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**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

COUNTY OF SANTA CLARA, ET AL.,

Plaintiffs/Petitioners,

vs.

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

Respondent,

ATLANTIC RICHFIELD COMPANY, ET AL.,

Defendants/Real Parties in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SIXTH APPELLATE DISTRICT,
CASE NO. H031540, FROM THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA, HON. JACK KOMAR, JUDGE, CASE NO. CV 788657.

**BRIEF *AMICUS CURIAE* OF THE CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA IN SUPPORT OF
DEFENDANTS/REAL PARTIES IN INTEREST**

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vs.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA,
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Respondent,

ATLANTIC RICHFIELD COMPANY, ET AL.,

Defendants/Real Parties in Interest.

**INTRODUCTION: INTEREST OF AMICUS
AND IMPORTANCE OF ISSUE**

The Civil Justice Association of California (CJAC), a broad-based coalition of businesses, professional organizations and local government associations, has a vital interest in the issue presented – *viz.*, May government hire and pay private lawyers on a contingency fee basis to prosecute on its behalf “public nuisance” lawsuits so long as government retains “control” of the litigation?

The resolution of this question is fundamental in determining what kind of civil justice system California provides, whether its civil prosecutors will be seen to be financially free from, or have a personal stake in, the outcome of litigation they handle for government. Its importance to the public interest as well as its divisiveness amongst lawyers and litigants is mirrored within CJAC’s own membership. Our governmental members side with their co-government plaintiffs herein, arguing that cash-strapped budgets necessitate this kind of fee arrangement if various wrongdoers

– here the targeted group is manufacturers and distributors of lead-based paint, but other defendants *du jour* (e.g., gun manufacturers, green house gas polluters, etc.) can be substituted depending on the depth of their pockets, the intensity of their unpopularity and the metastasis of pertinent law – are ever to be prosecuted for public nuisance abatement. Our non-governmental members, however, are adamant that use of the contingency fee in this kind of case perverts justice by distorting the necessary *neutrality* required of public prosecutors when enforcing vague laws in which complex interests are to be delicately balanced.

While CJAC usually abstains from participation in cases where our members’ views sharply diverge, this one is an exception because it clearly implicates our central purpose: to educate the public about aspects of our civil liability laws which further “fairness, efficiency, economy and certainty” or that require amendment to better do so. Significantly, these goals are remarkably similar to those underlying the judicial principle of *stare decisis*: that the major objectives of our legal system – e.g., certainty, predictability and stability – are best maintained when parties are able to regulate their conduct with reasonable assurance about the governing rules of law. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504.)

CJAC contends the question this case presents is, in accordance with *stare decisis*, plainly answered by *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740 (“*Clancy*”); and that answer is a unanimous and unequivocal, No. “[T]he *contingent fee* arrangement between the City and the [private attorney] is antithetical to the *standard of neutrality* that an attorney representing the public must meet when prosecuting a

public nuisance . . . action.”¹ That is also how the trial court viewed the attorney fee agreement between the County of Santa Clara and its private, contingency fee-retained counsel. “[O]utside counsel must be precluded from operating under a contingent fee agreement, regardless of the government attorneys’ and outside attorneys’ well-meaning intentions to have all decisions in this litigation made by government attorneys.”² Upon granting the defendants’ motion for an order enjoining plaintiffs from paying their private lawyers through the contingent fee, plaintiffs sought appellate writ relief and CJAC entered the fray as amicus in support of defendants.

Significantly, *Clancy* makes clear its fee proscription applies only to a “class of civil actions that demands the representative of the government to be absolutely neutral.”³ One specific cause of action embraced within this “class” is indisputably “public nuisance,” an offense so vague the danger of it being wielded too broadly by government requires, for reasons of constitutional and public policy fairness, prosecutorial *neutrality*. Giving the prosecutor a financial incentive in the form of a “piece of the action” for prevailing in this litigation violates this neutrality requirement.

CJAC believes *Clancy* governs this case despite the differences highlighted by plaintiffs, their amici, and the appellate opinion. Indeed, *Clancy* so closely resembles the factual pattern animating the issue echoed here that, unless the Court significantly reverses or revises *Clancy* by accepting the reasoning of the appellate opinion and its

¹ *Id.* at 750; emphasis added.

² Order of Hon. Jack Komar, Judge, *County of Santa Clara v. Atlantic Richfield Co.*, Superior Court, County of Santa Clara, April 4, 2007, p. 4:1-3 (“Order”).

³ *Clancy*, *supra*, 39 Cal.3d at 748.

“control” distinction, it should inform and guide the conclusion here that the attorney fee agreement at issue is void. CJAC sees no principled distinctions between the facts of this case and those animating *Clancy*.

Neither have the reasons and policies underlying *Clancy* lost any persuasive force with the passage of time. More than two decades of respect for, and compliance with, *Clancy* have firmly established it as binding precedent. What made good sense when *Clancy* was decided makes good sense now; and to suddenly reverse course and allow government lawyers a “piece of the action” for successfully prosecuting public nuisance lawsuits will diminish the fairness, both perceived and actual, of our civil justice system.

