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COURT DECLINES 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 issued a decision yesterday that declined 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.

The decision was a setback for the Washington Legal Foundation (WLF), which 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. Yesterday's decision upheld a lower court ruling that refused to award fees to WLF's client. WLF has vowed to press on and to seek Supreme Court review of the case.

Although the Seventh Circuit declined to award fees in this case, there is a silver lining. The appeals court decided two of the three major issues in the case in WLF's favor; as a result, it will be considerably easier for companies in the future to recoup their litigation costs when they successfully fend off suits from environmental groups.

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. The Seventh Circuit disagreed; it held that fee awards in environmental cases should be treated the same way that they are in civil rights cases. It has long been the rule in civil rights cases that prevailing plaintiffs are treated far more favorably than prevailing defendants when it comes to fee awards.

WLF's client is The Steel Company, a small, marginally profitable steel

manufacturer 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. 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 company then asked the trial court in Chicago to order CBE to reimburse its fees. It was after the trial court denied the company's motion that WLF agreed to take on the case *pro bono* (at no cost) because of the important issues at stake.

Although the appeals court affirmed the denial of a fee award, it rejected the two arguments upon which the trial court had based its decision. The trial court held that because the Supreme Court had ruled for The Steel Company on a procedural issue instead of on the merits of the plaintiff's claims, The Steel Company was ineligible for a fee award because: (1) the court lacked jurisdiction to make an award; and (2) The Steel Company was not a "prevailing party." In rejecting both arguments, the Seventh Circuit declined to follow the unanimous contrary holdings of four other federal appeals courts. By doing so, the Seventh Circuit made it considerably easier for defendants in environmental cases to recoup their fees in the future.

"Unless courts become willing to award fees to prevailing defendants in environmental litigation, we will continue to see a proliferation of extortionate lawsuits filed against the business community," WLF Chief Counsel Richard Samp said today. "As things 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," Samp said.

WLF's brief argued that neither plaintiffs nor defendants should automatically be entitled to fees if they prevail in an environmental lawsuit. Rather, WLF argued, 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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