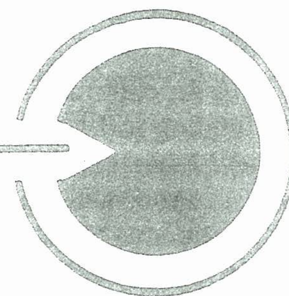
BIO-PROBE NEWSLETTER



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PETITION FOR A WRIT OF MANDAMUS

In a separate letter soliciting funds, you were provided a copy of the December 3, 1992 order issued by the United States Court of Appeals for the District of Columbia Circuit. This Court Order directed the FDA to file a response to the petition for mandamus by December 24, 1992 and gave the plaintiffs' attorneys 30 days from the date of the order to file a reply. Due to the holidays, the Court was kind enough to extend the final date for a plaintiff reply to January 11, 1993.

Four attorneys prepared the FDA 20 page response to the petition for mandamus. Margaret Jane Porter, Chief Counsel for the FDA; Leslie Kux, Associate Chief Counsel for Medical Devices; Stuart M. Gerson, Assistant Attorney General, Civil Division; and David A. Levitt, U.S. Department of Justice, Office of Consumer Litigation.

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The focus of the FDA response to the Court was to attack the right of the plaintiffs to even present a petition to the Court. The legal provision is termed "standing." To have standing, there must be proof showing that the FDA's failure to classify amalgam, or that their placement of mercury in class I, caused harm to the individual plaintiff or caused harm or impacted on the organizational plaintiffs' ability to perform their chartered purpose.

This is an extremely tough set of standards and relates to the great reluctance of the Court to direct a government agency to perform in accordance with existing laws and regulations. Government agencies as a rule are supposed to have administrative procedures that provide a vehicle for addressing and resolving questions such as those contained in the petition for mandamus; which is the second major point the FDA response made. The FDA claimed that the plaintiffs had not exhausted all the administrative remedies available to them and as a consequence the Court should dismiss the petition.

Preparation of the Plaintiffs' reply to the FDA response has been an extremely intense effort on the part of plaintiffs' counsel, Robert E. Reeves, Esq. of the firm of Reeves and Graddy in Lexington, Kentucky and James S. Turner, Esq of Swankin & Turner in Washington, D.C.

We have no idea at this point as to how long the Court will take to make its determination regarding standing and administrative remedies. Assuming that the Plaintiffs' reply to the FDA response fulfills the Court's legal requirements, it may then elect to hear oral arguments from both sides prior to making a final determination on the validity of the petition for mandamus against the FDA. At this point

everything that could have been done has been done and the plaintiffs are now at the mercy of the Court.

This leaves the extremely important and unfinished task of funding to be addressed. Every practicing dentist and other health professional reading this issue of Bio-Probe will ultimately be the beneficiary of this tremendous effort that has, up to now, been supported financially by a few dedicated and understanding individuals. However, this is not a matter that pertains only to a few "enlightened" doctors. Win, lose, or draw, everyone will benefit because the issue has been taken out of a linguistic no-resolution duel category and placed on the record before an impartial court of law. The previous statement applies whether you are pro- or anti-amalgam. If the plaintiffs are successful, the potential benefits to the entire health profession and to the health of hundreds of millions of individuals are truly incalculable and will be beyond comprehension of most beneficiaries. Each of you reading this issue of Bio-Probe must find it in your hearts to participate by contributing funds to help pay the legal obligations incurred. Regardless of the temporary sacrifice that may be necessary, each of you should finally resolve to participate and contribute to this action for "truth." Contributions should be made to the Foundation For Toxic Free Dentistry (or just FTFD) and marked "Legal Fund." Send them to FTFD, P.O. Box 608010, Orlando, FL 32860-8010. Remember, the Foundation is a 501(c)(3) non-profit tax-exempt organization. Your gift is tax deductible to the full extent the law allows. You should also understand that the FTFD is staffed by all volunteer help who draw no compensation of any kind. Consequently, every dollar you contribute goes to the purpose stated. Further, the legal fund of the Foundation is under the special control of a committee of six health professionals who determine and approve all disbursements.

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FLUORIDE

The following News Release from the National Federation of Federal Employees, Local 2050 dated December 17, 1992 is quoted in its entirety:

DEPARTMENT OF LABOR JUDGE GIVES UNION WHISTLE-BLOWER VICTORY

In a decision dated December 3, 1992, Department of Labor Administrative Law Judge David A. Clarke, Jr. found the reasons EPA cited for firing Dr. William Marcus last May "were a pretext and that his employment was terminated because he publicly questioned and opposed EPA's fluoride policy."

Dr. Marcus, a board-certified toxicologist and 20-year veteran of Government service, is an official of Local 2050 of the National Federation of Federal Employees. He was defended by the Union and the law firm of Kohn, Kohn and Colapinto, P.C. of Washington, DC.

Judge Clarke ordered EPA to reinstate Dr. Marcus in his position as GS-15 Toxicologist and Senior Science Advisor in the Criteria and Standards Division, Office of Drinking Water. Dr. Marcus is to receive back pay, including interest, lost fringe benefits, attorneys' fees and expenses, and $50,000 compensatory damages. EPA is prohibited from taking adverse action against him in the future except for good cause shown, and EPA is to post notice of the Judge's Decision and Order in a prominent place at Headquarters for at least thirty days. The Secretary of Labor must approve the Judge's Decision and Order before enforcement.

The Agency had contended that Dr. Marcus was guilty of using official information for private gain, engaging in business activities that was or appeared to be a conflict of interest, failing to follow leave procedures, and failing to gain approval for outside employment.

In his decision, Judge Clarke accepted Dr. Marcus's refutation of specifications of all the charges except for several times when he spoke inappropriately about his work at EPA when he appeared as an expert witness at toxic tort trials. Judge Clarke found that firing was much too severe a sanction for such mistakes, citing several cases where equal or worse infractions were met with a few days suspension, but never dismissals. The Judge said that Marcus was really fired for expressing his professional opinion which disagreed with Agency policy regarding a drinking water standard for fluoride.

Judge Clarke took particular notice of the Inspector General's Office's shredding of evidentiary notes, contrary to law and regulation. He unfortunately did not mention witness tampering by management (one witness said that he had been threatened with dire consequences if testimony was given that helped Dr. Marcus's case) nor what appear to be,