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

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

The Washington Legal Foundation (WLF) yesterday urged the U.S. Supreme Court to stop the practice of routinely granting large attorney fee awards to environmental groups that prevail in lawsuits they file against private companies, but routinely denying fees to the 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 and now is attempting to recover some of the hundreds of thousands of dollars in legal fees it paid to defend the suit.

The federal appeals court in Chicago ruled last fall that WLF's client is not entitled to recover its costs. WLF is asking the Supreme Court to review that decision. WLF agreed in 1999 to represent the company -- a small, minority-owned Chicago firm known as The Steel Company -- because the firm lacked the resources to pursue the fee issue on its own.

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 should generally be 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 fee statute at issue (42 U.S.C. § 11046(f)) by its plain language 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 argued that the appeals court's contrary decision conflicts with a 1993 Supreme Court decision; WLF asked the Court to hear The Steel Company's case in order to resolve that conflict.

The Steel Company 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. However, CBE alleged 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 federal district court in Chicago to order CBE to reimburse its fees. It was after the district court denied The Steel Company's motion that WLF agreed to take on the case *pro bono* (at no cost) because of the important issues at stake. In the appeals court, WLF won several important procedural victories for The Steel Company before the court ultimately decided that prevailing defendants in environmental cases should almost never be awarded fees.

"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 filing The Steel Company's brief. "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.

WLF's brief argues that neither plaintiffs nor defendants should automatically be entitled to fees if they prevail in an environmental lawsuit. Rather, WLF argues, fees should be awarded to the prevailing party unless the loser can demonstrate that its litigating position was "substantially justified."

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.