

January 21, 2003

## **COURT OF APPEALS UPHOLDS EXCESSIVE SUPERFUND JUDGMENT** *(United States v. Alcan Aluminum Corporation)*

The United States Court of Appeals for the Second Circuit upheld a district court decision that imposed liability against Alcan Aluminum Corporation (Alcan) for approximately \$13 million in cleanup costs of two EPA Superfund sites in upstate New York. In doing so, the court of appeals ruled that the factual findings of the district court regarding the presence of nickel and other substances in the waste were subject to deference, despite the fact that the government's own tests did not show the presence of nickel. The court also rejected the Washington Legal Foundation's (WLF) arguments that even if there were hazardous substances in the waste, the court should have made a divisibility assessment, namely, to apportion liability based only on the small percentage of hazardous substance allegedly found in Alcan's otherwise benign emulsion.

WLF had filed a brief with the Second Circuit in 2001, urging that court to reverse the district's adverse finding. Alcan's allegedly "hazardous substance" was essentially nothing more than water. WLF argued that if the decision were not reversed, then practically everything in the universe could be considered a "hazardous substance" under the Superfund law, including breakfast cereal, vitamins, and garden soil. Businesses, restaurants, municipalities, and even ordinary citizens could face crippling liability for properly disposing of harmless waste materials.

WLF's brief was filed on behalf of itself and a leading group of federal, state, and local officials, trade associations, and policy organizations. WLF's clients included U.S. Senator Larry E. Craig, Chairman of the Subcommittee on Forests and Public Land Management of the Senate Energy and Natural Resources Committee; U.S. Representative Michael G. Oxley, Chairman of the House Financial Services Committee; and U.S. Representatives John E. Peterson and John M. McHugh. WLF also represents New York State Senator James W. Wright, New York State Assemblywoman Frances T. Sullivan, and Mayor John J. Gosek, Mayor of the City of Oswego, New York.

WLF also represented business, civic, and policy organizations, including the Chamber of Commerce of the United States, the National Association of Manufacturers, the National Restaurant Association, the National Food Processors Association, the Manufacturers Association of Central New York, the New York State Conference of Mayors and Municipal Officials, the Business Council of New York State, Inc., Operation Oswego County, Inc., and the Allied Educational Foundation.

Alcan operates a facility in Oswego, New York that makes sheets of aluminum from

ingots made partly from recycled aluminum cans. A watery lubricant used in the manufacturing process is not considered a "hazardous substance" under the Comprehensive Environmental Response, Liability, Compensation Act of 1980 (CERCLA). After the emulsion is used, however, there are minute levels of harmless compounds that are below natural background levels, and are even less than that found in many FDA-approved food products.

In 1987, EPA sued 83 businesses for reimbursement of the cleanup costs at the sites. Everyone but Alcan settled because Alcan maintained that its water emulsion was benign. In the first appeal of this case in 1993, the Second Circuit agreed with Alcan and reversed the trial court. When the case was retried six years later, the government's new strategy was to find trace levels of other compounds in the emulsion, but over a dozen EPA tests for the compounds were negative. Using junk science, the court nevertheless speculated that other compounds were probably in the emulsion, and held Alcan fully liable again, simply because the watery substance mixed with everyone else's hazardous waste.

WLF argued in its brief that the district court failed to properly apportion liability for Alcan's fair share of the wastes, based on such factors as the relative degree of toxicity of the trace levels of compounds alleged to be in the emulsion. WLF argued that it was not fair to impose full liability on responsible companies like Alcan which treat and properly dispose of its waste according to EPA regulations. Congress never intended for the Superfund law to be used to punish responsible companies like Alcan for disposing benign substances, and that to do so would be unconstitutional and against the public interest. But even assuming the worst-case scenario, WLF also argued that Alcan's share of the costs, using the relative toxicity standard, should only be .01%, or approximately \$32.00, rather than the excessive \$13 million that was assessed by the trial court. A petition to review this case by the Supreme Court of the United States is expected to be filed later this Spring.

WLF is a national non-profit public interest law and policy center based in Washington, D.C., that regularly advocates principles of free enterprise and limited government in the courts and agencies.

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