ACCESS TO JUSTICE: THE USE OF CONTINGENT FEE ARRANGEMENTS BY PUBLIC OFFICIALS TO VINDICATE PUBLIC RIGHTS

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Childhood lead poisoning from lead pigment in paint has plagued children and their families for decades. The toxicity of lead has been known since ancient times. Despite that knowledge, however, lead pigments for paints were produced, manufactured and sold long after they were known to cause childhood lead poisoning.[1] Tragically, the result of this production, manufacture and sale has been the widespread presence of lead-pigments in the place where children should be the safest – their own homes.[2] When this lead pigment poisons young children, it can affect nearly every system in the child's growing body and can cause long term problems such as learning disabilities, behavioral problems and decreases in a child's IQ.[3] The problems caused by lead poisoning are so severe and widespread that it is considered to be one of the most prevalent environmental health threats to children in the United States.[4]Furthermore, the consequences from the harm caused

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[1] *See* GERALD MARKOWITZ & DAVID ROSNER, DECEIT AND DENIAL: THE DEADLY POLITICS OF INDUSTRIAL POLLUTION 1 – 138, University of California Press (2002). (Recounting the manufacture, promotion and sales along with the knowledge of the resulting childhood lead poisoning from lead pigments).

[2] *See* U.S. DEPT. OF HEALTH AND HUMAN SERVICES, PUBLIC HEALTH SERVICE, PREVENTING LEAD POISONING IN YOUNG CHILDREN A STATEMENT BY THE CENTER FOR DISEASE CONTROL 1 (2005) [hereinafter PREVENTING LEAD POISONING] ("The most common high dose sources of lead exposure for U.S. children are lead-based paint and lead contaminated house dust and soil.").

[3] U.S. ENVTL. PROTECTION AGENCY, PROTECT YOUR FAMILY FROM LEAD IN YOUR HOME 5 (2001).

[4] Wendy Johnson, *The Legacy of Lead: Pervasive Poisoning, Suspect Science, and the Industry*

by childhood lead poisoning extends well beyond the individual children who had been poisoned – lead pigments also adversely affects families and peers of lead-poisoned children, as well as schools, property owners, taxpayers and state agencies.[5]

In 1999, in direct response to this public health threat, then Rhode Island Attorney General Sheldon Whitehouse brought a lawsuit on behalf of the State designed to end the harm caused by lead pigment.[6] This action sought to hold accountable the one group of potential wrongdoers who have never contributed to the mitigation of lead poisoning either in Rhode Island or throughout the United States – the former manufacturers of lead pigment. The litigation was unprecedented in scope in Rhode Island. After almost seven years of intense pre-trial litigation and the longest jury trial in Rhode Island Superior Court history, a Rhode Island jury rendered the first verdict against three former manufacturers of lead pigment.[7]

Before bringing the action, however, the Attorney General recognized the daunting task that lay ahead and the need to augment the limited financial and legal resources of the Department of Attorney General. The Attorney General therefore

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Effort to Escape Liability, MULTINATIONAL MONITOR, Apr. 2003, at 51 ("Many public health experts consider lead poisoning to be the biggest preventable environmental threat to children's health in the United States.").

[5] U.S. DEPT. OF HEALTH AND HUMAN SERVICES, TASK FORCE , PUTTING THE PIECES TOGETHER; CONTROLLING LEAD HAZARDS IN THE NATION'S HOUSING 2 (1995) [hereinafter PUTTING THE PIECES TOGETHER] (recognizing that lead based paint hazards affect "parents, children, private property owners, lenders, insurers" and "the nation at large."). In 1991 the Rhode Island General Assembly enacted the Lead Poisoning Prevention Act [LPPA], R.I. GEN. LAWS § 23-24.6-1 *et seq.* and found: that the most "significant sources of environmental lead" that cause childhood lead poisoning "are lead based paint in older housing and house dust and soil contaminated by this paint." R.I. GEN. LAWS § 23-24.6-2(2) (1991); that childhood lead poisoning is "dangerous to the public health, safety, and general welfare of the people and necessitates excessive and disproportionate expenditure of public funds for health care and special education, causing a drain upon public revenue." R.I. GEN. LAWS § 23-24.6-2(5) (1991); that "Rhode Island presently does not have the public or the private resources to handle the total problem, requiring prioritizing on a need basis." R.I. GEN. LAWS § 23-24.6-2(7) (1991); and that the "magnitude of the childhood lead poisoning in Rhode Island's older homes and urban areas is a result of approved use of lead based materials over an extended period in public buildings and systems and private housing that a comprehensive approach is necessary to alleviate the cause, identify and treat the children, rehabilitate the affected housing where young children reside, and dispose of the hazardous material." R.I. GEN. LAWS § 23-24.6-2(7) (1991).

[6] State of Rhode Island v. Lead Industries Ass'n Inc., et al., P.C. No. 99-5226, Complaint, (R.I. Super. Oct. 12, 1999) listing Defendants: Lead Industries Association Inc., American Cyanamid Company, the Atlantic Richfield Company, E.I. Dupont DeNemours & Co., The O'Brien Corporation, the Glidden Company, N.L. Industries, SCM Chemicals, The Sherwin Williams Company and John Doe Corporations. The State subsequently amended the Complaint to add Cytec Industries Inc., the O'Brien Corporation, Conagra Grocery Products Company and Millennium Inorganic Chemicals, Inc. as successors to former manufacturers of lead pigment. *See* Rhode Island v. LIA, 898 A.2d 1234, 1235 (R.I. 2006) ("Despite the enactment of the Lead Poisoning Prevention Act (the 'LPPA'), Rhode Island has been dubbed by some as the 'lead paint capital of the country.' This perceived public health crisis resulted in a decision by former Attorney General Sheldon Whitehouse (Whitehouse) to commence a lawsuit against Defendants.").

[7] Rhode Island v. LIA, PC No. 99-5226, Jury Verdict form, (R.I. Super. Feb. 22, 2006). A Rhode Island jury found that The Sherwin Williams Company, Millennium Holdings, LLC, and NL Industries were liable for the creation of a public nuisance—the cumulative presence of lead pigments in paints and coating on buildings in Rhode Island—and that they should be ordered to abate the public nuisance.

entered into a contingent fee agreement with outside counsel to assist in the prosecution of the public nuisance action.[8] This decision sparked far-reaching legal and philosophical debate about the ability of an Attorney General to employ outside counsel on a contingency fee basis and the propriety of doing so in a public nuisance suit. In Rhode Island, this debate led to a legal challenge by the lead pigment Defendants to invalidate the Attorney General's contract. The trial court denied the Defendants' challenge; they subsequently petitioned for a writ of *certiorari* to the Rhode Island Supreme Court, which determined that the challenge prior to the end of the trial court proceedings was not ripe for adjudication.[9]

This article will address the practical aspects of bringing a public nuisance action by a state Attorney General and the legal challenges to the use of a contingent fee agreement to augment the resources of the office pursuing justice on behalf of the public.

I. PUBLIC NUISANCE CASES: A SHIFT FROM SECONDARY PREVENTION TO PRIMARY PREVENTION OF CHILDHOOD LEAD POISONING

There is no legitimate debate in the medical and scientific communities about the pernicious effects of childhood lead poisoning. From early in the last century the medical literature recognized that "lead poisoning among children is a serious evil, and one that should not be tolerated."[10] In an address to the Australasian Medical Congress in 1908, Dr. A. Jefferis Turner found that "[p]revention is easy," and that "[p]aints containing lead should never be employed on outside surfaces such as fences, walls, and particularly verandah railings in places where children, especially young children are accustoming to play."[11] Over the last century, literally thousands of articles have been written about the effects of childhood lead poisoning, and by "the mid-1920's, there was strong and ample evidence of the toxicity of lead paint to children... as studies detailed the harm caused by lead dust, the dangers of cumulative doses of lead, the special vulnerability of children, and the harm lead caused to the nervous system in particular."[12]

Despite this early knowledge, lead pigment continued to be manufactured, promoted for use in residential paints and sold until the Federal Government

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[8] Rhode Island v. LIA, 898 A.2d at 1235 ("To help shoulder the enormous cost of this unprecedented lawsuit, the Attorney General engaged two private law firms to provide legal representation under a contingent fee agreement. . . . Realizing the state did not have adequate resources to finance such a demanding suit, in October 1999 Whitehouse executed a retainer agreement (agreement) with John J. McConnell, Jr. of the law firm Ness, Motley, Loadholt, Richardson & Poole, now Motley Rice LLP, and Leonard Decof of the law firm Decof & Grimm, now Decof & Decof (collectively Contingent Fee Counsel)").

