

January 19, 2000

## COURT OVERTURNS DAMAGES AWARD BECAUSE OF JUNK SCIENCE

(*Wilhite v. Rockwell Int'l Corp.*)

In a long-awaited ruling, the Washington Legal Foundation (WLF) scored a victory last week when the Kentucky Court of Appeals overturned a multi-million dollar compensatory and punitive damages award against Rockwell International Company because the witness primarily relied upon by the landowners did not properly qualify as an "expert" in evaluating the economic damage allegedly caused by Rockwell's release of chemical PCBs.

In *Wilhite v. Rockwell International Corporation*, the plaintiffs brought a lawsuit against Rockwell Corporation claiming that small amounts of PCBs from Rockwell's facility had damaged their farms and property, even though the levels were well below EPA's limits, and even though the owners of the land continued to use the land for agricultural and other purposes. The jury awarded the plaintiffs approximately \$7.5 million in compensatory damages, and \$210 million in punitive damages. WLF had filed a brief in 1997 with the Kentucky Court of Appeals urging the court to overturn a multi-million dollar award assessed against Rockwell because of statements made by the plaintiffs' attorneys to the jury that were prejudicial against the company.

WLF argued in its brief that the \$210 million awarded as punitive damages in this case represents one of the grossest distortions of our civil justice system, a distortion directly attributable to the inflammatory rhetoric of plaintiffs' counsel during the trial. In particular, plaintiffs' counsel repeatedly hurled derogatory comments at Rockwell because its headquarters is located in California rather than in Kentucky, and that, as a corporation, it "has no soul" and therefore is unaccountable.

WLF's brief demonstrated that courts throughout the country have long condemned the appeals to jury bias against out-of-state corporations similar to those made throughout closing argument in this case. WLF also argued that the repeated arguments against the corporation because it has "no soul" prejudiced the jury against the company. WLF's brief pointed out how corporations enjoy many of the same protections in the Constitution as do individuals, and that excessive awards ultimately hurt the company's shareholders who are

individuals, many of whom are retired.

In its decision, the court did not have to address these arguments because the court reversed the judgment on other grounds. In particular, the appellate court ruled that the so-called "expert" relied upon by the plaintiffs to determine the value of the property allegedly damaged, did not qualify as an expert under the Rules of Evidence as articulated by the Supreme Court in several "junk science" cases. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *Kumho Tire Co., LTD v. Carmichael*, the Supreme Court ruled that any and all scientific or otherwise specialized testimony or evidence must not only be relevant but scientifically or professionally reliable. WLF participated in both of those "junk science" cases before the Supreme Court.

Applying the *Daubert* and *Kumho Tire* principles to this case, the appellate court noted that the plaintiffs' land evaluation expert had "virtually no experience appraising contaminated properties and none valuing contaminated farms in Kentucky or elsewhere." The court further found that the "expert" admitted that he had a "complete lack of knowledge of the effect of PCB deposits on real property and had no idea whether at some level PCBs are not hazardous to people, animals or crops." In conclusion, the court stated:

In this case, the trial court permitted [the "expert"] to opine that any quantity of PCB contamination, no matter how slight, renders property worthless; and this is true, according to [the "expert"], in the absence of proof of any harm to the property, to the people who occupy it, to their crops or to their farm animals. The admission of this testimony was an abuse of discretion [by the trial court].

WLF had filed the brief on behalf of itself and the Allied Educational Foundation of New Jersey. Kent Masterson Brown of Danville, Kentucky served as WLF's local counsel in the case. The case will likely be appealed to the Kentucky Supreme Court.

For further information, contact Paul D. Kamenar, WLF's Executive Legal Director, at 202-588-0302.