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Outsourcing Justice: The California Supreme Court's Decision in *County of Santa Clara v. Superior Court (Atlantic Richfield)*

By William L. Stern

INTRODUCTION

On July 26, 2010, the California Supreme Court handed down its long-awaited decision in *County of Santa Clara v. Superior Court (Atlantic Richfield)*, S163681 (July 26, 2010), handing the plaintiff's class action bar a gift. The decision allows the Attorney General, each of California's 58 District Attorneys, and countless additional City Attorneys to outsource to private attorneys the right to sue on behalf of the State for claims alleging public nuisance and potentially other claims, including claims for civil penalties under California's unfair competition law (Cal. Bus. & Prof. Code § 17200 *et seq*.) ("UCL").

THE FACTS

Ten California cities and counties brought suit against lead paint manufacturers alleging that lead paint used decades ago in hospitals, schools, and other private and public buildings constituted a public nuisance. The public entities were represented by both government lawyers and private lawyers hired on a contingency basis. Defendants moved to bar the payment of contingent fees to private attorneys, citing *Clancy v. Superior Court*, 39 Cal. 3d 740, 705 P.2d 347 (Cal. 1985), which held that public law enforcement officials may not delegate the powers of the sovereign to private lawyers. *Id.* at 747.

The government-plaintiffs argued that *Clancy* was wrong, and that courts should allow the arrangement in civil cases so long as the public attorneys retained sufficient "control" over their private attorney colleagues. The trial court disagreed, concluding that private attorneys are in no position to properly balance the public interest in the litigation.

The Sixth District Court of Appeal reversed: "*Clancy* does not justify the superior court's order barring the public entities from compensating, by means of a contingent fee agreement, their private counsel, who are merely assisting in-house counsel and lack any control over the litigation." *Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842, 850 (Cal. Ct. App. 2008).

THE CALIFORNIA SUPREME COURT'S HOLDING

The Supreme Court agreed and jettisoned *Clancy*'s absolute bar on contingency-fee arrangements, at least for public nuisance cases. The Court recognized that "private counsel who are remunerated on a contingent-fee basis have a direct pecuniary interest in the outcome of the case, they have a conflict of interest that potentially places their personal interests at odds with the interests…" (Slip Opn., at 21.) But that does not mean that a blanket rule requiring disqualification in every case is necessary: "Accordingly, the absolute prohibition on contingent-fee arrangements imported in *Clancy* from

the context of criminal proceedings is unwarranted in the circumstances of the present civil public-nuisance action." (Slip Opn., at 19.)

The *Clancy* prohibition against private outsourcing will continue to apply in criminal cases, but it no longer applies to civil cases so long as the claim does not seek injunctive relief—read: it "does not threaten the continued operation of an ongoing business" (Slip Opn., at 22)— and the retainer agreement contains certain recitals.

THE ESSENTIAL RECITALS

Under *County of Santa Clara*, so long as the retainer agreement recites the right words—reserving to the public lawyers (at least the nominally) right to supervise the litigation—outsourcing of civil cases to private, contingency-fee lawyers will be permitted:

> [R]etention agreements between public entities and private counsel must specifically provide that decisions regarding settlement of the case are reserved exclusively to the discretion of the public entity's own attorneys. Similarly, such agreements must specify that any defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with contingent-fee counsel.
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> Additionally,…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."

Slip Opn., at 29-30.

The Supreme Court relied on faith and trust: "There is no indication that the contingent-fee arrangements in the present case have created a danger of governmental overreaching or economic coercion. Defendants are large corporations with access to abundant monetary and legal resources. Accordingly, the concern we expressed in *Clancy* about the misuse of governmental resources against an outmatched individual defendant is not implicated in the present case." *Id.*, at 19. By the same token, "we decline to assume that private counsel intentionally or negligently will violate the terms of their retention agreements by acting independently and without consultation with the public-entity attorneys or that public attorneys will delegate their fundamental obligations." *Id* at 27.

THE FIG LEAF OF "CONTROL"

The California Supreme Court based its ruling on the proposition that public attorneys will exercise control over the contingency-fee lawyers to ensure the public interest is protected. But this control is illusory and almost impossible to supervise. Indeed, even assuming the best of intentions by the parties, courts tasked with supervising this relationship will run into daunting problems.

First, there is the attorney-client privilege. As the Toyota case (discussed below) illustrates, the government is unlikely to share its trial strategy with the public, or a court.

Second, there are practical problems with supervising the relationship. Will a court be required to hold ex parte hearings during the course of the trial in an effort to police the government's relationship with its attorneys? Will it have to review

the contingency-fee contract? Will it have to approve any settlement agreement and other major trial decisions?

Third, there is the question of just how much control over the relationship the government lawyers must exercise. Every decision a lawyer makes has the potential to affect the outcome of the case. It is unclear which decisions can be made by the private attorneys and which must be decided by the government. And lastly, how will the judge and the defense team even know whether or not the required control is being exercised? Short of having defense counsel sit in on the plaintiff's strategy meetings, there is very little chance the defense lawyers would even know who is making the decisions on the plaintiff's team. You can't object to something if you don't know what's happening.

THE DISTRICT ATTORNEYS OPPOSED

The result in *County of Santa Clara* was opposed even by the California District Attorneys Association, which filed a friend-of-the-court brief urging the Court to reject such outsourcing agreements. As the CDAA wrote, allowing contingency fees "jeopardizes key civil law enforcement statutes by undermining existing public confidence that those statutes will be applied in an even-handed, neutral, impartial manner by financially disinterested prosecutors."

SUDDEN ACCELERATION

If private lawyers are allowed to pursue cases where the government is acting as sovereign, there is no reason *Santa Clara* will be limited just to claims of public nuisance. *Santa Clara* happened to be a public nuisance case, but its reasoning could apply to claims brought under the UCL, false advertising, and environmental law claims.

The race is on already. In March 2010, Orange County District Attorney Tony Rackaukas put his pedal to the metal by hiring a private lawyer to sue Toyota in a "sudden acceleration" case. (*See* Complaint, *People v. Toyota Motor Sales, U.S.A., Inc.*, No. 30-2010-00352900-CU-BT-CXC (Super. Ct. filed March 12, 2010).) He retained Mark Robinson, former president of the Consumer Attorneys of California, on a contingency basis to bring these claims under the UCL.

The Toyota case shows just how these arraignments can undermine public confidence. Mr. Rackaukas hired the law firm without a competitive bidding process and the district attorney's office has refused to disclose the details of the agreement, saying it would expose litigation strategy.

Contact:

William L. Stern
(415) 268-7637
wstern@mofo.com

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