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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1140, 1141, 1097, 1139, 1081, 1134, 1135, 1100, 1101, 1098, 1099, 1105, 1106, 1102, 1103, 1115, 1119, 1136, 1122, 1123, 1124, 1130, 1133, 1127, 1129 August Term, 1985

(Argued April 9, 1986 Decided )

Docket Nos. 84-6273, 84-6321, 85-6035, 85-6051, 85-6083, 85-6261, 85-6265, 85-6301, 86-6303, 85-6307, 85-6323, 85-6325, 85-6327, 85-6329, 85-6335, 85-6349, 85-6371, 85-6373, 85-6379, 85-6381, 85-6385, 85-6387, 85-6393, 85-6395, 85-6411.

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IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION
MDL No. 381

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B e f o r e: VAN GRAAFEILAND, WINTER, and MINER, Circuit Judges.

This is the first of nine opinions, all filed this date, deciding appeals from various orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, in multidistrict litigation No. 381, In re "Agent Orange" Product Liability Litigation. This opinion begins with a section that summarizes the entire litigation and all of our rulings. It also sets out in detail the procedural history and general background of all the appeals, familiarity with which may be necessary to understand the other opinions. It then goes on to affirm the certification of a class action and approval of the settlement.

The other opinions deal seriatim with appeals from the establishment of a distribution scheme for the resultant settlement fund, the grant of summary judgment against plaintiffs who opted out of the class action, the dismissal of an action brought against the United States by veterans and derivatively by their families, the dismissal of a third-party action against the United States by the chemical companies, the dismissals of actions against the United States and the chemical companies by civilian plaintiffs, the dismissal of a "direct" action against the United States by wives and children of veterans, the upholding of a fee agreement among members of the Plaintiffs' Management Committee, and the award of attorneys' fees by the district court.

SHERMAN L. COHN, Washington, D.C.; ROBERT A. TAYLOR, JR., Washington, D.C.; RICHARD L. STEAGALL, Peoria, Illinois; BENTON MUSSLEWHITE, Houston, Texas; AVRAM G. ADLER, Philadelphia, Pennsylvania; FRANCIS KELLY, Philadelphia, Pennsylvania (Ashcraft & Gerel, Washington, D.C.; Nicoara & Steagall, Peoria, Illinois; Adler & Kops, Philadelphia, Pennsylvania; James H. Brannon, Jamison & Brannon, Houston, Texas; Joel Rome, Rome & Glaberson, Philadelphia, Pennsylvania; Marlene Penny Maynes, Cincinnati, Ohio; Richard D. Heidemen, Louisville, Kentucky; Stephen L. Toney, Werner, Beyer, Lindgren & Toney, New London, Wisconsin; Richard Ellison, Cincinnati, Ohio; James C. Barber, Dallas, Texas; William Beatty, Granite City, Illinois; John T. McKnight, Brunswick, Georgia; Richard L. Gill, Gill & Brinkman, St. Paul, Minnesota; James H. Davis, Los Angeles, California; Kenneth R. Yoffey, Newport News, Virginia; Richard L. Powell, Augusta, Georgia;

Joseph H. Latchum, Jr., Watkins, Chase, Latchum & Williams, Hampton, Virginia; Lula Abdul-Rahim, Duda, Rahim & Rotto, Oakland, California; Robert D. Gary, Gary & Duff, Lorain, Ohio; J. Edward Allen, Forston, Bentley & Griffin, Athens, Georgia; Charles 0. Fisher, Walsh & Fisher, Westminster, Maryland; William J. Risner, Tucson, Arizona; Walter L. Blair, Blair & Starks, Charles Town, West Virginia; Janet Frazier Phillips, Las Vegas, Nevada; Russell Smith, Laybourne, Smith, Gore, Akron, Ohio; H. Muldrow Etheredge, New Orleans, Louisiana; Ford S. Reiche, Barrett, Reiche & Sheehan, Portland, Maine; Sara Hayes, Gage & Tucker, Kansas City, Missouri; William Jorden, Jorden & White, Meadville, Pennsylvania; Eugene P. Cicardo, Alexandria, Louisiana; Carry R. Dettloff, Kistner, Schienke, Staugaard, Warren, Michigan; James H. Bjorum, Cox, Dodson & Bjorum, Corpus Christi, Texas; Jack E. London, Hollywood, Florida; James T. Davis, Davis & Davis, Uniontown, Pennsylvania; Robert W. Kagler, Moundsville, West Virginia; Michael Radbill, Philadelphia, Pennsylvania; William T. Robinson, III, Robinson, Arnzen, Parry, Covington, Kentucky; William Jarblum, Jarblum & Solomon, New York, New York; John R. Mitchell, Charleston, West Virginia; Dennis A. Koltun, Miami, Florida, of counsel), for Plaintiffs-Appellants Objectors to the Class Settlement.