[9] *See* Rhode Island v. LIA, 898 A.2d at 1239-40.

[10] A. Jefferis Turner, *On Lead Poisoning in Childhood*, 1908, *reprinted in* I BRIT. MED. J. 897 (1909).

[11] *Id.*

[12] Gerald Markowitz & David Rosner, *Cater to the Children: The Role of The Lead Industry in a Public Health Tragedy – 1900-1955*, 90 AM. J. PUB. HEALTH, 190-195 (2000).

banned it in 1978.[13] In banning the use of lead paint, the Consumer Product Safety Commission (the "CPSC") concluded that the "adverse effects of [lead poisoning from lead pigments in paints] in children can cause a range of disorders such as hyperactivity, slowed learning ability, withdrawal, blindness, and even death."[14] Furthermore, the CPSC "issued the ban because it has found (1) that there is an unreasonable risk of lead poisoning in children associated with lead content of over 0.06 percent in paints and coatings to which children have access and (2) that no feasible consumer product safety standard under the CPSA would adequately protect the public from this risk." [15]

While the CPSC ban in 1978 was an important milestone in the public health fight to eradicate lead poisoning, it was of limited effectiveness for a single, important reason: the CPSC only had the authority to ban future sales of lead-pigment after 1978. The ban itself could do nothing to eliminate the harm posed to society from lead-based paint that was already on the walls of homes and buildings throughout the country. Because of this limitation on pre-1978 lead pigments, today lead-based paint is the most important source of lead exposure for young children.[16]

As a result, lead poisoning continues to cause harm to children and society nearly thirty years after the use of lead pigments was banned. Because of the wide-spread nature of these harms, the federal government and state government have initiated, funded and run lead poisoning prevention programs aimed at reducing the number of lead-poisoned children, as well as the burdens that fall on society as a result of lead pigments.[17] These policies are generally considered secondary prevention programs – they find children who have been poisoned by screening their blood for lead and then deal with the lead hazards in their homes.[18]

The filing of the Rhode Island public nuisance lawsuit in 1999 signaled a significant shift in the approach to lead poisoning prevention. The purpose of the public nuisance suit is simple: it seeks to provide a meaningful way in which the State can effectively move from secondary prevention, after a child has been

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[13] *See* 16 C.F.R. § 1303.1- 1303.5 (1977). Interestingly, numerous other countries banned lead pigments for use in paints decades before the United States did. *See* MARKOWITZ & ROSNER, *supra* note 1 at 15-16 (Outside the United States, the dangers represented by lead pigments, in particular the application of white lead for interior painting along with the manufacturing led many countries to enact bans or restrictions on its use for interior paint: France, Belgium, and Austria in 1909; Tunisia and Greece in 1922; Czechoslovakia in 1924; Great Britain, Sweden, and Belgium in 1926; Poland in 1927; Spain and Yugoslavia in 1931; and Cuba in 1934.).

[14] 16 C.F.R. § 1303.5(a)(1) (1977).

[15] 16 C.F.R. § 1303.1(c) (1977).

[16] PREVENTING LEAD POISONING , *supra* note 2,at 4.

[17] *Id.* at 1 ("The reduction in [blood lead levels] in the United States during 1970-1999, primarily because of implementation of federal and state regulations to control lead exposure, was one of the most significant public health successes of the last half of the twentieth century.").

[18] PREVENTING LEAD POISONING , *supra* note 2; *See* the LPPA, R. I. Gen Laws § 23-24.6-1 *et seq.* (1991) (establishing Rhode Island's secondary prevention program to hold property owners accountable on a prospective basis due in part to a lack of resources); *See* discussion, *supra* note 5.

harmed, to a primary prevention program that will prevent the harm in the first instance. The ultimate goal of the suit is to secure inspection, testing and detection services to remediate the lead hazards and potential lead hazards in all homes in the State that have been insidiously poisoned by toxic lead pigment before children are poisoned.[19] Primary prevention had long been recognized as the preferred way to deal with this issue not only by public health experts, but also by those in the lead pigment industry.[20]

II. CONTINUING LOSSES FOR THE LEAD PIGMENT INDUSTRY

Following the initiation of the Rhode Island lawsuit in 1999, the lead pigment Defendants launched an unprecedented counter-attack on the lawsuit, attempting to persuade the trial court and the court of public opinion that they should be immunized from any responsibility for the consequences of their actions. Their attempts through legal motions to derail the Rhode Island lawsuit, as well as similar litigation elsewhere, have been largely unsuccessful. Courts in Rhode Island, California and Wisconsin have all upheld the viability of a public nuisance claim against the lead pigment manufacturers.[21] More recently, on February 22, 2006, a

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[19] Rhode Island v. LIA, P.C. No. 99-5226, Complaint, (R.I. Super. Oct.12, 1999) ("Relief Requested" included "Judgment ordering the Defendants to detect and abate Lead [pigment] in all residences, schools, hospitals, and public and private buildings within the State accessible to children.").

[20] Since the Rhode Island lawsuit began, numerous significant public health agencies have asserted that this shift from secondary prevention to primary prevention is critical in the fight to end childhood lead poisoning. *See, e.g.*, PREVENTING LEAD POISONING, *supra* note 2, at 1 ("preventing elevated [blood lead levels](BLLs) is the preferred course of action. A compelling body of evidence points to the limited effectiveness of waiting until children's BLLs are elevated before intervening with medical treatments, environmental remediation, or parental education . . .because no level of lead in a child's blood can be specified as safe, primary prevention must serve as the foundation of the effort."); Am. Acad. Of Pediatrics, Policy Statement, *Lead Exposure in Children: Prevention, Detection, and Management* 116 PEDIATRICS 1036 (2005) ("The best approach to lead poisoning is to prevent exposure in the first place, but it will be years before that goal is realized); *see also* PUTTING THE PIECES TOGETHER, supra note 5, at 8 (The Task Force recommended "Ten Guiding Principles" among them that "[t]he answer to lead poisoning is prevention" since "the alternative of intervening only after a child has been harmed is unacceptable and serves neither the interest of the child nor the property owner nor future generations of children."); *see also* Inter-Office Letter from A.B.H. Cleveland Executive Office, The Sherwin Williams Company, to Mr. E. C. Baldwin, Cleveland Office (June 2, 1969) (on fie with authors) (reporting on the Building Advisory Board Meeting in New York City of May 26, 1969 that "as to a solution to the problem, a very simple statement, but very difficult to carry out, would be to remove the source of lead or put it behind barriers so that the children could not get at it." The report went further and recognized that "with the statement of the problem," the solution is to "a) identify the source b) inactivate it c) remove it d) cover it so that no debris falls from the walls, ceilings, etc." *Id.* at 1-2. The memo concluded that "[t] he entire problem is certainly depressing and the outlook for an economical practical solution is not too optimistic." *Id.* at 4.)

