SUPREME COURT OF LOUISIANA

No. 96-C-1110

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

versus

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

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF EAST BATON ROUGE

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Jeffrey P. Victory
ASSOCIATE JUSTICE

Knoll, J., not on panel. Rule IV, Part 2, §3.

The issue presented in this case is whether the Attorney General of the State of Louisiana has the authority to enter into contingency fee contracts with private attorneys to represent the State in enforcing the State's environmental laws. We find that absent legislative authorization, such contracts violate state law and are illegal.

FACTS AND PROCEDURAL HISTORY

The Attorney General entered into a "Contract for Professional Legal Services" (the "Contract") with two law firms, Domengeaux, Wright, Moroux and Roy, A Professional Law Corporation, and John D. Bernhardt, A Professional Law Corporation (collectively, "Intervenors"). Under the terms of the Contract, Intervenors are appointed as "Special Assistant Attorneys General" to investigate and prosecute state environmental damage claims on a contingency fee basis. Specifically, the Contract provides that if damages are recovered, Intervenors are entitled to "an amount equal to twenty-five percent (25%) of Gross Recovery,[1] if any . . ." subject to a cap of "$10 million per claim to each of the two firms signing this Contract and $10 million each per claim to Approved Subcontractors listed in Paragraph 13.2, total claims not to exceed 1,000 claims," plus reimbursement of Qualifying Expenses. In addition, the Contract provides that outside counsel and the Attorney General will direct any person making a payment "constituting Gross Recovery" to pay the attorney fees payable under the Contract directly to outside counsel. To date, Intervenors have filed no state environmental damage claims pursuant to the Contract.

[1]"Gross Recovery" is defined as "the aggregate of all sums of money, including future benefits or payments (excluding any annual royalties, rentals, bonuses or other payments) and/or any civil or other penalties of fines, and the present fair market value or equivalent of non-monetary items (including but not limited to any on-site or off-site remediation, mitigation, restoration, clean-up or other response) which become payable, deliverable or performable or which are paid to and received by or for the state, and/or the state through counsel, the Attorney General, or any agent or employee of any of the foregoing in settlement or satisfaction of all or any part of any claim and determined before the deduction of any sums due counsel in payment or reimbursement of any attorney's fee or Qualifying Expenses due under the Agreement.

The Louisiana Independent Oil & Gas Association, Inc. ("LIOGA") and several of its individual members (collectively, "Plaintiffs") filed suit seeking a judicial declaration that the Contract was invalid under the Louisiana Constitution and statutory law and an injunction prohibiting the implementation and enforcement of the Contract. The trial court overruled the Attorney General's exceptions of lack of standing, lack of a justiciable controversy and prematurity. After a hearing, the trial court held that the Contract was illegal inasmuch as it violated Article VII, Section 9 of the Louisiana Constitution and Louisiana Revised Statutes 30:2205. The First Circuit Court of Appeal agreed and affirmed. ***Meredith v. Ieyoub***, 95-0719 (La. App. 1st Cir. 4/4/96), 672 So. 2d 375.

We granted a writ to consider the Attorney General's assignments of error that the court of appeal erred (1) by not finding that the respondents lacked standing and that therefore the trial court lacked subject matter jurisdiction to decide the matters at issue; (2) in finding that the Contract violates state law. ***Meredith v. Ieyoub,*** 96-1110 (La. 6/21/96), 675 So. 2d 1094.

DISCUSSION

A. Standing

The Attorney General and Intervenors claim that the Plaintiffs lack standing to bring this suit because no suit has been instituted against them pursuant to the Contract. Plaintiffs assert that they have standing as taxpayers and as members of the industry that is the target of the Contract. The court of appeal found that, although the Plaintiffs "failed to offer proof that the actions of the Attorney General would, with certainty, increase their tax burdens," because they were seeking to restrain a public body from alleged unlawful action, other methods of proof were available. 672 So. 2d at 378. The court of appeal found standing based on Plaintiffs' "fear they may be called upon

to defend potentially groundless claims as targets of an environmental 'witch-hunt'." ***Id.***

