*

Public Justice, P.C., is a national public interest law firm that specializes in precedent-setting and socially-significant civil litigation, and is dedicated to pursuing justice for the victims of corporate and governmental abuses. Litigating throughout the federal and state courts, Public Justice prosecutes cutting-edge, high-impact litigation designed to advance consumers' rights, workers' rights, civil rights and civil liberties, public health and safety, environmental protection, and the protection of the poor and the powerless. For example, its work has resulted in a jury verdict in favor of and compensation for a class of protesters wrongfully arrested during the 1999 World Trade Organization Conference in Seattle, Washington, in *Hickey v. City of Seattle* (Case No. C00-1672, W.D. Wash.); a landmark settlement to remedy unequal pay and promotional opportunities at Lawrence Livermore Laboratory in *Singleton v. Regents of the University of California* (Case No. 807233-1, Alameda County Superior Court); and a decision from the California Supreme Court in *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, holding a class action ban in a consumer contract of adhesion to be unconscionable where it operates to immunize the corporate drafter from

liability. Public Justice (then called Trial Lawyers for Public Justice) also worked alongside government attorneys two decades ago to file lawsuits seeking to hold the lead paint pigment manufacturers accountable on an industry-wide basis for the damages caused by lead paint, and witnessed first hand the paper war unleashed by industry lawyers to overwhelm its resource-poor, civil servant opponents.

The Healthy Children Organizing Project (HCOP), formerly known as the Childhood Lead Poisoning Prevention Project, works to protect young children from preventable diseases caused by environmental hazards in San Francisco's low-income and minority communities. Since 1991, lead poisoning as a result of lead paint in housing has dominated the attention of HCOP because 94 percent of San Francisco's housing was built before 1979. A high percentage of low-income families in San Francisco occupy rental homes, and many of their homes are over-crowded, substandard, and full of lead hazards. HCOP urged the City and County of San Francisco to join this lawsuit in 2001.

The Western Center on Law and Poverty (WCLP) is a nonprofit public interest law firm representing low-income Californians. For the past ten years, WCLP has led local and state efforts for legislative and administrative reforms that have helped reduce lead poisoning among children in California. WCLP chairs a subcommittee of the State's Strategic Plan to Eliminate Childhood

Lead Poisoning and helped to draft California Senate Bill 460, the Lead Poisoning Prevention Act authored by Senator Ortiz that became law in 2003.

STATEMENT OF INTERESTS

Lead paint poisoning disproportionately targets the client community of *amici* – the poor and the powerless, and especially low-income children. Low-income children are most at risk because they are most likely to live in old, deteriorating housing that contains lead paint, and they ingest lead-contaminated dust. Local governments lack the resources to rid these homes of lead paint. As a result, this lawsuit represents local governments' best opportunity to garner sufficient resources to protect their children from further lead paint poisoning.

The issue presented in this case implicates local governments' ability to co-counsel with and retain private counsel on a contingency-fee basis to pursue public nuisance abatement actions. Due to budgetary constraints, low staffing levels, and a lack of expertise, local governments often cannot seriously litigate by themselves against an entire industry. Therefore, the resolution of the issue before the Court will have a direct and profound impact on whether public nuisance actions, especially against rich and powerful corporations and industries, can be maintained at all. *Amici* have strong interests, in general, to ensure that public-private collaborations will continue to be a means to hold accountable an industry responsible for a public health crisis, and, specifically, and to combat defense arguments designed to insulate

from liability an industry that spent decades hiding the truth about the dangers of lead-based paint to the detriment of California's citizens.

NEED FOR FURTHER BRIEFING

The *amici curiae* are familiar with the issues presented in this case. The *amici curiae* believe there is a need for additional briefing on the issue so the Court can consider the statewide – and, indeed, national – public policy ramifications of the trial court's decision to disqualify private co-counsel. The decision, if upheld, could well be the death knell of public nuisance actions for the protection of public health and safety. Accordingly, *amici curiae* respectfully request that leave be granted to allow the filing of the accompanying *amici curiae* brief.

Dated: August 23, 2007

Respectfully submitted,

By: Victoria W. Ni by SES

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I. INTRODUCTION

Plaintiff cities and counties filed this action seven years ago to remedy a serious health threat to California citizens: the presence of lead-based paint in public and private buildings within Plaintiffs' jurisdictions. The cities and counties allege that Defendants assisted in the creation of a public nuisance by concealing the dangers of lead, mounting a campaign against the regulation of lead, and promoting lead paint for interior use, even though Defendants had known for nearly half a century that such use of lead paint was hazardous to human health. The paint sold by Defendants, which was used in the interiors and exteriors of private and public buildings, continues to this day to threaten and cause harm to the citizens of the Plaintiffs' jurisdictions. Plaintiffs claim that Defendants are liable for the abatement of this public nuisance.

After years of litigating over the pleadings in this action, Defendants moved to disqualify as counsel four private law firms retained by Plaintiffs on a contingency fee basis to assist in this litigation. The trial court disqualified these firms, adopting a *per se* rule against contingency fee agreements for co-counsel in public nuisance actions, despite clear instructions from the California Supreme Court that such agreements be examined on a case-by-case basis.

To allow Defendants to succeed on this attack on the public-private pairing of resources will essentially allow an entire industry to escape responsibility for the enormous health hazard that it created. The government

entities in this case have submitted sworn declarations that they are unable, both in terms of resources and expertise, to litigate this case without the assistance of contingency fee counsel. Moreover, the trial court disqualified contingency fee counsel despite explicit statutory authorization for the appointment of special counsel on terms deemed appropriate by local government and the lack of any demonstrable prejudice to Defendants.