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Clark, Gagliardi & Miller, White Plains, New York, for Appellee TH Agriculture & Nutrition Company, Inc.

Shea & Gould, New York, New York, for Appellee Uniroyal, Inc.

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WINTER, Circuit Judge:

This is the first of nine opinions, all filed on this date, dealing with appeals from Judge Pratt's and Chief Judge Weinstein's various decisions in this multidistrict litigation and class action. This opinion begins with a section entitled "Overview and Summary of Rulings" that summarizes the entire case and all of our decisions. The next section, "Detailed History of Proceedings," gives the background for all of the appeals. Familiarity with this section may be necessary to understand the various opinions that follow. The present opinion also contains our rulings regarding the certification of & class action and the approval of the settlement between the plaintiff class and the defendant chemical companies. Two other opinions by this author review the propriety of the distribution scheme for the resultant fund and the grant of summary judgment against those plaintiffs who opted out of the class action. Three opinions by Judge Van Graafeiland resolve issues concerning the liability of the United States to veterans, their families, and the chemical companies. A fourth opinion by Judge Van Graafeiland reviews the dismissal of actions brought by civilian plaintiffs against the United States and the chemical companies. Two opinions by Judge Miner resolve issues concerning the validity of a fee agreement among the members of the Plaintiffs' Management Committee ("PMC") and the district court's award of attorneys' fees.

Most of the appeals in this litigation were argued on

April 9-10, 1986. The appeal from the adoption of the distribution scheme, however, was not taken until August 19, 1986 and was not argued until October 1. Because the issues raised by the latter appeal were in many ways interrelated with those argued in April, the panel had to suspend consideration of these matters until it heard the arguments in October.

## I. OVERVIEW AND SUMMARY OF RULINGS

By any measure, this is an extraordinary piece of litigation. It concerns the liability of several major chemical companies and the United States government for injuries to members of the United States, Australian, and New Zealand armed forces and their families. These injuries were allegedly suffered as a result of the servicepersons' exposure to the herbicide Agent Orange while in Vietnam.

Agent Orange, which contains trace elements of the toxic by-product dioxin, was purchased by the United States government from the chemical companies and sprayed on various areas in South Vietnam on orders of United States military commanders. The spraying generally was intended to defoliate areas in order to reduce the military advantage afforded enemy forces by the jungle and to destroy enemy food supplies.

We are a court of law, and we must address and decide the issues raised as legal issues. We do take note, however, of the nationwide interest in this litigation and the strong emotions these proceedings have generated among Vietnam veterans and their families. The correspondence to the court, the extensive

hearings held throughout the nation by the district court concerning the class settlement with the chemical companies, and even the arguments of counsel amply demonstrate that this litigation is viewed by many as something more than an action for damages for personal injuries. To some, it is a method of public protest at perceived national indifference to Vietnam veterans; to others, an organizational rallying point for those veterans. Thus, although the precise legal claim is one for damages for personal injuries, the district court accurately noted that the plaintiffs were also seeking "larger remedies and emotional compensation" that were beyond its power to award. In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 747 (E.D.N.Y. 1984).

Central to the litigation are the many Vietnam veterans and their families who have encountered grievous medical problems. It is human nature for persons who face cancer in themselves or serious birth defects in their children to search for the causes of these personal tragedies. Well-publicized allegations about Agent Orange have led many such veterans and their families to believe that the herbicide is the source of their current grief. That grief is hardly assuaged by the fact that contact with the herbicide occurred while they were serving their country in circumstances that were unpleasant at best, excruciating at worst.