We explained the requirements for standing when a party seeks to restrain a public body from alleged unlawful action in ***Alliance For Affordable Energy v. Council of City of New Orleans***, 96-0700 (La. 7/2/96), 677 So. 2d 424. In that case, the Alliance for Affordable Energy sought to restrain the New Orleans City Council from entering into professional service contracts with certain utility consultants in violation of the New Orleans City Charter. We held that "because plaintiffs seek to restrain the City Council from entering into certain contracts allegedly through an illegal process, plaintiffs are not required under ***League of Women Voters*** [***v. City of New Orleans,*** 381 So. 2d 441 (La. 1980)] and its progeny to demonstrate a special or particular interest" which is distinct from the public at large. 677 So. 2d at 429. "Rather, plaintiffs are afforded a right of action upon a mere showing of an interest, however small and indeterminable." ***Id.*** Although in that case we found that the plaintiffs had proven that the action constituted a burden on their tax base, we also held that plaintiffs' interest in the health and welfare of the residents of Orleans Parish was sufficient for standing purposes. ***Id.***

Here, the individual members of LIOGA, who would be subject to law suits filed by Intervenors under the Contract, clearly have an interest and therefore have standing to institute this action to restrain the Attorney General from entering into the Contract allegedly in violation of the Constitution and statutory law.

In addition, LIOGA has standing under the requirements for organizational or associational standing set forth in ***La. Associated General Contractors, Inc. v. State Through Division of Admin., Office of State Purchasing***, 95-2105 (La. 3/8/96), 669

So. 2d 1185, 1190-1191. "An association will have standing to bring a suit solely on behalf of its members and in the absence of injury to itself when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit.

669 So. 2d at 1190 (citing ***Hunt v. Washington State Apple Advertising Commission***, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). We have already stated that the individual members have standing to sue in their own right. In addition, LIOGA claims it is seeking to protect against lawsuits motivated by money, the looming specter of a dual system of regulation of the environment by different agencies of the state, and the loss of financing of oil and gas projects, all of which are germane to the organization's purpose, which is to protect the interests of independent oil men. Finally, this declaratory judgment and injunctive relief action does not require the participation of LIOGA's individual members.

Accordingly, all Plaintiffs have standing to bring this action.

B. Validity of the Contract under State Law

The separation of powers doctrine, enunciated in Article II, § 2 of the Louisiana Constitution, provides as follows: "Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." La. Const. Art. II, § 2. "Unlike the federal constitution, a state constitution's provisions are not grants of power but instead are limitations on the otherwise plenary power of the people of a state exercised through its legislature." ***Board of Commissioners of Orleans Levee District v. Department of Natural Resources***, 496 So. 2d 281, 286 (La. 1986). "It is elementary that the 'fiscal affairs of the state, the possession, control, administration, and disposition of the property, funds, and revenues of the state, are matters appertaining exclusively to

the legislative department.'" ***State v. Duhe***, 9 So. 2d 517, 521 (La. 1942) (citing ***Carter v. State***, 42 La. 927, 933, 8 So. 836, 837 (1890)). This long-standing principle also applies under the 1974 Constitution, as we have more recently held that "[t]he legislature has control over the finances of the state, except as limited by constitutional provisions." ***Louisiana Ass'n of Educators v. Edwards***, 521 So. 2d 390, 394 (La. 1988). There, we further elaborated on the separation of powers doctrine, holding that "[e]xcept as expressly provided by the constitution, no other branch of government, nor any person holding office in one of them, may exercise the legislative function." ***Id.*** (Emphasis added).

It is also fundamental that "[t]he legislative power of the state is vested in the Legislature." ***Board of Commissioners***, *supra* at p. 286 (citing La. Const. 1974, Art. III, § 1. "In its exercise of the entire legislative power of the state, the Legislature may enact any legislation that the state constitution does not prohibit." ***Id.*** We find nothing in the state constitution which prohibits the Legislature from enacting statutes enabling the Attorney General to enter into contingency fee contracts with outside attorneys.