For these reasons, this Court should correct and overturn the trial court's order.

II. ARGUMENT: THE TRIAL COURT'S DECISION VIOLATES *CLANCY* AND SOUND PUBLIC POLICY

Twenty years ago, the California Supreme Court held in *People ex rel. Clancy v. Superior Court*, (1985) 39 Cal.3d 740 (hereinafter "*Clancy*") that city attorneys may retain contingency counsel under "appropriate circumstances." The trial court's decision badly misinterpreted – and violated – *Clancy*, creating a bright-line rule prohibiting the use of contingency fee counsel in public nuisance actions. By its terms, however, *Clancy* requires a case-by-case evaluation to determine whether or not the use of a contingency fee agreement is proper.

The trial court's misapplication of *Clancy* also creates an unnecessary constitutional conflict between the judicial and legislative branch, where the legislature has expressly and specifically empowered a local government to contract for specialized legal services and to compensate the attorneys "as it

deems proper." Cal. Gov. Code §§ 37103, 53060. The trial court should have deferred to the policy decisions of the legislature. *Marine Forests Society v. California Coastal Commission,* (2005) 36 Cal.4th 1, 25 (hereinafter "*Marine Forests*").

Furthermore, compelling policy reasons exist to allow the use of contingency fee counsel here. Bringing large-scale public nuisance litigation with the assistance of attorneys paid by the hour would be impracticable, if not impossible, for local governments due to the uncertain expense of hourly attorneys, the perverse incentives for abuse created by hourly litigation, and the seemingly unlimited amount of resources available to Defendants and their counsel.

Historically, government entities have repeatedly and properly used their discretion to enter into contingency fee agreements with private counsel, particularly in circumstances where the litigation is complex and costly. To allow Defendants' current attack against contingency fee contracts in public nuisance litigation would open the door to similar arguments in other areas of law, creating an unfair playing field between litigants, where the viability of any lawsuit would be determined by the resources of the parties.

Further, there is an evidentiary presumption that the government officials will perform their duties properly. Cal. Evid. Code § 664. Defendants have the obligation to present evidence overcoming this statutorily-imposed presumption. Cal. Evid. Code § 606. No such evidence

has been presented here. Rather, the record abounds with sworn statements from public officials that they have properly carried, and will continue to properly carry, out their duties. Even without such evidence, however, institutional safeguards exist to ensure that Defendants suffer no undue prejudice, including the ability of the trial court to oversee the litigation. Moreover, the very nature of the contingency fee agreement itself weighs against pursuit of non-meritorious cases. Finally, the political process provides protection that the city and county officials will properly perform their obligation to oversee this litigation.

A. *Clancy* Requires a Case-By-Case Evaluation of Whether Contingency Fee Contracts Are Appropriate in a Public Nuisance Action

The trial court's decision rested entirely on its misinterpretation – and violation – of *Clancy*. 39 Cal.3d at p. 740. In *Clancy*, the California Supreme Court unanimously found that a city could retain private counsel on a contingency fee basis under "appropriate circumstances." *Id.* at p. 748. After carefully analyzing the factual circumstances of that case, the Supreme Court found the use of a contingency fee agreement improper there. *Id.* at p. 750. The facts of *Clancy*, however, could not be more different from the facts of this case.

In *Clancy*, the City of Corona was attempting to stop an individual bookstore owner from selling sexually explicit reading materials. *Id.* at p. 743. The city initially passed two zoning ordinances regulating adult bookstores,

which were invalidated on First Amendment grounds. *See Ebel v. City of Corona*, (9th Cir. 1983) 698 F.2d 390; *Ebel v. City of Corona*, (9th Cir. 1985) 767 F.2d 635 (hereinafter "*Ebel*"). "Frustrated by its defeats in federal court on the constitutional issue," the City passed a public nuisance ordinance that defined a public nuisance as a place of business "in which obscene publications constitute all of the stock in trade, or a principal part thereof," and retained attorney Clancy on a contingency fee basis to prosecute the bookstore owner. *Clancy,* 39 Cal.3d at p. 743. The actual city attorney did not participate in the litigation, and, as a consequence, the private attorney had absolute control over the litigation. *Ibid.*

Here, in interpreting *Clancy* to bar contingency fee contracts under ***all*** circumstances, the trial court failed to examine the specific circumstances of this case – which could not be more remote from the circumstances in *Clancy*. First, in *Clancy*, the City passed multiple ordinances specifically designed to run the defendant out of business, two of which were found to violate the defendant's First Amendment rights. *Id.* at p. 743. In the instant case, no such special ordinances are at issue, and the city and counties are relying on long-established common law to require abatement of a hazard created by Defendants.

Second, the prosecutor's duty of neutrality was especially important under the facts of *Clancy* because there, the public's interest in abatement had to be balanced against countervailing private and public interests in free

speech, as well as private property interests. *Id.* Here, no countervailing interests exist, and attorneys representing Plaintiffs need only consider the public's interest in remediation of a condition hazardous to public health.

