

CLARK, THOMAS & WINTERS AGREES TO PAY MILLIONS TO FORMER CLIENT

by MARY ALICE ROBBINS

A double whammy hit Austin-based Clark, Thomas & Winters this month. On June 17, a Blanco County grand jury indicted Bennie Fuelberg, former general manager of Pedernales Electric Cooperative (PEC), and Walter Demond, a former Clark, Thomas shareholder who represented the PEC for two decades. Then on June 18, the firm agreed to pay the PEC a \$4.1 million settlement, thereby avoiding a civil suit.

The two indictments obtained by the Texas Office of the Attorney General, which investigated and will

prosecute Fuelberg and Demond, charge both men with misapplication of fiduciary property, theft and money laundering stemming from allegations of payments of PEC money to two outside consultants.

Attorneys for Fuelberg and Demond say their clients have done nothing wrong.

Chris Gunter, Fuelberg's attorney and a partner in Austin's Gunter & Bennett, says the allegations against Fuelberg are not true. "He did not commit a crime as alleged," Gunter says.

Austin solo E.G. "Gerry" Morris, who represents Demond, says, "Anyone who knows Walter Demond

knows he's never taken a nickel he didn't earn and never given anybody any client's money that wasn't entitled to it."

Demond no longer works at Clark, Thomas, according to firm spokesman Chuck McDonald.

In a June 18 statement announcing the settlement, Martha Dickie, Clark, Thomas' attorney, wrote, "When Clark, Thomas & Winters management became aware in December of 2008 of the details of the payments to outside consultants and PEC's reimbursement of some of those payments, it promptly notified both PEC management

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and the Office of the Attorney General. The firm has fully cooperated with subsequent investigations by both."

By agreeing to pay \$4.1 million, Clark, Thomas avoided litigation. "If they had not reached a settlement with us, we would have definitely filed suit and pursued our legal remedies," says Jimmy Williamson, a principal in Houston's Williamson & Rusnak who represents the PEC.

Clark, Thomas shareholder Ken Ferguson says the firm's professional liability insurance carrier will participate in paying the settlement.

Ken Ferguson, a Clark, Thomas shareholder in Austin and a member of the firm's management team, says the PEC has released all of its claims against his firm. "We decided it wasn't in the best interests of anyone to litigate this, so we reached a reasonable solution," says Ferguson, who participated in the settlement negotiations.

Clark, Thomas, which Ferguson says has more than 110 attorneys in its Austin, San Antonio and Houston offices, is the largest firm in the capital city, as well as one of its oldest firms. "We've been around for 70-something years," Ferguson says.

The PEC, headquartered in Johnson City, is the largest electric cooperative in the United States, providing electricity to approximately 229,000 meters throughout 8,100 square miles in Central Texas, according to its

Web site.

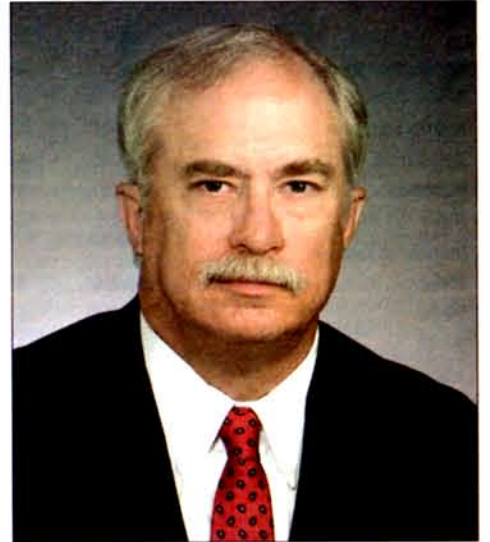
A December 2008 report that Navigant Consulting Inc. of Austin submitted to the PEC's board of directors under the terms of a settlement in a separate class action against the PEC brought to light payments that Clark, Thomas had made to two outside consultants using money obtained by billing the PEC. Two paragraphs in Navigant's 390-page report noted that invoices for \$510,000 in payments that the PEC had made to Clark, Thomas between 1998 and 2004 provided "limited descriptions for the purpose of the payments." According to the report, the payments went to Curtis Fuelberg, brother of the PEC's former general manager, and William Price, a Lampasas attorney who is the son of former PEC director E.B. Price.

No charges have been brought against Curtis Fuelberg or Price. But the payments to them are at issue in the indictments against Bennie Fuelberg and Demond.

Each indictment alleges that between Nov. 14, 1996, and March 13, 2007, Bennie Fuelberg and Demond unlawfully appropriated and misapplied more than \$200,000 of the PEC's money by making payments to Curtis Fuelberg and Price. With regard to the money laundering charge, each indictment alleges that between Sept. 1, 2005, and March 13, 2007, Bennie Fuelberg and Demond did "acquire, maintain an interest in, conceal, possess, and transfer the proceeds of criminal activity," and "conduct, supervise, and facilitate a transaction involving the proceeds of criminal activity," that being the theft of and misapplication of between \$100,000 and \$200,000 of the PEC's money.