Thus, under the separation of powers doctrine, unless the Attorney General has been expressly granted the power in the constitution to pay outside counsel contingency fees from state funds, or the Legislature has enacted such a statute, then he has no such power. The question is not, as the Attorney General and Intervenors argue, whether any law prohibits the Attorney General from entering into such contracts because, as we have seen, our constitution vests the power over state finances in the legislative branch as part of its plenary power, a power the Attorney General can obtain only by the constitution or other law.

Thus, we first look for express authority for the Attorney General to enter into

the Contract in the constitution. The authority of the Attorney General, part of the executive branch of government, is set out in Article IV, § 8 of the Louisiana Constitution as follows:

> There shall be a Department of Justice, headed by the attorney general, who shall be the chief legal officer of the state. The attorney general shall be elected for a term of four years at the state general election. The assistant attorneys shall be appointed by the attorney general to serve at his pleasure.
>
> As necessary for the assertion or protection of any right or interest of the state, the attorney general shall have authority (1) to institute, prosecute, or intervene in any civil action or proceeding; (2) upon the written request of a district attorney, to advise and assist in the prosecution of any criminal case; and (3) for cause, when authorized by the court which would have original jurisdiction and subject to judicial review, (a) to institute, prosecute, or intervene in any criminal action or proceeding, or (b) to supersede any attorney representing the state in any civil or criminal action.
>
> The attorney general shall exercise other powers and perform other duties authorized by this constitution or by law.

The Attorney General and Intervenors argue that the Attorney General's powers to institute civil proceedings and to appoint assistant attorneys includes the inherent authority to hire outside attorneys on a contingency fee basis to prosecute these claims. We disagree. Paying outside attorneys to prosecute legal claims on behalf of the state is a financial matter. As our prior jurisprudence indicates, the power over finances must be expressly granted by the constitution to another branch of government or else that power remains with the Legislature. We find nothing in Article IV, § 8, nor any other constitutional provision, which expressly grants the attorney general the power to hire and pay outside legal counsel on a contingency fee basis. The power to institute suit on behalf of the state, while extremely broad, does not expressly give him this power. Nor does the power to appoint assistant attorneys to serve at his pleasure. This provision applies to the Attorney General's staff, and even then, in order to hire and pay his staff, he must include these assistant attorneys in his budget request.

As the constitution does not expressly give the Attorney General the financial power to hire and pay outside attorneys on a contingency fee basis, we now look to statutory law to see if the Legislature has granted him this power under the Legislature's legislative power. When the Legislature has intended to allow the Attorney General to enter into contingency fee contracts in certain types of cases, it has done so by statute. *See* La. R.S. 23:1669(c) (contingency fees allowed in labor and worker's compensation cases); La. R.S. 41:724 (contingency fee lawyer allowed to deduct 10% before turning remainder over to state treasurer); La. R.S. 41:922 (contingency fees mandated in certain public land actions); La. R.S. 47:1512 (additional 10% attorney fee charge in tax recovery actions allowed where private attorney hired to assist in tax collection).

However, in environmental cases, the Legislature has stated just the opposite. La. R.S. 30:2205, establishing the Hazardous Waste Site Cleanup Fund, provides as follows:

> A(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 with 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," . . .the sums recovered through all judgments, settlements, assessments of civil or criminal penalties, fees and oversight costs received. . . .

As noted by the lower courts, this provision expressly mandates that all recoveries in cases involving environmental legislation must be paid into the state treasury. The language of the statute is clear and unambiguous: "[a]ll sums recovered through judgments" means <u>all</u> sums, not all sums remaining after the Attorney General has paid

his contingency fee lawyers. If the Legislature had intended to allow the Attorney General the right to deduct the fees of contingency fee lawyers from judgments or settlements in environmental cases before paying the remainder into the state treasury, surely it would not have clearly directed that "all sums recovered" be paid into the state treasury.[2]

Furthermore, while it is beyond dispute that the Attorney General can hire private attorneys to represent the State,[3] he does not have unbridled discretion in this regard as numerous statutes set out specific requirements that must be met for professional service contracts, including the requirement of La. R.S. 39:1498(A) that the Office of Contractual Review must determine that "[t]here has been appropriated or otherwise lawfully made available and ready for expenditure sufficient monies for payment of the services called for in the contract, at least for the applicable fiscal year."[4] *See also* La. R.S. 39:1497, 39:1498, 49:257, 49:258.