Third, in *Clancy* the private attorney stood in place of the government attorney; here, the cities and counties remain engaged in the litigation, and retain full control over litigation decisions. *See infra*, sec. (II)(E)(1). In fact, the record is uncontested that the cities and counties have retained full control over the management of this case.[1] *Id.*

Fourth, in *Clancy*, the City had more wealth and resources than the adult bookstore, whereas here the opposite is true. The industry Defendants have vastly more resources available for the defense of this action. *See infra*, sec. (II)(C)(3).

Finally, the cities and counties retained contingency fee counsel to assist in this litigation because it is the ***only means*** by which these cases can be seriously prosecuted. Without private counsel's assistance, there would be no litigation at all. That is the reason for Defendants' strategic maneuver to disqualify private counsel after seven years of hotly-contested litigation.

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[1] The *Clancy* Court specifically distinguished an out-of-state authority on the grounds that, in that case, the court had approved the assistance of a private attorney only because "he appeared 'not in place of the State's duly authorized counsel.'" *Clancy v. Superior Court*, supra, 39 Cal.3d at p. 749 n3 (citing *Sedelbauer v. State,* (Ind. App. 1983) 455 N.E.2d 1159).

By creating a bright-line rule that prohibits public entities from retaining and co-counseling with private contingency fee counsel, the trial court's ruling allows Defendants to avoid liability entirely. This is not the outcome that the *Clancy* court intended. Rather, under the case-by-case analysis envisioned by *Clancy*, this case presents circumstances in which the courts should defer to the cities' and counties' discretion to retain private counsel on a contingency fee basis.

B. Courts Should Generally Defer to the Legislature's Choice to Allow Government Entities the Discretion To Hire and Compensate Counsel with Specialized Skills

The central function of government is to make policy decisions and allocate limited public resources in order to protect the health and safety of its citizenry. An action seeking to minimize or eliminate the health hazards associated with lead paint is a quintessential example of government executing its core role. Government is, and should be, given wide latitude in how it executes this function. Interference from the judiciary should only occur to rectify demonstrable violations of constitutional or statutory rights.

California law empowers local government entities to enter into contracts, including the express right to enter into contracts for special services such as legal services. Two sections of the California Government Code "expressly authorize a general law city, and other public agencies, to employ and compensate personnel for the performance of 'special services.'"

Montgomery v. Superior Court of Solano County, (1975) 46 Cal.App.3d 657, 668.[2] The Government Code specifically authorizes local governments to "contract with any specially trained and experienced person, firm, or corporation for special services and advice in . . . legal . . . matters." Cal. Gov. Code § 37103. The statute further allows a local government to provide "compensation to these experts ***as it deems proper***." *Ibid.* (emphasis added).

The Legislature has also conferred on the "legislative body of any public or municipal corporation or district" the power to "employ any persons for the furnishing to the corporation or district special services and advice in . . . legal . . . matters if such persons are specially trained and experienced and competent to perform the special services required." Cal. Gov. Code § 53060. Like section 37103, this provision authorizes the municipal corporation of district to provide compensation for "such persons ***as it deems proper*** for the services rendered." Cal. Gov. Code § 53060 (emphasis added).

California's separation of powers clause resides at Article III, section 3 of the California Constitution, which provides: "The powers of state

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[2] "In California, cities are classified as 'general law cities,' organized under the general law of the state, or 'chartered cities,' organized under a charter." *People v. Chacon*, (2007) 40 Cal.4th 558, 571 (citing Cal. Gov. Code §§ 34100-34102). Those cities and counties involved in this litigation that are charter cities also acted pursuant to the legal authority granted by their charters. *See, e.g.*, Petitioner's Appendix of Exhibits in Lieu of Clerk's Transcript ("Pet'r App.") at pp. 406, 457-58.

government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Although the demarcation is not absolute, "[the separation of powers] doctrine unquestionably places limits upon the actions of each branch with respect to the other branches." *Marine Forests*, 36 Cal.4th at p. 25 (citing *Superior Court v. County of Mendocino*, (1996) 13 Cal. 4th 45, 53). "The judiciary, in reviewing statutes enacted by the Legislature, ***may not undertake to evaluate the wisdom of the policies embodied in such legislation***; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." *Marine Forests*, 36 Cal.4th at p. 25 (emphasis added).

Indeed, the California Supreme Court has further recognized that, "[t]he law is well settled that a public agency may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter provision." *See Compensation Insurance Fund v. Riley*, (1937) 9 Cal.2d 126, 131 (hereinafter "*Riley*"). No such prohibition exists here. The *Riley* court recognized that a variety of circumstances exist that might require the employment of other counsel, to prevent the interests of the county or city from being neglected or wholly sacrificed:

> [The District Attorney] may be incompetent, or sick, or absent from the county, or engaged in other business, or the business in hand may be of such magnitude and importance as to demand, on the part of the Board, in the exercise of such foresight and

> care only as business men bestow upon important matters, the employment of additional counsel.

Id. at p. 132. Thus, both California statutes and case law have expressly recognized that local governments have the authority and discretion to contract with and determine compensation for special counsel.

Here, the trial court based its ruling on its inherent authority to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." Cal. Code Civ. Proc. § 128(a)(5). But the trial court's inherent authority is not boundless – and does not allow it to override the cities' and counties' right to set the terms for compensating special counsel. "Of necessity the judicial department as well as the executive ***must in most matters yield to the power of statutory enactments.***" *People v. Standish*, (2006) 38 Cal.4th 858, 879 (emphasis added). Where possible, a court should "avoid constitutional or statutory interpretations in one area which raise serious and doubtful constitutional questions in another." *People v. Birks*, (1998) 19 Cal. 4th 108, 135. Here, the trial court's ruling ***directly conflicts*** with the discretion given to city and county governments pursuant to legislative enactments and fails to take into account separation of powers considerations.

