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92-7575

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SHIRLEY IVY, Individually and as Representative of the Estate of DONALD IVY, Deceased; SHIRLEY ZALEWASKI, Individually and as Representative of the Estate of JOSEPH ZALEWASKI, deceased; GARY THOMAS; MARY LEE THOMAS; EMMA I. KENT Individually and as Representative of the Estate of JAMES L. KENT; JAMES DONALD DELOATCH; JOYCE DELOATCH; CHARLES JARDON; TONY K. JARDON; CHARLES JARDON, JR.; ROBIN JARDON; WARREN JARDON; SHARON JARDON,

Plaintiffs-Appellants,

VERNA WILSON, Individually and as Representative of the Estate of ISAIAH WILSON, JR., Deceased; (plaintiffs continued on inside)

Plaintiffs,

V.

DIAMOND SHAMROCK CHEMICALS COMPANY, also known as Diamond Shamrock Refining & Marketing Company, also known as Occidental Electro Chemical Corporation, also known as Maxus Energy Corp., also known as Occidental Chemical Corporation, also known as Diamond Shamrock Co.; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY, also known as Thompson Chemicals Corporation; T.H. AGRICULTURE & NUTRITION COMPANY, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION EN BANC

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JULY 7, 1993

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

The veterans and their families who are plaintiffs here presented to this Court the question whether they would benefit from the principle of the rule of law in their pursuit of claims that they were injured by defendants' herbicide products when they fought for their country to defend such democratic principles. Brief of Shirley Ivy, et al., Ivy v. Diamond Shamrock ("Ivy"), No. 92-7575, September 16, 1992 (hereafter "Ivy Br.") at 4. These veterans have fought in Ivy for an unbiased and independent state forum to judge whether they had agreed to settle for "nuisance value," in 1984, claims that did not then exist. Their question has been answered in opinions, first by Judge Weinstein below and now by Judge Van Graafeiland of this Court, which interfere with state proceedings in order to impose novel, result-oriented rulings that deny the veterans' right to a day in court by substituting rationalized preferences for established rules of law. Both judges were involved in the 1984 litigation implicated here, and both wrote decisions that, as discussed below, seem firmly closed to a fair analysis of the facts and law presented by the veterans.

A predisposition against a full and fair consideration of the veterans' cause was evidenced during oral argument of this case. There Judge Van Graafeiland insisted that plaintiffs could not file a reply brief longer than the 25 pages allowed by rule in response to defendants, although defendants had not objected to the length of Mrs. Ivy's reply. Defendants, meanwhile, had been allowed to file a brief the equivalent of 60 pages longer than plaintiffs' principal brief, and three times longer than the rules permit. The Court's sua sponte rejection of plaintiffs'

brief without leave to refile facilitated its turning a blind eye to much of Mrs. Ivy's' argument that would undermine and refute the reasoning of the Court's ruling in Ivy v. Diamond Shamrock, June 24, 1993 (2d Cir.) ("Op."). Some of this argument is now presented by way of rehearing in an attempt, within the limited space available at this time, to prevent dispositive points of law and fact from being overlooked or misapprehended by the Court in its decision of this important case.

The panel's apparent lack of evenhandedness -- in the limited briefing allowed plaintiffs, in Mrs. Ivy's truncated oral argument, wherein a third of Mrs. Ivy's time was assigned to Benton Musslewhite, a lawyer of proven unethical proclivities who has aided defendants more than plaintiffs in this matter, and where much of the remaining time was consumed in an unusual harangue by Judge Graafeiland of Mrs. Ivy's counsel addressing only one of the many important issues in this case, and finally in a decision that studiously avoids even arguments that the veterans were able to present and thus barely provides a useful departure for analysis -- suggests that this case is appropriate for en banc consideration. Even a possibility that the veterans' claims have not been given a fair and full hearing by the panel, when viewed in light of the importance of the issues involved -- as reflected both in the opposition of 21 State Attorneys General to the court's decision, and in the recent attempts in other mass tort cases to employ the future claim settlement device now endorsed by the panel to destroy unmatured state claims -- not to mention the

vast impact of the decision on thousands of wartime veterans who have already grown deeply cynical about the quality of justice available to them in the country for which they fought as youths, cries out for the otherwise exceptional remedy of attention by the full court to this case.

