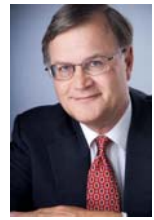
The Supreme Court of California Rules on *Santa Clara* Contingency Fee Issue – Backpedals on *Clancy*

By David M. Axelrad and Lisa Perrochet

IMAGINE that a City Attorney comes before the court and makes the following argument:

> "Your Honor, we face a crisis. We believe certain substances present in the homes and public buildings of our fair City must be removed. Not only can we not afford to pay for that removal, we cannot afford to litigate the public nuisance action that we think must be brought to protect our city. Were we to undertake such litigation on our own, the limited resources of our office would quickly be overwhelmed by the law firm firepower that the defendants would bring to bear. The only way we can address this problem in a fiscally responsible way is if we get help by hiring outside counsel who will level the playing field and enable us to serve the people by pursuing a public nuisance action. And the only way we can afford the skilled outside counsel that this lawsuit demands is to hire counsel on a contingent fee basis, so that our cash-strapped City does not have to incur the enormous out-of-pocket expense of hourly attorney fees, and our contingent fee counsel can instead be compensated out of the monetary recovery in the public nuisance action.



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> Now, I understand your concerns about hiring contingent fee counsel and I want to assure you that I will be in control of the entire litigation, fully supervising every aspect of contingent fee counsel's involvement. Contingent fee counsel are hired only to assist me. I'm in charge here.
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> We need to solve a problem that urgently impacts the welfare of our citizens. But in these tough economic times, we just need a little help. Thank you."

Superficially, this may sound like a reasonable approach to solving a major problem. But on closer examination, the proposed cure—outsourcing the prosecution of public law enforcement claims to private counsel under a contingent fee agreement—is worse than the disease.

The practice of government entities hiring private contingent fee counsel to prosecute sovereign, public law enforcement actions undermines impartial law enforcement by entrusting these actions to lawyers with a financial interest in the outcome. Nonetheless, in *County of Santa Clara v. Superior Court*,[1] the Supreme Court of California issued a ruling that will skew the filing and handling of civil lawsuits by contingent fee counsel acting on behalf of government entity plaintiffs seeking redress for everything from obesity to climate change. As a result, instead of determining whether and how to pursue litigation based on the *overall public interest*, government plaintiffs will be guided by the advice of private outside counsel who have a personal stake in obtaining the largest amount of money.

Contingent fee arrangements, when used appropriately, are recognized as an important tool of American justice, "facilitat[ing] access to the judicial system for individuals who lack the means to pre-pay legal expenses."[2] Nonetheless, contingent fee agreements continue to generate skepticism. As one commentator noted:

> One of the most serious dangers is that contingent fees tend to erode an attorney's judgment. . . .
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> When the lawyer in effect invests in a cause of action by taking his fee as a percentage of the recovery, it is easy for him to lose his detachment from the client's interests. He often becomes more of

[1] 50 Cal.4th 35 (Cal. 2010).

[2] David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of* Parens Patriae *Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 317-318 (2001).

> a businessman concerned with his own financial well-being than a proper advisor to the client. . . .
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> "[T]he contingent fee is now viewed as giving a lawyer an interest in the actual accident, disaster, or transaction that precipitated the lawsuit and a stake in its outcome." This . . . undermines public faith in the judicial system by seeming to encourage the filing of lawsuits that lack merit.[3]

Recently, however, states and other governmental entities have either sought or been persuaded to retain private contingency counsel to pursue public nuisance claims. This trend began in the 1980s, "when Massachusetts decided to hire private lawyers to pursue claims over asbestos removal."[4] Even after the California Supreme Court limited the use of contingent fee attorneys in public nuisance cases,[5] the use of these contingency fee schemes spread, leading to the "creation of a new model for state-sponsored litigation that combines the prosecutorial power of the government with private lawyers aggressively pursuing litigation that could generate hundreds of millions in contingent fees."[6] The increasing use of contingent fee counsel by public prosecutors has prompted extensive criticism. "Editorials and op-eds . . . have been highly critical of the practice of paying private attorneys to prosecute civil enforcement claims on behalf of the State based on their success in bringing in the greatest monetary award."[7]

Contingent fee arrangements have been employed without objection in litigation where the government acts in the traditional role of a plaintiff seeking damages to compensate for an injury.[8] However, when the government is seeking the enforcement of public rights, a contingent fee arrangement gives the attorney representing the government a financial stake in the outcome of litigation that creates an appearance of impropriety affecting the integrity and neutrality of the government's prosecution.

