S163681

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA, et al.,

Petitioners,

v.

THE SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent,

ATLANTIC RICHFIELD COMPANY, et al.,

Defendants/Real Parties in Interest.

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

BRIEF *AMICUS CURIAE* IN SUPPORT OF THE BRIEFS OF REAL PARTIES IN INTEREST

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DESCRIPTION AND INTEREST OF AMICUS CURIAE

Amicus, the National Organization of African Americans in Housing ("NOAAH")(http://www.noaah.org/) is a national nonprofit organization that provides technical, operational, and other support to its members and offers opportunities for economic development. Its members and NOAAH advocate cooperative partnerships with industry and government to design and implement fair housing policies and programs, to formulate innovative strategies that improve the quality of housing and services delivery, and to promote healthy, vibrant communities.

Because African American and other minorities often live in older, deteriorating housing (pre-1950s construction), millions of their children are at risk of mental retardation, impaired growth, respiratory infections, chronic diseases, even death. NOAAH's data reveal that 22% of African American children living in older, predominantly urban housing experience elevated blood lead levels.[1] The inability of housing authorities, property owners, and managers of affordable housing to keep pace with the costs of necessary physical improvements, environmental safeguards, and education programs represents a significant challenge to policy makers, housing advocates, and industry.

NOAAH's Healthy Home Initiative is committed to identifying solutions to this crisis that strike a balance between the need to make costly environmental and physical improvements to the nation's affordable housing stock and provide decent, safe and quality housing for the families who live there. As part of its Healthy Home Initiative, NOAAH researches best practices to educate communities to health hazards concerning lead-based paint. NOAAH is familiar with California's comprehensive lead programs[2]

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1 http://www.noaah.org/LBPHomes.cfm. Lead in paint was severely restricted in 1978; lead solder in food cans was banned in the 1980s; lead in gasoline was removed during the early 1990s.

2 *E.g.*, http://www.cdph.ca.gov/PROGRAMS/CLPPB/Pages/default.aspx.

and it has monitored California's success in reducing incidences of new cases of children with elevated blood lead levels. As these programs demonstrate, the best way to reduce and eliminate lead poisoning in minority children is through providing resources to housing authorities, property owners, and managers of affordable housing to eliminate lead hazards on their properties. This litigation against manufacturers diverts attention and resources and threatens to interfere with existing programs that have a meaningful impact on improving the quality of housing available to poor, minority populations living in older, deteriorated housing.

SUMMARY OF ARGUMENT

Several California counties and cities have hired private lawyers to file contingency fee lawsuits claiming lead paint or pigment manufactured and sold decades ago should be (retroactively and creatively) declared a "nuisance." However, paint manufacturers stopped making interior residential lead-based paints over a half-century ago, decades before Congress enacted a federal law dealing with lead based paint, 42 U.S.C. § 4821 (1971). State law always governs this issue.[3]

Plaintiffs seek to have the court order the paint's original producers to pay for its removal, even if the paint is not hazardous,[4] even if the effort to remove the paint will create (rather than abate) a hazard, and even if the owners of the property do not want the

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[3] The State of California, pursuant to the Childhood Lead Poisoning Prevention Act, Cal. Health & Safety Code, §§105275-105310, regulates this area; it makes property owners (not the paint manufacturers) responsible to prevent and abate lead hazards in buildings. To fund enforcement of this law, California imposes fees from manufacturers and sellers of products that historically contributed to environmental health dangers.

[4] The California law provides that the lead paint must be "deteriorated" to be a hazard. *E.g.*, Cal. Health & Safety Code, § 17920.10; Cal. Admin. Code tit. 17, § 35037. Cal. Admin. Code tit. 17, § 35037 provides:

> " '*Lead hazard' means deteriorated lead-based paint*, lead contaminated dust, lead contaminated soil, disturbing lead-based paint or presumed lead-based paint without containment, or any other nuisance which may result in persistent and quantifiable lead exposure." (Emphasis added).

paint companies to access their property. The former lead pigment or paint manufacturers can avoid this liability if they pay money directly to the government to settle this lawsuit; the government need not use this money to remove lead paint, but it must pay 17% to the contingent fee lawyers.

The issue in this case is whether government lawyers — notwithstanding the California statutory scheme that already governs this issue — may hire private lawyers on a contingent fee basis to sue the former lead pigment or paint manufacturers for engaging in conduct that was perfectly legal at the time they engaged in it. May the government deputize private lawyers with a financial motive to bring these public nuisance suits and confer on them a mantle of legitimacy and state endorsement?