SUMMARY OF FACTUAL AND PROCEDURAL BACKGROUND

Ten cities and counties⁴ accuse numerous defendant paint manufacturers in this case of creating a public nuisance because their lead-based paints are on buildings within plaintiffs’ jurisdictions.⁵ All plaintiffs have substantially similar contingency fee agreements with private counsel to prosecute this case, an arrangement defendants challenged by motion to bar payments to their private lawyers on the grounds that the fee agreements are void *ab initio* under the authority and reasoning of *Clancy*.

The challenged fee agreements make payment of attorney fees and costs

⁴ City and County of San Francisco, Counties of Santa Clara, Solano, Alameda, Monterey, San Mateo, and Los Angeles, and Cities of Oakland, San Diego, and Los Angeles.

⁵The fourth amended complaint presently before the court has been pared down and now contains only one cause of action for representative public nuisance; previous complaints alleged several causes of action, including negligence, unfair competition, fraud and strict liability and did so on a class action basis.

contingent on plaintiffs' monetary recovery. As plaintiffs state: "The sole contingency upon which [local government plaintiff] shall pay compensation to outside counsel is the recovery and collection by outside counsel of monies on behalf of [the plaintiff] in the litigation."⁶ "The compensation on the foregoing contingency shall be outside counsel's reasonable disbursements plus 17% of any recovery."⁷

On April 4, 2007 the Santa Clara Superior Court ruled on defendants' motion to bar payment to plaintiffs' contingency fee counsel, stating that the government is "precluded from operating under a contingent fee agreement"⁸ The court gave plaintiffs 30 days to "file with [it] new fee agreements in accordance with the order,"⁹ which they eschewed and instead sought appellate writ relief.

The appellate court, observing that it was "bound by only the *holding* in *Clancy*, not all of its language,"¹⁰ reversed the trial court. In explaining why *Clancy* did not require what the trial court felt it did, the appellate opinion states that "*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.*"¹¹

⁶ Petition of Santa Clara County in the Court of Appeal , p. 9, ¶ 8.

⁷ *Id.*

⁸ *Supra*, note 2.

⁹ *Id.* at p. 4.

¹⁰ *County of Santa Clara v. Superior Court* (2008) 74 Cal.Rptr.3d 842, 849 reprinted in unofficial reports for tracking purposes only.

¹¹ *Id.* at 850.

SUMMARY OF ARGUMENT

The attorney fee agreement in this case between government plaintiffs and their private counsel conflicts with *Clancy*, a unanimous and well-reasoned opinion from this Court based on common law, constitutional principles, and sound public policy.

The policy objectives of the ban on paying government attorneys' fees for successful prosecution of public nuisance claims are twofold – to prevent government lawyers from targeting and prosecuting unpopular non-governmental defendants in order to extract money from them to fatten the public purse and line the attorneys' pockets; and preclude injection of pecuniary interests into the “neutrality” required of public prosecutors charged with the delicate task of balancing factors pertinent to enforcement and implementation of vague laws.

Plaintiffs seek to avoid these proscriptions by having private counsel (*sans* private plaintiffs) represent them in prosecuting defendant paint companies for causing a “public nuisance” through their manufacture and distribution of lead-laced paint. In this way, private counsel bootstrap onto the “standing” of the government plaintiffs, thereby obviating the need to prove specific harm to any individual plaintiff, a requirement that applies to private (but not government instigated) “public nuisance” lawsuits.¹² In return – and herein lies the rub – private counsel are

¹² “[S]uing on behalf of the state [or a local government] can help a private firm get around statutes of limitations and problems of standing, and class-action hurdles can be lower. When Motley Rice [a contingency fee law firm] sued lead-paint companies on behalf of Rhode Island, it didn’t have to prove an actual injury to any one person. A private law firm acting on its own would have to meet a tougher standard.” Editorial, *The Pay-to-Sue Business*, *WALL ST. J.*, April 16, 2009, p. A14, c. 1.

promised a “piece of the action” or percentage of any recovery, what the legal profession euphemistically refers to as a “contingency fee.” This approach for compensating plaintiffs’ counsel, however, violates law, express public policy and common-sense.

Attorney fees *should not*, under the sound reasoning and authority of *Clancy*, be awarded to government plaintiffs for successfully prosecuting “public nuisance” actions. This is also evident from the plain language of numerous statutes and judicial opinions specifying when government can recover attorney fees from private defendants. What the government cannot obtain directly – i.e., attorney fees from unsuccessful defendants – it should not be able to obtain indirectly by contracting-out with private counsel to represent it on a contingency fee basis.

In short, plaintiffs cannot, consistent with well-settled law, do what the lower court properly ordered them not to do – shift the reasonable cost of their legal expenses to non-prevailing real parties in interest; or pay their attorneys, as the fee agreements provide, 17% of any recovery. If plaintiffs do not agree with these prohibitions, they should turn to the Legislature, which has shown considerable response to both public concerns about lead-based paint¹³ and to assuring that government can, in appropriate cases, recover their attorney fees. For plaintiffs to get defendants to pay for the prosecution of this case, the statutory framework detailing when and under what circumstances government can recover its legal fees must be amended or the Court must be persuaded to revise *Clancy*, a conclusion amicus argues against.

