For Opinion See 188 P.3d 579

Supreme Court of California.
COUNTY OF SANTA CLARA, et al., Petitioner,
v.
SUPERIOR COURT OF THE STATE OF CALIFORNIA, County of Santa Clara, Respondent.
Atlantic Richfield Company, et al., Real Parties in Interest.
No. S163681.
April 29, 2009.

On Appeal from a Decision of the Court of Appeal Sixth Appellate District, Case No. H031540, Santa Clara County Superior Court Case No. CV-788657, The Honorable Jack Komar

Application for Leave to File Amici Curiae Brief and Proposed Amici Curiae Brief of the California State Association of Counties and the League of California Cities in Support of Petitioners County of Santa Clara, et al.

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***1 TO THE HONORABLE PRESIDING JUSTICE:**

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, the California State Association of Counties and the League of California Cities submit this application to file an amicus brief in support of Petitioners County of Santa Clara, et al.

THE AMICI CURIAE

CSAC is a non-profit corporation, the membership of which consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves issues affecting all counties.

The League of California Cities is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to ***2** municipalities, and identifies those cases that are of statewide -- or nationwide -- significance. The Committee has identified this case as being of such significance.

STATEMENT OF INTERESTS

The issue presented in this case implicates local government's ability to collaborate with private co-counsel on a contingency-fee basis to pursue nuisance abatement actions. The resolution of this issue will have a direct and profound impact on whether nuisance actions, especially against larger corporations, can be maintained at all. For this

reason, the amici curiae have a substantial interest in the matter before the Court.

NEED FOR FURTHER BRIEFING

Amici curiae are familiar with the issues and the scope of their presentation and believe additional briefing is needed on the statewide public policy ramifications of the real parties in interest's attempt to disqualify private co-counsel. If adopted, this rule of per se prohibiting contingency fee agreements for public nuisance actions will effectively eliminate the option of pursuing such actions in many situations, defeating the important public interest served by this kind of litigation. The proposed amicus brief will also discuss the constitutional and statutory authority granted to cities and counties to hire special counsel and set the terms of ***3** compensation. Therefore, Amici Curiae hereby request that leave be granted to allow the filing of the accompanying amici curiae brief.

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INTERESTS AND DESCRIPTION OF AMICI CURIAE

The California State Association of Counties (CSAC) and the League of California Cities (League) file this brief in support of Petitioners because the case before the Court has important implications for citizens of counties and cities throughout the State. The real parties in interest (hereinafter the lead paint companies) are attempting to impede the ability of cities and counties to seek legal recourse to address significant public hazards in their communities through public nuisance actions. While this might be good for the lead paint companies, it is contrary to applicable statutory authority and case law, and amounts to bad public policy. The Sixth Appellate District's decision should therefore be affirmed.

CSAC is a non-profit corporation, the membership of which consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves issues affecting all counties.

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all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide -- or nationwide -- significance. The Committee has identified this case as being of such significance.

INTRODUCTION

This case presents a critical issue for cities and counties: Whether a local government may collaborate with private co-counsel on a contingency-fee basis to pursue public nuisance abatement actions. The appellate court correctly concluded that petitioners are permitted to seek abatement of public nuisances through the use of a contingent fee agreement with private counsel. Amici ask this Court to affirm and make clear that courts must determine on a case-by-case basis if government decision-making and control has been relinquished to private counsel before private co-counsel is disqualified. Where private co-counsel is employed to provide needed resources and expertise, but does not improperly influence the government's actions, disqualification results in an injustice to the citizens of this State and should be not required.

In this case, government agencies statewide determined that it was necessary, and in the interest of the public welfare, to bring comprehensive legal action against a large industry to abate a public nuisance. Indeed, public nuisance actions on both small and large scales serve an important role in protecting the public. The government is in the best position to know whether or not a proposed action can be accomplished with existing resources.

In this case -- as will be true in other situations in cities and counties around the State -- budgetary constraints, staff levels, and expertise made it unrealistic to seriously litigate against a conglomeration of billion dollar companies who are represented by specialized counsel. Without the assistance of private co-counsel, who help shoulder the risk and provide specialized expertise, this litigation and other important public nuisance actions around the State could not go forward. This may be a benefit to those individuals or industries that are creating a public nuisance, but it does nothing to protect the public. Consequently, adopting the lead paint industry's position requiring automatic preclusion of contingency-fee arrangements has adverse ramifications for local government statewide and the citizens that government is trying to protect.