I. Problems Associated with Hiring Contingency Fee Counsel

The need for both impartiality and the appearance of impartiality stems from the type of action for which the

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[3] WILLIAM G. ROSS, THE HONEST HOUR 242 (Carolina Academic Press 1996).

[4] Richard O. Faulk and John S. Gray, *Alchemy in the Courtroom? The Transmutation of Public Nuisance Litigation*, 2007 MICH. ST. L. REV. 941, 968 (2007).

[5] *See* People ex rel. Clancy v. Superior Court, 39 Cal.3d 740 (1985), discussed *infra*.

[6] Faulk and Gray, *supra* note 4, at 968.

[7] Br. of Chamber of Commerce of the United States of America and The American Tort Reform Ass'n as Amici Curiae Supporting Respondents/Real Parties in Interest at 11-12, *County of Santa Clara v. Superior Court* No. S163681 (Cal. filed Apr. 29, 2009) (hereinafter "Chamber Brief").

[8] *See* City of San Francisco v. Philip Morris, Inc., 957 F. Supp. 1130, 1135 (N.D. Cal. 1997) ("This lawsuit, which is basically a fraud action, does not raise concerns analogous to those in the public nuisance or eminent domain contexts discussed in *Clancy*. Plaintiffs' role in this suit is that of a tort victim, rather than a sovereign seeking to vindicate the rights of its residents or exercising governmental powers.").

government hires contingent fee counsel. When the government brings an action for public nuisance, eminent domain, or other similar claims, the government acts in its sovereign capacity as *parens patriae* for "the health and well-being—both physical and economic—of its residents in general."[9] When acting in this sovereign role to protect the general welfare of the citizenry, as distinct from the government's proprietary role[10] ("like other associations and private parties, a State . . . may . . . own land or participate in a business venture . . . [and] may at times need to pursue those interests in court . . ."), the government must be free of any outside influence that risks impairing the neutrality and impartiality essential to the government's ability to act in the best interest of all citizens.

In a criminal action, there would be no debate, for our society would never allow the prosecutor to employ contingent fee counsel who are paid for each criminal conviction they are able to secure.[11] And, if the prosecutor himself were to pursue an action for public nuisance on a contingent fee basis, the response would be swift and certain; no one would tolerate a prosecutor having a financial interest in the outcome of the litigation.

The rules should be no different when the prosecutor hires a private attorney as his or her agent to pursue a public law enforcement on the prosecutor's behalf. The California Supreme Court stated this principle emphatically in *Clancy*:

> [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 [the private attorney] is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards.[12]

The same potential for erosion of the government's neutrality and impartiality occurs whether a contingent fee is payable to the government or the government's agent. Either way, day-to-day litigation decisions—strategy calls, development and evaluation of facts, trial tactics, whether to proceed, whether to settle, whether even to end the litigation—are all necessarily colored by the inescapable fact that counsel hired to litigate the case will not be paid unless there is a substantial monetary recovery. That profit motive necessarily influences the course of the litigation. Where a contingent fee is involved, therefore, there is no longer a guarantee that a public law enforcement action will be guided solely by what is best for the

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[9] Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 607 (1982).

[10] *See id.* at 602-603.

[11] *See* People ex rel. Clancy v. Superior Court, 39 Cal.3d 740, 748 (Cal. 1985) ("'[T]he contingent fee is generally considered to be prohibited [in] the prosecution . . . of criminal cases . . . [T]he contingent element [is] against public policy because it tend[s] to bring about conviction regardless of the prosecutor's primary duty to see that justice [is] done'") (citing F.B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 52 (1964)).