When the case is viewed as a legal action for personal injury sounding in tort, however -- and we are bound by our oaths

to so view it -- the most noticeable fact is the pervasive factual and legal doubt that surrounds the plaintiffs' claims. Indeed, the clear weight of scientific evidence casts grave doubt on the capacity of Agent Orange to injure human beings. Epidemiological studies of Vietnam veterans, many of which were undertaken by the United States, Australian, and various state governments, demonstrate no greater incidence of relevant ailments among veterans or their families than among any other group. To an individual plaintiff, a serious ailment will seem highly unusual. For example, the very existence of a birth defect may persuade grieving parents as to Agent Orange's guilt. However, a trier of fact must confront the statistical probability that thousands of birth defects in children born to a group the size of the plaintiff class might not be unusual even absent exposure to Agent Orange. A trier of fact must also confront the fact that there is almost no evidence, even in studies involving animals, that exposure of males to dioxin causes birth defects in their children.

Both the Veterans' Administration and the Congress have treated the epidemiological studies as authoritative. Although such studies do not exclude the possibility of injury and settle nothing at all as to future effects, they offer little scientific basis for believing that Agent Orange caused any injury to military personnel or their families. The scientific basis for the plaintiffs' case consists of studies of animals and industrial accidents involving dioxin. Differences in the species examined and nature of exposure facially undermine the

significance of these studies when compared with studies of the veterans themselves.

Proving that the ailments of a particular individual were caused by Agent Orange is also extremely difficult. Indeed, in granting summary judgment against those plaintiffs who opted out of the class action (the "opt-outs"), the district court essentially held that such proof was presently impossible. The first evidentiary hurdle for such an individual is to prove exposure to Agent Orange, an event years past that at the time did not carry its current significance. Such evidence generally consists only of oral testimony as to an individual's remembering having been sprayed while on the ground and/or having consumed food and water in areas where spraying took place. The second and, in the view of the district court, insurmountable hurdle is to prove that the individual's exposure to Agent Orange caused the particular ailment later encountered. Plaintiffs do not claim that Agent Orange causes ailments that are not found in the population generally and that cannot result from causes known and unknown other than exposure to dioxin. Plaintiffs' proof of causation would consist largely of inferences drawn from the existence of an ailment, exposure to Agent Orange, and medical opinion as to a causal relationship. However, the

difficulties in excluding known causes, such as undetected exposure to the same or similar toxic substances in civilian life, and the conceded existence of unknown causes might make it difficult for any plaintiff to persuade a trier of fact as to Agent Orange's guilt. Causation is nevertheless an absolutely indispensable element of each plaintiff's claim.

The plaintiffs' claims are further complicated by the fact that an individual's exposure to Agent Orange cannot be traced to a particular defendant because the military mixed the Agent Orange produced by various companies in identical, unlabeled, barrels. No one can determine, therefore, whether a particular instance of spraying involved a particular defendant's product. In addition, the Agent Orange produced by some defendants had a considerably higher dioxin content than that produced by others. Because the alleged ailments may be related to the amount of dioxin to which an individual was exposed, it is conceivable that if Agent Orange did cause injury, only the products of certain companies could have done so.

Difficult legal problems also arise from the considerable uncertainty as to which product liability rules and statutes of limitations apply to the various plaintiffs. The plaintiffs come from throughout the United States, Australia, and New Zealand, and each would face difficult choice of law problems that might be resolved adversely to their claims.

Finally, doubt about the strength of the plaintiffs' claims

exists because of the so-called military contractor defense. The chemical companies sold Agent Orange to the United States government, which used it in waging war against enemy forces seeking control of South Vietnam. It would be anomalous for a company to be held liable by a state or federal court for selling a product ordered by Che federal government, particularly when the company could not control the use of that product. Moreover, military activities involve high stakes, and common concepts of risk averseness are of no relevance. To expose private companies generally to lawsuits for injuries arising out of the deliberately risky activities of the military would greatly impair the procurement process and perhaps national security itself.

An illustration of the many factual and legal difficulties facing the plaintiffs is the dispute among their counsel as to how many "serious" or "strong" claims there are. The Plaintiffs' Management Committee ("PMC") estimates a much smaller number than do counsel for the class members who object to the settlement. Neither group has hard evidence to support its estimates. If by "serious" or "strong" one means a case likely to prevail on liability and to result in a substantial damage award, then we believe that every plaintiff would encounter difficulties in proving causation and even graver problems in overcoming the military contractor defense. If a case is considered "serious" or "strong" because the plaintiff has grave ailments or has died,

then such cases do exist, although their numbers remain in doubt. What is not in doubt is that the widespread publicity given allegations about Agent Orange have led to an enormous number of claims alleging a large variety of highly common ailments. The illnesses claimants now attribute to Agent Orange include not only heart disease, cancer, and birth defects, but also confusion, fatigue, anxiety, and spotty tanning.