***4 ARGUMENT**

A. PUBLIC NUISANCE ACTIONS PLAY AN IMPORTANT ROLE IN PROTECTING PUBLIC PEACE, HEALTH AND SAFETY

The issue at stake in this case involves more than the present underlying action against lead paint manufacturers. Public nuisance actions can arise in many different contexts and play an important role in protecting the public. As one legal commentator has noted: "Public torts provide a mechanism that will encourage persons to take account of all the costs posed by their activities and, therefore, invest efficiently in safety."[FN2] Indeed, public nuisance actions such as the one in the underlying case "provide a vehicle that forces a defendant to take account of the costs it has imposed on society, even though the defendant's victims will not recover those damages in individual tort suits either because those individuals do not sue, or because recovery is not allowed for reasons other than defendant's conduct...."[FN3] Similarly, where defendants are unjustly enriched by "shifting the costs of product-related injuries to the government, then public tort lawsuits arguably serve a corrective justice ***5** function by forcing them to compensate the public for the cost of treating injuries caused by their products."[FN4]

FN2. Thomas C. Galligan, Jr., *Deterrence: The Legitimate Function of the Public Tort*, 58 Wash. & Lee L. Rev. 1019 (2001).

FN3. *Id.*

FN4. Richard C. Ausness, *Public Tort Litigation: Public Benefit or Public Nuisance*, 11 Temp.L.Rev. 825,

898 (2004).

In recent years, public nuisance actions have been brought by State and local governments across the country to address some of the most troublesome public health and safety issues of our time, including tobacco-related health costs, firearms-related health costs, and carbon dioxide emissions. (See, e.g. *City of Cincinnati v. Berretta U.S.A. Corp.* (Ohio 2002) 768 N.E.2d 1136; *Connecticut v. American Electric Power Co.* (S.D.N.Y. 2005) 406 F.Supp.2d 265.) Legal commentators have speculated that public nuisance actions could be raised in the future to address other societal ills, including polluted lands, health effects of petroleum, the health costs related to obesity, and damages caused by certain types of prescription drugs, predatory lenders, and the like.[FN5] Certainly, the success of each of these claims has and will depend upon the merits of the ***6** individual case. But one thing is clear-- public nuisance is a significant tool in addressing large-scale social ills.

FN5. See Angela Lipanovich, *Smoke Before Oil: Modeling a Suit Against the Auto and Oil Industry on the Tobacco Tort Litigation is Feasible*, 35 Golden Gate U.L.Rev. 429 (2005); Richard C. Ausness, *supra*, 11 Temp.L.Rev. 825 (2004); Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 Conn.L.Rev. 355 (2006); Dustin A. Frazier, *The Link Between Fast Food and the Obesity Epidemic*, 17 Health Matrix 291 (2007).

Equally important, if not more so, are smaller scale public nuisance actions. A public nuisance case does not need to involve national corporations and multiple city and county plaintiffs in order to be significant to the affected community. State law defines a public nuisance as any nuisance that "affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Civ. Code, § 3480.) As such, even a small-scale problem of toxic pollution, for example, is an appropriate subject for a public nuisance claim. As a leading commentator in the area of public nuisance has stated, the underlying basis for public nuisance is "to protect the public from lawful and even productive activities that are substantially incompatible with the public's common rights. Public nuisance is the only tort designed and equipped to protect the public from activities or conduct that is incompatible with public health, safety, or peace."[FN6]

FN6. David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 Conn.L.Rev. 1175, 1778 (2000).

***7** Given the importance of public nuisance actions to address both large-and small-scale harms to the public, this Court should affirm the appellate court's ruling, which would have the practical impact of allowing cities and counties to bring public nuisance actions when deemed necessary by the governing body to protect the public.

B. LOCAL GOVERNMENT HAS AUTHORITY TO USE PRIVATE CO-COUNSEL ON A CONTINGENCY FEE BASIS WITH PROPER CONTROLS.

In *People ex rel. Clancy v. Superior Court* (1985) 39 Cal.3d 740, 743 (*"Clancy"*), this Court found impermissible a private attorney serving as the sole representative of the government and in complete control of a public nuisance abatement action. The Sixth District recognized that the present case differs from *Clancy*, concluding "*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," (*County of Santa Clara v. Superior Court (Atlantic Richfield Co.)* (2008) 161 Cal.App.4th 1140, 1152.) This distinction, along with the constitutional and statutory authority granted to cities and counties to hire special counsel and set the terms of their compensation, support affirming the Sixth District's decision.