I. THE COURT IMPROPERLY ASSERTS EQUITABLE JURISDICTION OVER MRS. IVY'S CLAIMS IN VIOLATION OF THE ANTI-INJUNCTION ACT AND THE ABSTENTION DOCTRINE

1. The Anti-Injunction Act prohibits a federal district court from exercising nationwide equitable jurisdiction under the All Writs Act to prevent state courts from determining the res judicata effect of its class action settlements upon the state claims of absent class members who first challenge the adequacy of their class notice and representation collaterally in state court.

This Court's decision in Ivy directly conflicts with an indistinguishable Third Circuit holding that a federal court may not enjoin a state court under the All Writs Act from hearing a collateral action brought by an absent putative class member who lacks minimal contacts with the jurisdiction where the federal court sits. In re Real Estate Title & Settlement Services Antitrust Litigation, 869 F.2d 760, 762 (3d Cir.), cert. denied, 493 U.S. 821 (1989). Rather than address the Third Circuit's well-reasoned decision in point, the Court instead summarily labels as "frivolous" Mrs. Ivy's personal jurisdiction objection to the federal courts' exercise of "All Writs Act jurisdiction" to dismiss Ivy. Op. 4189. This Court's decision, with no discussion, thus creates a division in the Circuits without even acknowledging the contrary authority.

The Court does acknowledge that, even under this Circuit's

unique refitting of this remedial statute for generating federal subject matter jurisdiction contrary to long-standing rule, the All Writs Act cannot be employed to create federal subject matter jurisdiction except in "exceptional circumstances." Such circumstances tend in the Court's discussion of this case to resemble the exceptions to the Anti-Injunction Act.

To satisfy this condition the Court first asserts that a state court interpretation of Mrs. Ivy's involvement in the 1984 settlement agreement approved in Ryan v. Dow Chemical Co., 618 F.Supp. 623 (E.D.N.Y 1985) (Agent Orange I) would have a "substantial" but unspecified "deleterious effect on the Agent Orange I settlement mechanism." Op. 4186. Under the settlement created by Judge Weinstein, he will distribute the veterans' settlement funds, essentially, however he sees fit, until 1994. He has retained jurisdiction solely to control this unusually prolonged distribution process.

Should a state court disagree with the federal courts' interpretation of the ambiguous one-sentence basis for holding then non-existent claims of Mrs. Ivy and other absent putative class members settled in 1984, it could have no conceivable adverse effect on the ongoing distribution of these settlement funds. Judge Weinstein, as now, could continue to award an average of $3200, or perhaps even more, for the death or total disability of Vietnam veterans who apply. And he would continue to control grantmaking by the AOCAP foundation to the veterans' organizational leadership. No state court could conceivably

affect these powers and the Court provides no clue as to how it believes the court's jurisdiction to control this "mechanism" could be adversely affected in any way if the post-1984 Agent Orange claims are tried in state court rather than limited to being exchanged for a miniscule benefit in federal court.

The Court asserts that the All Writs Act can be used to foreclose state adjudication of res judicata defenses as a means to protect federal jurisdiction to carry out an ongoing judicial "duty to class members" in class actions. Op. 4188. But here the Court seems to be carrying out a perceived "duty," that is nowhere written into any law, to protect corporate defendants by vastly increasing the value of defendants' settlement, through a grant of blanket immunity from collateral state court litigation. The Court's decision in Ivy can have only a negative effect on the Ryan class members, by increasing the numbers of veterans consigned to share the meager Ryan settlement funds as their only available remedy. The Court reverses reality here in order to align this case with the "aid of jurisdiction" exception to the Anti-Injunction Act.

The Court justifies its conclusion about the "exceptional" nature of a state court ruling on defendants' res judicata defense with the non-sequitur observation that the parties to the settlement themselves agreed to bar all future claims. Op. 4186. Nothing could be less exceptional than a settlement whereby plaintiffs consent to give res judicata effect to their agreement by expressly barring all future claims. But this is the only

concrete justification offered for the Court's finding of "exceptional circumstances" to justify an All Writs Act removal of Ivy. Op. 4186.

In a final attempt to state something "exceptional" about a settlement which bars future litigation, and at the same time invoke the "relitigation" exception to the Anti-Injunction Act, the court goes well beyond the record in its assertion that, by approving the Ryan agreement, the district court had issued an "order against relitigation of matters it already had decided" and was also protecting the "integrity of its rulings." Op. 4187 (emphasis added).