Curtis Fuelberg, an Austin lobbyist, says the payments he received from Clark, Thomas were for services that benefited the PEC. "Over the years, I did a ton of work for that law firm," he says.

Curtis Fuelberg did not list Clark, Thomas or the PEC among his clients in the lobbyist reports he filed



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with the Texas Ethics Commission, according to a review of years 2004 to the present. While Clark, Thomas and the PEC did not hire him to lobby for them, Curtis Fuelberg says Clark, Thomas did hire him to keep the firm informed about things that might affect the PEC. "Everything I did for them was legitimate," he says.

Lampasas solo Evan Stubbs, who represents Price, says his client "hasn't done anything wrong, as far as we're concerned." Stubbs says Navigant's investigator did not contact Price about the payments.

Class Action

Navigant's investigation of the PEC was a provision in the settlement of a class action suit that three members of the member-owned cooperative filed in July 2007 in a Travis County district court. In that suit, the trio alleged, among other things, that the electric cooperative's board and management breached their fiduciary duties and contractual duties, according to the final judgment in the suit. Judge John Dietz of Austin's 250th District Court signed the final judgment in *John Worrall, et al. v. Pedernales Electric Cooperative* on May 5, 2008.

"The fact of the matter is that none of this would have happened if we hadn't filed suit," Austin attorney William

"Bill" Ikard says of the indictments against Demond and Bennie Fuelberg and the Clark, Thomas settlement with the PEC. Ikard, a partner in Ikard Wynne, was one of the attorneys who represented the plaintiffs in *Worrall*.

Sam Oatman, the district attorney for Blanco County and three other counties, says he began looking into the matter in January 2008 — after news reports on the PEC members' class action — and he asked Texas Attorney General Greg Abbott for assistance the following month. "Right away, his office said they would assist me," Oatman says.

However, Oatman says, he subsequently decided it would be better to turn the investigation over to the Office of the Attorney General and he recused himself from the criminal investigation on Aug. 25, 2008.

Oatman says he has a small staff that currently includes only four assistant district attorneys. "When it gets down to white-collar crime, we don't have any expertise in this office," he says.

On the same day Oatman recused himself, the 424th District Court appointed Eric Nichols, deputy attorney general for criminal justice, or any assistant attorney general designated by the OAG, as the district attorney pro tem with respect to the investigation of the PEC and any resulting prosecution. Tom Kelley, an OAG spokesman, declines *Texas Lawyer's* request to interview Nichols and also declines comment on the PEC investigation.

As noted in the indictments against Bennie Fuelberg and Demond, the 424th District Court impaneled the grand jury that returned those indictments in February.

Dickie says Clark, Thomas and the PEC began a mediation in April that resulted in the \$4.1 million settlement. Dickie, a partner in Austin's Akin & Almanza, says Clark, Thomas' "whole interest here was to do right by a client, and I'm convinced they did that and more."

Houston solo Lillian Hardwick, a co-author of the "Handbook of Texas Lawyer and Judicial Ethics," often serves as an expert witness for lawyer-defendants or clients who sue them. She says that Clark, Thomas did the right thing in settling with the PEC after a mediation.

"What you normally see is the firm denying everything and the lawsuits going on forever," Hardwick says.

Dickie points out that in settlements like the one Clark, Thomas reached with the PEC, the amount to be paid usually is not made public. The reason the PEC wanted disclosure, she says,

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was so people would not think the PEC is trying to keep the amount a secret.

Williamson says he will receive one-third of the \$4.1 million settlement under the contingent-fee agreement he has with the electric cooperative.

He defends the PEC board's decision to settle with Clark, Thomas so quickly.

"If the board had passed up the opportunity to settle and two years from now there was less money available, imagine the criticism they would receive," Williamson says.

Ferguson says that Clark, Thomas' professional liability insurance carrier will participate in paying the settlement, but he declines to say how much of the \$4.1 million tab the insurer will pick up. Ferguson also says it is his understanding that the settlement will have a minimal, if any, impact on the firm's future insurance premium.

James Pennington, a Dallas solo who usually represents clients suing their former lawyers but who is not involved in the Clark, Thomas-PEC settlement, says, "Any time an insurance company pays a settlement, that's definitely going to have an impact on their [the firm's] premium."

Pennington says settlements for the amount of money that Clark, Thomas has agreed to pay the PEC are "very rare." But he also says, "Any time you can get a settlement, the earlier, the better, for the law firm." ■



Martha Dickie, who represents Clark, Thomas, says the firm's "whole interest here was to do right by a client, and I'm convinced they did that and more."

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