***8** 1. *The Key Issue is Who Maintains Control Over the Litigation*

The lead paint companies' desire for a per se rule against all contingency fee arrangements in public nuisance actions

fails to consider the unique aspects of the *Clancy* case. Clancy was disqualified based on the egregious, case-specific facts. Clancy's sliding hourly-fee arrangement operated as an unchecked bounty on the public. Because of the constitutional and criminal overtones, notably absent here, the *Clancy* Court was particularly concerned with the contingency nature of Clancy's work.[FN7] Thus, the "standard of neutrality in *Clancy*" as referenced by the trial court was influenced by a set of constitutional and criminal concerns not present here.

> FN7. In *Clancy*, the subject of the case was a nuisance action against an adult bookstore. The bookstore owner challenged the ordinances being enforced against her as unconstitutional. There was also the element of potential criminal liability under Penal Code section 311.2 (prohibiting the sale of obscene matter). These constitutional and criminal elements are not raised in the present case.

The *Clancy* Court itself recognized that particularized set of facts with which it was faced, warning that "[n]othing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel." (*Clancy*, 39 Cal.3d at p. 352; See also ***9***Law Offices of Cary S. Lapidus v. City of Wasco* (2004) 114 Cal.App.4th 1361 [affirming contingency fee agreement between city and private counsel for securities investigation and recovery of funds from bond underwriter].)

The issue of control over contract experts in prosecution of an action was recently addressed by the California Supreme Court in *Hambarian v. Superior Court* (2002) 27 Cal. 4th 826. In *Hambarain*, the Court considered whether the district attorney should be disqualified for using a forensic-accountant expert whose $314,000 in fees was paid for by the party who stood to gain from the prosecution. (*Id*. at p. 835.) The Court refrained from narrowly focusing on the type of financial assistance provided. Instead, the *Hambarian* Court used a flexible standard--whether financial assistance is of a "nature and magnitude likely to put the prosecutor's discretionary decision-making within the influence or control of an interested party." (*Id*. at p. 836.)

Similarly, the United States District Court for the Eastern District of California recently rejected a claim that a city's outside counsel must be disqualified in a public nuisance action under *Clancy*, focusing instead on who retains control over the litigation. "Even assuming arguendo that the City's outside counsel is hired on a contingency fee basis, Defendants have not countered Plaintiff's showing that the City Attorney for the City of ***10** Grass Valley is acting as co-counsel in this action and the City retains the 'ultimate decision-making authority in the case.' (Dec. of Jeffrey Folz in Opp. P 4; Pl's Opp. At 6:12-20.)" (*City of Grass Valley v. Newmont Mining Corp*. (E.D.Cal., Nov. 20, 2007, No. 2:04-cv-00149-GEB-DAD [2007 U.S.Dist.LEXIS 89187].)

Consequently, disqualification is not required under the case law merely because financial assistance to the government has made the litigation economically feasible. (*People v. Eubanks* (1996) 14 Cal.4th 580, 599 ["defendants do not have a right to expect crimes to go unpunished for lack of public funds"].) Instead, the court's inquiry must focus on whether the government's decision-making has been placed within the influence or control of an interested party. (*Ibid.*; *See also* *City and County of San Francisco v. Philip Morris, Inc*. (N.D. Cal 1997) 957 F. Supp. 1130, 1135 [holding that law firm was not subject to disqualification under the *Clancy* analysis where public counsel retains control of the litigation]; *Philip Morris Inc. v. Glendening* (1998) 349 Md. 660.)

In the present case, the record shows that the government was not swayed or pressured by interested parties to file this litigation. (Pet'r App. 428.) Santa Clara County Counsel originated the California litigation after consultation with a county environmental specialist. (*Ibid*.). The ***11** government lawyers advised the public entity boards or councils in closed session of the proposed litigation and the public bodies authorized the litigation. (Pet'r App. 406, 425-26, 428-29, 454, 458, 475.) Closed-session activities with the client were attended by government counsel only. (*Ibid*.) In fact, some of the local entities require private counsel to communicate with the government department exclusively through government counsel. (Pet'r App. 435.)