But Ryan was settled, not "decided" by the district court. The district court's order only gave effect to the terms of the settlement, incorporating some of those terms, and could go no further. Ivy Br. 72.

There were no decisions or rulings on the numerous issues raised by a settlement of the future tort claims of absent class members, because no guardian was appointed who could present these issues. The district court merely adopted the same ambiguous sentence found in the settlement agreement, which this Court also cites as the sole basis for now holding it to be "crystal clear," Op. 4189, that in 1984 Agent Orange I settled the potential future claims of absent tort plaintiffs for the first time in the history of Anglo-American law, without any discussion. The Court fails to observe that this conclusion, designed to satisfy the relitigation exception, is seriously undermined by its later labored argument

in Part II of its ruling, Op. 4190-4203, attempting to justify this same interpretation of the Ryan settlement.

While the settlement agreement did state that certain "persons who had yet to manifest injury were class members," apparently because, as a matter of fact, some such persons had voluntarily intervened in Ryan, the Court totally begs the question whether future claimants absent from Ryan ever litigated the issue of whether, and on what conditions, unknown future claimants could be made parties to that settlement.

Since an actual prior decision on the issues raised by Mrs. Ivy here cannot be and is not identified by the Court, the federal courts are clearly interfering with the Texas court on the basis of a "post hoc judgment" that violates the Anti-Injunction Act. Ivy Br. at 73, et seq.

Stripped of these unsupported assertions that there was something sufficiently "exceptional" about the Agent Orange settlement to both justify an All Writs Act injunction of state court proceedings, and also to invoke exceptions to the Anti-Injunction Act, the panel's decision merely expresses its preference that a state court not exercise its Constitutional authority to determine the res judicata effect of this particular federal court settlement of state claims. Op. 4184-4190.

A final problem with the Court's reconstruction of the All Writs Act as a means to implement this preference is that no All Writs Act proceeding was properly initiated in which the Writ could be issued. The Court has now acknowledged that Mrs. Ivy's

tort claim was improperly removed under the removal statute, 28 U.S.C. § 1441. Op. 4185-86. However she was never properly served as a defendant in an All Writs Act action, as she pointed out in her Answer to the pleadings that purported to initiate those proceedings, Ivy Br. at 10, and as discussed at some length in the stricken Reply Brief of Shirley Ivy, December 23, 1992, at 27-30.

2. The abstention doctrine reserves to the United States Supreme Court, and not to the federal courts themselves, through injunctive interference with the state courts, the power to adjust relations between state courts and federal courts when states have expressed a significant interest in state civil proceedings that might threaten some perceived authority of the federal courts.

The abstention doctrine precludes federal court interference with state litigation even when the Anti-Injunction Act might allow it. The states have a strong interest in protecting their courts' proper jurisdiction to assure that not only "orders and judgments," but also the state's substantive laws themselves, "are not rendered nugatory" by federal interference. Op. 4189. The effect of this Court's decision is to bar a Texas citizen from suing another Texas citizen under Texas law in a Texas state court, on the basis of legal theories that are newly fashioned to achieve this result. The State of Texas, along with twenty other states, has expressly communicated to this court its particular interest under its Constitution "in ensuring unfettered access by [its] own citizens to their own courts to resolve state law disputes, without unwarranted, ad hoc, interference by the federal judiciary." Amicus Brief of Alabama, et al. at 1 & n.1. Twenty-one State Amici have pointed to the "judicial

condescension" of this Court in Texaco v. Pennzoil, 481 U.S. 1 (1986) itself, and note that the "similar invasion of the prerogatives of state courts" in this case is an "insult to state courts throughout the nation." Id. 17-18.

There is hardly stronger language available with which Texas could express its significant interest in allowing its courts to adjudicate Mrs. Ivy's claim and thereby trigger Pennzoil protection from federal interference in this civil proceeding.

The Court excuses its refusal to abide by the abstention dotrine on grounds that it "would threaten the authority of the federal judicial system," Op. 4189, but it fails to make much of a case for this dire prediction. In any event, the abstention doctrine quite clearly reposes in the United States Supreme Court, and not in the lower federal courts, the authority to protect both sides of the nation's dual court system against any such threats as may actually occur. The doctrine properly denies this ultimate authority to arbitrate relations between state and federal courts to one of the competitors for power, but instead accords that authority exclusively to the Supreme Court in excercise of its appellate jurisdiction. Reply Brief at 10.