[21] *See* Rhode Island v. LIA, 2001 WL 345830, at 8 (R.I. Super. Apr. 2, 2001) (Finding that the following allegations stated a claim for public nuisance against the Lead manufacturers: "The State alleges that the Defendants are responsible for the presence of lead, a product recognized by our courts and the Legislature as constituting a potentially severe health hazard to members of the public, in public and private properties throughout the State. It further contends that the Defendants'" conduct "has unreasonably interfered with the public health, including the public's right to be free from the hazards of unabated lead."); County of Santa Clara v. Atlantic Richfield Co., 137 Cal.App. 4th 292, 300 (Cal.App. 6 Dist. 2006) (public nuisance claim viable based on allegations that Defendants had known about the dangers of lead for nearly a century but had engaged in "a concerted effort to hide the dangers of lead"

Rhode Island jury found that: (1) the cumulative presence of lead pigment in paints and coatings on buildings throughout the State of Rhode Island constitutes a public nuisance; (2) the Sherwin-Williams Company, NL Industries, and Millennium Holdings LLC caused or substantially contributed to the creation of the public nuisance; and (3) the Sherwin-Williams Company, NL Industries, and Millennium Holdings LLC should be ordered to abate the public nuisance.[22]

In the face of these defeats the lead pigment Defendants realized that they lack the legal basis or the necessary evidence to rebut the merits of the public nuisance claims brought by proper government officials.[23] They shifted strategy:

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from the government and the public. For many years, Defendants promoted lead paint for interior use and claimed that it was safe. Defendants tried to stop the government from regulating lead and to prevent the government from requiring warnings about lead's hazards. Defendants opposed government efforts to combat lead poisoning. Scientific studies had only recently demonstrated that even very low levels of lead exposure could cause serious damage to fetuses, children, and adults."); City of Milwaukee v. NL Industries, Inc., 691 N.W.2d 888 (Wis. Ct. App. 2004) (affirming that the following allegations support a claim for public nuisance against a single lead pigment Defendant: "Defendants are responsible for these damages because their conduct in marketing and selling substantial quantities of lead pigments and/or lead-based paint in the City of Milwaukee during and after the construction of these dwellings, when they knew the hazards of lead poisoning related to their product, was a substantial factor creating the public nuisance at issue in this case."). *But see* In re Lead Paint Litigation , 924 A.2d 484 (N.J. 2007) (dismissing public nuisance claim by cities and counties against lead pigment manufacturers on narrow state law grounds); City of St. Louis v. Benjamin Moore & Co. --- S.W.3d ----, 2007 WL 1693582 (Mo. 2007) (dismissing claims for monetary damages against lead pigment manufacturers under a public nuisance theory).

[22] *See* Rhode Island v. LIA. C.A. No. 99-5226, Jury Verdict form (R.I. Super. Feb. 22, 2006). In a 198-page decision on Defendants' post-trial motions, the trial court upheld the jury verdict, commenting on both the viability of the legal theory of public nuisance and the quantity of evidence that supported a finding of liability against the three Defendants. On the liability issue, the trial court concluded that:

the jury could properly have concluded from this testimony that the Defendants' substantially participated in the sale and promotion of lead pigment nationally. Then, in combination with Dr. Rosner's testimony on each Defendant's individual promotion efforts in Rhode Island, and his opinion that each Defendant sold and promoted lead pigment in Rhode Island, the jury could have inferred (though it was not required to so infer) that each Defendant's participation in Rhode Island was similarly substantial. It is also undisputed that lead pigment became illegal on or near 1978, so that any lead-containing paint that still exists in Rhode Island has been there for almost thirty years. Therefore, although each Defendant stopped manufacturing some time ago, the jury could still have concluded that the Defendants' lead pigment is still on Rhode Island buildings in substantial amounts. On the basis of the foregoing, the Court concludes that the evidence was sufficient to make a prima facie case that the Defendants substantially participated in activities which proximately caused the public nuisance."

Rhode Island v. LIA, C.A. No. 99-5226, Decision at 27 (R.I. Super. Feb. 26, 2007).

[23] In Rhode Island the Attorney General's unique responsibility for prosecuting a common law public nuisance claim is consistent with his constitutional and statutory authority. *See* R.I. CONST. art. IX, § 12; Suitor v. Nugent, 98 R.I. 56, 58 (R.I. 1964) ("The constitution did not purport to create such an office [of Attorney General], but recognized it as existing and provided for the continuance of the powers and duties exercised by its occupant prior to the adoption of the constitution."). As recognized by the Superior Court, the "common law equity power as to public nuisances [was] vested in the Attorney General even prior to the adoption of our State Constitution." Rhode Island v. LIA, 2003 WL 1880120, at *3 (R.I. Super. Mar. 20, 2003); Greenough v. Industrial Trust Co., 82 A. 266, 266 (R.I. 1912) (recognizing an "information in equity brought in the superior court by the Attorney General, in behalf of the state, to abate a public nuisance . . ."); Engs v. Peckham, 11 R.I. 210, 212 (R.I. 1875) (finding that a "public nuisance . . .may be proceeded against by information in equity and be abated . . . .").

In regard to the imbalance of resources and the nature of the litigation undertaken in Rhode Island the roster of appearances by attorneys on behalf of the Defendants and their activity speaks volumes to the necessity of hiring counsel to assist in the prosecution of this lawsuit. As of May 2005,

instead of relying on the merits of the law or facts, the Defendants attacked the use of a contingency fee agreement in public nuisance cases arguing that it violates Constitutional protections. This attack challenges the ability of government entities to bring and prosecute to conclusion such a significant, far-reaching matter as lead poisoning with sufficient resources to properly represent the public's interest in lead abatement litigation.

Contingency fee agreements should be allowed in public nuisance lawsuits by government entities. A close examination of the law governing fee agreements, as well as the proper constraints of the due process concerns raised by the Defendants, compels that result. Ultimately, however, the decision on whether to allow contingency fee agreements must turn on questions of fundamental fairness and access to justice. Should a state Attorney General be denied the ability and discretion to weigh the risks and to determine whether a civil action should be filed and prosecuted on behalf of the public? Should a Defendant's wealth, power and political influence be allowed to deny a government entity the ability to protect the public health, safety and welfare? Should a government entity be precluded from utilizing the full range of legal armament with the same type of fee agreement that has been uniformly recognized and adopted as appropriate and fair? Should a government entity be denied the ability to choose its own counsel?

III. THE CHALLENGES TO THE USE OF CONTINGENT FEE AGREEMENTS IN LEAD PUBLIC NUISANCE CASES

In Rhode Island, on the eve of the first trial in August 2002, the Defendants filed a motion for an order baring payment of a contingency fee to the State's counsel on the public nuisance claim as a violation of public policy based upon the reasoning of *People ex. Rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985).[24] At the hearing the State argued that:

> deny[ing] the Attorney General [the ability] to bring this claim in the manner that he has would impermissibly restrain and lock the door on the ability of the Attorney General to vindicate these rights on behalf of the

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one hundred twenty-one (121) lawyers have appeared, twenty-nine (29) local Rhode Island attorneys and ninety-two (92) out-of-state counsel, on behalf of the Defendants. In contrast, the Rhode Island Department of Attorney General has a total of thirteen (13) lawyers assigned to the Civil Division's Government Litigation Unit that represent the State and its various agencies, departments, and officers. The three attorneys assigned to the case from the Government Litigation Unit also have other responsibilities beyond that case. Further, since discovery began in earnest in the spring of 2002, the State has produced over two million pages of documents; there have been over 412 depositions conducted, every conceivable discovery device utilized, with well over 2000 pleadings filed that all culminated in a four month jury trial – one of the longest in Rhode Island Superior Court history. The Superior Court docket sheet is presently a colossal record-setting 193 pages long, and the litigation continues.

[24] Rhode Island v. LIA, 898 A.2d at 1235-36; The first trial on the single issue of whether the cumulative presence of lead pigment in homes and buildings in Rhode Island constituted a public nuisance ended in a hung jury after six weeks of trial. The second jury trial began on November 1, 2005 on all issues and resulted in the verdict discussed above. *See* notes 7 and 23 *supra*.

> public. The State doesn't have the resources to martial against these defendants and to — to deal with this litigation. And, because of that, Your Honor, and because there is no strict statutory bar, I believe this motion should be denied.[25]

The Superior Court agreed, finding that:

> The Court ... believes that to preclude this type of fee arrangement would be unnecessarily to tie the hands of the Attorney General in the proper performance of his duties, because it's clear to this Court that the costs of this litigation extend into the millions and perhaps the multi-millions of dollars, just the costs of litigation. It would be preclusive for any Attorney General to undertake this type of a litigation predicated either on his own budget or even with special appropriations from the General Assembly.[26]

Dissatisfied with their thwarted attempt to side track the trial, Defendants filed a renewed motion to declare the agreement unenforceable and void on the ground that it was an (1) unlawful delegation of the Attorney General's authority to outside counsel, and that (2) the agreement was improper based on *Clancy*.[27] The State responded that (1) the Attorney General has at all times maintained control of the litigation; (2) the ethical rules governing the practice of law in Rhode Island mandate that the Attorney General remain in control of the litigation;[28] and (3) the contract could be reasonably read consistently with the law of Rhode Island.

