SUPREME COURT OF LOUISIANA

No. 96-C-1110

ROBERT MEREDITH, III, JOHN W. CRANCER, HARRY F. HUFFT, L.D. UHLER, PAUL HILLIARD, JOE ELSBURY, JR., AND THE LOUISIANA INDEPENDENT OIL & GAS ASSOCIATION, INC.

Versus

THE HONORABLE RICHARD P. IEYOUB, IN HIS CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF LOUISIANA

LEMMON, J., Dissenting

The majority bases its decision, in part, on La. Rev. Stat. 30:2205, characterizing that statute as the "opposite" of a Legislature grant of authority for contingency fee contracts to recover damages caused by violations of environmental laws and implying that the statute was a legislative denial of such authority. However, the Legislature has never expressly prohibited the use of contingency fee contracts in such cases, although it demonstrated such know-how by expressly prohibiting cost-plus contracts.

La. Rev. Stat. 30:2171-2206 comprise the Louisiana Hazardous Waste Control Law, which was intended "to authorize the development, implementation, and enforcement of a comprehensive state hazardous waste control program." La. Rev. Stat. 30:2172. The Hazardous Waste Control Law, which contains in detail the power and authority of the Department of Environmental Quality (DEQ) in this area, also creates several funds, including the Underground Storage Tank Trust Fund (Section 2195), the Hazardous Waste Protection Fund (Section 2198), and the Hazardous Waste Site Cleanup Fund (Section 2205). Section 2205 immediately follows specific prohibitions in Section 2202 regarding hazardous waste, a requirement in Section 2203 of prompt remediation when hazardous waste enters ground waters, and authority in

Section 2204 for ordering owners and operators to clean up hazardous wastes that constitute environmental hazards.

Section 2205A(1)[1] does not expressly prohibit contingency fee contracts for lawyers who litigate claims by the state against persons responsible for environmental conditions and damages. Moreover, Section 2205A(1) contains much more than the introductory sentence relied upon by the lower courts as impliedly prohibiting such contingency fee contracts.

The primary purpose of Section 2205 was to establish the Hazardous Waste Site Cleanup Fund. Enactment of the statute insures that money recovered from prosecuting environmental offenders goes into this cleanup fund (after payment of secured obligations), rather than into the state treasury's general fund, in accordance with controlling constitutional provisions.

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[1]Section 2205A(1), the statute relied on by the lower courts, provides more fully as follows:

> (1) All sums recovered through judgments, settlements, assessments of civil or criminal penalties, funds recovered by suit or settlement from potentially responsible parties for active or abandoned site remediation or cleanup, or otherwise under this Subtitle, or other applicable law, each fiscal year for violation of this Subtitle, shall be paid into the state treasury and shall be credited to the bond Security and Redemption Fund. After a sufficient amount is allocated from that fund to pay all obligations secured by the full faith and credit of the state which become due and payable within any fiscal year, the treasurer, prior to placing such remaining funds in the state general fund, shall pay into a special fund, which is hereby created in the state treasury and designated as the "Hazardous Waste Site Cleanup Fund", twenty-five percent of those funds generated by the hazardous waste tax under the provisions of Chapter 7-A of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950 and the sums recovered through all judgments, settlements, assessments of civil or criminal penalties, fees and oversight costs received from potentially responsible parties for the department's work in overseeing of assessment and remediation at inactive or abandoned sites, funds recovered by suit or settlement from potentially responsible parties for active or abandoned site remediation or cleanup, or otherwise, for violation of this Subtitle . . . . (emphasis added).

Under La. Const. art. VII, §9(B)[2], state money deposited in the state treasury first goes into the treasury's Bond Security and Redemption Fund before going into the general fund or other funds such as the Hazardous Site Cleanup Fund. An amount is allocated annually from the Bond Security and Redemption Fund sufficient to pay all obligations for the fiscal year secured by the full faith and credit of the state, and the remainder goes into the general fund unless otherwise provided by law.

Section 2205A, besides creating the Hazardous Waste Site Cleanup Fund, is an "otherwise provided by law" provision which authorizes payment into that fund of "all sums received" through settlements and judgments in claims against environmental offenders after the required payment of obligations from the Bond Security and Redemption Fund.

Since the Legislature clearly intended by Section 2205A(1) to establish the Hazardous Waste Site Cleanup Fund and to dedicate part of the state's recovery from settlements or judgments in claims against environmental offenders into that Fund (after payment first into the Bond Security and Redemption Fund), there is no reasonable

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[2]La. Const. art. VII, §9(A), relied on by plaintiff, provides in part:

> All money received by the state or by any state board, agency, or commission shall be deposited immediately upon receipt in the state treasury . . . .