In their Amicus Brief, at 17, the states have urged that this Court learn the lesson of Pennzoil and now refrain from treading yet again upon state powers merely to aggrandize authority under "special rules of Fortune 500 federalism."

II. THE COURT'S IMPROPERLY ACQUIRED JURISDICTION IS ABUSED FOR THE VERY END OF IMPOSING NOVEL RULES, WHICH ARE DESIGNED TO DESTROY "FUTURE" STATE TORT CLAIMS FOR THE ENORMOUS FINANCIAL BENEFIT OF LARGE CORPORATE TORTFEASORS, BUT WHICH NO STATE RECOGNIZES.

1. The potential future state tort claim of an absent federal class member cannot be settled, if it may be settled at all in federal court, without the express appointment of a specific named representative who adequately represents solely the absent party's interests in the settlement.

The court seems to acknowledge that, contrary to what "[the court] ordinarily would anticipate" no guardian was appointed in Agent Orange I to represent Mrs. Ivy's interests. Op. 4201. To justify imposing a nuisance value settlement of her claim in her absence, the Court assumes the role of a jury in concluding that the nuisance value settlement of her 1989 wrongful death claim in 1984 for about $3200 was substantively fair.

First this Court conjectures that there is "more than a mere possibility," even a "reasonable probability," Op. 4199, that the government contractor defense would still apply to this case, notwithstanding Boyle v. United Technologies Corp., 487 U.S. 500 (1988). The Court ignores chief Judge Oakes' express finding to the contrary in Joint Eastern and Southern District Asbestos Litigation, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990). Under Boyle, this question would be a fact issue for the jury. But the Court chose to omit from its analysis, as a jury would not likely do, the dispositive facts that the government did not order any dioxin in the Agent Orange it purchased, and that the contractors conspired to keep the extent of the dioxin contamination, and its effects, secret from the government.

Second the court takes on an analysis of the fact issue of causation, claiming that the veterans would not likely be able to prove that dioxin caused their injuries. Certainly the question

of causation would be hotly contested at trial. But here the Court again, unlike any jury, relies on a text not apparently of record, and certainly not sworn to, Op. 4200, while it chooses to totally ignore the record, sworn testimony of Mrs. Ivy's expert witness. This witness, Dr. Jenkins, is a scientist with the Environmental Protection Agency who has provided abundant sworn evidence in her Affidavit associating dioxin with numerous diseases suffered by members of the alleged Ivy class. Joint Appendix at 129. The Court's refusal to acknowledge this evidence reprises one approach Judge Weinstein used to deny a jury trial to the 1984 opt outs. This approach by which judges pick and choose among experts has been recently rejected 9-0 in Daubert v. Merrell Dow, ___ U.S. ___ (1993). The Court's findings also ignore Overmann v. Syntex (USA) Inc., et al. (Mo. September 20, 1991) where a state court award of damages for dioxin injuries totally refutes this Court's pessimistic assessment of the prospects for plaintiffs' similar dioxin claims here.

2. The Court ignores numerous additional reasons why absent future plaintiffs were not and could not be party to the Ryan settlement.

The Court reduces the question of whether Mrs. Ivy's claim was destroyed in 1984 to whether she was included within the class definition of those "injured".

For its definition of "injured" the Court draws on analogies from New York statute of limitations law, constitutional standing doctrine, insurance law, and makes an extended argument based on evidence outside the record below and outside the

contract itself. It concludes that it was the "court's intent [and] that of the parties' to the Settlement Agreement" to include within the settlement agreement's definition of "injured," those veterans who were merely exposed to dioxin, i.e "at risk" of but not actually suffering an injury compensable in tort. Op. 4192-93. The Court claims that it had "recognized the propriety of this inclusion" of absent potential future claimants in the plaintiff class, quoting in support language from its opinion not remotely suggesting future claims. Op. 4193.

In its search for support of its definition of "injury," the Court assiduously avoids noting any definition derived from the actual context of the claims settled in 1984: state tort law. The Court thus ignores the numerous cases uniformly holding that a toxic tort victim "'can be said to be "injured" only when the accumulated effects of the deleterious substance manifest themselves.'" See Urie v. Thompson, 337 U.S. 163, 170 (1949), and other cases, including Texas cases, cited in Ivy Br., at 79-80. The Court issues its decision on contested facts concerning the intent of the parties without even considering the most relevant evidence presented to it on the issue, reversing the proper approach of an appellate court on review of a dismissal.