The procedural aspects of this litigation are also extraordinary. Chief Judge Weinstein certified it as a class action at the behest of most of the plaintiffs and over the objections of all of the defendants. Certain issues, such as the damage suffered by each plaintiff, were not, of course, to be determined in the class action. Instead, they were to be left to individual trials if the outcome of the class action proceedings was favorable to the plaintiffs. Some plaintiffs opted out of the class action, but their cases remained in the Eastern District of New York as part of a multidistrict referral.

The class certification and settlement caused the number of claimants and the variety of ailments attributed to Agent Orange to climb dramatically. It also has caused disunity among the plaintiffs and increased the controversy surrounding this case. Correspondence to this court indicates that many of the original plaintiffs, most of whom joined the motions for class certification, were never advised that use of the class action device might lead to their being represented by counsel whom they

did not select and who could settle the case without consulting them. In the midst of this litigation, original class counsel, Yannacone & Associates, asked to be relieved for financial reasons. Control of the class action soon passed to the PMC. Six of the nine members of the PMC advanced money for expenses at a time when the plaintiffs' case, already weak on the law and the facts, was near collapse for lack of resources. This money was furnished under an agreement that provided that three times the amount advanced by each lawyer would be repaid from an eventual fee award. These payments would have priority, moreover, over payments for legal work done on the case.

The trial date set by Chief Judge Weinstein put the parties under great pressure, and just before the trial was to start, the defendants reached a $180 million settlement with the PMC. The size of the settlement seems extraordinary. However, given the serious nature of many of the various ailments and birth defects plaintiffs attributed to Agent Orange, the understandable sympathy a jury would have for the particular plaintiffs, and the large number of claimants, 240,000, the settlement was essentially a payment of nuisance value. Although the chances of the chemical companies' ultimately having to pay any damages may have been slim, they were exposed potentially to billions of dollars in damages if liability was established and millions in attorneys' fees merely to continue the litigation.

The district judge approved the settlement. It is clear that he viewed the plaintiffs' case as so weak as to be virtually baseless. Indeed, shortly after the settlement, he granted summary judgment against the plaintiffs who opted out of the class action on the grounds that they could not prove that a particular ailment was caused by Agent Orange and that their claims were barred by the military contractor defense.

In addition, Chief Judge Weinstein awarded counsel fees in an amount that was considerably smaller than had been requested by the attorneys involved. The size of the award was clearly influenced by his skepticism about whether the case should ever have been brought.

The final extraordinary aspect of this case is the scheme adopted by Chief Judge Weinstein to distribute the class settlement award. That scheme, which is described as "compensation-based" rather than "tort-based," allows veterans who served in areas in which the herbicide was sprayed and who meet the Social Security Act's definition of disabled to collect benefits up to a ceiling of $12,000. Smaller payments are provided to the survivors of veterans who served in such areas. No proof of causation by Agent Orange is required, although benefits are available only for non-traumatic disability or death. The distribution scheme also provides for the funding of a foundation to undertake projects thought to be helpful to members of the class.

Many of the decisions of the district court were appealed,

and we summarize our rulings here. In this opinion, we reject the various challenges to the certification of a class action. Although we share the prevalent skepticism about the usefulness of the class action device in mass tort litigation, we believe that its use was justified here in light of the centrality of the military contractor defense to the claims of all plaintiffs. We also approve the settlement in light of both the pervasive difficulties faced by plaintiffs in establishing liability and our conviction that the military contractor defense absolved the chemical companies of any liability. In a second opinion by this author, No. 86-3039, we affirm the distribution scheme's provision for disability and death benefits to veterans exposed to Agent Orange and their survivors. We reverse the scheme's establishment of a foundation; however, the district court may on remand fund and supervise particular projects it finds to be of benefit to the class. A third opinion by this author, No. 85-6163, affirms the grant of summary judgment against the opt-out plaintiffs based on the military contractor defense. On two grounds we hold that the chemical companies did not breach any duty to inform the government of Agent Orange's hazardous properties. First, at the times relevant here, the government had as much information about the potential hazards of dioxin as did the chemical companies. Second, the weight of present scientific evidence does not establish that Agent Orange caused injury to personnel in Vietnam. The chemical companies did not breach any duty to inform the government and are therefore not liable to the opt-outs.

