

FOR IMMEDIATE RELEASE

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COURT URGED TO REHEAR CASE EXCLUDING ACCOUNTING TESTIMONY

(Rumsfeld v. United Technologies Corp.)

The Washington Legal Foundation (WLF) today urged the U.S. Court of Appeals for the Federal Circuit to reconsider its January 5, 2003 ruling on the admissibility of expert accounting testimony.

In its decision, a panel of the Federal Circuit held that the trier of fact -- in this case, the Armed Services Board of Contract Appeals -- cannot allow testimony as to what should be counted as a "cost" under the federal Cost Accounting Standards (CAS). The CAS are a set of rules adopted by the Cost Accounting Standards Board that govern the accounting practices of government contractors. The appeals court thus required the exclusion of testimony from an array of experts on both sides of the case, including professors of economics and accounting.

In its brief filed in *Rumsfeld v. United Technologies Corp.*, WLF argued that the Federal Rules of Evidence and precedents of the U.S. Supreme Court make clear that the trier of fact has broad discretion in choosing whether to admit or exclude expert testimony where that testimony is reliable and relevant. Testimony on technical accounting standards is precisely the type of testimony permitted under Federal Rule of Evidence 702: "specialized knowledge" that will "assist the trier of fact to understand the evidence or determine a fact in issue." Supreme Court cases hold that the trial judge's discretion to admit expert testimony may be set aside only upon finding an abuse of discretion. WLF is concerned that if the panel's ruling is allowed to stand, the result will be greater uncertainty in the application of cost accounting rules for government contracting -- an issue of particular significance in this period of escalating need for defense technology.

The hazards of proceeding without expert guidance were illustrated by the panel decision itself. In place of the testimony allowed by the Board of Contract Appeals, the panel first turned to a Webster's dictionary. After conceding that the dictionary does not define the term "with any precision," the panel turned to the Uniform Commercial Code -- though the UCC is nowhere incorporated into the federal accounting standards that the panel was interpreting. Roughly \$250 million is at issue in the case, according to a government estimate.

WLF's brief was drafted and filed on a *pro bono* basis by Clarence T. Kipps, Jr., a partner in the Washington, D.C. law firm of Miller & Chevalier.

WLF is a public interest law and policy center with supporters in all 50 states. It has filed briefs in numerous cases regarding the admission of expert testimony, including *Kumho Tire Co., Ltd. v. Carmichael*, 526 U. S. 137 (1999), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

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For further information, contact WLF Senior Vice President for Legal Affairs David Price, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.