¹³ See H & S C. §§ 105250 *et. seq.* (Residential Lead-Based Paint Hazard Reduction).

ANALYSIS

I. **CLANCY, WHICH HOLDS THAT GOVERNMENT CANNOT CONTRACT WITH COUNSEL ON A CONTINGENCY FEE BASIS TO PROSECUTE A “PUBLIC NUISANCE” ACTION, SHOULD CONTROL THIS CASE.**

A. **In all Principled Respects this Case is the Same as *Clancy*.**

This case is “dépà vu all over again.”¹⁴ The issue it presents – *viz.*, whether local government can retain private counsel through a *contingency fee* contract to prosecute *public nuisance* actions – was squarely addressed by *Clancy, supra*, 39 Cal.3d 740. There, a city sought court approval for its contingency fee contract with an attorney to prosecute an adult book store as a “public nuisance.” Here, the County of Santa Clara and other local governments seek judicial approval for their contingency fee contracts with a law firm to prosecute manufacturers and distributors of lead-based paint for creating a public nuisance.

In a unanimous opinion by Justice Stanley Mosk, former “chief law enforcement officer” for California, *Clancy* held “inappropriate” a “contingency fee arrangement between a city government and a private attorney whom it hired to bring [public nuisance] abatement actions.” What *Clancy* deemed “inappropriate” about use of the contingency fee in public nuisance actions, which “involves a balancing [and] . . . delicate weighing of interests,” is that it “is antithetical to the standard of *neutrality*

¹⁴ “[W]henver somebody [asks, ‘What time is it?’], I suppress an urge to reply with Yogi Berra’s classic answer to this question: ‘You mean right now?’ Mr. Berra (also author of ‘it’s dépà vu all over again’) was a Socratic master of indeterminacy.” Anthony D’Amato, *Counterintuitive Consequences of ‘Plain Meaning’* (1991) 33 *ARIZ. L. REV.* 529, 532, fn. 13.

that an attorney representing the government must meet”¹⁵ in such cases.

This “neutrality” is “born of two fundamental aspects” of the public prosecutor’s role, whether civil or criminal.¹⁶ “First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power, from failing to act evenhandedly.”¹⁷

Not only is a government lawyer’s *neutrality* essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole. Our system relies for its validity on the confidence of society; without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive.¹⁸

A contingency fee arrangement conflicts with the principle of neutrality because it gives the prosecuting attorney “an interest in the result of the case . . . , an interest extraneous to his official function in the actions he prosecutes on behalf of the City.”¹⁹ And “[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated.” As one commentator aptly put it:

The principle here isn’t hard to grasp. Lawyers who act on behalf of government as distinct from private clients come

¹⁵ *Clancy, supra*, 39 Cal.3d at 750.

¹⁶ “The justification for prohibition against contingent fees in criminal actions extends to certain civil cases. . . [T]he rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally.” *Clancy, supra*, 39 Cal.3d at 748.

¹⁷ *Id.* at 746.

¹⁸ *Id.*

¹⁹ *Id.* at 747-748.

under special ethical obligations of impartiality. If a lawyer claiming to speak in the name of the people charges you with misconduct, his judgment on whether to drop the charges should not be clouded by the prospect that [a percentage] of any penalties extracted from you would drop into his own private pocket.²⁰

The impropriety of government prosecutions by private contingency fee counsel was underscored by our own Attorney General who, after joining with 49 other states in suing big tobacco for, *inter alia*, public nuisance, he (along with several other AGs from sister states) rejected offers from outside contingency fee counsel and instead turned to the Legislature for additional budgetary help to fund the litigation.²¹ Echoing the spirit of *Clancy*, our Attorney General explained “[t]he fact we are not using outside counsel lends a lot more credibility to the legitimacy of these claims.”²² Similarly, the Attorney General for Colorado commented that her decision to keep the litigation “in-house” was driven by the recognition that out-house contingency fee attorneys are motivated more by the prospect of money than the pursuit of justice. “We tend to be more objective than private counsel who are employed on a contingency fee basis and who maintain their own personal financial

²⁰ Walter Olson, *Tort Travesty*, *WALL ST. J.*, May 18, 2007.

²¹ At the Attorney General’s request, the California Legislature appropriated an additional \$14 million to hire 132 staffers, including 32 lawyers, to help with the litigation against the tobacco industry. James V. Grimaldi, *Lawyers Could Get Billions in Tobacco Deal*, *SEATTLE TIMES*, Oct. 5, 1997, p. 1.

