



Lawyer: D.C. Climate Suit Could Accept Investment From Hedge Funds, Per Contract

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A D.C.-based attorney and associate with the Cato Institute says the contract being offered by the district asking for a legal team to take up a contingency-fee based suit against energy producers like Exxon has a clause allowing the law firm or team to sell their proceeds of a judgment in advance to investors or a hedge fund.

The upshot, according to lawyer Andrew Grossman, is the prospect of third-party financiers essentially making bets on whether a government can successfully sue deep-pocketed energy companies. This adds another ethical complication to a scheme some high-profile attorneys have already complained is dubious to begin with.

Since 2017, numerous governments—including the cities of Oakland and San Francisco, and the state of Rhode Island—have launched lawsuits against energy producers such as Exxon Mobil and BP seeking millions in damages due to climate change.

The D.C. attorney general's office currently is seeking bids from outside law firms or legal teams to do the same on a contingency-fee basis, meaning the firm would only be paid if the suit is successful in recovering damages.

A clause in the contract allows that the contractor "may assign to a bank, trust company, or other financing institution funds due or to become due as a result of the performance of this contract."

"The D.C. office of attorney general's proposed contract permits the private attorneys to sell off a portion of their contingency fee, and they could sell it to litigation investors, they can sell it to a hedge fund," Grossman said. "They could sell it to anyone who might put up money."

"The result would be that that third-party investor would effectively be buying a piece of the state's law enforcement authority."

The AG's office disagrees, saying the specifics for the legal arrangement were laid into a contract that is mainly boilerplate, and therefore contains clauses geared toward vendors of more standard services.

"State attorneys general routinely use outside counsel to provide the technical and legal resources needed for labor- and expertise-intensive investigations," a spokesman with the AG's office said in an email.

"The contract language you point to is a standard provision contained in contracts between the District government and outside vendors for all kinds of services. Its purpose is to allow vendors to obtain the necessary resources to perform the contract while awaiting payment from the District government. Importantly, the contract also ensures that all litigation decisions, including the terms of settlement, are made solely by the Attorney General and in the interest of District residents."

Grossman says he's not convinced that the clause ended up in the contract accidentally.

"We do know that that draft contract has a variety of other terms all throughout that are incredibly specific to this particular legal engagement and are not any type of boilerplate whatsoever," Grossman said in response to the AG's claims.

"So clearly the district did give some thought into how exactly to structure this agreement and wasn't just pulling boilerplate off the shelf."

"If that wasn't the intention of the attorney general's office, it would be very easy for them to simply remove that provision."

Nearly all of the climate suits currently underway across the country are contingency-fee based, something many high-profile Republican attorneys have criticized as unethical.

Gale Norton, former secretary of the interior under President George W. Bush and also a former attorney general of Colorado, is one such critic.

"I saw firsthand as an Attorney General involved in the national tobacco litigation and settlement in the 1990's that contingent fee arrangements can get out of hand," Norton told the *Free Beacon* in October.

"Public-agency litigation should be about seeking justice and representing the public interest. When contingent fee attorneys are controlling the litigation, they often put their individual interests ahead of the public interest. They seek large damages, so they can collect a large percentage for themselves."

The AG offices that have entered into the suits have consistently argued they retain full control over the litigation, mitigating any ethical concerns.