The private firms unequivocally take direction from the government lawyers. (Pet'r App. 407, 410, 429-30, 434, 448,

451, 455, 458.) The agreements make clear that the government lawyers steer the litigation and advance approval of all litigation strategy is required. (Pet'r App. 410, 426, 429-30, 434-35, 448.) The government lawyers in this case have drafted both the original and the most recently amended complaint, argued motions, written pleadings, and participated in all substantive decisions. (See e.g., Pet'r App. 426, 430, 452.) And the private attorneys can be terminated without cause. (See e.g., Pet'r App. 417, 441.)

Finally, it should be noted that significant judicial supervision will be required to implement the abatement remedy sought by Petitioners. If Petitioners are successful on the merits of this case, the Superior Court will have ample opportunity to monitor implementation of the abatement ***12** remedy, including appropriateness of any fee award. Such judicial supervision over any fee award, which would have been absent in *Clancy*, allows an independent check on attorney conduct and provides an added level of security against any alleged prosecutorial bias. (See e.g. *Davis v. Southern Bell Tel. & Tel. Co.* (S.D.Fla. 1993) 149 F.R.D. 666.)

The facts here demonstrate that contingency-fee agreements with private counsel can be proper in public nuisance cases where control measures are firmly in place. Consequently, the trial court's per se rule of disqualification too rigidly excludes reasonable contingency-fee arrangements and should be reversed.

2. *Courts Should Generally Defer to the Legislature's Choice to Allow Government Entities the Discretion to Hire and Compensate Counsel With Specialized Skills*

A central function of government is to make policy decisions and allocate limited public resources in order to protect the health and safety of its citizenry. An action seeking to minimize or eliminate the health hazards associated with lead paint is a quintessential example of government exercising its core role. Government needs, and should be given, wide latitude in how it executes this function. Interference from the judiciary should only occur to rectify demonstrable violations of constitutional or statutory rights.

***13** California law empowers local government entities to enter into contracts, including the express right to enter into contracts for special services, such as legal services. Two sections of the California Government Code "expressly authorize a general law city, and other public agencies, to employ and compensate personnel for the performance of 'special services.' " (*Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657, 668.)[FN8] The Government Code specifically authorizes local governments to "contract with any specially trained and experienced persons, firm, or corporation for special services and advice in ... legal ... matters." (Gov. Code, § 37103.) The statute further allows a local government to provide "compensation to these experts *as it deems proper*." (*Ibid* (emphasis added).)

> FN8. Cities and counties in California are authorized to adopt charters controlling their governance. (Cal. Constit., art. XI, §§ 3-4.) Those cities and counties involved in this litigation that are charter cities or counties also acted pursuant to the legal authority granted by their charters. (*See, e.g.*, Petitioner's Appendix of Exhibits in Lieu of Clerk's Transcript ("Pet'r App") at pp. 406, 457-58.)

The Legislature has also conferred on the "legislative body of any public or municipal corporation or district" the power to "employ any persons for the furnishing to the corporation or district special services and advice in ... legal ... matters if such persons are specially trained and experienced and competent to perform the special services required." ***14** (Gov. Code, § 53060.) Like Government Code section 37103, this provision authorizes the municipal corporation or district to provide compensation for "such persons *as it deems proper* for the services rendered," (Gov. Code, § 53060 (emphasis added).)

California's separation of powers clause, article III, section 3 of the California Constitution, provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The separation of powers doctrine "unquestionably places limits upon the actions of each branch with respect to the other branches." (*Marine Forests Society v.*

California Coastal Commission (2005) 36 Cal.4th 1, 25, citing *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53.) "The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function." (*Ibid*.)

Indeed, this Court has further recognized that, "[t]he law is well settled that a public agency may employ special counsel to protect its rights, unless specifically prohibited from so doing by statutory or charter ***15** provision." (*Compensation Insurance Fund v. Riley* (1937) 9 Cal.2d 126, 131.) No such prohibition exists here. The *Riley* court recognized that a variety of circumstances exist that might require the employment of other counsel, to prevent the interests of the county or city from being neglected or sacrificed:
[The District Attorney] may be incompetent, or sick, or absent from the county, or engaged in other business, or the business in hand may be of such magnitude and importance as to demand, on the part of the Board, in the exercise of such foresight and care as business men bestow upon important matters, the employment of additional counsel.