Specific statutory provisions give the Plaintiff government entities the power to employ special counsel where such services are necessary. The cities

and counties exercised their discretion in determining not only that the services of special counsel were necessary, but also that compensating them on a contingency fee basis was necessary. Cal. Gov. Code §§ 37103, 53060. *See also* Pet'r App. at pp. 407, 410-11, 426-27, 429-431, 448, 453, 455-56, 459, 474-75 (statements by the Plaintiff public entities describing the necessity of hiring special counsel and their particular expertise in this type of litigation). The trial court, in creating a *per se* bar to contingency fee contracts in public nuisance cases, ignored the statutory authorization for such contracts and the complicated and delicate balancing of authority between the separate branches of government.

C. Policy Considerations Strongly Favor Allowing Government Entities Discretion to Enter Into Contingency Fee Contracts with Private Counsel in Resource-Intensive Public Nuisance Actions

Were the Court to wade into policy waters usually reserved for other branches of government; substantial compelling policy reasons militate against upholding the trial court's bright-line rule in public nuisance actions. First, the cost alone would preclude litigating this case pursuant to an hourly-fee contract. Second, hourly billing itself can create perverse incentives and conflicts between attorney and client. Third, contingency contracts help to create an even playing field between the government entities and wealthy defendants.

1. The Unbounded Expense of Litigating Pursuant to an Hourly Contract Would Preclude Prosecution of This Case

The costs of prosecuting "mega-cases" such as this – a case that involves dozens of defense firms, multiple plaintiff government entities and the abatement of lead in properties throughout the state of California – have the potential to be astronomical. Rarely is the total cost of litigation in such cases known, however, as the enormous bills that are paid by corporate defendants to hourly attorneys pursuant to private contracts are not made public.

Recently, however, one Court asked defense counsel, in a criminal white-collar case, to reveal what a "reasonable, privately-funded defense would cost" and what the "minimum cost of a competent, privately retained defense for an individual . . . would be." Beth Bar, *Defense Cost Estimates Offered in KPMG Case*, N.Y.L.J. (July 13, 2007). There, defense attorneys' estimates of total fees for a case estimated to last only six to eight months ranged from $10 million to $44 million. *Id.* In addition, the parties pointed to the defense costs of other similar high-profile white-collar criminal defenses, which ranged from $21 million for the defense of former HealthSouth CEO Richard Scrushy, to $70 million for former Enron Chief Executive Officer Jeffrey Skilling's defense.

In the tobacco litigation, although the final cost for defending the industry has never been publicly revealed, enormous sums were spent on discovery alone:

> [T]hey had the most powerful law firms in the country representing them, good law firms, outstanding lawyers. In our case, thirty law firms, 600 lawyers, being paid every single day at $ 500 an hour, $ 450 an hour, whatever. Every month their bills went out. They said in court under oath that they spent over $ 100 million just producing the privileged documents in our case. RJR said it spent over $ 95 million producing its document index. Who did that money go to? In defending their right - and they have a right to have that type of defense ... But how are you going to take them on? Who is going to take them on?

Michael Ciresi, *The Tobacco Litigation & Attorneys' Fees*, 67 Fordham L. Rev. 2827, 2837 (1999).

The enormous fees charged by attorneys billing on an hourly basis, the lack of public information about these fees, and the uncertainties inherent in litigation underscore a fundamental difficulty government entities face if they seek to contract with counsel on an hourly basis in public nuisance actions: the inability to predict the total cost of fees for a large case. As noted by the American Bar Association in an extensive survey on the impact of hourly billing, "[h]ourly billing does not offer any predictability for the client. It is not until the matter concludes that the client knows the ultimate cost." ABA Commission on Billable Hours, ABA Commission on Billable Hours Report, (2001-2002), at p. 6 (hereinafter "ABA Report"). Such uncertainty for government entities would simply wreak havoc on government budgets.

2. Hourly Billing Rates Can Create Perverse Incentives and Conflicts Between the Client and Attorney

Both contingency fees and hourly fee billing can lead to abuse and fraudulent practices. One is not worthier of scrutiny than the other. As Judge Sargus explained in response to the lead industry's attempt to remove contingency fee agreements in a similar nuisance abatement suit in Ohio, "in either fee structure, there is hypothetically a conflict of interest built in." *See* Petitioners' Request For Judicial Notice ("Pet'r RFJN"), Ex. 1 at 44:19-20. But attorneys, regardless of billing choice, are all bound by a code of professional ethics. To presume that attorneys will violate this code and work against the interests of their client based only upon the style of their billing practice is unsupportable and unjust. Contingency fees have opened the courthouse doors for those otherwise unable to access legal representation. That the Petitioners have chosen a contingency arrangement after careful consideration of their needs and the needs of their constituents should not bar them access to the court. But this is essentially what the trial court order has done, even though the alternative suggested – hiring attorneys by the hour – itself creates a host of potential harms to the administrative of justice, such as the following:

Encourages Inefficiency: Hourly billing does not encourage proper staffing of tasks, limiting of the number of attorneys and paralegals billing to a task, nor minimizing duplication of effort. ABA Report, supra, at p. 6.

