

July 1, 1998

SECY-98-159

For: The Commission

From: John F. Cordes, Jr. /s/
Solicitor

Subject: LITIGATION REPORT - 1998 - 3

Thermal Science, Inc. v. NRC, No. 4:96-CV-2282 CAS (E.D. Mo., decided June 23, 1998)

This lawsuit, filed in late 1996, seeks an injunction against NRC pursuit of a proposed \$900,000 civil penalty against Thermal Science, Inc. (TSI). The proposed civil penalty results from a series of allegedly misleading statements made by TSI about the effectiveness of its fire retardant product, Thermo-Lag. TSI claims that the proposed civil penalty unlawfully subjects it to double jeopardy (TSI had previously been acquitted of charges that it had misled the NRC about Thermo-Lag) and that it lies outside the NRC statutory authority.

Shortly after the lawsuit was filed, the district judge (Shaw, J.) stayed all proceedings indefinitely pending the outcome of a then-pending Supreme Court case on double jeopardy (Hudson v. United States). After Hudson was decided in the government's favor, the district court revived the case, considered the parties' briefs and heard oral argument. Both sides also filed post-argument proposed findings of fact and conclusions of law.

On June 23, 1998, the court denied all injunctive relief and dismissed the lawsuit in its entirety. The court reasoned, as we had argued, that the agency had yet to take any "final" action and that TSI was required to exhaust its agency remedies before going to court. The court required TSI to file its response to the proposed civil penalty with the NRC (Office of Enforcement) within fourteen days (or by July 7).

TSI has indicated that it will appeal the district court's decision to the United States Court of

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Appeals for the Eighth Circuit. TSI has asked the district court to stay the NRC's administrative proceedings pending the outcome of its appeal. We are opposing the stay motion.

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