(*Id*. at p. 132.) Thus, both California statutes and case law have expressly recognized that local governments have the authority and discretion to contract with and determine compensation for special counsel.

While the courts have inherent authority to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto," (Code Civ. Proc, § 128, subd. (a)(5)), that authority is not boundless. It does not allow the courts to override the cities' and counties' right to set the terms for compensating special counsel. "Of necessity the judicial department as well as the executive must in most matters yield to the ***16** power of statutory enactments." (*People v. Standish* (2006) 38 Cal.4th 858, 879.) Where possible, a court should "avoid constitutional or statutory interpretations in one area which raise serious and doubtful constitutional questions in another." (*People v. Birks* (1998) 19 Cal.4th 108, 135.)

Here, the lead paint companies' argument directly conflicts with the discretion given to city and county governments pursuant to legislative enactments. Specific statutory provisions give petitioners the power to employ special counsel where such services are necessary. The cities and counties exercised their discretion in determining not only that the services of special counsel were necessary, but also that compensating them on a contingency fee basis was necessary. (Gov. Code, §§ 37103, 53060. *See also* Pet'r App. at pp. 407, 410-11, 426-27, 429-31, 448, 453, 455-56, 459, 474-75 (statements by the petitioner public entities describing the necessity of hiring special counsel and their particular expertise in this type of litigation).) The lead paint companies fail to take into account separation of powers considerations. Creating a per se bar to contingency fee contracts in public nuisance cases ignores the statutory authorization for such contracts and the complicated and ***17** delicate balancing of authority between the separate branches of government. The argument should be rejected.

C. ECONOMIC REALITIES, RESOURCE ALLOCATION, AND LITIGATION EXPERTISE REQUIRE FLEXIBILITY IN THE USE OF PRIVATE CO-COUNSEL.

In refusing to disqualify the California Attorney General's use of private counsel in *People v. Attransco Inc*. (1996) 50 Cal.App.4th 1926, the court noted that only the Attorney General is in a position to know how the office's personnel and resources can be stretched. Leanly staffed counties and cities with severe budget constraints and no experience in lead-paint litigation are poorly matched against defendants who can hire legions of lawyers with decades of lead-litigation expertise.

A contingency fee, co-counsel relationship that provides needed financial support and personnel to accomplish tasks that require immense resources as well as the specialized expertise is the only realistic way to ensure that complex public nuisance actions can be addressed.

1. *Private Co-Counsel Make Some Public Nuisance Actions Economically Feasible*.

The Chief Justice of the California Supreme Court, Ronald George stated in his 2001 State of the Judiciary Speech: ***18** "If the motto, 'and justice for all' becomes 'justice for those who can afford it,' we threaten the very underpinnings of our social contract."

This litigation is designed to hold defendants accountable for the clean-up costs associated with the marketing and public distribution of lead based paint, which harms the citizens of this State. Economic realities, however, would frustrate this effort because public entities need private co-counsel but cannot afford to pay them on an hourly basis.[FN9] (See e.g., Pet'r App. 459.) And a pro bono relationship for this sort of massive undertaking is not realistic.

> FN9. Even if the government could hire co-counsel on an hourly-fee basis would-be defendants could quickly exploit this arrangement by running up costs and deterring litigation over time.

Even in smaller-scale public nuisance actions, it is not difficult to imagine the necessity of a contingency-fee agreement with co-counsel. For example, Mariposa County is home to the Yosemite Valley and its precious natural resources, with under 20,000 residents based on the last census. The County employs one in-house attorney, the Mariposa County Counsel. Under these circumstances, a public nuisance involving, for example, some kind of toxic hazard in the environment would be detrimental to the local residents and could put the area's significant natural resources in jeopardy. Yet bringing a public nuisance action would be nearly impossible given the ***19** staffing limitations of the in-house counsel, and the possible resources of the defendants. And hiring qualified legal counsel on an hourly-basis may not be an option given the small tax-base and limited resources of a small county. Without the availability of a contingency fee agreement for co-counsel, this type of public nuisance action would almost certainly not go forward.

This situation is surely not unique. For example, of California's 58 County Counsel Offices, 26 have 10 attorneys or less. In fact, 18 have five attorneys or less. In addition three counties do not have full time in-house counsel, but instead have appointed a contract attorney in private practice as County Counsel, and one has a part-time in-house County Counsel who also maintains a private practice.