²² *Id.*

interest in the outcome of the litigation It gives them different motives.”²³

Despite *Clancy* and the example of our own Attorney General and others in the tobacco litigation cases, plaintiffs entered into partnerships with private bounty hunter law firms in which the lawyers stand to get a “piece of the action” or percentage of any net recovery obtained. Rather than take on *Clancy* directly, the plaintiff local governments argue instead that this public nuisance case is sufficiently different from *Clancy* that violation of the neutrality principle needn’t be of concern. But the asserted differences between this case and *Clancy* are of no legal significance.

Plaintiffs argue, for instance, that unlike *Clancy*, the contingency fee attorneys here are under the “control” of local prosecutors; but *Clancy* expressly notes that this makes no difference to the outcome. “It appears that attorney Clancy may have had little discretion in the decision whether to bring an action under the public nuisance ordinance; he does so at the discretion of the city council.”²⁴ Government control of the litigation, then, does not obviate the need for prosecutorial neutrality and sanction use of the contingency fee in public nuisance prosecutions, no more than does contracting-out to private counsel avoid the need for prosecutorial neutrality. “[A] lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if [counsel] is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must

²³ *Id.*

²⁴ *Clancy, supra*, 39 Cal.3d at 749, fn. 4.

adhere to those standards.”²⁵ As the trial court correctly stated: “Oversight by the government attorneys does not eliminate the need for or requirement that outside counsel adhere to the standard of neutrality.”²⁶

Plaintiffs also argue that the factual scenarios animating the two public nuisance cases are so different that any comparison is inapt, like comparing “apples and oranges.” In *Clancy* the targeted “public nuisance” was an adult book store; here it is those who make and distribute lead-based paint. But a “public nuisance” action is a “public nuisance” action. It is the malleable nature of the legal wrong asserted, the vagueness of its contours, that requires public prosecutors to engage in a “delicate balancing” of competing interests for which *neutrality*, actual and perceived, is essential.

Nor does it matter that *Clancy* implicated possible “criminal violations,” while this case allegedly does not. Indeed, as *Clancy* states:

Public 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. . . . “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.” A suit to abate a public nuisance can trigger a criminal

²⁵ *Id.* at 747.

²⁶ Order, *supra*, note 2 at p. 3.

prosecution²⁷

Neither does it matter in terms of the law that, absent the contingent fee arrangement with outside counsel, plaintiffs would not be financially able to prosecute this public nuisance action. Numerous schemes that have as their justification the raising or reserving of financial resources for the public good have been found constitutionally infirm.²⁸ As the trial court remarked, “[Plaintiffs] contend public policy should preclude disqualification in this case because the government entities and lawyers lack the resources and specific expertise necessary to prosecute this action. The standard of neutrality should apply, however, regardless of the wealth of either the government lawyer or the defendants.”²⁹

In sum, the reasons articulated in *Clancy* for disqualifying counsel from representing government on a contingency fee basis for prosecuting a public nuisance action are fully applicable to this case. Stability, certainty and fairness require the same result here as in *Clancy*.

It will not do to decide the same question one way between one set of litigants and the opposite way between another. “If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate

²⁷ *Clancy, supra*, 39 Cal.3d at 749; citations omitted.

²⁸ See, e.g., *Shapiro v. Thompson* (1969) 394 U.S. 618; *U.S. Dept. of Agriculture v. Moreno* (1973) 413 U.S. 528; *U.S. Dept. of Agriculture v. Murry* (1973) 413 U.S. 508.

²⁹ Order, *supra*, note 2, p. 4, citing to and quoting from *City & County of San Francisco v. Philip Morris, Inc.* (N.D. Cal. 1997) 957 F. Supp. 1130, 1136 fn. 3: “The Court wishes to make clear that it does not base this ruling on plaintiffs’ argument that, as a matter of public policy, a contingent fee arrangement is necessary . . . to make it feasible for the financially strapped government entities to match resources with the wealthy tobacco defendants. The Court does not find this argument convincing in light of the concerns expressed in *Clancy*.”

cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am a plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast; it would be an infringement, material and moral, of my rights.” Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.³⁰

³⁰ Benjamin N. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 33-34 (1921), quoting W.G. Miller, *The Data of Jurisprudence*.

B. The Constitutional Concerns and Public Policies Underlying *Clancy* Apply in this Case and are as Viable Today as When *Clancy* was Decided.

1. *Prosecutorial Neutrality is of Critical Importance When a Vague Law like Public Nuisance is Involved.*

Clancy did not invalidate all government contingent fee contracts with outside counsel. In fact, the opinion admits “Nothing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel.”³¹ The opinion even cites to a case which it says presents a situation where “government may hire an attorney on contingent fee to try a civil case.”³² When it comes to “public nuisance” actions, however, the ban on contingent fees is absolute because it is a financial arrangement “that . . . tempt[s] the government attorney to tip the scale [of neutrality and] cannot be tolerated.”³³

What makes “public nuisance” actions unique is that their enforcement “involves a delicate weighing of values,” a “balancing of interests.” That is because the contours and parameters of the wrong are, unlike most other laws, vague, especially when, as here, “public nuisance” is employed to get at manufacturers and distributors of a product, lead-based paint.