Hourly billing often penalizes the efficient and productive lawyer. Given that fees are maximized by, obviously, increasing the number of hours billed, inefficient and less productive lawyers are rewarded for billing more hours. *Ibid.*

Discourages Communications Between Client and Lawyer: One particular concern expressed by the trial court here was the ability for the government attorneys to retain control over certain aspects of the case. Pet'r App. at 794. Hourly billing, however, possibly exaggerates this problem even more, as any client communications with an attorney results in an expensive charge. Hourly billing may discourage a client from communicating with his or her lawyer, because the client is "concerned such action will start the billing clock." ABA Report at p. 6.

Aggressive Time Recording: The high hourly requirements of law firms today put "pressure on lawyers to be aggressive rather than conservative in recording their time." *Id.* at p. 7. Ten years ago, it was stated that firms typically expect hourly-paid attorneys to bill 2,000 hours or more per year. *See* Douglas R. Richmond, *Professional Responsibility and the Bottom Line: The Ethics of Billing*, 20 S.ILL.U.L.J. 261, 262 (1996). William H. Rehnquist commented that "if one is expected to bill more than two thousand hours per year, there are bound to be temptations to exaggerate the hours actually put in." William H. Rehnquist, Dedicatory Address: *The Legal Profession Today*, 62 IND. L. J. 151, 155 (1987). When profits of a firm depend on the amount

of hours billed, there is a motivation to extend the lawsuit and worse, to pad those hours.

Puts Client's Interests in Conflict with Lawyer's Interests: Although a client's interests are to resolve litigation efficiently and quickly, an efficient lawyer will earn a lower fee than an inefficient lawyer. Charging by the hour puts a client's interests, at least as they relate to billing, in conflict with the attorney's. ABA Report at p. 7. Private counsel hired on an hourly basis has less incentive to pursue only merit based claims because they will get paid regardless of whether they prevail. And certainly, they get paid more if the litigation continues.

3. Government Entities Should Be Allowed to Litigate on a Fair Playing Field

The resources available to the industry Defendants in this case, both in terms of money and attorney time, are extraordinary. In support of the seven Defendants, ***fifteen*** law firms have appeared as defense counsel in this appeal alone. It is even possible that more law firms are participating on Defendants' behalf, but have not appeared publicly. The four largest of these firms, Arnold & Porter LLP, Orrick, Herrington & Sutcliffe LLP, McGuire Woods LLP and Jones Day, collectively employ over 4100 attorneys. *2006 AmLaw 100: Two More Billion-Dollar Firms,* (May 2006) The American Lawyer (hereinafter "*American Lawyer Top 100 Firms*"). These four firms employ more than ***four times as many attorneys*** than do the Plaintiff governmental entities combined.

See Return by Real Parties in Interest to Petition for Writ of Mandate, Prohibition, Certiorari or Other Alternative Relief ("Return") at p. 51 n15 (suggesting staff attorney resources total 941 for the various Plaintiffs). The financial resources available to these four law firms are staggering, placed at over $2.6 billion in revenues in 2005. *See generally American Lawyer Top 100 Firms*. Similarly, Defendants themselves have seemingly inexhaustible resources to support this litigation. The joint sales and revenues of the Defendants total in the tens of billions of dollars.[3]

Clear policy reasons support the pairing of private counsel with government entities to prosecute this litigation. Without private counsel, this massive litigation would not have been filed, would have been quickly

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[3] *See, e.g.*, Press Release, *Wyeth Reports Earnings Results for the 2006 Fourth Quarter and Full Year; Worldwide Net Revenue for the 2006 Fourth Quarter and Full Year Increased 10% and 9% to $5.2 Billion and $20.4 Billion, Respectively*, PR Newswire US (Jan. 30, 2007) (Wyeth, the parent company of Defendant American Cyanamid Company, had over $20.4 billion in net revenue in 2006); Press Release, *Lyondell Reports Fourth-Quarter and Full-Year 2006 Results; Highlights*, PR Newswire US (Jan. 25, 2007) (Lyondell Chemical Company, the indirect parent company of Defendant Millennium Holdings LLC, had over $22 billion in sales and other operating revenues 2006); Press Release, *DuPont Records Strong Earnings Growth in 4Q and Full Year 2006; Company Expects to Grow 2007 Earnings to $3.15 Per Share*, PR Newswire US (Jan. 23, 2007) (Defendant DuPont had over $27 billion in net sales in 2006); Press Release, *NL Reports Fourth Quarter Results*, PR Newswire US (Mar. 13, 2007) (Defendant NL Industries had over $190 million in net sales in 2006); *Sherwin-Williams Profit Rises In 4th-Quarter, Helped By Higher Contractor Sales*, Ass. Press Financial Wire (Jan. 25, 2007) (Defendant The Sherwin-Williams Company had $1.79 billion in revenue in 2006).

dismissed, or possibly will be settled on terms less favorable to the residents of California. "As a policy matter, it is unthinkable that state agencies statutorily charged with recovering costs of cleaning up pollution should be deterred from their purpose because they can be outmanned in a paper war." *People ex rel. Department of Fish & Game v. Attransco*, (1996) 50 Cal.App.4th 1926, 1938.