This time the Superior Court conditionally granted the Defendants' renewed motion unless:

> Plaintiff provides to this Court and to counsel for the Defendants a copy of an amendment to the Retainer Agreement containing a provision or provisions, which cure what this Court has found in this Decision to be a wrongful ceding of power/authority by the Attorney General to Contingent Fee Counsel. Such amendment may, in the discretion of the parties to the Retainer Agreement be on a *nunc pro tunc* basis to the date of the execution of the Retainer Agreement provided that the Attorney General execute a statement to the effect that by signing the original complaint herein the Attorney General made the ultimate determination as to who the Defendants should be and as to the causes of action to be asserted against them.[29]

The State complied since the parties always understood that the Attorney General retained control directing the litigation, and since the Attorney General made the ultimate decision of who the Defendants in this action should be and the

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[25] Rhode Island v. LIA, P.C. No. 99-5226, Transcript at 173-174 (R.I. Super. Sept. 3, 2002).

[26] Rhode Island v. LIA, P.C. No. 99-5226, Decision at 176 (R.I. Super. Sept. 3, 2002); *See* Rhode Island v. LIA, 898 A.2d at 1236.

[27] Rhode Island v. LIA, 898 A.2d at 1236.

[28] *See* R.I. Supreme Court Rules of Professional Conduct R. 1.2(a)(a "lawyer shall abide by a client's decisions concerning the objectives of the representation ...").

[29] Rhode Island v. LIA, 898 A.2d at 1237.

claims to be asserted against them.[30] The Defendants then petitioned for a writ of *certiorari* to the Rhode Island Supreme Court.

On appeal the Defendants claimed that the agreement violated their due process rights and that the Attorney General's decision to bring the lawsuit raised issues of separation of powers.[31] Since review of these constitutional issues was "not unavoidable" the Supreme Court denied the petition without prejudice for want of "present justiciability."[32]

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[30] Rhode Island v. LIA, 898 A.2d at 1236.

[31] *Id.* at 1239.

[32] *Id.* After their unsuccessful attempts to derail the Rhode Island litigation through the motion to disqualify the Attorney General's counsel, the lead pigment manufacturers took their fight to California and Ohio. In California, the pigment manufacturers were unsuccessful at blocking the public nuisance claims brought by several cities and counties seeking abatement of lead pigment from homes and buildings within their jurisdictions. Having failed to convince the California appellate court and the California Supreme Court that the suit was legally infirm, the lead manufacturers brought a motion to disqualify the cities and counties' fee agreements with outside counsel, arguing that the California Supreme Court's decision in *Clancy* mandated disqualification of contingency fee contracts in all public nuisance cases. The cities and counties countered that *Clancy* did not forbid contingency fee agreements in all public nuisance cases, but instead required a balancing of the public interests versus the Defendants' interests. The trial court disagreed, however, and granted the motion, effectively determining that *Clancy* bars any contingency fee agreement in any public nuisance case. *See* Santa Clara, et. al. v. Atlantic Richfield Co., et. al., C.A. No. 1-00-CV. 788657 Decision (Calif. App. Dep't. Super. Ct. Apr. 4, 2007). On June 28, 2007 the appellate court in California accepted the cities' and counties' Petition for Writ of Mandate, Prohibition, Certiorari, or Other Appropriate Relief, and issued an Order to Show Cause to the Superior Court. *See* Santa Clara et al. v. Atlantic Richfield Co., et al., Court of Appeals No. H 031540. The trial court has granted a stay of proceedings while the appeal is pending.

In Ohio seven municipalities, as well as the State of Ohio, have filed public nuisance actions in state court claiming lead pigment has caused a public nuisance in their representative jurisdictions. *See* City of East Cleveland, Ohio v. Sherwin-Williams Company, et al., Case NO. CV 06 602785, Complaint (Cuyahoga County); City of Cincinnati, Ohio, v. Sherwin-Williams Company, et al. Case NO. A0611226, Complaint (Hamilton County, Ohio); City of Columbus, Ohio, v. Sherwin-Williams Company, et al. Case NO. 06CVH12 16480, Complaint (Franklin County, Ohio); City of Lancaster, Ohio, v. Sherwin-Williams Company, et al. Case NO. 06 CV 1055, Complaint (Fairfield County, Ohio); City of Toledo, Ohio, v. Sherwin-Williams Company, et al. Case NO. G-4801-CI-200606040, Complaint (Lucas County, Ohio). Sherwin Williams alone filed for declaratory and injunctive relief in U.S. District Court for Eastern District of Ohio. In its complaint, Sherwin-Williams contends, among other things, that the Due Process Clause prohibits the use of contingent fee counsel by five Ohio cities and their mayors as a violation of its civil rights pursuant to 42 U.S.C. § 1983. Sherwin Williams Company v. City of Columbus, et al., C.A. No. 2:06 CV 829 (E.D. Ohio, Apr. 9, 2007). Sherwin-Williams' motion for a preliminary injunction and for declaratory relief was denied on June 18, 2007. The court concluded that Sherwin-Williams' procedural due process claims were without merit because "In this case the state law of Ohio, when construed in conjunction with the relief sought by the defendants in state court, has provided the broadest possible due process prior to a judgment with regard to the rights of the plaintiff." Sherwin Williams v. City of Columbus, et al., C.A. No. 2:06-cv-00829, Transcript of Hearing before the Honorable Edmund Sargus at 79 (S.D. Ohio E.D. June 18, 2007). The court also concluded that Sherwin-Williams' substantive due process rights had not been violated, per se, by the existence of contingency fee agreements between the cities and private counsel. Instead, the court concluded that concluded that assessment of the constitutionality of the contingency fee contracts required consideration of two issues: "First, does the city retain control? . . . Second, may the city settle without counsel's approval, private counsel's approval?" *Id.* at 84. True to form, Sherwin-Williams remained unwilling to accept the court's determination the contingency fee agreements may be proper in public nuisance cases, and it filed a Renewed Motion For Declaratory Relief And A Preliminary Injunction Pursuant To 42 U.S.C. § 1983. That motion was heard by the court on July 16, 2007, and was denied by the court on July 18, 2007. *See* Sherwin Williams v. City of Columbus, et al., C.A. No. 2:06-cv-00829, Opinion and Order (S.D. Ohio July 18, 2007).

IV. CONTINGENT FEE AGREEMENTS BY GOVERNMENTS TO VINDICATE PUBLIC RIGHTS ARE APPROPRIATE AND CONSTITUTIONAL

There can be no doubt that the use of a contingency fee agreement is well established in American jurisprudence. In fact, contingency fee agreements are recognized as appropriate, ethical and proper in all fifty states, including Rhode Island, California, and Ohio, jurisdictions where the pigment manufacturers have launched their challenge to the government's use of such agreements.[33] The policy reasons for allowing the use of contingency fees in cases is clear: courts have recognized that plaintiffs should not be denied access to justice simply because they do not have the financial resources to pay attorneys on an hourly fee.[34] As one court has noted: "There is no question that contingent fee agreements constitute a valid and vital legal resource, which enable plaintiffs with meritorious causes of action, but who lack funds to pay a lawyer, to obtain justice for themselves, and, in many cases, for others similarly situated."[35]

Despite the authority to engage in contingency fee contracts in tort actions, the lead Defendants argue that such agreements are void in public nuisance tort cases. They rely on two inapplicable legal principals in support of their position: (1) the standard for judicial neutrality, and (2) a twenty-year-old case from California, *People ex. Rel. Clancy v. Superior Court*, 39 Cal. 3d 740 (1985), that has been distinguished in numerous jurisdictions in factually similar cases.[36] Neither of these arguments can withstand scrutiny to bar the use of such agreements to vindicate public rights.