Well-developed bodies of law guide courts in evaluating claims for damages caused by products grounded in strict products liability, negligence, or even misrepresentation, but courts

³¹ *Clancy, supra*, 39 Cal.3d at 748.

³² *Id.* at 748, citing to *Denio v. City of Huntington Beach* (1943) 22 Cal.2d 580 (contingent fee arrangement whereby the city hired a law firm to represent it in all matters relating to the protection of its oil rights).

³³ *Id.* at 749.

evaluating *public nuisance* actions against product manufacturers have lacked the benefit of such extensive precedent. Courts reach differing judgments about the legitimacy of a public nuisance theory of recovery against product manufacturers because of both *the vague and variable manner in which the tort often has been defined and inconsistent judicial understandings of the core elements of the tort.*³⁴

As other scholars have observed, “Throughout history, there have been various attempts to turn the tort of public nuisance into a Zelig-like legal theory as amorphous as the word ‘nuisance’ itself.”³⁵

“Vague laws in any area suffer a constitutional infirmity.”³⁶ The vice of a vague law is that it “not only fails to provide adequate notice to those who must observe its strictures, but also ‘impermissibly delegates basic policy matters to [prosecutors], policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’ ”³⁷

No clearer incentive exists for government lawyers to arbitrarily and unfairly enforce laws entrusted to them than the promise of a financial “kicker” at the conclusion of a successful prosecution. Indeed, the taint of private, self-interested persons making government decisions that may burden others while pecuniarily

³⁴ Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort* (2003) 71 *U. CIN. L. REV.* 741, 748; emphasis added.

³⁵ Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort* (2006) 45 *WASHBURN L.J.* 541.

³⁶ *Ashton v. Kentucky* (1966) 384 U.S. 195, 200.

³⁷ *Williams v. Garcetti* (1993) 5 Cal.4th 561, 567-568, citing to and quoting from *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108-109, fn. omitted.

benefitting them has long been of constitutional concern. In *Carter v. Carter Coal Co.* (1936) 298 U.S. 238, for example, legislation that delegated to a commission the authority to regulate maximum hours and minimum wages in the coal industry based on the standards agreed to in contracts negotiated between producers of two-thirds of the annual tonnage and representatives of more than half of the employed mine workers, was found to violate the due process clause of the Fifth Amendment. What the court found “obnoxious” about this delegation was that it was “not even delegation to an official or an official body . . . but to *private persons whose [financial] interests may be and often are adverse to the interests of others . . .*” (*Id.* at 311; emphasis added.)

Similarly, *State Board v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, invalidated on constitutional grounds a law that authorized a State Board of Dry Cleaners (composed mostly of people who owned dry cleaning establishments) to set minimum prices for dry cleaning establishments in cities or counties for the ostensible purpose of protecting public health and safety. The court held the statute improperly delegated legislative authority to a board that consisted mainly of persons who had a *pecuniary stake* in restricting competitors’ rights. (*Id.* at 441-443, 448.) This same concern about financial self-interest affecting (or infecting) government decisions was reiterated in *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, which emphasized that “[w]hen [governmental] authority . . . is delegated to a . . . group of individuals with a pecuniary interest in its subject matter, the constitutional fault is compounded.” (*Id.* at 12.) In *Bayside Timber*, the Legislature delegated to timber owners and operators the exclusive power to formulate forest practice rules with the force and effect of law. (*Id.* at 10.)

An essential check against abusive governmental enforcement of vague laws such as public nuisance is, as *Clancy* instructs, to remove any financial incentive that would unfairly tilt the playing field by diminishing prosecutorial neutrality; and the contingent fee arrangement “is antithetical to the standard of neutrality . . . an attorney representing the government must meet when prosecuting a public nuisance . . . action.”³⁸ “A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and . . . raise serious constitutional questions.”³⁹ According to our High Court, a government attorney’s duty is, in contrast to the incentive animating contingent fee counsel, not necessarily to prevail or to achieve the maximum recovery in a particular case; rather, “the Government wins its point when justice is done in its courts.”⁴⁰

2. *Public Policies of Fairness and “Clean” Government Support Denying Awards of Attorney Fees to Government in Public Nuisance Actions Against Private Parties.*

A contingent fee pays the successful party’s attorney fees from the award or settlement obtained. It thus operates the same as a court awarded attorney fee for the prevailing party. But the public policy of California is not, with the exception of certain limited actions other than public nuisance, to allow courts to make private defendants pay for a successful government prosecution against them. California’s

³⁸ *Clancy, supra*, 39 Cal.3d at 750.

³⁹ *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 250, and authorities cited therein.

