



**March 23, 2009**

## **APPEALS COURT ORDERS NEW TRIAL IN ABUSIVE CRIMINAL PROSECUTION** *(United States v. San Diego Gas & Electric Co.)*

The U.S. Court of Appeals for the Ninth Circuit in San Francisco this week upheld a district court ruling that granted a new criminal trial to San Diego Gas & Electric Company, an employee, and a contractor, each of whom was convicted of technical violations of the Clean Air Act (CAA) for removing a multi-layered wrap around pipes that contained a small amount of asbestos.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *United States v. San Diego Gas & Electric Co.*, urging that a new trial be granted. WLF argued that the government abused its prosecutorial discretion by arbitrarily resorting to a felony criminal prosecution for this alleged technical infraction, when there were more suitable alternative administrative and civil remedies available. WLF filed its brief on behalf of itself and the National Association of Criminal Defense Attorneys.

The CAA regulations at issue apply to the removal of pipe wrapping when the material at issue contains more than 1% asbestos and the material is "friable" (that is, capable of being crumbled to powder by hand pressure). The district court ordered a new trial because it had serious doubts about the accuracy of government tests that purported to demonstrate that the 1% threshold had been met. The appeals court affirmed, agreeing with WLF that the district court did not abuse its discretion in determining that evidence of asbestos content was highly prejudicial and resulted in "a miscarriage of justice." WLF argued that the government had not tested representative samples and had failed to conduct the testing properly.

WLF also argued that the government had erred in treating this case as a criminal matter in the first case, given the highly technical nature of the defendants' alleged regulatory violation. WLF noted that there was no evidence that even a single asbestos fiber was released into the air or soil as a result of the defendants' activities. Indeed, test results affirmatively showed there was no such release, WLF argued.

WLF cited both EPA and Department of Justice guidelines that instruct employees to use non-criminal remedies in minor cases, particular where, as here, there existed a good-faith dispute as to whether the pipe wrap even met the 1% jurisdictional standard.

"This is an outrageous example of overcriminalization of legitimate business activity," said WLF Chief Counsel Richard Samp in response to the Ninth Circuit's decision. "One can only wonder why the Department of Justice would want to send hard-working employees to prison and punish the shareholders and customers of the company where no environmental harm occurred. Although the government is free under the appeals court decision to seek a new criminal trial, we call on the Justice Department to take a fresh look at whether continued pursuit of criminal charges is warranted," Samp said.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to combatting the overcriminalization of regulatory offenses allegedly committed by members of the business community, and to reining in excessive litigation. WLF's brief was drafted with the *pro bono* assistance of Michael L. Kichline and Adam T. Moore of Dechert LLP in Philadelphia.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, [www.wlf.org](http://www.wlf.org).