[12] *Id.* at 747.

general welfare.[13] There will always be a risk that decisions concerning government *parens patriae* litigation will be made in whole or in part for the sake of attorney profit rather than for the public's benefit.

The issue is not whether an advocate can be perfectly disinterested. All advocates have an interest in winning their cases.[14] The neutrality demanded of an attorney enforcing public rights does not require complete indifference to the outcome of the case. However, when the same attorney has a financial stake in the outcome of that case, the potential for the attorney to act out of self-interest rather than the public interest creates an indelible appearance of impropriety.[15]

Other areas of the law recognize the dangerous effect that a financial stake in the outcome of a transaction can have. For example, directors of a corporation who are "disinterested" (i.e. do not have a personal financial stake in a transaction) are presumed to have acted in the corporation's best interests.[16] However,

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[13] *See* Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 805 (1987) (plurality opinion) ("A prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards"); *see also* John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 590 (1994) ("A private prosecutor, who is being paid handsomely to convict someone, cannot also, without at least some subtle bias, fairly represent the interests of that person and consider the 'public interest' in treating that person justly.").

[14] Hollywood v. Superior Court, 43 Cal.4th 721, 734 (Cal. 2008).

[15] In their brief before the California Supreme Court, the California District Attorneys Association had this to say:

> Permitting contingent fee attorneys to represent public law enforcement interests will necessarily and inevitably inject improper personal financial interests into the balancing process required in civil law enforcement cases and will undermine public confidence in the civil law enforcement justice system. . . . The participation of the contingent fee attorneys who have direct, personal, substantial pecuniary interests in a successful outcome of this case creates an actual conflict because of the influence such attorneys possess to steer the course of this litigation in particular directions. Just as important, that participation also creates an appearance of impropriety due to the lack of transparency which jeopardizes not only the confidence of the defendants that the government attorneys will exercise their discretion in an impartial fashion, but also jeopardizes the confidence of the judiciary and the public at large in such neutrality . . . . Thus it is impossible to understate the importance . . .of maintaining public confidence in the fair and impartial enforcement of key civil law enforcement statutes . . . . [C]ourt approval of contingent fee agreements in civil law enforcement cases giving contingent fee outside counsel direct, personal, and substantial financial stakes in the outcome of commercial cases will greatly undermine public confidence in the fair and equitable use of those statutes with disastrous consequences." (Br. of Cal. Dist. Att'ys Ass'n as Amicus Curiae at 3, 26, 36, County of Santa Clara v. Superior Court, No. S163681 (Cal. filed Apr. 27, 2009).

[16] *See, e.g.*, Gantler v. Stephens, 965 A.2d 695, 706 (Del. 2009); Tritek Telecom, Inc. v. Superior Court, 169 Cal.App.4th 1385, 1390 (Cal. Ct. App. 2009); Lippman v. Shaffer, 836 N.Y.S.2d 766, 772 (N.Y. Sup. Ct. 2006).

that presumption disappears when it is shown that a director "will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally."[17] Similarly, public officials are prohibited both at common law and by statute from '"having a financial interest in contracts created by them in their official capacities"' in order to "prevent the conflict of interest between personal financial interest and official duties that arises when public officials have a personal economic interest in business they transact on behalf of the government."[18]