In an opinion by Judge Van Graafeiland, No. 85-6091, we affirm the district court's dismissal of actions against the United States by veterans on the grounds that they are barred by the Feres doctrine and the discretionary function exception to the Federal Tort Claims Act. A second opinion by Judge Van Graafeiland, No. 85-6153, affirms the dismissal of an action against the United States by the chemical companies seeking contribution or indemnity for the $180 million they paid in settling with the plaintiff class. A third opinion, No. 85-6161, affirms the dismissal of civilian actions against the United States on discretionary function grounds and of similar actions against the chemical companies on statute of limitations and military contractor defense grounds. A final opinion by the same author, No. 86-6127, affirms the dismissal of the so-called "direct" claims by families of veterans against the government on Feres and discretionary function grounds.

An opinion by Judge Miner, No. 85-6365, invalidates the PMC members' agreement to repay on an "up front" basis treble the expenses that any of them advanced. We hold that this agreement creates a conflict of interest between the attorneys and the class by generating impermissible incentives to settle. A second opinion by Judge Miner, No. 85-6305, affirms the district court's award of counsel fees except with regard to the abrogation of one fee award.

## II. DETAILED HISTORY OF PROCEEDINGS

1) Early Proceedings

Plaintiffs allegedly were exposed to the herbicide Agent Orange as a consequence of efforts undertaken by the United States military forces to defoliate the jungle in Vietnam. One purpose of this defoliation project, known as "Operation Ranch Hand," was to clear away foliage near supply transport lines, power lines, and military bases, and thus deprive enemy forces of protective cover. The herbicide was also used to destroy crops available to the enemy. Some plaintiffs claim to have been directly exposed to the herbicide, while others claim that it contaminated the food and water they consumed or the ground on which they slept.

Although various herbicides were used during the war, Agent Orange was thought to be best suited for the military's purposes and was used most frequently. Agent Orange was a mixture of the herbicides known as 2,4-D and 2,4,5-T.[1] The manufacture of 2,4,5-T is said inevitably to result in the production of dioxin, which is alleged to be a highly toxic substance. Whether the trace elements of dioxin in Agent Orange were hazardous to persons in sprayed areas is sharply disputed. Indeed, the toxicity of dioxin itself remains a controversial issue. See generally P. Schuck, Agent Orange on Trial 16-24 (1986); M. Gough, Dioxin, Agent Orange (1986).

The Agent Orange litigation began in July 1978, with the filing of a lawsuit by Vietnam veteran Paul Reutershan, now

deceased, in Supreme Court, New York County. The defendants were several chemical companies alleged to have manufactured Agent Orange. That case was removed to federal court and then transferred to the Eastern District of New York. On January 8, 1979, Reutershan's estate filed an amended complaint seeking relief on behalf of a class of veterans and their families injured by Agent Orange. Several other complaints alleging similar class claims were filed in late 1978 and early 1979. In March 1979, counsel for Reutershan's estate and for defendant Dow Chemical Co. jointly petitioned pursuant to 28 U.S.C. § 1407(c) (1982) for the establishment of a multidistrict litigation proceeding. The Judicial Panel on Multidistrict Litigation established In re "Agent Orange" Product Liability Litigation, MDL No. 381, in the Eastern District of New York. The first cases were transferred to the Eastern District on May 8, 1979, and nearly 600 cases have since been transferred. MDL No. 381 was assigned to then District Judge Pratt.

The third amended class complaint in the case designated by the court as the lead action alleged federal question jurisdiction under the "common law and/or the statutory laws of the United States." Defendants moved to dismiss this complaint for want of subject matter jurisdiction. Judge Pratt adopted the federal common law theory and accordingly denied the motion. In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 737, 743-49 (E.D.N.Y. 1979). However, a divided panel of this court reversed. In re "Agent Orange" Product Liability Litigation, 635

F.2d 987 (2d Cir. 1980), cert. denied. 454 U.S. 1128 (1981). The class action thereafter proceeded in federal court solely on the basis of diversity jurisdiction under 28 U.S.C. § 1332 (1982).