A. The Due Process Clause Does Not Bar Contingency Fee Agreements in Public

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[33] The Rhode Island Supreme Court Rules of Professional Conduct Article V., Rule 1.5(c) provide that "a fee may be contingent on the outcome of the matter, for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph d) or other law. . . ." Rule 1.5(d) states that: "[a] lawyer shall not enter into an arrangement for, or charge, or collect: 1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the original amount of alimony or support, or property settlement in lieu thereof; or 2) a contingent fee for representing a defendant in a criminal case; Ohio Rev. Code 4705.15 (states that the use of contingency fee agreements is permissible in tort actions); *See* Ohio Rules of Professional Conduct, Rule 1.5(1)(c) (stating that "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by division (d) of this rule or other law.").

[34] *See* Landis v. Grange Mut. Ins. Co., 82 Ohio St.3d 339, 342 (Ohio 1998) (contingency fee agreements "permit persons of ordinary means access to a legal system which can sometimes demand extraordinary expense."); Saucier v. Hayes Dairy Prods. Inc., 373 So.2d 102, 105 (La.1978) ("Such contracts promote the distribution of needed legal services by reducing the risk of financial loss to clients and making legal services available to those without means."); Alexander v. Inman, 903 S.W.2d 686, 696 (Tenn. App. 1995) ("Contingent fee arrangements serve a two-fold purpose. First, they enable clients who are unable to pay a reasonable fixed fee to obtain competent representation. Second, they provide a risk-shifting mechanism not present with traditional hourly billing that requires the attorney to bear all or part of the risk that the client's claim will be unsuccessful.").

[35] Cambridge Trust Co. v. Hanify & King Professional Corp., 721 N.E.2d 1, 6 (Mass. 1999).

[36] *See* City and County of San Francisco v. Philip Morris, 957 F.Supp. 1130 (N.D.Cal. 1997); Philip Morris Inc. v. Glendening, 709 A.2d 1230 (Md. 1988); Rhode Island v. LIA, C.A. No 99-5226, Decision at 176 (R.I. Super. Sept. 3, 2002).

Nuisance Cases

The United States Constitution through its procedural due process protection guarantees an impartial court system that protects liberty and property interests. The lead Defendants have attempted to bootstrap the constitutionally required impartial court system into an absolute prohibition on the use of contingency fee counsel in public nuisance cases.[37] Their ultimate thesis fails, however, since the cases they rely upon have expressly limited the requirement of "neutrality" to a hearing before an impartial ***judge*** or ***tribunal***.[38]

The United States Supreme Court has expressly rejected the premise at the heart of the lead Defendants' arguments, i.e. that contingency fees create an impermissible financial stake in the outcome of the litigation requiring disqualification. Contrary to the lead manufacturer's position, attorneys representing the government are not required to meet the exacting standards of judicial impartiality, and the Supreme Court has found that "due process does not necessarily preclude a prosecutor from having a personal or financial interest in the outcome of a case seeking civil penalties."[39] The *Marshall* Court concluded that:

> The rigid requirements of *Tumey* and *Ward,* designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity. Our legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process, and similar considerations have been found applicable to administrative prosecutors as well.

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[37] Interestingly, the lead Defendants do not contend that a government entity can never use contingency fee counsel; instead, their argument is limited to public nuisance claims only. No credible explanation is offered for their distinction. One can only surmise that the lead Defendants are aware that contingency fee agreements are regularly used by government officials and that a complete challenge to the use of such agreements would turn decades of precedent and procedure on its head.

[38] *See* Marshall v. Jerrico, 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases"). *See also* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that it "violates the Fourteenth 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* which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.") (emphasis added); Ward v. Village of Monroeville, 409 U.S. 57, 59-60 (1972) (finding violation of due process that a defendant who was compelled to stand trial for traffic offenses before the town mayor-judge, who was also responsible for village finances and whose court through fines, forfeitures, costs, and fees provided a substantial portion of village funds); Brown v. Vance, 637 F.2d 272, 277 (5th Cir. 1981) (passing on due process considerations in compensation of judges.).

[39] Marshall, 446 U.S. at 242. In addition to the constitutionality of allowing a prosecutor to have a financial interest in the outcome of a case and the ethical obligation of a prosecutor to be a zealous advocate, of particular note is the fact that ethical rules only limit the use of contingency fee agreements to *defendants* in criminal matters and in domestic relations cases. *See* Ohio Rules of Professional Conduct, Rule 1.5(1)(d) (prohibiting contingency fee agreements in domestic relations and for defendants in a criminal case); Rhode Island Supreme Court Rules of Professional Conduct Article V, Rule 1.5(d)(1) & (2) (same). There is no language similarly prohibiting the use of contingency fee agreements by governments in civil matters. Furthermore, under the Ohio Statutes, contingency fee agreements are specifically authorized in all tort matters. Ohio R.C § 4705.15. In the absence of an express prohibition, there is no basis for claiming that all contingency fee agreements in all public nuisance cases brought by any government entity must be prohibited.

> Prosecutors need not be entirely "neutral and detached." In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law. The constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties. The distinction between judicial and nonjudicial officers was explicitly made in *Tumey*, 273 U.S. at 535 where the Court noted that a state legislature "may, and often ought to, stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people."[40]

Because the Supreme Court has recognized that prosecutors may have a financial or personal stake in the outcome of litigation, the lead Defendants' claim that procedural due process[41] requires disqualification of contingency fee counsel, regardless of the circumstances, is unsubstantiated.[42]

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[40] Marshall, 446 U.S. at 248-49.

[41] Sherwin-Williams has attempted to classify their due process concerns as "substantive" due process concerns, rather than procedural due process concerns. *See* Sherwin-Williams v. City of Columbus, et al., C.A. No. 2:06cv829, Plaintiff The Sherwin-Williams Company's Reply in Support of Its Motion for Declaratory Relief and a Preliminary Injunction Pursuant to 42 U.S.C. § 1983 at 22 (S.D. Ohio E.D. May 25, 2007) (wherein Sherwin-Williams asserted that due process claims involving the neutrality of judicial officials are substantive, rather than procedural.). Such an assertion, however, is completely contrary to the holding of the United States Supreme Court in Marshall v. Jerrico, Inc. 446 U.S. 238 (1980), wherein the Supreme Court expressly concluded that:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process.

Id. at 240 (emphasis added). *See also* Ernst v. Children & Youth Services of Chester County, 1993 WL 343375 (E.D.Pa. 1993), *aff'd in part and rev'd in part on other grounds*, 108 F.3d 486 (3rd Cir. 1997) (finding the "essential components of procedural due process are notice and an opportunity to be heard. An opportunity to be heard promotes dialogue in the decision making process and prevents mistaken or unjustified deprivations of life, liberty, and property. To safeguard these concerns, the due process clause mandates judicial neutrality in all adjudicative proceedings."). Furthermore, as evidenced by the Federal Court ruling in Sherwin-Williams v. City of Columbus, et al., *supra*, classification of the due process claim as substantive or procedural has no bearing on the ultimate outcome of the analysis; instead, under either theory, a contingency fee agreement may be appropriate in a public nuisance action. *See supra* note 32.

[42] Defendants also do not object to the hiring of outside counsel on an hourly basis to represent the State in a public nuisance action. Again, the lead manufacturers offer no adequate explanation for why an hourly fee is appropriate while a contingency fee is not. As several commentators and courts have noted, hourly fee agreements implicate serious ethical issues and questions about the interests of the public and justice:

> Originally hailed for its objectivity and efficiency, hourly billing increasingly has been assailed for encouraging inefficiency, excessive litigation, and fraud. In particular, critics of hourly billing have correctly pointed out that hourly billing diminishes incentives for expeditious work and rewards incompetence and inexperience. Hourly billing also has been blamed in part for the continued proliferation of burdensome and often unnecessary discovery in civil litigation. Moreover, some recent discussions of hourly billing also suggest that a surprisingly large number of attorneys perform unnecessary tasks and

In the absence of an express legislative or ethical prohibition on the use of contingency fees in public nuisance cases, the lead manufacturers argue that nebulous policy grounds set forth by the California Supreme Court in a single case, *Clancy*, more than twenty years ago should broadly prohibit a government from bringing such an action, determining the best terms of its financial arrangements and choosing its own attorneys in public nuisance cases around the country. Furthermore, the lead Defendants' interpretation of *Clancy* threatens the ability of public entities to pursue these public nuisance actions – that are often the only means for governments to remedy large-scale, serious, and ongoing harms to the public health and the environment. The lead Defendants' arguments fail because:

1. The facts and legal circumstances in *Clancy* are not analogous to the public nuisance claims at issue in the lead pigment cases;
2. The flexible requirements of due process that are designed specifically to protect the public as well as Defendants do not prohibit use of contingency fee agreements in large scale public nuisance cases; and
3. Adopting Defendants' arguments would lead to a dangerous public policy that would effectively silence the public's ability to have their rights vindicated through the judicial system.

