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# CONTINGENT FEE LAWYERS' REPRESENTATION OF COUNTY REJECTED BY STATE COURT

by  
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Over the past decade many governmental authorities have resorted to suing manufacturers of lawful products such as cigarettes and lead paint as a way to recover funds they claim they need to pay the costs of health care and environmental clean up allegedly resulting from the use of those products in their jurisdictions. In most of those suits, such as the claims filed by state attorneys general against manufacturers of tobacco products and lead pigments, the governmental plaintiffs hired private attorneys on a contingency fee basis to manage or conduct the trial of the cases. In that litigation, the private attorneys have championed their public clients primarily by seeking to apply the common law of “public nuisance” to claims which historically have been adjudicated under the more rigorous evidentiary and liability standards of product liability and negligence law. The contorted use of public nuisance law has expanded with the governmental plaintiffs’ increased willingness to retain private counsel on a contingency fee, non-competitive bid basis. See Richard O. Faulk and John S. Gray, *The Mouse that Roared?: Novel Public Nuisance Theory Runs Amok In Rhode Island*, Washington Legal Foundation WORKING PAPER (Mar. 2007) available at <http://www.wlf.org/upload/0322307GL.pdf>.

The impropriety of contingency fee arrangements in public nuisance litigation was recently highlighted in a decision by Judge Jack Komar, the California trial judge presiding in a public nuisance suit brought by the County of Santa Clara against several manufacturers of lead paints and pigments. In that case, Judge Komar granted defendants’ motion to bar the governmental plaintiffs from hiring outside counsel to assist them in the litigation under any retention agreement in which payment of fees and costs is contingent on the outcome of the litigation. See *County of Santa Clara v. Atlantic Richfield Company*, Superior Court of California, County of Santa Clara, Case No. 1-00-CV-788657. Judge Komar expressly held that contingent fee arrangements entered into by governmental authorities pursuing public nuisance actions are antithetical to the standard of neutrality that an attorney representing a governmental entity must meet under California law.

In opposing defendants’ motion, the *Santa Clara County* plaintiffs argued that the contingent fee agreement was valid because the public authorities who hired them continued to retain and/or exercise decision-making power and ultimate control over the conduct of the litigation. Those plaintiffs described the private outside counsel they had retained as mere “collaborators.” The court flatly rejected these contentions, holding that the private outside counsel had appeared as “co-counsel” in the case and that “[o]versight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard

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of neutrality.” The court further ruled that the governmental entities’ alleged lack of internal resources and expertise necessary to prosecute the case was not a sufficient grounds for permitting contingency fee agreements and dispensing with the standard of neutrality for counsel representing public entities.

In so ruling Judge Komar relied on the unanimous holding of the California Supreme Court in *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740; 705 P.2d 347; 218 Cal. Rptr. 24 (1985). In *Clancy*, the City of Corona retained Mr. Clancy, a private attorney, to bring public nuisance abatement actions against business owners who allegedly sold obscene materials within city boundaries. Mr. Clancy provided his legal counsel pursuant to a contingent fee agreement providing that his hourly rate was doubled for cases in which he prevailed and recovered attorneys’ fees. The California Supreme Court disqualified Mr. Clancy from representing the city in the public nuisance actions on the grounds that the contingent fee contract gave him a financial interest in the outcome of the actions, thus potentially impairing the neutrality required of him in his position as representative of the governmental entity.

In barring use of contingency fee agreements, the *Clancy* court aptly explained that

[p]ublic nuisance abatement actions share the public interest aspect of eminent domain and criminal cases, and often coincide with criminal prosecutions. These actions are brought in the name of the People by the district attorney or city attorney. (Code Civ. Proc., § 731.) A person who maintains or commits a public nuisance is guilty of a misdemeanor. (Pen. Code, § 372.) ‘A public or common nuisance . . . is a species of catch-all criminal offense, consisting of an interference with the rights of the community at large . . . . As in the case of other crimes, the normal remedy is in the hands of the state.’ (citations omitted) A suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney.

39 Cal. 3d at 749

Similar challenges to governmental entities’ use of contingency fee agreements in public nuisance actions are pending in several other jurisdictions, including Rhode Island, Ohio, New Jersey, Missouri and Wisconsin. For example, in 2005 defendants in a public nuisance action brought by the Rhode Island Attorney General challenged the state’s hiring of contingent fee private counsel. The trial court denied defendants’ motion to disqualify the retained private counsel and allowed that counsel to proceed with their representation of Rhode Island through the trial of the case, which resulted in an adverse jury verdict against defendants. The Rhode Island Supreme Court, on petition for writ of certiorari, elected to defer ruling on defendants’ challenge, stating that the matter implicated “novel questions of constitutional law in this jurisdiction” and that its review of the issues would benefit from an expanded record to be presented in conjunction with defendants’ eventual appeal of the adverse jury verdict and any remedy selected by the trial court. The questions which the court identified for possible review include defendants’ assertion that the Attorney General’s hiring of contingent fee private attorneys for public nuisance litigation violates their rights to due process and “necessarily implicates sensitive questions regarding the proper role of the constitutional office of the Attorney General in relation to the exclusively legislative powers of the General Assembly.” See *State of Rhode Island v. Lead Industries Association, Inc.*, 898 A.2d 1234, 1239 (R.I. 2006). How those questions are resolved in Rhode Island and the other states where similar challenges are pending will determine in large measure whether public nuisance law becomes the standard tort vehicle of the 21<sup>st</sup> Century.