What, specifically, is the problem? First is the risk that public confidence will be eroded by the perception that litigation is being steered by profit-seeking rather than public policy. Government-sponsored public nuisance complaints have spawned enormous and complicated litigation. However, in-house civil service lawyers are not experts in specialized fields like complex public nuisance suits.[19] A contingent fee arrangement is therefore attractive because it allows a public entity to hire specialists without the expense of training them or paying their salaries. But the inexpert government lawyers are then expected to exert control over the conduct of the case, including the discretionary and strategic decisions that are daily made by the very specialized outside counsel who were hired because of their greater expertise in directing the course and conduct of such cases. Contingent fee counsel may use this expertise differential to steer the case in a way that may not serve the public interest. Even if the senior member of the government agency involved in the litigation has some expertise in the field of law involved, the sheer size of these cases necessitates that many significant discretionary decisions will be made by contingent-fee attorneys without effective supervision. Although some might dismiss these everyday decisions as irrelevant, the United States Supreme Court has recognized their importance, noting (in the context of a criminal prosecution) that litigation "contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record."[20] These decisions, which incrementally determine the course of the case, become unreviewable by a court, which can neither micromanage litigation of this size nor review aspects of the litigation that are not part of the record.[21]

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[17] Marx v. Akers, 666 N.E.2d 1034, 1042 (N.Y. 1996); *accord* Pfeffer v. Redstone, 965 A.2d 676, 690 (Del. 2009).

[18] Klistoff v. Superior Court, 157 Cal.App.4th 469, 480 (Cal. Ct. App. 2007).

[19] *See* John C. Coffee, Jr., *"When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241, 250 (2001) (stating that government agencies should not handle similar complex matters "on an in-house basis with civil service lawyers who lack the requisite prior experience in a specialized field").

[20] Young v. U.S. ex rel. Vuitton et Fils S.A., 481 U.S. 787, 813 (1987) (plurality opinion).

[21] Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, Northwestern Law Research Roundtable on Expansion of Liability Under Public Nuisance 5 (2008), available at http://www.law.northwestern.edu/searlecenter/papers/Redish_revised.pdf (last

Second, even if prosecutor "control" could in theory eliminate the taint of contingent fee counsel's financial interest, how could the public or the courts ever know if the "control" was in fact sufficient? Thus far, the government entities advocating the control exception, and the courts that have adopted it, have ignored the problem of verification and have instead relied on a government attorney's assurance that "I'm in control." This is a thin reed. After all, the government is hiring contingent fee counsel because they do not have the personnel or the resources to conduct the litigation themselves. How then, can the public be assured that the government has the resources and personnel needed to "control" contingent fee counsel in the conduct of massive, multi-party litigation? And, how can there be actual verification of the prosecutor's "control" when verification would require a wholesale and probably unacceptable intrusion into the attorney-client and attorney work-product privileges?

Third, there can be serious conflicts between the objectives of an attorney who is paid a percentage of the recovery and the objectives of the public.

Sometimes public interest considerations dictate dropping litigation altogether or focusing on nonmonetary relief more than monetary relief. But contingency fee lawyers, perhaps unlike most government lawyers or even most outside hourly fee lawyers, arguably can be expected to pursue the maximum monetary relief for the state without adequately considering whether that relief advances the public interest and/or whether the public interest would be better served by foregoing monetary claims, or some faction of them, in return for nonmonetary concessions.[22]

Fourth, hiring contingent fee counsel circumvents the legislative process by enabling the executive branch to bypass the legislative body that normally would have to appropriate funds to prosecute the litigation[23] and by shifting public policy making from the legislature to courtroom litigation guided by for-profit contingent fee attorneys.[24]

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visited Apr. 25, 2011) ("Actual impropriety in a specific instance will generally be difficult to unearth. Indeed, it is quite conceivable that the government attorney herself would be unaware of the impact of the motivational twist on her behavior. It is for that reason that we generally establish *prophylactic* rules to ensure adherence to the public interest by our government officers").

[22] Dana, *supra* note 2, at 323; *see also* Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2103 (2004) ("Whether by adjudication or settlement, there may be questions of whether to pursue injunctive relief, money damages, or both. A person committed to the cause may give greater weight to injunctive remedies. A person seeking to maximize monetary recovery may give less weight to injunctive remedies or, in a class action or other context requiring court approval, may even prefer to include illusory injunctive remedies combined with significant money damages.").

[23] Dana, *supra* note 2, at 320 n.8.