B. Clancy *Does Not Require Disqualification of Outside Counsel Acting at the Direction of the Appointing Government Authority*

The factual and legal circumstances of the agreement in *Clancy* are different than the litigation in Rhode Island, Ohio and California. Therefore, the issues considered and the conclusions reached by the *Clancy* court do not necessarily apply to different litigation.

First, and foremost, *Clancy* is not a constitutional due process case. The *Clancy* court did not address any constitutional concerns and never analyzed the narrow question before it in terms of due process. Instead, the case dealt with issues specific to California, and primarily the intersection of the fee agreement with ethics rules and guidelines. As such, *Clancy* cannot provide broad based, black letter support for the Defendants' legal claims.

Second, *Clancy* differs significantly factually from the government entity lead cases. In *Clancy,* shortly after an adult bookstore and video arcade opened, the City of Corona passed ordinances regulating the sale of "sex oriented material." The ordinance, which would have required the new store to move, was challenged

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record time that was never expended on behalf of any client.

William G. Ross. *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1, 3 (1991) (and sources cited therein). Conversion to an hourly fee, as opposed to a contingency fee, therefore does not eliminate the potential for an attorney to use financial motivation to affect the process of litigation; instead, it presents new challenges because attorneys are financially motivated to keep litigation going as long as possible, to increase the activity in the litigation, and to fail to engage in meaningful settlement discussions (because their fees would end).

on Constitutional ground and a federal court found those ordinances independently unconstitutional and granted a permanent injunction, which was affirmed on appeal.[43] Frustrated by its defeats in federal court on the constitutional issues, the City" passed a new ordinance defining a "public nuisance as '[a]ny and every place of business in the City... in which obscene publications constitute all of the stock in trade, or a principal part thereof....'"[44] These public nuisance actions were a direct attempt by the city to circumvent the prior unfavorable decision on the constitutional issues.

The City retained private counsel on a contingent fee contract, pursuant to which he would be paid $30 per hour in unsuccessful cases and $60 per hour in successful cases.[45] Clancy, acting as "special attorney" for the City, then filed a complaint alleging the bookstore was a public nuisance.[46]After the filing, the City sent police officers to the store to obtain photographs to be used during the prosecution of the public nuisance action.[47] In addition, the City ordered a store clerk to appear in court and produce all 262 publications the police photographed so the court could determine if they were obscene.[48] The bookstore moved to prevent production of the publications based on the clerk's Fifth Amendment right to avoid self-incrimination, and the trial court granted the motion. Acting on the City's behalf, Clancy then petitioned for a writ of mandate to vacate the order.[49] The bookstore cross-petitioned to vacate a separate order denying its motion to disqualify Clancy as the attorney for the City.[50]

The California Supreme Court ruled that "under the circumstances" the "extraordinary relief of disqualifying" an attorney present there should be granted.[51] While the court's discussion focused primarily on criminal cases addressing the duties of a criminal prosecutor, it also extended some of those duties to certain aspects of civil cases implicating analogous and important public policy interests.[52]

While the lead Defendants have attempted to convince courts to broadly apply *Clancy* to all public nuisance actions, this interpretation is in stark contrast with the actual findings of the California Supreme Court. Indeed, *Clancy* made clear that the decision does not stand for the broad proposition that all contingency fee agreements in public nuisance cases violate due process: the very language of the *Clancy* decision indicates that it was tailored to the particular facts in that case

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[43] *See* Ebel v. City of Corona, 698 F.2d 390 (9th Cir. 1983); Ebel v. City of Corona, 767 F.2d 635 (9th Cir. 1985).

[44] Clancy, 39 Cal.3d at 743.

[45] *Id.* at 745.

[46] *Id.* at 744.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Clancy*, 39 Cal.3d at 743-44.

[51] *Id.* at 743.

[52] *Id.* at 748-49.

and does not have broad application to all public nuisance cases.[53] Specifically, the court first noted that nothing in its decision "should be construed as preventing the government, under appropriate circumstances from engaging private counsel."[54] The court acknowledged "there are cases in which a government may hire an attorney on a contingent fee to try a civil case." *Id.* Thus, the court carefully limited its holding to the "class of civil actions" that implicate the public policy interests presented by the specific and unique public nuisance action that implicated constitutional and criminal protections at issue there. *Id. See also Sherwin-Williams v. City of Columbus, et al.,* Case No. 2:06-cv-00829, Hearing and Decision Transcript at 81 (S.D. Ohio June 18, 2007) (wherein the court commented that "The case [*Clancy*] also noted... nothing we say herein should be construed as preventing the government under appropriate circumstances from engaging private counsel. Certainly, there are cases in which a government may hire an attorney on a contingency fee basis to try a civil case.").

Because the *Clancy* court limited the holding that was not to be broadly construed to prohibit all contingency fee agreements in all public nuisance cases, the appropriate inquiry is whether the facts in *Clancy* are sufficiently analogous to the public nuisance cases against the lead pigment industry. The factual scenario presented by the litigants in the *Clancy* case, however, is completely different from that present in the lead pigment cases, in that *Clancy* directly implicated criminal violations, Constitutional violations and Fifth Amendment issues. None of those issues, which raise significant liberty interests under the Constitution, are present in the public nuisance abatement cases brought against the lead pigment industry.[55]

C. The Flexible Requirement of Due Process Provide for the Hiring of Outside Counsel in Lead Pigment Public Nuisance Cases

The limitations of the *Clancy* holding become important when considering controlling United States Supreme Court precedent concerning due process. Specifically, the Supreme Court has mandated that consideration of due process be limited to the facts and circumstances presented by an individual case, noting that due process requirements are flexible and must be tailored to the circumstances of a particular situation.[56]In *Mathews v. Eldridge,* the Court set out the flexible

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[53] *Id.* at 748.

[54] *Id.*

[55] *See* Rhode Island v. LIA. No. 99-5226, Decision (Feb. 26, 2007) (finding that there was no violations of lead pigment manufacturers' Due Process, First Amendment, Commerce Clause, or Takings Clause rights and that the public nuisance lawsuit did not impermissibly violate the doctrine of separation of powers).

[56] *See* Mathews v. Eldridge, 424 U.S. 319 (1976); *see also* Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (Due process "is flexible and calls for such procedural protections as the particular situation demands" in order "to minimiz[e] the risk of error."); Greenholz v. Inmates of the Neb. Penal and Corr. Complex, 442 U.S. 1, 12-13 (1979) (Due process "is flexible and calls for such procedural protections as the particular situation demands" in order "to minimiz[e] the risk of error."); Morrissey v. Brewer, 408 U.S. 471 (1972).

boundaries of due process that must be reviewed and fit to the particular situation at hand:

> '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. [D]ue process is flexible and calls for *such procedural protections as the particular situation demands*.. . . The identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[57]

Furthermore, even with this flexible analysis, due process requirements are not strenuous. Instead,

> an essential principle of due process is that a deprivation of property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Although the formality and procedural requisites for the hearing can vary, 'depending upon the importance of the interests at stake and the nature of the subsequent proceedings,' the fundamental requirement of procedural due process is that an individual be given an opportunity to be heard at a meaningful time and in a meaningful manner. At the least, this requires notice of the charges and an opportunity to view and contest the evidence supporting them. Such notice must be reasonably calculated, under the circumstances, to apprise the interested parties of the pendency of an action and afford them an opportunity to present their objections.[58]

In the lead public nuisance cases, there is no argument that the basic requirements of due process, notice and opportunity to be heard, have not been satisfied. The Defendants argue, however, that they are entitled to more than notice and an opportunity to be heard; they claim that due process requires that they be able to dictate how or under what circumstances the underlying public nuisance action can be prosecuted or who should be able to represent the government entities. When this argument is balanced against the test identified by *Mathews* and in light of the factors considered by the *Clancy* court, it becomes manifest that there is no due process right or prohibition that would prevent the use of a contingent fee agreement for the extraordinary relief of disqualifying counsel in public nuisance suits.

