

■ CONTINGENCY FEES ■

Conflict of interest

By Paul N. Singarella SPECIAL TO THE NATIONAL LAW JOURNAL

CONTINGENT-FEE lawyers have been retained in various states, from New Jersey to California, to help prosecute government claims regarding alleged damage to groundwater, rivers and other natural resources. These arrangements introduce a profit motive that may undermine the neutrality that applies to government attorneys.

In September, the New Jersey attorney general ordered 66 companies to characterize, and begin restoration of, natural resources in the lower Passaic River, focusing on the ecological and economic services that the river allegedly once provided. The attorney general's sweeping order follows on the heels of its July 9 agreement to retain out-of-state lawyers on a contingent-fee basis to help New Jersey prosecute natural-resources damages cases. The contingent fees are based on net damages recovered—for cases that go to trial, \$5,875,000 of the first \$25,000,000 recovered, and 20% of every dollar above \$25,000,000. The outside lawyers are to use their "best efforts to maximize the ultimate recovery" for the state, and thus for themselves.

In California, water districts in the Sacramento area (Sept. 30) and in Orange County (May 6) hired contingent-fee lawyers who filed public nuisance claims to protect groundwater from the fuel additive MTBE, or methyl tertiary butyl ether.

The outside counsel for the California water districts and the state of New Jersey appear to have one thing in common—the larger the recovery, the more they get paid. The validity of contingent-fee arrangements when the government sues in its sovereign capacity

to protect natural resources is questionable.

The California Supreme Court in *Clancy v. Superior Court* (1985), a nuisance case involving an adult bookstore, ruled that the government could not use contingent-fee lawyers to prosecute a public nuisance claim, finding that such cases require a balancing of interests: private property rights on the one hand and the interest of the people in "ridding their city of an obnoxious or dangerous condition," on the other.

A California trial court in 2002 applied the *Clancy* holding to a case involving groundwater containing MTBE. The case had been brought by a county district attorney with the assistance of contingent-fee counsel. The trial court held that the balancing of interests required in public nuisance cases heightens the standard of neutrality required of the prosecuting attorneys, rejecting the argument that *Clancy* should be limited to matters involving First Amendment rights. The *Clancy* doctrine has not been squarely presented in reported decisions from jurisdictions other than California. However, public nuisance cases involving natural resources share an important characteristic. The U.S. Supreme Court has held that a state suing to abate a public nuisance sues as *parens patriae* to protect an "interest independent of and behind the titles of its citizens, in all the earth and air within its domain." The 9th U.S. Circuit Court of Appeals held that the state of Alaska acted as *parens patriae* when it brought the *Exxon Valdez* suit, a renowned natural-resources case. The basic doctrine underlying *Clancy*—a sovereign seeking to protect public rights—is present when a government sues in its representative capacity to protect natural resources.

The *parens patriae* principle may help the courts sort the cases where a contingent-fee arrangement may be acceptable and those where it is not. The U.S. District Court for the

Northern District of California in 1997 upheld the government's use of contingent-fee lawyers in tobacco litigation in large part on this basis. The court characterized the action as "basically a fraud action," where the government plaintiff's role was not as a "sovereign seeking to vindicate the rights of its residents or exercising governmental powers." The court likened the arguments to be made by the contingent-fee attorneys as akin to the arguments they might make when representing a smoker, in contrast to arguments involving "policy choices or value judgments."

Ethical considerations

The rules require that lawyers prosecuting cases on behalf of the government be held to high standards of impartiality and neutrality. In September, the 9th Circuit found that a government assessment of the condition of natural resources in Idaho conducted under Superfund was an "exaggerated overstatement," suggesting that the zeal to "maximize the ultimate recovery" may have obscured an objective and balanced assessment of natural resources. As the Idaho case indicates, concerns about the professional-conduct aspect of this problem are not academic. Where an attorney makes more money for a certain outcome, there is at least an appearance that these standards might be compromised. These considerations are heightened when the case involves natural resources, public drinking water supplies, and fish and wildlife, where the law requires the government to strike the right balance—protective but not overzealous. **NLJ**

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