D. The Decision to Retain Private Counsel on a Contingency Basis Was Necessary and Appropriate Under the Circumstances

Plaintiffs seek to abate a massive health crisis that especially threatens one of the most vulnerable segments of our population: our children. This Court previously recognized that Plaintiffs have stated a valid claim against Defendants, affirming that "[c]learly [petitioner's] complaint was adequate to allege the existence of a public nuisance for which these entities, acting as the People, could seek abatement." *County of Santa Clara v. Atlantic Richfield Co.*, (2006) 137 Cal.App.4th 292, 306. But despite the merits of Plaintiffs' claim, if Plaintiffs are denied the right to contract with private counsel on a contingency basis, Plaintiffs will lack the resources and expertise necessary to seek redress from an industry whose products jeopardize public health and safety.

Public entities have repeatedly exercised discretion as to when and whether contractual arrangements contingent upon the merits and success of an endeavor are necessary to carry out policy and advance the interests of the electorate. In many situations, including this one, this type of contractual

arrangement is the only realistic means by which a governmental entity can effectively participate in litigation on behalf of the public due to resource constraints (both human and financial). Without the ability to enter into such agreements, government entities will very frequently have to forgo enforcement actions involving serious and widespread dangers to public health. The *Clancy* court did not and could not have intended this result.

Although Defendants' current attack focuses on contingency fee contracts in cases involving public nuisance claims, corporate defendants will unquestionably be emboldened to repeat this tactic in other types of cases if this attack is successful. Upholding the trial court's bright-line rule will jeopardize every case involving public-private counsel, where private counsel's fees are in any way measured by counsel's performance in the matter. A broad restriction against cities and counties entering into contingency fee agreements here could well be the death knell for numerous other large-scale, resource-intensive, high-risk civil actions brought by government entities to redress or prevent massive injury to the public caused by well-financed corporate wrongdoers. The result will be a chilling effect on government entities that might otherwise prosecute valid claims, and that fear they lack the resources to litigate against well-financed defendants without the support of private counsel.

Contingency fee agreements promote efficiency in large, complex litigation. By way of contingency fee agreements, private counsel agree to

contribute much-needed human and financial capital to support the litigation, with no guarantee that they will be paid for the time expended or expenses advanced. The compensation owed to these special counsel, if any, is dependent on the merits and results achieved in the action. Thus, in the class action context, courts have observed that contingency agreements "directly align[] the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, (2d Cir. 2005) 396 F.3d 96, 122 (citations omitted).

The vital importance of employing success-based fee agreements with private counsel to protect the public health and welfare is evident from one of the most significant pairing of private with public resources in the last decade. In the tobacco litigation, 46 states' Attorneys General joined with private law firms paid on a contingency basis to recover health-care costs of tobacco-related illnesses from the cigarette industry. In that litigation, the defendants' legal strategy was described by counsel for one of the largest defendants, RJ Reynolds ("RJR"), as tantamount to an arms race, aimed at driving the civil servant opponents into submission by overwhelming their resources:

> The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his.

Haines v. Liggett Group, (D.N.J. 1993) 814 F. Supp. 414, 421. Faced with an opponent with legions of attorneys being paid on an hourly basis (and thereby motivated to drag cases out as long as possible), state Attorneys General face the risk of budgetary crises or bankrupting government coffers to fight epic battles against such committed defendants. Without private counsel retained on a contingency fee basis, the governments' only realistic alternative is to not bring such an action or to file it and face increasing pressure to dispose of a case prematurely, being unable to match defendants' resources.

The State Attorney General of Connecticut, one of the states involved in the tobacco litigation, described the difficulty in confronting budgetary hurdles in these types of actions, and the necessity for private co-counsel given limited government resources:

> I went to the legislature asking for resources to prosecute these cases, and the legislature in its wisdom would not give me the attorney positions, the investigators, and the funds that I needed to adequately bring a case against an industry that had unlimited resources and that spends six billion dollars every year on advertising, promotion and legal fees.
>
> If you were at the courtroom where we argued, you would have been absolutely astonished by the number of lawyers who appeared for the defendant tobacco companies, compared to the much smaller group that appeared for the State of Connecticut.

Hon. Richard Blumenthal, *The Role of State Attorneys General*, 33 Conn. L. Rev. 1207, 1212 (Summer, 2001).

The ability of the state Attorneys General to enter into contingency fee contracts made a determinative difference. In 1998, these 46 states and the

tobacco industry entered into a settlement agreement for an estimated $206 billion. *See McCendon v. Georgia Department of Community Health,* (11th Cir. 2001) 261 F.3d 1252.

Outside of tobacco litigation, public entities have used their discretion to enter into contingency fee agreements to enable important government participation in some of the largest and most contentious litigation seen in courts to date, spanning the areas of securities fraud, environmental disasters and public nuisance actions. For example:

- Contingency fee counsel represented the City of New Orleans in litigation against gun manufacturers. New Orleans Mayor Marc Morial explained his decision to hire leading plaintiffs' lawyers to handle the city's suit: "You want lawyers who can take on giants." Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation* in Suing the Gun Industry: A Battle at the Crossroads of Gun Control and Mass Torts (Lytton edit., 2005) p. 137.

- Contingency counsel represented cities in litigation over the contamination of ground water tainted by the gasoline additive MTBE, resulting in a settlement on behalf of the City of Santa Monica estimated at over $300 million, and on behalf of the South Lake Tahoe water district for $92 million. *See* Scheck, *Opening the Tap on Massive MTBE Settlements*, S.F. Recorder (Jan. 28, 2005).