The sure consequence of the lead paint companies' position is that many local government agencies would never be in a position to pursue public nuisance cases due to the lack of in-house resources and the lack of funding for outside counsel paid on an hourly basis. Given the size of many of the public law offices in this State, this Court should strive for a practical outcome that "acknowledges the realities attending the position of a city attorney in the cities of California, particularly the smaller ones." ***20** (*Montgomery v. Superior Court* (1975) 46 Cal.App.4th 657, 670-71.)[FN10] A contingency fee agreement, where private co-counsel provides added resources and expertise in exchange for the prospect of a modest portion of the outcome, is sometimes the only economically realistic way to pursue large, complex nuisance actions, or even smaller public nuisance actions depending on the size of the staff and budget of the affected city or county, and should be permitted.

> FN10. Current statistics on the number of in-house City Attorneys and the size of their offices is not available. The court in *Montgomery* noted that in 1972, of the 412 cities then in existence, only 64 had any full-time in-house legal staff. (*Montgomery v. Superior Court* (1975) 46 Cal.App.4th 657, 672.)

2. *Prohibiting Contingency Fee Agreements Per Se Will Deter Nuisance Actions Statewide*.

In *Attransco, supra*, 50 Cal.App.4th at 1930, the Department of Fish and Game employed outside counsel in a case against a corporation to recover cleanup costs from an oil spill. The Attorney General handled the litigation for a period of time, but then recommended that the department seek special counsel to assist. The corporation moved to disqualify the private counsel based on civil service requirements prohibiting state agencies from employing counsel other than the Attorney General. (Gov. Code, §§11042 et. seq.)

***21** The *Attransco* court quickly honed in on the true motivation behind the motion to disqualify private counsel, noting that it is "unthinkable" that a state agency would be prohibited from recovering costs from pollution clean up efforts "because they can be outmanned in a paper war." (*Attransco, supra*, 50 Cal.App.4th at 1930.) The *Attransco* court further stated that "every lawyer knows that it is fact of life that a lawsuit can be won or favorably settled if the opposition cannot respond quickly enough to a hefty motion." (*Ibid*.)

The *Attransco* court's pointed discussion of the threats presented by resource inequities during litigation are the same risks the government is attempting to prevent in this case. But this problem is not limited to the instant case. As noted above, half of the counties in California have ten or fewer in-house civil attorneys. Indeed, two counties have just a single county counsel, and four counties have no in-house counsel at all and rely entirely on contract private attorneys. (*See also Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657, 670-671.) The trial court's ruling hits the smallest jurisdictions the hardest because small-scale nuisance actions would be a prohibitive endeavor and larger nuisance cases (facing the number of lawyers in this case for example), would be impossible.

***22** Larger jurisdictions would not fare much better. Even though larger counties and cities have more attorneys, they have commensurate mandatory legal obligations that must take precedence over elective litigation. (See e.g. Pet'r App. 407, 411.) For instance, counties are mandated to provide legal advice and representation to departments, officers, Board of Supervisors, commissions, and districts, and advance and protect a myriad of diverse interests, including fire and police services, psychiatric emergency services, airport operations, detention services, child protective services, waste water operations, and landfill operations.

Regardless of the number of public lawyers available to a public entity, it would be virtually impossible for any city or county in this State to match the resources at the disposal of the lead paint companies' counsel. Consequently, categorically precluding the government from collaborating with contingency fee co-counsel will have the certain affect of deterring public nuisance actions. Given the importance of public nuisance actions in protecting the public, this Court should permit contingency-fee agreements where adequate protections are in place.

CONCLUSION

Government's efforts to abate public nuisances cannot be accomplished without resources. The myriad of expertise and staffing ***23** levels of private firms is often not an economically viable option for public agencies unless it is provided through contingency fee agreements. When private firms are working as co-counsel under control and oversight of government counsel, there is no danger of improper influence warranting disqualification. Therefore, this Court should affirm the appellate court decision and hold that contingency fee arrangements, with appropriate terms, are an acceptable means for cities and counties to undertake public nuisance actions.

COUNTY OF SANTA CLARA, et al., Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA, County of Santa Clara, Respondent. Atlantic Richfield Company, et al., Real Parties in Interest.
2009 WL 1541983 (Cal.) (Appellate Brief)

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