Fighting the Unholy Alliance

By Randall L. Christian and Jason H. Casell

The California Supreme Court heard oral arguments this month in a case closely watched by plaintiffs' and defense attorneys around the country.

At stake in *County of Santa Clara v. Superior Court*: whether to uphold the appellate court's reversal of a 25-year-old precedent finding that the government hiring of a private attorney on a contingency fee basis to prosecute a public nuisance action on the state's behalf flies in the face of the neutrality that an attorney representing the government must uphold.

What some refer to as an "unholy alliance" between plaintiffs' attorneys and state attorneys general has its roots in the 1990s with the litigation by many states against tobacco companies. Former Texas Attorney General Dan Morales pioneered this approach, hiring numerous private law firms to pursue the tobacco litigation on the state's behalf, leading to a $17 billion settlement with the tobacco industry in 1998 and more than $3.3 billion in legal fees.

Now, contingency fee arrangements between state attorneys general or other government attorneys and private plaintiffs' attorneys have spread to other arenas, including financial services, environmental litigation, and general products liability. Government attorneys claim they need private counsel to bring suits on behalf of the people of their states because their state governments often lack the resources and expertise to win these types of cases.

So what's wrong with this system? Here are just a few egregious examples.

In a textbook illustration of "pay to play," it was reported that South Carolina Attorney General and gubernatorial candidate Henry McMaster received thousands of dollars in campaign donations from private lawyers he hired to sue pharmaceutical giant Eli Lilly in Medicaid-related litigation involving the drug Zyprexa. After hiring three lawyers in 2006 to sue Lilly on the state's behalf, McMaster refused to produce the no-bid contingent fee contract with those lawyers for almost a year. An examination of his campaign records showed the attorneys, spouses, and law firms contributed more than $60,000 to McMaster since 2006. After being blasted by a *Wall Street Journal* editorial in October, McMaster agreed to return some of the contributions.

Plaintiff's attorney F. Kenneth Bailey and his Houston, Texas, law firm were retained by Pennsylvania Gov. Ed Rendell's Office of General Counsel to sue Janssen Pharmaceutica for alleged improper marketing of its drug Risperdal. Bailey and his firm, who stand to receive a 15 percent contingency fee out of any recovery, reportedly made nearly $100,000 in contributions and airfare to Rendell's 2006 re-election campaign. The Pennsylvania Supreme Court heard arguments last fall on a trial court's denial of Janssen's motion to disqualify the plaintiffs' attorneys from the case. A decision is expected soon.

And remember Dan Morales? He plead guilty and was sentenced to four years in federal prison for trying to steer millions of dollars in unearned legal fees to a private attorney and friend who did little work on the tobacco litigation.

As we turn our eyes to Sacramento, it appears the outcome of the *Santa Clara* case will depend on who controls the litigation. In this case, several counties, including San Francisco, Oakland, San Mateo, and Monterey counties, hired private attorneys on a contingency fee basis to file a class action lawsuit against former lead and paint manufacturers based on a public nuisance claim.

The California Supreme Court will have to decide whether the court below got it wrong when it decided that the 1985 case of *People ex rel. Clancy v. Superior Court* applies only when the state has given up control of the litigation to private counsel. The appellate court found that *Clancy* does not prevent public entities from hiring private counsel under a contingency fee agreement as long as the public entity's in-house counsel keeps control over the litigation.

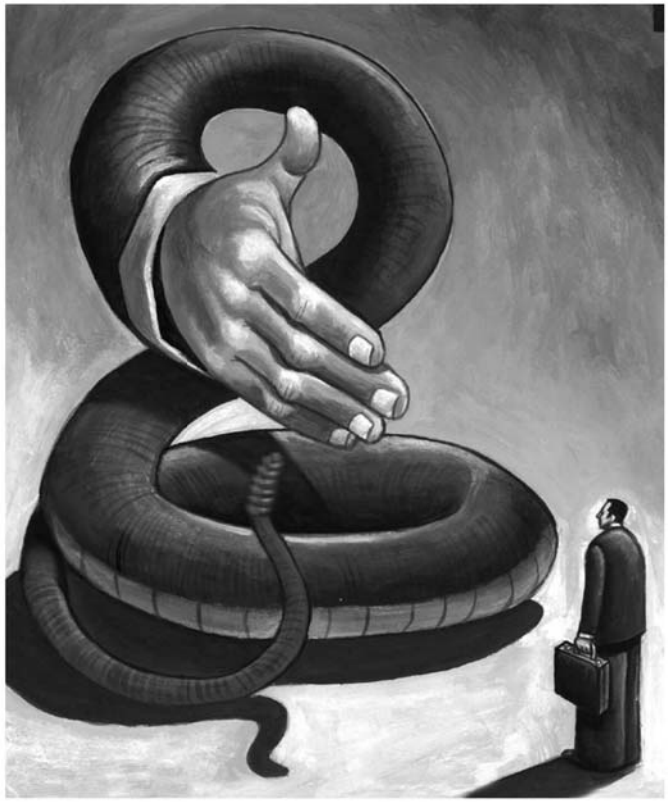
The justices may already have tipped their hands as to how they will decide *Santa Clara*. In March, the court declined to review an appellate ruling allowing a Beverly Hills law firm to represent the city of Anaheim in its litigation of tax assessment proceedings against Priceline.com and other online travel booking companies. In *Priceline.com Inc. v. City of Anaheim*, the court left undisturbed 4th District Court of Appeal ruling that *Clancy* does not prevent contingency fee lawyers from assisting government lawyers as co-counsel in ordinary civil litigation.

But attorneys representing the government are charged with seeking the public good, even if that means agreeing to injunctive relief or dropping a case without merit. When an attorney who is supposed to look out for the people's interests stands to profit personally from a monetary recovery, he compromises his ability to advance the public good above his own well-being. There are also serious concerns about the separation of powers among the government's branches.

If the Court upholds *Santa Clara*, thereby reversing *Clancy*, defendants throughout the country will no longer be able to rely on this persuasive authority that has been a key weapon in their arsenal for 25 years. We will likely see even more outrageous situations like South Carolina and Pennsylvania.

States should follow the examples of Texas and other states that require legislative approval of large contingency fee contracts. States can also mandate that attorneys take part in a competitive bid process, impose caps on contingency fee agreements, and prohibit attorneys who contribute to attorney general campaigns from collaborating with those officials in litigation.

Delegating public enforcement power to private attorneys with a large financial incentive may make sense for those attorneys' pocketbooks, but it is not in the best interest of justice. The battle against the "unholy alliance" must continue.



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