Next, the Attorney General and Intervenors point to La. R.S. 39:1509 as a grant of authority to enter into contingency fee contracts with outside attorneys. We cannot agree. La. R.S. 39:1509, concerning the types of contracts that may be used by state agencies in the procurement of professional, personal, consulting and social services,

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[2]Since the payment provisions of the Contract violate La. R.S. 30:2055(A) and the separation of powers doctrine, it is unnecessary to reach the question of whether the Contract also violates La. Const. art. VII, § 9(A), providing that "[a]ll money received by the state or by any state board, agency or commission shall be deposited immediately upon receipt in the state treasury, ..."

[3]In fact, the legislature has, within the statutes applicable to the Attorney General, created the "Department of Justice Claims Recovery Fund," consisting of "an amount equal to the amount of proceeds received by the state from court-awarded judgments and settlements," after these amounts have first been deposited into the state treasury Bond and Security Redemption Fund and "a sufficient amount is allocated from that fund to pay all obligations secured by the full faith and credit of the state ... ." La. R.S. 49:259(C). That statute further provides that the "monies in the fund shall be available for appropriation by the legislature to the Department of Justice solely for the purpose of paying the salaries of Department of Justice employees, the general operating expenses of the department, and defraying the costs of . . . contract legal counsel . . . ."

[4]In addition, clearly when the Attorney General hires outside attorneys on an hourly basis he must include this in a budget request under La. R.S. 39:1, *et seq.*

provides that "[s]ubject to the limitation of Section 1510 hereof, any type of contract which will promote the best interests of the state may be used." La. R.S. 39:1510 provides that "[t]he cost-plus-a-percentage-of-cost system of contracting shall not be used." However, the types of contracts referred to in 39:1509 still need to be approved by the Commissioner of Administration and placed in the budget. Furthermore, if this statute gave the Attorney General the express authority to enter into contingency fee contracts, it would be redundant for the Legislature to enact statutes giving the Attorney General power to enter into such contracts in certain types of cases. In addition, it is evident that the Legislature was not intending this to be a blanket approval of contingency fee contracts because the definition of "contract" in La. R.S. 39:1484(5) does not include contingency fee contracts, but provides as follows:

> "Contract" means every type of state agreement, including orders and documents purporting to represent grants, which are for the purchase or disposal of supplies, services, construction, or any other item. It includes awards and notices of award; contracts of a fixed price, cost, cost-plus-a-fixed-fee, or incentive type; contracts providing for the issuance of job or task orders, and letter contracts. It also includes contract modifications with respect to any of the foregoing.

Clearly, La. R.S. 39:1509 is not authority for the Attorney General to enter into contingency fee contracts in environmental cases without legislative authorization.

Finally, the Attorney General and Intervenors argue that La. R.S. 37:218 gives the Attorney General authority to enter into contingency fee contracts without legislative authorization. La. R.S. 37:218 is the general law allowing Louisiana attorneys to enter into contingency fee contracts with their clients with the clients' written approval. Even if we were to accept the argument that this article applies to the Attorney General and not just private attorneys, the Attorney General would still need the client's approval, in this case the State through the Legislature.

CONCLUSION

It is within the power of the Legislature to authorize contingency fee contracts and it has not done so in this case. Until the Legislature enacts a statute authorizing the Attorney General to enter into contingency fee contracts, the Contract is invalid and may not be implemented or enforced.

DECREE

For the foregoing reasons, the judgment of the court of appeal is affirmed.[5]

AFFIRMED.

[5]Plaintiffs also filed a motion to supplement the record. This motion is denied.