[24] *See* Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 921 (2008) ("[M]ost often, the power shift is not simply one between two elected branches of government. . . . Instead, public policy decisions regarding which public health and safety crises to address and who should be held financially accountable for these matters have been functionally delegated

Finally, introducing a profit motive into the prosecution of public nuisance actions raises constitutional due process concerns.[25]

Each of these problems raises ethical public-policy and even constitutional issues that counsel against allowing the government to hire contingent-fee attorneys to prosecute actions enforcing public rights. One commentator summarized the problem as follows:

> 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?[26]

Under these circumstances, it is not surprising that, as a matter of public policy, the federal government does not hire contingent fee attorneys. A recent appellate brief explained that:

> [T]he federal government pursues litigation without hiring lawyers on a contingency fee basis. In May 2007, President George W. Bush formalized this policy by promulgating Executive Order 13433, "Protecting American Taxpayers From Payment of Contingency Fees," 72 Fed. Reg. 28,441 (daily ed., May 18, 2007). The President's order states "the

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to a small handful of mass products plaintiffs' lawyers who specialize in litigation brought by states and municipalities against products manufacturers."); *see also* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 39 (2000) ("[G]overnment checks and balances depend largely on purse strings, and contingent fees make those purse-strings disappear 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.").

[25] *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) ("[I]t certainly violates the 14th Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."); Marshall v. Jerrico, Inc., 446 U.S. 238, 249-250 (1980) ("A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.").

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

> policy of the United States that organizations or individuals that provide such services to or on behalf of the United States shall be compensated in amounts that are reasonable, not contingent upon the outcome of litigation or other proceedings, and established according to criteria set in advance of performance of the services, except when otherwise required by law." *Id.* Hiring attorneys on a hourly or fixed fee basis, and not through a contingency fees arrangement, "help[s] ensure the integrity and effective supervision of the legal and expert witness services provided to or on behalf of the United States.[27]

II. *County of Santa Clara v. Superior Court*

In the underlying case, a group of public entities initiated a public nuisance action against manufacturers of lead paint and pigment, seeking an order requiring the defendants to abate lead hazards in millions of residential and commercial structures throughout the state. The scope of this litigation is breathtaking. The plaintiff government entities brought this public nuisance claim against defendants in 2001, twenty-three years after the United States banned lead paint. Plaintiffs alleged that by promoting and selling products containing lead before 1978, defendants created a public nuisance that they should be required to abate by eliminating lead paint from every public and private building within each plaintiff's jurisdiction, even though defendants neither own nor control any of these properties. By allowing this public nuisance theory to proceed (plaintiffs' representative public nuisance theory was approved by the California Court of Appeal in *County of Santa Clara v. Atl. Richfield Co.*),[28] California expanded public nuisance law, with its very liberal proof standards and very long statute of limitations, to encompass what is essentially a products liability claim based on alleged marketing and promotion of lead paint dating back more than twenty-three years.

All but one of the government entities retained private counsel on a contingent fee basis to prosecute the action. The trial court found the contingent fee agreements violated *Clancy*.

The California Court of Appeal reversed, holding that fee agreements ceding to government lawyers "'final authority over all aspects'"[29] of the litigation of public nuisance claims against lead paint manufacturers did not offend *Clancy's* prohibition.

The Supreme Court upheld the Court of Appeal's embrace of the "control exception," and concluded that the decision in *Clancy* "should be narrowed." As justification for backing away from *Clancy*, the Court reasoned that the *Santa Clara* Lead Paint Litigation was not much more than a suit for money against big, wealthy corporations.

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[27] Chamber Brief, *supra* note 7, at 29-30.

[28] 137 Cal.App.4th 292 (Cal. Ct. App. 2006).

[29] County of Santa Clara v. Superior Court, 50 Cal.4th 35, 45 (Cal. 2010).

