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COURT URGED TO END BIAS IN FAVOR OF ENVIRONMENTAL GROUPS IN FEE AWARDS

(Citizens for a Better Environment v. Steel Co.)

The U.S. Court of Appeals for the Seventh Circuit in Chicago this week heard oral arguments in connection with the Washington Legal Foundation's (WLF) efforts to stop the practice of routinely granting large attorney fee awards to environmental groups that prevail in lawsuits they file against private companies, while routinely denying fees to companies when the environmental groups lose. WLF is representing a small Chicago company that successfully defended a lawsuit filed against it by a large environmental group. Now the company is attempting to recover some of the hundreds of thousands of dollars in legal fees it paid to defend the suit.

The case was heard by a three-judge panel consisting of Judges William Bauer, Frank Easterbrook, and Kenneth Ripple. The panel is likely to issue a ruling by summer. It gave little indication regarding how it was likely to rule on WLF's argument that defendants should be placed on an equal footing with plaintiffs in fee award cases, but questions from the judges suggested that they are likely to reject the procedural defenses raised by the environmental group in an effort to have the fee petition dismissed.

After a federal district court in Chicago last summer denied the fee request brought by the defendant (a company that recycles steel), WLF agreed to represent the company on its appeal of that denial, *Citizens for a Better Environment v. Steel Company*. WLF filed the defendant's written briefs last fall.

The attorney fee issue is of vital importance to companies and individuals faced with environmental litigation. Congress has adopted legislation providing that the "prevailing party" in environmental litigation generally is entitled to recover its attorney fees from the losing party. Large environmental groups like Citizens for a Better Environment (CBE) -- the group that sued in this case -- routinely win fee awards whenever they prevail in a lawsuit. But some courts have held that the fee statute is not a two-way street; they deny fees to prevailing defendants except in those rare cases in which the defendant can demonstrate that the suit was utterly frivolous.

WLF argued in its brief that the plain language of the fee statute at issue places defendants on an equal footing with plaintiffs; the same presumption in favor of a fee award should apply regardless whether the prevailing party is the plaintiff or the

defendant. WLF has pledged to pursue the issue all the way to the U.S. Supreme Court, if necessary.

WLF's client is The Steel Company, a small, marginally profitable company located in Chicago. It was sued in 1995 by CBE (a well-funded environmental group) under the Emergency Planning and Community Right-to-Know Act ("EPCRA"), a federal law that requires companies to report certain hazardous materials in their possession. It is uncontested that The Steel Company is in compliance with EPCRA and also was fully compliant at the time suit was filed. CBE alleged, however, that at some points in the past, The Steel Company failed to file timely reports.

After three years of contentious litigation, the U.S. Supreme Court finally ruled in 1998 that CBE never should have filed suit in the first place because it lacked "standing" to sue. But by that time, The Steel Company had already incurred more than \$200,000 in attorney fees trying to defend itself.

The Steel Company then asked the district court in Chicago to order CBE to reimburse its fees. After the district court denied its motion, The Steel Company approached WLF about taking over legal work in the case. The company had exhausted its resources and had no funds to hire lawyers to pursue further appeals. WLF agreed to take on the case *pro bono* (at no cost) because of the important issues at stake.

"Unless courts become willing to award fees to prevailing defendants in environmental litigation, we will continue to see a proliferation of extortionate lawsuits being filed against the business community," WLF Chief Counsel Richard Samp said after the oral argument. "As things now stand, defendants are forced into paying money to settle meritless suits because they know that the cost of defending the suits will exceed the costs of a quick settlement; environmental groups thus have every incentive to file meritless suits in hopes of obtaining quick settlements," Samp said.

The Washington Legal Foundation is a public interest law and policy center with supporters in all 50 states. It devotes a considerable portion of its resources to defending the rights of business persons who have become the targets of unwarranted government regulation and excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302.