Defendants next moved for summary judgment based on the so-called military contractor defense. The motion contended that the plaintiffs' claims against the chemical manufacturers were barred on the grounds:

> (1) that they merely manufactured and supplied Agent Orange to the government pursuant to validly authorized contracts[;] (2) that Agent Orange was not manufactured before and has not been manufactured since; (3) that they completed their compelled manufacture of Agent Orange in strict compliance with the specifications supplied by the government, specifications that contained no obvious or "glaring" defects that would have alerted the defendants of any impending danger in following them; and (4) that they manufactured Agent Orange without any negligence on their part.

In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 795 (E.D.N.Y. 1980).

Although Judge Pratt stated that this defense might be available to the defendants, id. at 796, he denied defendants' motion on the ground that their own descriptions of their contract performance and their relationship to the government raised issues of fact requiring a trial. Id.

Judge Pratt planned to hold an initial trial on the military contractor defense and allowed discovery on this issue. He stated:

> The elements of the defense will be uniquely adapted to consideration and adjudication, separate and apart from the issues of liability,

> causation and damages. As a practical matter, discovery as to these discrete issues will be rather narrow compared to the discovery that some of the other fact issues presented by this action may require.

Id.

In addition, Judge Pratt stated his intention to certify a class pursuant to Fed. R, Civ. P. 23(b)(3) of "persons who claim injury from exposure to Agent Orange and their spouses, children and parents who claim direct or derivative injury therefrom." Id. at 788. He noted that "it may later prove advantageous to create subclasses for various purposes." Id. Judge Pratt rejected plaintiffs' request for certification of a "limited fund" class action pursuant to Fed. R. Civ. P. 23(b)(1)(B), on the ground that plaintiffs had failed to offer evidence that the defendants were likely to become insolvent if held liable for plaintiffs' injuries. Id. at 789-90.

Following eleven months of discovery, defendants Hercules, Thompson Chemical, Riverdale Chemical, Hoffman-Taft, Dow Chemical, TH Agriculture and Nutrition, and Uniroyal again moved for summary judgment on the military contractor defense. Defendants Monsanto and Diamond Shamrock did not join in the motion. Judge Pratt granted summary judgment to Hercules, Thompson Chemical, Riverdale Chemical, and Hoffman-Taft, but denied the motions of Dow Chemical, TH Agriculture and Nutrition, and Uniroyal. In re "Agent Orange" Product Liability Litigation, 565 F. Supp. 1263 (E.D.N.Y. 1983). He also concluded that the planned separate trial on the military contractor defense was not

desirable. He noted that discovery and argument of motions on the military contractor defense had revealed that the defense implicated factual issues also central to both liability and causation and thus should not be tried separately. Subsequently, defendants Hercules and Thompson Chemical were reinstated as defendants.

In 1980, Yannacone & Associates, a consortium of lawyers who banded together for purposes of this litigation, was designated lead counsel for the representatives of the plaintiff class. See 506 F. Supp. at 788 n.32. In 1983, the firm of Ashcraft & Gerel and attorneys Benton Musslewhite, Steven Schlegel, and Thomas Henderson joined Yannacone & Associates as lead counsel for the representatives of the class. In September 1983, Yannacone & Associates moved to be relieved of its duties as class counsel, citing an inability to bear the costs associated with the litigation. This motion was granted. Ashcraft & Gerel sought to gain control of the case but failed to do so and withdrew as class counsel. As we describe infra, Musslewhite, Schlegel, and Henderson then recruited additional attorneys to the PMC. See generally Schuck, Agent Orange on Trial at 73-77, 94-95, 102-110. Although not a member of the PMC, Ashcraft & Gerel has continued to represent plaintiffs who have opted out of the class action, certain civilian plaintiffs, and certain class members who object to the settlement.

2) Class Certification

Judge Pratt's duties as a newly-appointed member of this

court precluded him from continuing as trial judge, and in October 1983, Chief Judge Weinstein assumed responsibility for MDL No. 38V. After conferring with the parties, he ordered the trial of the class claims to begin on May 7, 1984. He formally certified a Rule 23(b)(3) class, finding

> (1) that the affirmative defenses and the question of general causation are common to the class, (2) that those questions predominate over any questions affecting individual members, and (3) given the enormous potential size of plaintiffs' case and the judicial economies that would result from a class trial, a class action is superior to all other methods for a "fair and efficient adjudication of the controversy."

In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 724 (E.D.N.Y. 1983) ("Class Certification Opinion").

