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In Santa Clara, Litigation Trumped Remediation

Law360, New York (December 03, 2013, 8:04 PM ET) -- When the California Supreme Court decided County of Santa Clara v. Superior Court of Santa Clara (Santa Clara), 50 Cal. 4th 35 in 2010, abandoning its quarter-century prohibition on public agencies retaining private law firms with contingent fees, the court was aware of the risks. Government attorneys enforcing the state's laws are held to the highest duty of neutrality; their job is to represent and protect the public interest. Government lawyers do not share in the financial success of a lawsuit pursued by their respective clients — a protection that promotes objectivity and the likelihood that justice will be served. Private attorneys, on the other hand, are held to a different standard; their interest derives from the specific goals of their respective clients, not the public.

For many years, private firms have acted as outside counsel to government bodies, but their fee was never predicated upon the success of litigation. Santa Clara changed that dynamic and, in doing so, has created a vacuum that entices cash strapped public agencies to seek counsel from contingency fee attorneys who have serious and inherent conflicts of interest with the public they represent.

When hired by the government on a contingency fee basis, private attorneys really are not enforcing state laws. They are employed by their government client to win as much money as they can; money they will share in on a percentage basis if the case is successful. Of course, public agencies are looking for contingency fee arrangements because they cost little, if anything, to pursue the litigation. But the private attorney has little incentive to promote the public interest in these cases; their interest is in a successful lawsuit, measured in terms of dollars collected in the case — which in many instances is not equivalent to the public's interest.

Yet, for the Santa Clara court, the potential benefits were too tempting. In theory, it was time for a change: overworked government attorneys could shift their enforcement burden to private attorneys who are only paid when the litigation is successful. Theoretically, requiring government attorneys to control and supervise private counsel hired on a contingent fee basis would maintain the heightened standard of neutrality. If the theory held, everyone, including the public, would benefit.

A mere three years later, the theory has already been overwhelmed by reality, to the detriment of California's citizens and its environment. And nowhere is the new reality starker than in the Orange County Water District.

The OCWD was created by a special act of the California Legislature in 1933 to protect Orange County's water rights in the Santa Ana River. Now, its primary responsibility is to manage the groundwater basin under northern and central Orange County — an enormous basin that supplies water to 2.3 million California citizens, or nearly 75 percent of total water demand in the county.

Pursuant to its statutory authority, the OCWD has developed an incredibly extensive and sophisticated groundwater protection program. It conducts over 350,000 analyses of the more than 18,000 water samples it collects from the roughly 700 wells in its jurisdiction.

After the OCWD testing revealed that portions of the shallow aquifers in the northern and southern sections of the groundwater basin were contaminated, it began development of remediation programs. The North Basin Groundwater Protection Project ("NBGPP") calls for the agency to construct wells to remove contaminated groundwater, as well as pipelines to transport contaminated groundwater to a future treatment facility. The so-called “South Basin Groundwater Protection Project ('SBGPP')" is similar, but premature as investigation is yet to be completed. Together, the projects, if ever built, will cost an estimated $230 million.

In 2004, before remediating the contamination, the OCWD’s board of directors voted to begin litigation to recover the investigation costs of the groundwater contamination in the northern basin. Several years later, nearly identical litigation was initiated against alleged contributors to the south basin contamination. Even though remediation had yet to start, the OCWD decided to start suing potential contributors.

Rather than enforce water quality standards itself, the OCWD opted to outsource the litigation. The board hired a private law firm on a contingency fee basis. Ideally, the OCWD could then avoid the costs of enforcement while collecting recovery at the back end.

Things have not worked out nearly as well as the OCWD had hoped, and the returns on its preemptive litigation strategy have been disastrous.

In the past year, the OCWD has been rebuked by California trial courts in both actions. In the NBGPP case, Judge Kim Dunning ruled that the OCWD had failed to provide sufficient evidence that any of the alleged defendants contaminated the north basin aquifer. Most alarmingly, though the court found no evidence of causation by the defendants, it did find the OCWD certainly contributed to contamination during its recharge activities in the shallow aquifer.

The SBGPP case has not gone any better. Judge Nancy Wieben Stock ruled recently that the agency could not recover investigative costs for the SBGPP without first responding to or remediating the contamination. In fact, the court found the OCWD had not even submitted sufficient evidence to support a nuisance claim, let alone recovery for future remediation. There was simply no evidence of substantial and unreasonable harm to the south basin shallow aquifer.

Unable to succeed in the courtroom, the OCWD took to the state legislature. S.B. 658 would modify existing California law to allow recovery of investigative costs by the OCWD — a direct attempt to circumvent unfavorable rulings in its investigative cost recovery actions. The bill started with six sponsors. It is now down to one — Senator Lou Correa from Orange County — and the bill was ordered inactive by its lone sponsor in May.

The long litigation has proven at least one thing — that the OCWD brought suit before it knew who to sue. Now it faces the harrowing prospect of funding both remediation projects entirely with taxpayer money. Worse still, the entire situation likely could have been avoided.

The California Supreme Court’s Santa Clara decision opened a tempting door to the OCWD; one the agency should not have walked through. The OCWD should have prioritized its statutory responsibilities

to protect groundwater over its interest in immediately recovering investigative costs. But it did not. Instead, it opted for a convenient and relatively quick low cost strategy to make others pay now for the problem, without regard for the consequences that shotgun litigation will bring.

Unlike past practice, businesses were not consulted before the OCWD filed suit. One company, Gallade Chemical, has been working with other regulators to remediate its property. After the OCWD sued Gallade in 2008, millions were sunk into litigation instead of remediation.

Even more troubling, the OCWD's litigation strategy seems to have succumbed to private motives. Suit was brought against dozens of defendants in both cases without any regard for their possible contribution to the contamination. Faced with the prospect of expensive, protracted litigation, several companies were forced to settle with the OCWD. Considering the OCWD has yet to start cleanup, those settlements cannot even be considered a hollow victory. And such results beg the question as to whether this litigation has "created [the very] danger of governmental overreaching or economic coercion" the Court expressed concern about in Santa Clara.

Moreover, prioritizing litigation over remediation made it increasingly difficult for the OCWD to establish causation in either case. Without proof of causation, the OCWD's lawsuits sought recovery of investigation costs, a theory that failed to persuade either trial court. Tellingly, rather than abide by the law — a fundamental part of the government attorney's duty of neutrality — the OCWD tried to change it.

The OCWD put litigation before environmental remediation. Now, OCWD is stuck between a rock and a hard place.
The agency no longer has the good will of the Orange County business community, making cooperative cleanup all the more difficult. The OCWD can either pursue remediation in the north and south basins, forcing taxpayers to foot the $230 million bill for the projects, or it can abandon the cleanup. Either way, the OCWD has abdicated its responsibilities, and California's citizens and environment will suffer the consequences.

Santa Clara was a decision based on policy, not statute. The California Supreme Court was convinced by the theory that government attorneys could maintain control over private counsel retained by contingency fees. The reality of recent experience with the OCWD emphatically demonstrates otherwise.

The court should acknowledge this reality. It should recognize, simply, that Santa Clara is bad policy. For the sake of the people and its environment, it is once again time for a change.

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