- Private counsel represented California Public Employees' Retirement System, the New York City Pension Funds, and the New York State Common Retirement Fund on a contingency basis, resulting in a $3.2 billion settlement of a securities fraud class action brought against Cendant Corporation and its auditors, Ernst & Young. *See In re Cendant Corp. Litig.*, (3d Cir. 2001) 264 F.3d 201, 223.

- The University of California Board of Regents retained private contingency counsel in the massive litigation against the Enron defendants regarding securities fraud, resulting in settlements to date of $7.2 billion for class members. Lead Plaintiff Proposes Plan To

Allocate $7.2 Billion In Enron-Related Settlement Funds, *Foster Electric Report* (Aug. 1, 2007).

Absent contracts conditioned on success, these public entities undoubtedly would not have been able to participate in these actions.

E. The Government's Interest in Protecting Public Health Outweighs Defendants' Speculative Harm

The trial court's approach assumes contingency fee agreements will cause overzealous prosecution of the lead pigment industry. But Defendants have presented no evidence of actual prejudice as a result of the involvement of contingency fee counsel for nearly seven years. Instead, an evidentiary presumption exists that the public officials will properly and impartially perform their duties, and the record stands uncontroverted that the public officials here acted properly by maintaining complete control of this litigation. Moreover, institutional safeguards exist that ensure Defendants will not be prejudiced by the continuation of this litigation, including (a) the trial court's presence as a neutral arbiter; (b) the contingent nature of the contract with private counsel itself ensuring that only meritorious claims are litigated; and (c) the presence of the political process itself as a check on the actions of public officials.

1. There Is No Record of Actual Prejudice to Defendants Due to the Governments' Agreements with Special Counsel

It is uncontested that the government attorneys are active participants in this litigation, fully in control of and overseeing the actions of private counsel.

California law has long recognized a presumption that government officials have fully, properly, and regularly performed their duties. Cal. Evid. Code § 664 ("It is presumed that official duty has been regularly performed."); *Roelfsema v. Department of Motor Vehicles*, (1995) 41 Cal.App.4th 871, 879 ("in the absence of evidence to the contrary, it is presumed that official duty has been properly performed").

This presumption imposes upon the industry the burden of proving that the government attorneys have not and will not fulfill their duty of neutrality. Cal. Evid. Code § 606 ("The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."). Critically, the lead industry has presented no evidence to overcome this statutorily imposed presumption.

To the contrary, the record is replete with declarations and contracts from city and county officials stating that they will fully perform their duty to ensure evenhanded prosecution by overseeing and controlling this lawsuit. For example, the Office of County Counsel for the County of Alameda has declared that their office "has always been and currently is actively involved in and directs all decisions related to the litigation." Pet'r App. at p. 410. The declaration from the Monterey County Counsel's office assured the court that "[n]o major actions or decisions are made in the case without the authority of [the County Counsel]." *Id.* at p. 426. The City and County of San Francisco has declared that the City Attorney's Office has "retained control over all

significant decisions relating to the prosecution of San Francisco's case." *Id.* at p. 452. The City Attorney for the City of San Diego declared that he will "retain final authority over all aspects of the litigation as it pertains to the City of San Diego." *Id.* at p. 458. Similar statements are on record from every county counsel and city attorney's office in this matter. *Id.* at pp. 405-475. Further, the private counsel has contractually agreed that the county counsel and city attorneys in this action "have maintained and continue to maintain complete control over all aspects of the litigation." *Id.* at p. 477.

The industry, in contrast, failed to present evidence to overcome – or even challenge – the presumption that city and county officials will properly abide by their duty of neutrality. On this ground alone, this Court should reverse the trial court's court order. *See Romero v. County of Santa Clara,* (1970) 3 Cal.App.3d 700, 703-704 (presumption imposed under section 664 controlled in light of plaintiff's failure to present evidence that County employees had not regularly performed duties).

2. Safeguards Exist to Protect Defendants and the Public Against the Possibility of Overzealous Prosecution

a. Courts Frequently Examine Attorney-Client Relationships to Ensure Adequacy of Control Over Litigation

Defendants essentially suggest that because private contingency counsel are assisting in litigating this action and have a financial stake in the success of the litigation, they will pursue Plaintiffs' claims heedless of the

interests of justice and the required neutrality of the prosecutor. This argument overlooks both the key fact that the government attorneys fully control the litigation, and the fact that the judge will be present at all stages of the pre-trial litigation and trial itself to ensure that the Defendants are not being prosecuted purely for the financial gain of contingency fee counsel. Institutional controls exist both in statutes and in case law that ensure overzealous advocacy does not trump the fair administration of justice.

Significantly, the law and the courts routinely permit individuals with a financial stake in a claim to prosecute actions in the public interest. For example, in *qui tam* actions under the federal False Claims Act, 31 U.S.C. §§ 3730, *et seq.*, courts have recognized the feasibility and appropriateness of a private citizen, with financial incentives, initiating lawsuit on behalf of the government, even where the public official retains less contact or control in the case than in the case at hand. *See e.g., United States ex rel. Stillwell v. Hughes Helicopters Inc.*, (C.D. Cal. 1989) 714 F. Supp. 1084 (hereinafter "*Stillwell*"); *United States ex rel. Kelly v. Boeing Co.*, (9th Cir. 1993) 9 F.3d 743 (hereinafter "*Kelly*"). Where the government declines to intervene in a *qui tam* action, the plaintiff prosecutes the case on behalf of and instead of the government while retaining a personal financial interest (a statutory bounty in the amount of 15%-30% of recovery). *Id.* at p. 749.

