

The Expert's Corner

CONTINGENT FEES FOR REPRESENTING THE GOVERNMENT: DEVELOPMENTS IN CALIFORNIA LAW

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As entrepreneurial plaintiffs' attorneys seek new opportunities in a world with rising class action hurdles, representing governments for contingent fees has proven to be a fruitful path. The tobacco litigation proved, of course, the extreme example of this. But I have written recently of the benefits and pitfalls of other such opportunities. See Expert's Corner: *Privatizing Government Litigation: Do Campaign Contributors Have An Inside Track?*, 3 CLASS ACTION ATT'Y FEE DIG. 407 (October 2009).

This summer, the California Supreme Court issued a new decision setting out some rules concerning private counsel involvement in contingent fee cases on behalf of the government, *County of Santa Clara v. Superior Court*, No. S163681, 2010 WL 2890318 (Cal. 2010). The decision is an advance for the plaintiffs' bar because it limited the Court's previous holding in *People ex rel. Clancy v. Superior Court*, 705 P.2d 347 (Cal. 1985), which had seemed to proscribe private lawyers from working for the government on a contingent-fee basis in public nuisance actions. At the same time, the case announced a very specific rubric by which courts should evaluate contingent fee agreements between private counsel and public counsel in such actions. The rubric is likely to gain some traction because it is principled and issues from the highest Court in the most populous and,

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arguably, most plaintiff-friendly, forum in the country. Here's the story.

Plaintiff counties and cities in California brought a public nuisance claim against several companies that had produced and distributed lead paint many years earlier, seeking an abatement for contaminated buildings. The plaintiffs entered into several fee agreements with private attorneys in which payment was contingent on results achieved. After the plaintiffs won summary judgment, the defendants filed a motion to bar payment on the contingent fee agreements, arguing that the Supreme Court's prior decision in *Clancy* prohibited the California government from retaining private counsel in a contingent fee arrangement in any public nuisance action.

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The California Supreme Court first reviewed its decision in *Clancy*, which involved a public nuisance action brought against an adult bookstore. The Supreme Court noted that the *Clancy* court had stressed the importance of lawyerly neutrality (and hence for not privatizing the government's action) in that particular case for two main reasons: (1) the delicate balance between the interest of the people in freedom from obnoxious or dangerous conditions, on the one hand, and the First Amendment interest of the landowner in

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