Chief Judge Weinstein defined the plaintiff class as

> those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.

Id. at 729.

In addition, Chief Judge Weinstein certified a Rule 23(b)(1)(B) mandatory class on the issue of punitive damages, though not on the ground, previously rejected by Judge Pratt,

that the claims against the defendants could render them insolvent. Rather, he reasoned that because the purpose of punitive damages is not to compensate but to punish, some limits should be imposed on the amount of punishment meted out to the defendants for a single transaction. See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 838-42 (2d Cir. 1967) (Friendly, J.). Chief Judge Weinstein reasoned that punitive damages might be awarded, if at all, only to the first plaintiffs to receive a judgment. He concluded that

> it would be equitable to share [a punitive damage award] among all plaintiffs who ultimately recover compensatory damages. Yet, if no class is certified under Rule [23](b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all.

100 F.R.D. at 728.

Chief Judge Weinstein also required that plaintiffs' counsel, at their own expense, provide notice to the members of the class as follows:

(1) Written notice was to be mailed to (a) all persons who had filed actions in the federal district courts, or had filed actions in state courts later removed to federal court, that were pending in or transferred to the Eastern District; (b) all persons who had intervened or sought to do so; (c) each class member then represented by counsel associated with the PMC who had not yet commenced an action or sought to intervene; (d) all persons then listed on the United States Government's Veterans'

Administration "Agent Orange Registry";

(2) Announcements were to be sent to the major radio and television networks, and to radio stations with a combined coverage of at least one half of the audience in each of the top 100 radio markets;

(3) Notice was to be published in certain leading national newspapers and magazines, in servicepersons' publications, and in newspapers in Australia and New Zealand;

(4) A toll-free "800" telephone number was to be obtained and staffed by persons who would provide callers with basic information about the litigation;

(5) Notice was to be sent to each state governor requesting that he or she refer the notice to any state agency dealing with the problems of Vietnam veterans.

The notice sent to individual veterans, reprinted in the appendix to this opinion, informed potential class members of the pendency of the class action and their right to opt out of the Rule 23(b)(3) class. The notice made clear that exclusion could be effectuated only by written request, and an "Exclusion Request Form" was attached to the notice for convenience.

Following certification of the two classes, the defendants petitioned this court for a writ of mandamus to compel the district court to vacate certification of the classes. See In re Diamond Shamrock Chemicals Co., 725 F.2d 858 (2d dr.), cert. denied, 465 U.S. 1067 (1984). In denying the petition, we noted that "mandamus is an extraordinary remedy," id. at 859, and that

"[r]eview of the many issues raised by the class certification will be available when the ramifications of each aspect of the ruling will be evident." Id. at 862. We also stated that "it seems likely that some common issues, which stem from the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial. The resolution of some of these issues in defendants' favor may end the litigation entirely." Id. at 860-61. We further observed that the notice required was at least arguably the best practicable under the circumstances. Id. at 862.

Various plaintiffs, as a means of challenging the settlement, now appeal from the class certification. They contend that the district court lacked subject matter jurisdiction, that there were insufficient common questions of law and fact to justify certification, and that the notice was inadequate.

3) The Settlement

In April 1984, Chief Judge Weinstein appointed three special masters – Leonard Garment, Kenneth Feinberg, and David Shapiro -- to assist in negotiations over a settlement of the class action. These negotiations intensified during the weekend before trial. See Schuck, Agent Orange on Trial at 49-66. On May 7, 1984, the day the trial was to have begun, the class representatives and the chemical companies agreed to settle the

class claims for $180 million. Thereafter, Chief Judge Weinstein conducted eleven days of hearings on the proposed settlement in New York, Atlanta, Houston, Chicago, and San Francisco. At these hearings, nearly 500 witnesses addressed the fairness of the settlement. Chief Judge Weinstein also considered "hundreds of written communications from veterans, members of their families, veterans' organizations and others . . . and read a large part of the relevant literature, taking judicial notice of its substance." In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 748 (E.D.N.Y. 1984) ("Settlement Opinion").

By May 6, 1984, the day before the settlement was reached, some 2,440 class members had opted out of the Rule 23(b)(3) class action by filing requests for exclusion. The settlement agreement provided for a period during which persons who had opted out of the class could be reinstated as class members if they filed a request with the district court. Settlement Agreement ¶ 8, id. at 865. Some 600 such requests were received. Chief Judge Weinstein stated that he would consider late applications to rejoin the class "sympathetically." Id. at 757.