ARGUMENT

I. BECAUSE GOVERNMENT LAWYERS MUST BE FINANCIALLY NEUTRAL WHEN GIVING ADVICE, *CLANCY* PROHIBITS THE GOVERNMENT FROM PAYING ITS LAWYERS CONTINGENT FEES IN PUBLIC NUISANCE CASES

A. A Long Tradition In The Case Law Of All Jurisdictions Acknowledges That Government Lawyers In Civil Cases Must Act For The Common Good, Not Personal Interests

1. *Clancy* Reflects A Settled Proposition — That Government Lawyers Have Special Ethical Obligations That Private Lawyers Do Not Share.

In *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985), a city hired a private lawyer on a contingent arrangement that, in effect, doubled his hourly rate if he prevailed in filing his nuisance action. The California Supreme Court held that this fee arrangement is prohibited. The contingent fee agreement gave the attorney a financial stake in the outcome of the abatement action "antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." *Id.* at 750. The Court of Appeal held that *Clancy* does not prevent cities and counties from hiring contingent fees attorneys as long as a City or County Attorney (hereinafter "City Attorney") adds boilerplate language to a contract or

otherwise declares that the City Attorney will supervise the lawyer who is deputized by the Government to enforce state law but is paid by a contingency fee. *County of Santa Clara v. Superior Court*, 74 Cal. Rptr. 3d 842 (2008). As *Clancy* points out, even if "the retainer agreement between the City " and the private lawyer "provides that Clancy is to be 'an independent contractor and not an officer or employee of City,'" that does not change the fact that "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 Clancy 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."[5]

History reinforces what our common sense already knows: money corrupts judgment. If whether and how much a lawyer is paid is contingent on winning that will affect the kind of advice that the lawyer gives and how he acts. In the 20th century, Ryszard Kapuściński, the famous Polish journalist, advises us, "Money changes all the iron rules into rubber bands." His counsel is hardly new. In the 5th century, B.C., Sophocles warns us in *Antigone* that money "teaches and corrupts the worthiest minds to turn base deeds."

The basic principle teaches us that the Sovereign cannot pay *judges* a contingency fee, because the money affects their judgment, even though a reviewing court exists to reverse any errors. The Sovereign cannot pay *government prosecutors* a contingency fee in criminal cases, even though a judge and jury decide guilt and the sentence, because the fee taints their judgment to indict, and the Sovereign cannot pay *government lawyers a contingency fee in public nuisance cases*, even though they are civil cases, because the contingency fee may affect their judgment away from a focus on the public interest. As *Clancy* noted:

> [The] prosecutor's *duty of neutrality* is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with the impartiality required of those who govern. Second, he has the vast

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5 *Clancy*, 39 Cal. 3d at 747.

> power of the government available to him; he must *refrain from abusing that power* by failing to act evenhandedly. *These duties are not limited to criminal prosecutors*: "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results."[6]

When the lawyer representing the Sovereign has "a personal interest in the litigation, the neutrality so essential to the system is violated."[7] It is hard to think of something more personal than a financial stake in the litigation. That stake is substantial. The private lawyers personally invest millions of dollars in mammoth lawsuits like this one by paying all litigation expenses upfront. They seek much more in return—billions of dollars in fees went to contingency fee lawyers in the tobacco litigation. That type of personal incentive is antithetical to fundamental ethical and constitutional principles of justice, fair play and lack of financial bias, all essential to public confidence in the integrity of the Government and the judicial system.

Clancy simply applies principles that other state and federal courts have articulated for many years. Government lawyers have a different duty and role than private lawyers. When the Government hires private lawyers on an contingent fee basis to prosecute a private suit like the instant one, the contingency fee interferes with the ethical and constitutional obligations of the Government. The Government, in short, may hire private law firms, but it may not pay them a contingent fee. This case is not about disqualifying a law firm; it is about prohibiting an inherently flawed method of paying the lawyer.[8]

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[6] *Clancy*, 39 Cal. 3d at 746 (emphasis added, citation omitted, citing ABA Model Code of Professional Responsibility, EC 7-14).

[7] *Clancy*, 39 Cal. 3d at 747.

[8] Hence, the Court of Appeal was in error when it claimed that the trial judge's order (prohibiting contingent fees) "would result in unjustifiably depriving the public entities of their right to counsel of choice." *Santa Clara*, 74 Cal. Rptr.3d at 846. The Government can pay the lawyers a flat fee — most government lawyers are hired by the year. Or, the Government can pay an hourly fee. Or, it can pay a flat fee to handle a