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[57] Mathews, 424 U.S. at 335 (emphasis added).

[58] Morrison v. Warren, 375 F.3d 468, 475 (6th Cir. 2004); *see also* Warren v. City of Athens, 411 F.3d 697 (6th Cir. 2005) ("Generally, the process that is due before a property deprivation includes prior notice and an opportunity for a predeprivation hearing.").

1. Unlike *Clancy*, the Interests that are Implicated by These State Court Public Nuisance Actions are Neither Constitutional nor Criminal

The first factor to be considered in the *Mathews* balancing test is "the private interest that will be affected by the official action."[59] As noted above, in *Clancy*, those interests included the defendant's previously determined First Amendment rights, as well as potential criminal prosecution against the defendants and their employees. As the court observed, in many public nuisance cases the abatement action "can trigger a criminal prosecution of the owner of the property" and, indeed, the store clerk was "potentially subject to prosecution under Penal Code § 311.2, which prohibits the sale of obscene materials."[60]The overlap between criminal and civil prosecution in that case was not merely theoretical but real, as evidenced by the police raid on the store to find evidence and the clerk's invocation of his Fifth Amendment rights. In light of the criminal and constitutional dimensions of that case and of the government's actions in prosecuting it, the court held that "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action."[61]

The liberty interests that led to the disqualification in *Clancy* do not exist in civil actions. All of the public nuisance lead litigation cases are civil actions. Since they are all civil actions, there is no threat of criminal prosecution or other criminal aspect to these cases. The police have played no role in these cases; there is none for them to play. Nor have the public nuisance Defendants asserted or had any reason to assert their Fifth Amendment rights. Also unlike *Clancy*, these cases do not involve the potential violation of any previously determined constitutional interests. In short, the abatement of a public nuisance does not implicate constitutional rights or criminal penalties. Thus, the private interest does not support the invalidation of the contingency fee agreement.

The Southern District of Ohio has occasion to comment on this very distinction in connection with the lead cases. In upholding the validity of contingency fee agreements in public nuisance cases against the lead manufacturers, the court noted that the distinction between a criminal prosecution and a civil action is factor to consider when resolving the constitutional issue. The court concluded that:

> Now the only claim made with regard to this issue has to do with the nuisance portion of the complaints, the single count involving nuisance claims, that each of the cities have brought against the plaintiff. And as I

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[59] Mathews, 424 U.S. 335.

[60] *Id.* at 744.

[61] *Id.* at 750.

> have discussed with counsel in oral argument, and I think both counsel agree, there is no debate that the cities may in many instances employ private counsel on a percentage basis, a contingency fee basis, with regard, for example, to an automobile accident case involving city property. At the other extreme is the absolute prohibition on a criminal prosecutor having some type of financial interest in the outcome of criminal litigation. The question in this case is which of the two poles does the case lie closer to? In other words, what type of action is this? Is it strictly a civil action, or is it more analogous to a criminal prosecution?
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> As a preliminary matter, I have no difficulty finding this is not what I would call a criminal matter or even quasi criminal. There is no access by the cities to the grand jury. There is no right to the issuance or seeking of search warrants, arrests or seizure orders. There is no chance of incarceration. And the remedies sought are all civil in nature, injunctive relief, abatement or damages. While Ohio law does provide for criminal prosecution of nuisance, these statues are not involved in the pending civil cases.[62]

In reaching this conclusion the court relied upon the rational of Maryland Court of Appeals in *Philip Morris Inc. v. Glendening*, 709 A.2d 1230 (1988). In that case, the Attorney General of Maryland entered into a contingency fee contract with outside counsel to represent the State in its lawsuit against the tobacco industry. Thereafter, the tobacco companies filed an action for declaratory and injunctive relief challenging the legality of the contract.[63] The tobacco companies primarily relied upon the *Clancy* case, arguing that the contract "violates due process and public policy because it provides outside counsel with an improper financial stake in the outcome of the underlying litigation.... " [64] The Maryland court rejected the tobacco companies' arguments and distinguished *Clancy* from the facts of that case. In so doing, the Maryland court correctly concluded, "The instant case is distinguishable from *Clancy,* as there are not constitutional or criminal violations directly implicated here, and hence, there is no potential conflict of interest."[65]

The distinction in the private interests at stake in *Clancy* and the private interests at stake in the lead pigment public nuisance cases is fatal to the lead Defendants' due process claims. There simply is no liberty interest at stake here that will be deprived if governments retain outside counsel on a contingency fee.

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[62] Sherwin-Williams v. The City of Columbus et al., C.A. No. 2:06cv 00829, Transcript of Hearing before the Honorable Edmund Sargus at 82-83 (S.D. Ohio E.D. June 18, 2007).

[63] *Id.* at 667.

[64] *Id.* at 669.

[65] *Id.* at 686.

2. There is no Risk of an Erroneous Deprivation of a Property of Liberty Interest Where Private Counsel Assist Neutral Public Attorneys, not Replace Them, Unlike *Clancy*.

The second prong of the *Mathews* balancing test requires the Court to consider "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards... ."[66] The contingent fee arrangements establish sufficient control and neutrality to ensure that the Defendants are treated fairly and impartially and that justice will be achieved.

First, there is **no** risk that the Defendants will be erroneously deprived of any protected property or liberty interest in the underlying state court public nuisance action. Those actions are presided over by a neutral judge and will be decided by a neutral jury. Furthermore, the Defendants are clearly afforded the ability to participate in those proceedings and contest any and all facts, evidence, and law. Thus, dispositive decisions on the merits of the action will be made by neutral arbiters at all stages of the proceeding, thus eliminating the possibility that the Defendants will be deprived of any protected interest during the litigation. As the federal court concluded:

> In this case the state law of Ohio, when construed in conjunction with the relief sought by the defendants in state court, has provided the broadest possible due process prior to a judgment with regard to the rights of the plaintiff.
>
> The [municipalities] have sought injunctive relief and damages, but have not sought to seize or retrain any of [Sherwin Williams'] property or property interests prior to final judgment, if that ever occurs, in state court. If such action occurs and damages are awarded, it will only come after a full trial on the merits in a state court to either a jury for damages or to a judge for injunctive relief. So I find that with regard to the procedural due process claim, the state law affords [Sherwin Williams'] the greatest possible due process under our law.[67]

Second, under the contingent fee agreements, responsibility for the conduct of the litigation, including any required balancing of public and private interests, has resided with the respective authorities and the public attorneys who are counsel of record in these cases. These public attorneys have not abdicated their responsibilities. Since the governments and the neutral public attorneys representing them have always remained in control of the decision-making there is no risk of an erroneous deprivation of an interest.

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[66] Mathews, 424 U.S. at 435.