If the definition contained in the class notices could be divined only after such extended analysis, absent class members themselves could not have had reasonable notice that their potential future claims were about to be destroyed by a class settlement to which they were not party. Only after the opt out

period expired did the ambiguous one line appear in the settlement agreement which, for the Court, made the issue "crystal clear."

The Court ignores plaintiffs' argument that, irrespective of intent, neither Mrs. Ivy nor any absent future claimant was or could be a party to a class action. No court has recognized the existence of a toxic tort personal injury "'claim' in advance of some manifestation of injury", a "claim" that as late as 1991 this Court expressly stated had not been accepted in this Circuit even in the context of bankruptcy litigation. See In re Chateaugay Corp., 944 F.2d 997, 1004 & n.1 (2d Cir. 1991); Ivy Brief 80-81.

The Court fails to answer plaintiffs' query as to how absent members of the class who lack a legal claim could either have been represented under F.R.Civ.P., Rule 23, or maintain litigation in a federal court. By ignoring that the Ivy appellants had no claim at the time of the Agent Orange I settlement, the Court is able to assert that "appellants' Agent Orange I claims, made in good faith, satisfied" the $10,000 minimum jurisdictional amount in controversy. Op. 4194-95. The Court refuses to address the objection that no one could make a "good faith" claim on behalf of a person who has no legal claim under any known precedent. It is a legal certainty that a non-existent diversity tort claim had a zero recovery value in 1984, and therefore could not be joined in a federal class action. See Packard v. Provident National Bank, 1993 WL 158811 (3d Cir. May 18, 1993).

The Court fails to point out who did, or had authority to,

assert a greater than zero value for Mrs. Ivy's non-existent 1984 claim, and where it was in fact asserted on her behalf. The Court glosses over a record devoid of any facts to support its assertion that such an exaggerated value was actually placed on her claim.

The Court also ignores that the federal courts lack standing to entertain a tort case in which no claim presently exists or is in fact alleged by the putative plaintiff to exist. Federal jurisdiction cannot rest solely on the basis of "allegations of possible future injury." Whitmore v. Arkansas, 495 U.S. 149, 155 (1990); Ivy Br. at 81.

The Court suggests that the Agent Orange I court acquired personal jurisdiction over Don Ivy to settle his non-existent claim in 1984 through a Multidistrict Litigation transfer. Op. 4195. But Mrs. Ivy asserts that her claims "were not included with any identifiable case transferred from Texas through MDL-381 prior to the 1984 settlement" Ivy Br. 96, and there is nothing in the record to the contrary. If no future claim was ever pleaded in a Texas class action then it could not have been transferred through the MDL to Brooklyn. Though challenged do so, the defendants failed to make any record showing that Mrs. Ivy's claim was pleaded in a transferred Texas action. The court again resolves this factual problem by simply ignoring it.

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) would allow a waiver of Mrs. Ivy's objection to personal jurisdiction if she failed to opt-out upon receiving notice that her non-existent claim was being litigated in 1984. The Court

distinguishes Shutts by claiming that it cannot apply here. Shutts' requirements apply only to "actions which seek to bind known plaintiffs concerning claims ... for money judgments." Op. 4195. This, of course, precisely defines the effect sought by the Court for Agent Orange I upon Mrs. Ivy and her tort claim for damages. In fidelity to Shutts, if future tort claimants cannot be notified because unknown, their claims should not be made part of a class until they actually arise.

The Court seems to agree that persons who have no legal claim because they lack any discernible injury could not be given effective notice for purpose of waiving their due process right. The Court suggests however that its finding of adequate representation can compensate for Mrs. Ivy's loss of any effective notice and opt out right. Op. 4190-92.

The Court concludes that the representation in Agent Orange I of Mrs. Ivy and other unknown potential future claimants was adequate because it cannot "envision any collusion" against the absent future claimants interests and because any conflicts, in the view of the court, did not actually harm Mrs. Ivy because she has the same right to a $3200 nuisance value settlement as the 1984 claimants. But it is not identity of results or fairness in the view of a reviewing judge, but the identity of interest that determines the adequacy of representation. Ivy Br. 88-90.

Respectfully submitted,

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