Although the trial court expressed reluctance to examine the relationship between the government attorneys and private counsel, suggesting

that "as a practical matter," it would be difficult to determine the level of control exerted (Pet'r App. At 794), courts routinely delve into the interaction between class counsel and their clients (both the individual representatives and the absent class members) to ensure that there is adequate control over the litigation. For instance, courts oversee the appointment and adequacy of class representatives and counsel. Under Federal Rule of Civil Procedure Rule 23, the court must determine whether or not any class representative will "fairly and adequately protect the interests of the class." (Fed. Rules Civ.Proc., rule 23(a) 28 U.S.C.). The court must also appoint class counsel and specifically consider counsel's investigative work, experience, knowledge of the applicable law, and resources that counsel will commit to representing the class. (Fed. Rules Civ.Proc., rule 23(g)(C)(i) 28 U.S.C.). This inquiry into the class representative's and class counsel's adequacy inserts courts directly into the questions of day-to-day control of cases by the client, and the expertise of the counsel representing them.

The Private Securities Litigation Reform Act applies a higher adequacy threshold at class certification than Rule 23 of the Federal Rules of Civil Procedure (28 U.S.C.), requiring that the sophisticated investors who act as lead plaintiff in these cases be "active, able class representatives who are informed and can demonstrate they are directing the litigation." *Feder v. Electronic Data Systems Corp.*, (5th Cir. 2005) 429 F.3d 125, 130. Courts

across the country routinely examine whether or not this heightened threshold has been met.

The industry's naked assertion that it may be prejudiced by the overly zealous advocacy of contingency fee counsel (Return at p. 35) ignores the fact that private counsel will work at the direction of public officials, and that the trial court is able to make any inquiry necessary into the government entities' control of this case. The lead pigment industry has not presented – and cannot present – any facts supporting a claim that they are prejudiced by the actions of the private or public attorneys prosecuting this case.

b. The Contingent Nature of the Agreements Is Its Own Safeguard

Contrary to the industry's claims, Plaintiffs' use of private counsel on a contingency basis is consistent with the fair administration of justice. Private counsel retained on a contingency fee basis will only financially benefit through the successful prosecution on the merits of the case and stand to lose financially if a case is unsuccessful. Lawyers hired on a contingency fee basis, therefore, have a compelling incentive to only initiate and prosecute meritorious claims. Courts have long recognized this fact. *See, e.g., Stillwell*, supra, 714 F.Supp. at p. 1091; *Kelly,* supra, 9 F.3d at p. 749. Judge Sargus, of the Federal District Court for the Southern District of Ohio, noted as much during a hearing on this issue: "in theory, if a person, as an attorney, handles a case on a contingency fee basis, that attorney who brings an un-meritorious

case is at financial peril; whereas someone on an hourly rate basis doesn't run the risk of a suit that fails." Pet'r RFJN, Ex. 1 at 8:13-17.

c. The Political Process Is a Check on Overzealous Prosecution

Finally, the political process itself forms an additional safeguard to protect the rights of both citizens and Defendants. Each of the county and city officials involved in this case is ultimately answerable to the electorate. Because each official faces the need for regular re-election, each must remain involved in, and control, the kind of sweeping litigation presented here. Delegation of major decisions to private attorneys could be perceived by the electorate as an abdication of the official's responsibilities, and thus hinder re-election prospects.

III. CONCLUSION

The trial court's decision represents a decisive turning-point not only in the instant litigation, but in many private-public partnerships in litigation now pending and litigation not yet filed. To allow the trial court's ruling to stand would deprive public entities of their statutory right to contract with private counsel and compensate these counsel as the public entities deem appropriate. For this reason, and all of those articulated above, this Court should reverse the trial court's order holding that contingency fee contracts are *per se* impermissible in public nuisance actions and disqualifying private counsel in this case.

DATED: August 23, 2007

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CERTIFICATE OF COMPLIANCE

I, VICTORIA W. NI, an attorney duly admitted to practice before all courts of the State of California and an attorney of *Amicus Curiae* Public Justice, P.C., hereby certify that the attached brief complies with the form, size and length requirements of Rule 8.204 of the California Rules of Court in that it was prepared in proportionally spaced type in Times Roman 13-point, double spaced, and contains less than 14,000 words as measured by using the word count function of "Microsoft Office Word 2003."

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I hereby certify that on this 23rd day of August, 2007, I caused an original and four copies of the foregoing APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND PROPOSED *AMICI CURIAE* BRIEF OF PUBLIC JUSTICE, P.C., HEALTHY CHILDREN ORGANIZING PROJECT, AND WESTERN CENTER FOR LAW AND POVERTY IN SUPPORT OF PETITIONERS COUNTY OF SANTA CLARA, *ET AL.* and *AMICI CURIAE* BRIEF OF PUBLIC JUSTICE, P.C., HEALTHY CHILDREN ORGANIZING PROJECT, AND WESTERN CENTER FOR LAW AND POVERTY IN SUPPORT OF PETITIONERS COUNTY OF SANTA CLARA, *ET AL.* to be manually filed with the clerk of the Court of Appeal for the Sixth Appellate District. Pursuant to Rule 8.44(b), I further caused four copies to be filed with the clerk of the Supreme Court of California. A copy is also to be mailed via First Class Mail to the following recipients on the attached Service List and one copy mailed to the clerk of the Superior Court in compliance with Rule 8.212(c) of the California Rules of Court.

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