> This case will result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that abatement purpose or by undertaking the abatement themselves. . . . 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. . . . [B]ecause—in contrast to the situation in *Clancy*—neither a liberty interest nor the right of an existing business to continued operation is threatened by the present prosecution, this case is closer on the spectrum to an ordinary civil case than it is to a criminal prosecution.[30]

One problem with this analysis is that, when the defendants earlier challenged the propriety of bringing a public nuisance action for what was, in essence, an "ordinary civil case" for product liability or negligence (theories that would be barred under a variety of defenses to such claims), an appellate court disagreed. In the first appellate decision arising out of this nuisance litigation, the court highlighted the specialized nature of the abatement remedy as being a reason that this case should be allowed to move forward as a sovereign claim that is not subject to the same limitations as those imposed on ordinary tort claims.[31]

Moreover, whether an action brought on behalf of the general public threatens a liberty interest or the continued operation of a business should be irrelevant to the question whether the action can properly

[30] *Id.* at 55-56.

[31] *See* County of Santa Clara v. Atl. Richfield Co., 137 Cal.App.4th 292, 309-310 (Cal. Ct. App. 2006) ("[T]he representative cause of action is a public nuisance action brought *on behalf of the People seeking abatement.* Santa Clara, SF, and Oakland are *not* seeking *damages* for injury to *their* property or the cost of remediating *their* property. A *representative* public nuisance cause of action seeking *abatement* of a hazard created by affirmative and knowing *promotion of a product for a hazardous use* is *not* 'essentially' a products liability action 'in the guise of a nuisance action.' . . . Because this type of nuisance action does not seek damages but rather abatement, a plaintiff may obtain relief *before* the hazard causes any physical injury or physical damage to property. A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a hazardous condition. . . . In contrast, a products liability action may be brought only by one who has already suffered a physical injury to his or her person or property, and the plaintiff in a products liability action is limited to recovering damages for such physical injuries. A products liability action does not provide an avenue to prevent future harm from a hazardous condition, and it cannot allow a public entity to act on behalf of a community that has been subjected to a widespread public health hazard. For these reasons, we are convinced that the public nuisance cause of action in the third amended complaint is not a disguised version of plaintiffs' products liability causes of action and is not invalid. . . .").

be pursued by counsel whose interest is in maximizing a monetary recovery over other forms of relief. Whenever the government exercises its sovereign power to bring a public law enforcement action of any kind, the assurance that the prosecutor is acting without any outside financial influence, is essential. Nonetheless, the Supreme Court in *Santa Clara* concluded that in a public nuisance abatement action, such as the Lead Paint Litigation, "retention of private counsel on a contingent fee basis is permissible . . . if neutral, conflict-free government attorneys retain the power to control and supervise the litigation."[32]

The Court did, however, specify certain provisions that the contingency fee agreement must include:

> [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. . . . [A]ny defendant that is the subject of such litigation may contact the lead government attorneys directly, without having to confer with contingent-fee counsel. . . . [P]ublic-entity attorneys will retain complete control over the course and conduct of the case [and] veto power over any decisions made by outside counsel . . . a government attorney with supervisory authority must be personally involved in overseeing the litigation.[33]

Unfortunately, the *Santa Clara* decision mirrors the attitude of other courts that have adopted a "control exception" to justify privatizing prosecution of a public nuisance action. In *State v. Lead Industries Association*,[34] Rhode Island's Attorney General brought a public nuisance abatement action against lead pigment manufacturers. After first deciding that the action should have been dismissed at the pleading stage because (as noted above) defendants' alleged actions as lead pigment manufacturers did not constitute public nuisance as a matter of law, the Rhode Island Supreme Court addressed the contingent fee issue. Although "reluctant to opine on an issue that has become moot,"[35] and cautioning that the law in this area is unsettled and "still developing,"[36] the Court addressed the validity of the contingent fee arrangement because "this particular subject is one of extreme public importance."[37] The Rhode Island court concluded that the state Attorney General, as a constitutional officer of the State, was "not precluded from engaging private counsel pursuant to a contingent fee agreement" so long as the Attorney General maintained absolute and total control over the decision making.[38]