[67] See Sherwin-Williams v. City of Columbus, et al., Tr. at 79-80

This government-controlled decision-making is distinguishable from the facts in *Clancy*. In reaching its decision to bar Clancy's contingent fee agreement, the California Supreme Court stated that "[c]ertainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case."[68] *Clancy* itself made clear the distinguishing facts of such cases: Defendants' motion in *Clancy* was to "bar the People from proceeding with Clancy *instead of* the regular City Attorney of Corona as its representative... ."[69]

The Maryland Court of Appeals' opinion in the *Philip Morris v. Glendening* case, *supra* supports this conclusion. In addition to distinguishing *Clancy* because of the absence of constitutional and/or criminal violations, the Maryland court also found *Clancy* inapplicable where there is oversight of a public official in all aspects of the litigation.[70] Furthermore, the United States District Court for the Northern District of California in *City and County of San Francisco v. Philip Morris*, 957 F. Supp. 1130 (N.D.Cal. 1997) reached a similar result. In that case, the City and County of San Francisco had contracted with outside counsel to represent them pursuant to a contingency fee agreement in their suit against the tobacco industry. The tobacco companies "citing *People ex. Rel Clancy v. Superior Court*, . . . argue that the Court should disqualify [outside counsel], as courts have the authority to disqualify counsel when necessary in the furtherance of justice."[71] The federal court rejected the defendants' contention, noting that "under appropriate circumstances, the government may engage private counsel."[72] The court specifically found the contingency fee agreement permissible since the outside counsel was:

> acting here as co-counsel, with plaintiffs' respective government attorneys retaining full control over the course of the litigation. Because plaintiffs' public counsel are actually directing this litigation, the Court finds that the concerns expressed in Clancy regarding over zealousness on the part of

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[68] Clancy, 39 Cal.3d at 748.

[69] *Id.* at 744 (emphasis added). In a footnote, the *Clancy* court dismissed Mr. Clancy's argument that he could bring the public nuisance actions "in the name of the People," stating: "*Clancy* relies on an Indiana authority, Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 1983). In that case, however, the court approved the *assistance of a private attorney only because he appeared 'not in place of the State's duly authorized counsel.'*" Clancy, 39 Cal.3d at 749 n. 3 (emphasis added). In *Sedelbauer*, an attorney for a private organization was allowed to aid in a *criminal* obscenity prosecution specifically because he did not serve as sole prosecutor but served as *co-counsel*, appearing *with* rather than *in place of* a deputy prosecuting attorney. Sedelbauer, 455 N.E.2d at 1164. By distinguishing *Sedelbauer* on its facts, the California Supreme Court confirmed that *Clancy* did not create a blanket rule against contingent fee counsel in all representative public nuisance cases. Instead, it strongly suggested that the retention of contingent fee counsel might be appropriate if that counsel assists, rather than replace the public attorneys.

[70] Glendening, 709 A.2d at 1242-43 (finding that "notably absent from *Clancy* . . . is the absence of oversight of an elected State official, who 'shall have the authority to control all aspects of [outside counsel's] handling of the litigation' and whose 'authority shall be final, sole and unreviewable.'").

[71] City & County of San Francisco v. Philip Morris, 957 F. Supp. 1130, 1135 (N.D.Cal. 1997).

[72] *Id.*

> private counsel have been adequately addressed by the arrangement between [contingent fee counsel] and the plaintiffs [public entities].73

Contingent fee counsel in the lead pigment litigation have in no sense replaced or been substituted for the public attorneys, or acted beyond the scope of the authorized representation. Unlike outside counsel in *Clancy*, all of the contingent fee counsel are assisting the public attorneys and are not vested with independent decision-making authority over the litigation. All substantive decisions in the litigation are made by or approved by the public attorneys as counsel of record. The public clients retain absolute control over all aspects of the litigation, and there is no risk that the government's duty - to do justice - will be compromised. These facts establish that there is simply no risk in these lead cases that the kind of neutrality expected of public entity attorneys will not be exercised as appropriate in the control of all aspects of the litigation.

Where the governmental authorities retain full control over the litigation and private and government counsel litigate the matter before a neutral arbiter according to the established substantive, procedural and ethical rules, there is no risk that the Defendants' property interest will be erroneously deprived.

3. Compelling Government Interests Weigh Heavily in Favor of Permitting Contingent Fee Agreements.

The final criteria to be assessed when considering whether a government can contract for legal representation on a contingency fee is the "government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[74] Important legal, practical and policy considerations are implicated that weigh heavily in favor of the right of appropriate government officials to determine the best financial means for bringing and maintaining such an action.

Barring all contingent fee arrangements in representative public nuisance actions would improperly restrict the ability of government entities to allocate their resources for the public's benefit. A blanket prohibition of contingent fee agreements in public nuisances cases would tell public entities that if they want to use the legal system to remedy the most serious dangers to the public health and environment, they have to either raise taxes or cut other important and necessary programs to pay for the staff and expertise necessary to litigate public nuisance actions. The large, wealthy corporate defendants, on the other hand, may in many cases simply turn their defense over to insurance companies and incur no financial effect from the litigation.

Requiring public entities to internally muster such resources in order to pursue a public nuisance action for the public benefit improperly interferes with

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[73] *Id.*

[74] Mathews, 424 U.S. at 335.

political and fiscal matters entrusted to public officials empowered to litigate on behalf of a government entity. Indeed, requiring such internal resources and political considerations might very well prevent litigation against the wealthiest and the most powerful.

Invalidation of the contingency fee contracts would frustrate public policy decisions that have been made by the people's elected representatives. Some of the contingent fee agreements used in lead cases were authorized by legislative enactments of certain governing bodies.[75] In other circumstances, the executive branch, like the Rhode Island Attorney General, has the constitutionally authorized core function to weigh the risks and determine whether and in what manner litigation should be pursued.[76]These procedures for formal authorization by local legislative bodies and government officials provide yet another layer of oversight to ensure that the fee agreements are fair and do not result in private counsel taking over the roles of public attorneys answerable to those same public authorities. Even where the responsibility to initiate such litigation resides in a duly elected constitutional officer of a state, they are ultimately held accountable by the electoral process.

Without the ability to enter into such arrangements, many public entities will not be able to pursue these actions. As a result, those actually responsible for the serious health and environmental hazards will escape scot-free to the detriment of not only the public entities but also to their citizens who must live with those hazards. The offenders who cause the greatest and most widespread damage to the public health and environment benefit the most because public entities often lack the resources and in some instances the expertise to pursue the biggest violators without the assistance of contingent fee counsel.

In short, a balancing of the interests of the public entities and the Defendants shows that the scales tips heavily in favor of the public entities' right to engage counsel to prosecute public nuisance actions, especially when trying to protect the health and safety of their citizens.

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[75] In Ohio, the contingency fee agreements were specifically authorized by municipal ordinances. City of East Cleveland Ordinance NO. 67-06 ("Whereas, the lead industry failed to take reasonable, responsible steps that would have prevented lead poisoning in the City of East Cleveland; and Whereas the City of East Cleveland has decided to take action by instituting suit against the lead industry. . ."); Columbus Ordinance; City of Lancaster Resolution 131-06 ("Whereas, the law Director's Office recommends participation in said litigation on a contingency fee basis for investigation, prosecution, and defense of litigation in connection with any and all matters pertaining to claims which the City of Lancaster has, or may have, against lead based paint manufacturers.").

[76] *See* note 23 *supra* (Recognizing constitutional authority of the Rhode Island Attorney General). *See also* Mottola v. Cirello, 789 A.2d 421, 425 (R.I.2002) ("It is not the province of this Court, or the Superior Court, to dictate how the Attorney General elects to carry out the statutory functions of his office.").

V. CONCLUSION

As Chief Judge of the California Supreme Court, Ronald George, said, "If the motto 'and justice for all' becomes 'and justice for those who can afford it,' we threaten the very underpinnings of our social contract."[77] Contingent fee agreements are well-recognized means of engaging outside counsel who provide the needed financial and litigation support to empower governments to engage in large-scale sophisticated litigation to achieve justice for the public. Without such additional preparedness for complex, protracted and hardball legal battles, governments would not be able to bring or withstand the pressures of such litigation. The public has a right to have their public nuisance claims vindicated by proper government authorities with the assistance of private counsel since "a defendant does not have a right or expectation of falling through the cracks for want of resources or lack of prosecutorial zeal."[78] As the lead Defendants are entitled to be treated fairly, so to is the public entitled to have their claims heard. The contingent fee agreements as described here provide appropriate safeguards to the perceived interests of the Defendants and ensure the public access to justice. The public is entitled to nothing less.

[77] Annual State of the Judiciary Speech (2001), *reprinted in* THE QUOTABLE LAWYER (Tony Lyons ed., The Lyons Press 2002).

[78] People v. Parmar, 86 Cal.App. 4th 781 (2001) *citing* People v. Eubanks, 927 P.2d 310 (Cal. 1996).