

December 16, 2003

SUPREME COURT URGED TO REVIEW MAJOR EPA SUPERFUND CASE (*Alcan Aluminum Corporation v. United States*)

The Washington Legal Foundation (WLF) filed a brief with the United States Supreme Court urging the Court to review and reverse a decision from the U.S. Court of Appeals for the Second Circuit that imposed joint and several liability against Alcan Aluminum Corporation (Alcan) for approximately \$13 million in cleanup costs of two EPA Superfund sites in upstate New York. The evidence indicated that Alcan's waste water emulsion only contained, at best, harmless traces or background levels of so-called hazardous substances. Nevertheless, the court of appeals effectively ruled that the presence of even one molecule of a manmade substance such as the ubiquitous polychlorinated biphenyls (PCBs), triggers liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).

If left intact, this decision will have enormous and costly consequences on large and small companies, and state and local governments, because almost everything can now be considered a hazardous substance, including rain, milk, and garden soil. Accordingly, such entities could be held jointly and severally liable for cleanup costs of Superfund sites just because their benign wastes were mixed with the truly hazardous wastes of other entities that may no longer be in existence. WLF argued in its brief that such an unfair result would be contrary to intent of Congress and against sound public policy.

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 congressional clients include **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 former chair of the House Subcommittee on Finance and Hazardous Materials which has oversight over the Superfund program; and **U.S. Representative John McHugh**, who represents the 24th District of New York where the Superfund sites are located. WLF also represents **New York State Senator Jim Wright**, **New York State Assemblyman William A. Barclay**, and **Oswego City Attorney Edward J. Izyk**, all of whom represent the area where the sites are located, as well as the **New York Conference of Mayors and Other**

Municipal Officials. WLF's business clients include the **U.S. Chamber of Commerce**, the **National Restaurant Association**, and **Operation Oswego County, Inc**, a local business development organization for Oswego County, New York. WLF also represents the **Allied Educational Foundation**, a nonprofit public policy organization based in New Jersey. WLF represented most of these clients when it filed a brief in the case in the Second Circuit in 2001.

The case began over 15 years ago when EPA sued 83 businesses and entities for reimbursement of the cleanup costs at the sites. Everyone but Alcan settled because Alcan maintained that its water emulsion, consisting of 95 percent water and 5 percent mineral oil, was benign and at best, contained only trace or background levels of metals. In the first appeal of this case in 1993, the Second Circuit agreed with Alcan and ordered the trial court to examine Alcan's emulsion more closely. However, when the case was retried almost six years later, the EPA's new strategy was to find trace levels of other compounds in the emulsion. Using junk science, the court speculated that other compounds were probably in the emulsion, including traces of PCBs.

On appeal for the second time, the Second Circuit held in early 2003 that since PCBs are manmade substances rather than natural ones, there can never be a "natural background level" of such substances. Hence, Alcan was held strictly liable for the entire remaining cleanup costs of the Superfund site.

WLF argued in its Supreme Court brief that PCBs do indeed have background levels and are present in the air, soil, and water. Indeed, tons of PCBs are found as far away as the Arctic. Even the Food and Drug Administration (FDA) issued rules, a copy of which WLF attached to its brief, proclaiming PCBs to be "ubiquitous" and setting tolerance levels of PCBs for milk, eggs, and even infant and junior foods. In short, WLF argued, the government allows our food to contain PCBs, but if that same food is discarded as waste, it becomes a hazardous substance, subjecting the person to costly joint and several liability under CERCLA. Industry groups such as the National Restaurant Association and the U.S. Chamber of Commerce readily recognized the major significance of this ruling if it were left intact.

As an alternative argument, WLF argued that the court of appeals erred by ruling that Alcan's waste was not divisible, that is, that it could not be apportioned according to the relative toxicity of the "hazardous substances." WLF argued that Alcan's share of the costs should be less than .01% of the entire cleanup costs because virtually all of its emulsion was harmless water. The Supreme Court will decide by late January 2004 whether it will hear the case or not.

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