News Release

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FOR IMMEDIATE RELEASE **December 21, 2011**

COURT URGED TO EXCLUDE UNRELIABLE EXPERT TESTIMONY

(Sargon Enterprises, Inc. v. University of Southern California)

The Washington Legal Foundation (WLF) this week urged the California Supreme Court to overturn an appeals court decision that opens the flood gates to unreliable expert testimony and trusts juries to judge for themselves whether to believe an expert's opinions. WLF argued that trial courts should be required to carefully examine all proffered expert testimony and to exclude from evidence all such testimony that does not employ a methodology that is generally accepted among experts in the field.

The case involves a breach-of-contract claim filed by a dentist against the University of Southern California (USC). A jury held in favor of the dentist, finding that USC had inadequately conducted a 23-patient clinical study of a new dental implant technique developed by the dentist. The issue still before the courts is the amount of damages suffered by the dentist as a result of the breach. An accountant hired by the dentist is prepared to testify that lost profits attributable to the breach were as much as $1.2 billion. The California Court of Appeal ruled last year that the proposed expert testimony should be admitted into evidence. USC is asking the California Supreme Court to overturn that ruling.

"Expert testimony can provide valuable assistance to the jury when the expert is both qualified to provide an opinion on a subject that is beyond the common experience of most jurors *and* when the opinion has evidentiary support and employs an accepted methodology," said WLF Chief Counsel Richard Samp after filing WLF's brief. "But when, as here, expert testimony does not meet those prerequisites, it serves only to confuse jurors and encourages them to decide fact issues based on emotion rather than on the evidence," Samp said.

In this case, the dentist contends that had USC performed its clinical trial adequately, his dental implant procedure would have become the standard of care and his start-up firm within a decade would have grown into an international company with hundreds of millions of dollars in annual sales. His $1.2 billion lost-profits claim is based on the testimony of an accountant who lacks experience in dentistry and who arrived at his damages estimate by examining the sales of the six largest firms in the dental implant field.

After conducting an extensive pre-trial hearing, the trial judge concluded that the expert testimony should be excluded because it was insufficiently reliable. He noted in particular that the dentist's firm was several orders of magnitude smaller than the six companies selected by the plaintiff's expert as "comparable," and that the expert's lost profit determination was not based on the firm's historical performance. He noted further that, according to the expert, but for USC's breach the dentist's sales would have increased as much as 157,000% over an 11-

year period. The six "comparable" companies were all multi-billion dollar corporations with massive sales forces; the dentist had no sales force.

The court of appeal reversed and held that the trial court had abused its discretion in ordering exclusion of the expert testimony. The appeals court ruled that the opinions of an expert are admissible so long as he has "some reasonable basis" for forming the opinion.

In urging the California Supreme Court to reverse that decision, WLF argued that the appeals court standard is overly lax and essentially holds that a trial court *always* abuses its discretion if it excludes expert opinions regarding lost profits. WLF argued that the lax standard is inconsistent with California Evidence Code section 801, which states that expert opinions are admissible only if they are of a type that "reasonably may be relied upon."

WLF also argued that the fairness of civil litigation is adversely affected if, as here, trial courts are denied discretion to exclude expert opinions that rely on speculative or unreliable methodologies. WLF noted that admitting expert testimony of the sort admitted here essentially forces the defendant to settle the case for a substantial sum, without regard to the merits of the underlying claim. If settlement is a viable option, no rational president of a corporation would take even a 1% risk of incurring a multi-billion-dollar judgment – thereby bankrupting the firm – even though he may have determined that the lawsuit lacks merit, WLF explained. WLF argued that settlement under those circumstances can legitimately be viewed as a "blackmail" settlement.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation. WLF filed its brief on behalf of itself and the Allied Educational Foundation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.