⁴⁰ *Brady v. Maryland* (1963) 373 U.S. 83, 88, n.2.

public interest attorney fee statute,⁴¹ for example, is a one-way street: it permits private parties to obtain their attorney fees from government defendants when successful in litigation or settlement, but not the other way around. “Neither Code of Civil Procedure section 1021.5 nor the private attorney general doctrine . . . grant [government] plaintiff[s] any right to attorney’s fees . . .”⁴² Indeed, the private attorney general doctrine and the statute codifying it rest “upon the recognition that privately initiated lawsuits are often essential to the effectuation of . . . fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important policies will as a practical matter frequently be infeasible.”⁴³ “This rationale has no application to the performance of official action by the governmental officers and agencies whose duty it is to prosecute such [i.e., public nuisance] actions.”⁴⁴

The public policy goal of forbidding government to recover its attorney fees from private persons against whom it has been successful in litigation is obviously to prevent overreaching. “Much of the resistance to the [two-way] private attorney general theory may be based upon fear of unfairness in taxing private defendants for

⁴¹ Code of Civ. Proc. § 1021.5 provides, in relevant part, that “with respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.”

⁴² *People ex. re. Cooper v. Mitchell Brothers’ Santa Ana Theater* (1985) 165 Cal.App.3d 378, 386 (“*Cooper*”).

⁴³ *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.

⁴⁴ *Cooper, supra*, 165 Cal.App.3d at 386.

attorney’s fees.”⁴⁵ “[C]onsider the use of the awesome power of [government] against an unpopular defendant . . . Normally, as a matter of policy, we do not allow the use of the power of government for self-enrichment, since such a power inevitably is abused.”⁴⁶

While the Legislature has allowed government to recover its attorney fees if it prevails in a number of situations – ranging from actions not brought in good faith by private plaintiffs against peace officers, trespass and others⁴⁷ – “public nuisance” claims are not amongst these. Plaintiffs’ attempt to use the device of the contingency fee in public nuisance litigation is simply a back-door attempt to pay their attorney fees from a court award or settlement in their favor.⁴⁸ But the legal result – attorney’s fees from a court award specifically for that purpose or from a portion of the court award for damages or restitution – must be the same, “for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition [is] leveled at the thing, not the name.”⁴⁹

⁴⁵ Comment, *Court Awarded Attorney’s Fees and Equal Access to the Courts* (1974) 122 U. PA. L. REV. 636, 678, fn. 248.

⁴⁶ Daniel J. Capra, *The Tobacco Litigation and Attorneys’ Fees* (1999) 67 FORDHAM L. REV. 2827, 2832.

⁴⁷ See Code of Civ. Proc. §§ 1021.7 - 1021.10.

⁴⁸ Though plaintiffs claim the contingency fee agreements do not place them at financial risk, it cannot be gainsaid that should they prevail in this litigation, assuming the contingency fee agreements are ultimately found valid, substantial revenue that would flow into their coffers will instead line the pockets of their contingency fee counsel.

⁴⁹ *Cummings v. The State of Missouri* (1866) 71 U.S. (4 Wall.) 277, 325; see also *Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 92 (city council member could not sue the mayor in an effort “to do indirectly what he cannot do directly for substantial policy reasons. . .”).

Another public policy reason underlying *Clancy's* prohibition on contingency fees in public nuisance and the entire “class of civil actions that demands the representative of the government to absolutely neutral,” is to keep government as free from conflict and corruption as possible.

Those members of the plaintiffs’ bar [who serve as retained, contingent fee lawyers for plaintiffs] are now hopelessly conflicted, serving as government contractors with financial incentives proportionate to their hoped-for conquest. The sword of the state is brandished by private counsel with a direct pecuniary interest in the litigation. On the one hand, they are driven by the contemplation of a huge payoff; on the other hand, they fill a quasi-prosecutorial role in which their overriding objective is supposedly to seek justice. How could such lawyers possibly evaluate with impartiality the prospect of a settlement, say, or the tradeoff between injunctive and monetary relief?⁵⁰

When public harm would be better redressed by nonmonetary relief, the public interest would seem to dictate that the government lawyer should trade nonmonetary concessions by defendants in return for reductions in monetary demands. “But it is hard to imagine contingency fee lawyers advocating to drop a case, as doing so would leave them without any compensation for their work. Similarly, because contingency fee lawyers will invariably have the easiest time collecting fees based on monetary relief for the plaintiffs, it is difficult to imagine them advocating reductions in the

⁵⁰ David Edward Dahlquist, *Inherent Conflict: A Case Against the Use of Contingency Fees by Special Assistants in Quasi-Governmental Prosecutorial Roles* (2000) 50 *DEPAUL L. REV.* 743, 784.

plaintiffs' monetary demands in return for nonmonetary concessions.”⁵¹

Besides conflicts between private and public counsel or the appearance of such conflicts, there is the perceived problem that contingency fee counsel for government are selected, not necessarily because of their skill or prowess in the field of public nuisance litigation, but because of their close political ties with certain public officials. The ban on contingency fee contracts for legislative advocates⁵² is presumably intended to cure the perception that such an arrangement could taint the legislative process. It could also taint or appear to infect the appointment process for contingency fee counsel. Attorneys appointed by the former Texas Attorney General, for example, received more than three billion dollars for their efforts in the litigation against big tobacco.⁵³ Five of these firms donated nearly \$150,000 in contributions to the Texas Attorney General's Office.⁵⁴ A similar pattern of political contributions to appointing prosecutors by contingent fee counsel has been documented in Mississippi⁵⁵ and Illinois.⁵⁶ In this very case, some appointed contingency fee counsel

⁵¹ David A. Dana, *Public Interest and Private Lawyers: Toward A Normative Evaluation of Parens Patriae Litigation by Contingency Fee* (2001) 51 *DEPAUL L. REV.* 315, 326.