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[32] *County of Santa Clara*, 50 Cal.4th at 58.
[33] *Id.* at 63-64.
[34] 951 A.2d 428 (R.I. 2008).
[35] *Id*. at 469-470.
[36] *Id*. at 476 n.50.
[37] *Id*. at 470.
[38] *Id*. at 475. In Priceline.com Inc. v. City of Anaheim, 180 Cal.App.4th 1130 (Cal. Ct. App. 2010), the California Court of Appeal held that tax collection efforts undertaken by contingent fee counsel on behalf of a city are not subject to the *Clancy* prohibition because,

Two federal trial courts, in unpublished opinions, have also accepted the propriety of contingent fee arrangements in similar situations. In *City of Grass Valley v. Newmont Mining Corp.*,[39] a city hired outside counsel on a contingent fee basis to litigate claims that included a request for abatement of a public nuisance. The federal court concluded that because the City Attorney acts "as co-counsel in this action and the City retains 'ultimate decision-making authority in the case,'" the City's retention of outside counsel on a contingent fee basis did not violate the government attorney's duty of neutrality.[40] And in *Sherwin-Williams Co. v. City of Columbus*[41] three cities entered into contingent fee agreements with private counsel to prosecute public nuisance actions. The court initially concluded that "an agreement between a municipality and private counsel in a public nuisance action which purports to vest in private counsel authority to prevent a settlement or dismissal of a suit is unconstitutional."[42] However, the court found the contingent fee agreements are permissible if they provide that the cities retain control over the litigation, including authorization of settlement, with the private attorneys working under the direction and at the discretion of the city governments.

Santa Clara stops short of authorizing private contingency fee counsel to pursue public remedies such as civil penalties available under consumer protection statutes. The court found the determinative factor in the case before it to be the difference between "the types of remedies sought and the types of interests implicated" in *Clancy* and in *Santa Clara*.[43] Thus, in a public action seeking statutory penalties against a business operating in California, for example, a court confronted with the issue might well find that the "type of remedy sought" (a penalty that is not tied to an amount needed to cure or abate harm caused by the defendant) and the "type of interest implicated" (the interest of a business with ongoing operations in California) means that the case falls outside the *Santa Clara* control exception to the rule barring contingent fee counsel. Whether courts in the future read *Santa Clara* narrowly or broadly in this respect remains to be seen.

III. Conclusion

"*Clancy* [only] bars governments from granting sole litigation discretion to contingency fee lawyers in public nuisance actions—and perhaps to other actions requiring delicate balancing and weighing of interests and values. Only those cases fall within the class of civil actions wherein the duty of absolute neutrality bars contingency fees." *Id.* at 1143-1144. The *Priceline* court was heavily influenced by evidence of the City's active supervision of outside contingent fee counsel retained to prosecute the tax collection actions. "This constant, direct oversight by the city attorney's office distinguishes this case from *Clancy*, in which a single contingency fee lawyer served as the sole 'special attorney' for the city in the public nuisance action." *Id.* at 1144.

[39] No. 2:04-cv-00149, 2007 WL 4166238 (E.D. Cal. Nov. 20, 2007).

[40] *Id.* at *1.

[41] No. C2-06-829, 2007 WL 2079774 (S.D. Ohio July 18, 2007).

[42] *Id.* at *3.

[43] *See County of Santa Clara*, 50 Cal.4th at 52.

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

Even if the courts were willing and able to take on the burden of supervising the government's maintenance of control over private contingent fee counsel to ensure that the profit motive did not influence the litigation, no amount of control will ever eliminate the potential for the decision-making to be skewed in favor of earning profit regardless of what is best for the people. And, just as important, no amount of control will change the appearance to the public that these civil law enforcement actions are influenced by an attorney's financial stake in the outcome. The resulting erosion in public trust is too high a price to pay.

The goal of actions brought by the government in its sovereign capacity is not to win at any cost but to do justice. This requires absolute impartiality that cannot be achieved unless the government, and its agents, are unaffected by private interests. Even a risk that a profit motive will influence the discharge of public duties is unacceptable. The neutrality and impartiality with which the government exercises its sovereign power must be guarded so that there is no potential for that power to be compromised.