However, Section 9(B) goes on to provide:

> Subject to contractual obligations existing on the effective date of this constitution, all state money deposited in the state treasury shall be credited to a special fund designated as the Bond Security and Redemption Fund, except money received as the result of grants or donations or other forms of assistance when the terms and conditions thereof or of agreements pertaining thereto require otherwise. In each fiscal year an amount is allocated from the bond security and redemption fund sufficient to pay all obligations which are secured by the full faith and credit of the state and which become due and payable within the current fiscal year, including principal, interest, premiums, sinking or reserve fund, and other requirements. Thereafter, except as otherwise provided by law, money remaining in the fund shall be credited to the state general fund.

basis for inferring any intent in Section 2205A(1) to prohibit use of contingency fee contracts to accomplish such recovery. In the light of this discussion, there also is no reasonable basis for interpreting the phrase "all sums recovered" as intended to preclude the deduction of contingency fees from the gross recovery of environmental damages before the payment of the net recovery by the state into the state treasury. If the Legislature intended to enact Section 2205A(1) in order to prohibit use of contingency fees in environmental damage cases, much clearer language was certainly available to express that purpose.

The more difficult issue is whether the contract infringes upon the Legislature's constitutional power of appropriation and thus violates the constitutionally required separation of powers. Plaintiffs argue that the Legislature must appropriate the money for payment of contractual attorney's fees included in the Attorney General's budget or must authorize in advance the Attorney General's commitment to future expenditures for attorney's fees from recovery made on the state's claim. Plaintiffs contend in effect that only the legislative branch can decide whether a portion of the state's claim can be committed to the attorney's fees and expenses associated with recovery on the claim. Thus, according to plaintiffs, legislative authorization is needed to pay attorney's fees under a contingency fee contract, just as a legislative appropriation would be needed to pay attorney's fees under an hourly fee contract. Amicus curiae further argues that enactment of a contingency fee statute constitutes an exercise of the Legislature's constitutional authority to appropriate public money by constructively appropriating, in anticipation of the state's recovery on the claim, the contingency fee to the payee designated in the statute.

The Attorney General argues that if he is denied the use of contingency fee contracts, many meritorious claims for environmental damages will go unprosecuted.

He contends that the difficulties in the political process of obtaining legislative action against powerful special interest groups will ultimately result in the causation or continued existence of extensive environmental damage. He further argues that the contract at issue, rather than taking money out of the state treasury, will result in placing money into the treasury that would not otherwise be there.

La. Const. art. III, §16 provides for the Legislature's annual appropriation function, prohibiting the withdrawal of money from the state treasury except through a specific appropriation by the Legislature for a period of no longer than one year. This section by its terms does not apply in the present case because there is no withdrawal from the state treasury. The issue is therefore whether the Legislature's exclusive power of appropriation encompasses the necessity of a constructive appropriation, in advance of recovery, of funds for attorney's fees and expenses out of a conditional recovery some time in the future on a legal claim owned by the state.

The Legislature has plenary power to do all things not limited by the Constitution or otherwise delegated in the Constitution. Chamberlain v. State Through Dep't. of Transp. and Dev., 624 So. 2d 874 (La. 1993). The issue in this case, however, is not whether the Legislature has the power to enact a law prohibiting the use of contingency fee contracts by the Attorney General, but whether the Attorney General can validly use, without legislative authorization, a contingency fee contract in exercising his constitutional power to file suit on the state's claims and his legislative authority to employ private attorneys in the litigation on any contractual basis, other than a cost-plus basis, that is beneficial to the state.

I do not find any express or implied constitutional or legislative requirement for legislative approval of the Attorney General's contracting to pay attorney's fees and costs of recovery out of the funds created by successful litigation of the state's

environmental damages claims. While plaintiffs argue that only the Legislature has the power to dispose of property belonging to the state, a disputed legal claim is a unique type of property in that its value can only be realized through a legal settlement or litigation.[3] Once the value of the state's disputed claims is realized through settlement or judgment, the money or property ultimately recovered for the state by its constitutionally authorized officer, after deduction of the costs of recovery, is the property that the Legislature has the exclusive power to dispose of. While there are persuasive arguments favoring the "no advance payment - no risk" contractual arrangements for attempting recovery through difficult and expensive litigation, there are also persuasive arguments against such contracts. The question is more one of policy than of legislative power. If the Legislature considers such contracts in this type of litigation to be imprudent policy, then a legislative enactment prohibiting such contracts may be appropriate, subject to possible challenges by the Attorney General. In the meantime, there is no constitutional or statutory barrier to the discretionary use of such contracts by the Attorney General.

[3]The value of a disputed legal claim depends upon both the chance of recovery and the costs of recovery.