⁵² Cal. Gov. C. § 86205 provides, in relevant part, that “No lobbyist or lobbying firm shall . . . accept or agree to accept any payment in any way contingent upon the defeat, enactment or outcome of any proposed legislative or administrative action.” (subd. f.)

⁵³ Bob Van Voris, *That \$10 Billion Fee: The New Tobacco Deal Will Generate the Largest Fee Ever – And It May Grow*, *NAT'L. L.J.*, Nov. 30, 1998, p. A1.

⁵⁴ Robert A. Levy, *Tobacco Medicaid Litigation: Snuffing Out the Rule of Law* (1998) 22 *S. ILL U. L. J.* 601, 641.

⁵⁵ Philip Terzian, *Greed, Not Altruism, is Driving Lawyer Funded for Tobacco Suits*, *COLUMBUS DISPATCH*, Jan. 19, 2000, p. 9A.

⁵⁶ John McCarron, *Fee Frenzy Pol Pals Get the Job Done*, *CHICAGO TRIB.*, Jul. 26, 1999, (continued...)

who appear on the briefs contributed to San Francisco’s City and County attorneys.⁵⁷

Naturally, perceptions that government decisions in the selection of contingency fee attorneys are tainted by political contributions from these attorneys or personal favors for political allies are avoided when, as *Clancy* requires, there is a ban on contingency fees for the prosecution of public nuisance claims.

C. The Notion that the Government Plaintiffs, and not their Privately Retained Contingent Fee Counsel, “Control” the Public Nuisance Litigation is a Fiction that is Unworkable in the Real World.

The appellate court bought plaintiffs’ argument that *Clancy* needn’t be of concern in this case because the government, not its contingent fee counsel, are really in “control” of the litigation. “The public entities have . . . established that their private counsel serve in a subordinate role in which [they] merely assist in-house counsel and lack any authority to control the litigation.”⁵⁸ How did plaintiffs “establish” this? By submission to the court of their written fee agreements, which contain language to this effect. But this, as has been pointed out, was also the case in *Clancy*, though the Court was not fooled by it. “It appears that attorney Clancy may have . . . little discretion in the decision whether to bring an action [for] . . . public

⁵⁶(...continued)
p. 11.

⁵⁷ Campaign disclosure reports show that in 2005 Dennis Herrera, attorney for plaintiff City and County of San Francisco, received \$3500 in contributions from attorneys with Cotchett, Pitre, Simon & McCarthy and \$500 from Mary Alexander & Associates, both firms who have contingency fee contracts with other plaintiffs in this case. See <http://mission.sfgov.org/cfsearch/CFDMain.aspx>. There is nothing illegal about these contributions, but they do raise concerns about the propriety of contingent fee counsel partnering with government counsel and contributing to elected office holders who may well play a role in influencing who gets chosen by whom as contingency fee lawyers for plaintiffs.

⁵⁸ *County of Santa Clara, supra*, 74 Cal.Rptr.3d at 849.

nuisance; he does so at the discretion of the city council.”⁵⁹

This Court well knows the gap between the rhetoric of “control” and the actual exercise of same when it comes to litigation and the role of the contingent fee. As a leading legal scholar has observed:

Contingent fees give incentives to the lawyer to minimize time and risk in order to maximize return, whereas the client would seek to maximize the lawyer’s time and risk in order to minimize risk and maximize return. *It is the lawyer who steers the process, and the client is usually not able to judge whether or not the lawyer’s self-interest determines the extent of work and assistance for the client’s case.* The timing and the amount of recovery seems to be a main conflict of interest if the lawyer is given a percentage of the recovery.⁶⁰

“Control” by the client is, in other words, a “canard.” In fact, real control comes with “budget based political accountability,”⁶¹ which is removed by the contingency fee arrangements in this litigation.

[G]overnment checks and balances depend largely on purse strings, and contingent fees make those purse-strings disappear

⁵⁹ *Clancy, supra*, 39 Cal.3d at 749, fn. 4.

⁶⁰ Peter Eggenberger, *License to Bill = License to Kill? Ethical Considerations on Lawyers’ Fees (With a View to Switzerland)* (2002) 20 PENN ST. INT’L L. REV. 505, 519-20 (emphasis added).

