

April 17, 2001

COURT OF APPEALS VACATES \$100 MILLION SUPERFUND RULING

(United States v. Hercules, Inc.)

The Washington Legal Foundation (WLF) scored a major victory last week for itself and WLF's clients, a group of prominent scientists and organizations, when the United States Court of Appeals for the Eighth Circuit vacated a \$100 million Superfund liability ruling by the U.S. District Court for the Eastern District of Arkansas, and remanded the case to the district court to determine whether the Hercules company is liable, and if so, to what extent, for the costly cleanup of an industrial site containing dioxins.

In *United States v. Hercules, Inc.*, EPA sought reimbursement of approximately \$100 million in cleanup costs from Hercules, Inc. and Uniroyal Chemical Co. under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), for dioxin that was generated years ago by a third company, Vertac Chemical. CERCLA, otherwise known as "Superfund," imposes joint and several liability on the parties who contributed to the harm, unless the party can show that its harm is divisible from the hazardous wastes of others. In that case, the party will have to pay only its share of the cleanup costs. The district court ruled that Hercules did not present any facts showing that the harm it contributed to the site was "clearly divisible" or that its waste "did not, or could not, contribute to the release and the resulting response costs at the site."

In its ruling, the court of appeals held that the district court applied the wrong standard when it ruled that Hercules could not escape joint and several liability under CERCLA by showing divisibility of harm. The court held that a defendant can show either a "distinct harm" it caused, or a "reasonable basis" for apportioning causation for a single harm caused by several parties. Such bases for divisibility of a single harm include "volumetric, chronological, or other types of evidence." The court of appeals remanded the case to the district court for further proceedings to consider these other factors.

In its brief on appeal, WLF argued that EPA's dioxin policy, which was the basis of liability for Hercules, was a product of "junk science." EPA ignored studies by its own Science Advisory Board and other experts clearly showing that certain levels of dioxin were not harmful. For example, studies show that dioxin, like its chemical cousin tamoxifen, actually reduces breast and liver cancers. WLF's brief

also cited to several other treatises and books to demonstrate the folly of EPA's excessive regulation. One such book, "Breaking the Vicious Circle: Towards Effective Risk Regulation" by then-Judge Stephen Breyer, discusses examples of costly regulation by the EPA. In one case, the EPA required the expenditure of \$9.3 million to clean a site that *already* was clean enough for children to eat small amounts of the dirt daily for 70 years without any significant harm. As Judge Breyer pointed out, the site was a swamp where no children lived or played in any event, or were likely to live or play. By ignoring sound science and common sense, WLF argued that EPA's dioxin policy was similarly arbitrary, capricious, contrary to law, and against public policy.

WLF's clients include: **John Doull, Ph.D., M.D.**, a Professor Emeritus of Toxicology at the University of Kansas Medical Center who has extensive expertise on dioxin issues and who served as a consultant to the Health Panel of EPA's Science Advisory Board, Dioxin Reassessment Review; **Karl K. Rozman, Ph.D.**, a Professor of Pharmacology and Toxicology at the University of Kansas Medical Center who is considered a leading expert on dioxin; **William J. Waddell, M.D.**, a Professor and Chair, Emeritus, Department of Pharmacology and Toxicology, School of Medicine, University of Louisville; **K. Roger Hornbrook, Ph.D.**, a Professor and Chair of the Department of Pharmaceutical Sciences, College of Pharmacy, at the University of Oklahoma Science Center, who served as a member of the Halogenated Organics Subcommittee of EPA's Science Advisory Board; **Daniel M. Byrd III, Ph.D., D.A.B.T.** (Diplomate, American Board of Toxicology), who is President of Consultants in Toxicology, Risk Assessment and Product Safety, a scientific support firm that helps clients acquire and interpret biomedical data for purposes of product safety and a Senior Science Fellow with Federal Focus, Inc.; **Robert Golden, Ph.D.** (Environmental Toxicology) who is President of ToxLogic which assesses the health related aspects of environmental chemical exposures; and **B. Frank Vincent, Ph.D.**, who is President of the **International Society of Regulatory Toxicology and Pharmacology (ISRTP)**, a professional membership organization whose mission is to ensure that the regulatory policy and process in public health and the environment are driven by objective scientific principles.

In addition to ISRTP, WLF's organizational clients include the **American Council on Science and Health (ACSH)**, a national nonprofit consumer education association, directed and advised by over 200 scientists, health professional, and policy advisors, and the **Allied Education Foundation**, a nonprofit charitable and educational foundation based in Englewood, New Jersey.

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