⁶¹ Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lanyering in Mass Litigation* (2000) 34 U.C. DAVIS L. REV. 1 (explaining why “contingent fee lawyers should not be used to pursue government litigation, even if the tobacco litigation is viewed in hindsight as a successful use of such arrangements”).

or at least put the strings beyond the reach of the legislative branch . . . Contingent fees allow the [public prosecutors] to pursue litigation without worrying about the budget, and thus without the immediacy of budget-based political accountability.⁶²

Moreover, any attempt by in-house counsel to “control” the litigation is, as the concurring opinion in this case acknowledges and implicitly confirms, unworkable. The questions to be answered in determining who actually exercises “control” of the litigation are so numerous and would involve such a high degree of involvement by employed government counsel as to render nugatory any supposed savings to government through retention of contingency fee counsel.:

(a) how much control the government attorneys must exercise in order for a contingent fee arrangement with outside counsel [to] be permissible, (b) what types of decisions the government attorneys must retain control over, *e.g.*, settlement or major strategy decisions, or also day-to-day decisions involving discovery and so forth, and (c) whether the government attorneys have been exercising such control throughout the litigation or whether they have passively or blindly accepted recommendations, decisions, or actions by outside counsel.⁶³

As CJAC’s President remarked,

Pity a judge having to determine what’s really going on, as Justice Patricia Bamattre-Manoukian in her concurring opinion proposes be done. She would have the agreements plus “the

⁶² *Id.* at 39.

⁶³ *County of Santa Clara, supra*, 74 CalRptr.3d at 861.

factual circumstances” and “the conduct of the plaintiff’s counsel” be among the “many important factors in each case” that courts should henceforth analyze when approval of contingency fee agreements come before them. And come before them they will – in droves, once the contingency fee bar seizes the financial opportunities that lay in a new block of government clients.⁶⁴

Finally, the duties and responsibilities of publicly employed in-house counsel are different from those of privately retained contingency fee counsel, presenting potential conflicts between the two. When it comes to litigation, contingency fee lawyers pursuit of their own financial interests can, as previously mentioned, conflict with the interests of the government lawyers in public nuisance abatement actions when it comes to the importance of monetary relief over nonmonetary relief, to granting the defendant nonmonetary benefits in return for monetary recovery, and in structuring a settlement that couples illusory nonmonetary relief with the defendants’ commitment to support the plaintiff lawyers’ request for large fees based on an overvalued money equivalent of the nonmonetary relief.⁶⁵ Even when, as here, government lawyers are supposed to monitor and “control” the litigation, they are dependent on the contingency fee lawyers who are actually doing the work for information about the facts and development of the case. Thus, even when government lawyers want to secure the public interest rather than simply obtain the most amount of money from the defendants, they will lack and be dependent on

⁶⁴ John H. Sullivan, *Ruling Ignores the Necessity of Impartiality in Government*, *S.F. DAILY J.*, April 18, 2008.

⁶⁵ Dana, *supra*, 51 *DEPAULL. REV.* at 325.

private contingency fee counsel to provide the necessary information to shape “litigation outcomes.”⁶⁶

D. *Clancy* Has Been Well-Received and is not the Subject of Criticism by Other Courts or Legal Scholars.

In the almost quarter century that has passed since *Clancy* banned use of contingency fees in public nuisance prosecutions, there have been no reported California cases criticizing it or urging its repeal or revision. Law review articles citing and discussing *Clancy* have been laudatory or noncritical about it.⁶⁷ Other states have mostly cited and followed *Clancy*. To be sure, a few opinions have sought to distinguish *Clancy* on grounds urged by plaintiffs that, amicus submits, do not withstand scrutiny.⁶⁸ When, as here, an opinion like *Clancy* has not “received a chilly reception,”⁶⁹ it should be followed “on the assumption that certainty, predictability and stability in the law are the major objective of the legal system.”⁷⁰

⁶⁶ *Id.* at 329.

⁶⁷ See, e.g., Richard O. Faulk & John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation* (2007) *MICH. ST. L. REV.* 941, 973-74.

⁶⁸ See discussion *ante* at p. 11-14.

⁶⁹ *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1192.

⁷⁰ *Id.*

CONCLUSION

It is inherently impossible for an outside, private retained counsel, compensated on the basis of a contingency fee contract, to uphold the principles of impartiality and neutrality that represent the office of the public prosecutor. As the *Wall Street Journal* editorialized, “When outside lawyers are hired to do the government’s business, and then given a financial stake in the outcome, it creates irreconcilable conflicts of interest.”⁷¹

The trial court was correct in applying and following *Clancy* to disqualify contingent fee counsel in this case. Accordingly, this court should reverse the Court of Appeal and reaffirm the “bright line” wisdom of *Clancy*.

Dated: April 27, 2009.

Law Offices of Fred J. Hiestand

By _____
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⁷¹ Editorial, *supra*, *WALL ST. J.*, April 16, 2009 at A14.

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Date: April 27, 2009

Fred J. Hiestand

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I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On April 27, 2009, I served the foregoing document(s) described as: Amicus Curiae Brief of the Civil Justice Association of California in Support of Defendants and Real Parties in Interest in *County of Santa Clara, et al v. Superior Court (Atlantic Richfield Co.)*, S163681 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed this 27th day of April 2009 at Sacramento, California.

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