In a lengthy opinion, reported at 597 F. Supp. 740 (E.D.N.Y. 1984), Chief Judge Weinstein approved the settlement subject to hearings on counsel fees and preliminary consideration of plans for distribution of the settlement proceeds. Various members of the class appeal from the approval of the settlement on the ground that the $180 million award is inadequate.

4) Counsel Fees

By late 1983, the three remaining members of the PMC -- Schlegel, Musslewhite, and Henderson -- found that they lacked the resources necessary to continue the litigation. In order to attract new members both to finance and staff the lawsuit, the members of the PMC entered into an agreement whereby those members who advanced money for expenses were to be repaid at three times the amount of money advanced "off the top" out of any award of counsel fees. The agreement also established a formula, later rescinded, by which the remainder of the fee award was to be distributed among the PMC members. As a result, those who had advanced money for expenses in return for a trebled repayment controlled six of the nine PMC votes. Chief Judge Weinstein was not informed of this agreement until after the case had been settled.

After the settlement, more than 100 applications for attorneys' fees and expenses were submitted to the district court. Hearings on these applications were held on September 26 and October 1, 1984. On June 18, 1985, Chief Judge Weinstein issued an amended order awarding a total of $10,767,443.63 in fees and expenses to 88 law firms and individual lawyers for their work on behalf of the class. In re "Agent Orange" Product Liability Litigation. 611 F. Supp. 1296, 1344-46 (E.D.N.Y. 1985). The district court followed the so-called "lodestar" approach to attorneys' fees awards, see City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) ("Grinnell I"), and City of Detroit

v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977) ("Grinnell II"), using national hourly rates of $150 for partners, $125 for law professors, and $100 for associates. The court increased some fee awards by a quality multiplier, ranging from 1.50 to 1.75, to reward those who exhibited "exceptional or extraordinary skill" in the litigation. 611 F. Supp. at 1328. The court declined, however, to apply an overall risk multiplier to the lodestar amount. Appeals have been taken from these rulings.

As noted, the PMC agreement required a trebled return of funds advanced off the top of any fees awarded by the court. Some PMC members therefore stood to receive enormously greater fees than they were awarded by the court, while others stood to receive substantially less. For example, David J. Dean, who was to have served as lead trial counsel and was awarded $1,424,283 in fees by the district court, would receive only $542,310 under the fee-sharing agreement. In contrast, Newton Schwartz, who was awarded only $41,886 by the district court, would receive $513,026 under the agreement.

Chief Judge Weinstein denied a motion by Dean to set aside the fee-sharing agreement after concluding that the agreement had no adverse impact on the interests of the class. In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1452, 1458-62 (E.D.N.Y. 1985). However, he ordered that "[i]n future cases, as soon as a fee-sharing arrangement is made its existence roust be made known to the court, and through the court to the class." Id. at 1463. Dean has appealed from that ruling.

5) Distribution of the Settlement

A number of proposals for distribution of the settlement fund were presented to Chief Judge Weinstein. We focus on the plans submitted by the PMC, by Victor Yannacone, original lead counsel for the class, and by Special Master Feinberg.

The PMC proposed to compensate all class members who could prove that they suffered from any of 24 medical conditions that the PMC's experts associated with exposure to Agent Orange. These conditions included chloracne; peripheral and central neuropathy; various liver disorders, including cirrhosis, chronic hepatitis, and porphyria cutanea tarda; gastrointestinal conditions; hematological, endocrinal, and metabolic problems; benign and malignant tumors; birth defects; and miscarriages. The PMC proposal also suggested providing compensation to claimants with other medical problems, such as arthritis, heartburn, abdominal pain, and diarrhea, that "seem to have been reported in the literature as possibly accompanying Agent Orange exposure." The PMC would have adjusted each compensation award by a number of "individual discount factors" to reflect a claimant's financial needs and the legal and factual difficulties that the claimant would have encountered in proving his or her case in court. Accordingly, two claimants with similar medical conditions might have received different monetary awards depending, for example, on their collateral source payments, numbers of dependents, and ability to receive gratuitous services; the statutes of limitations and availability

of a strict liability cause of action under the applicable state law; their levels of exposure to Agent Orange and/or dioxin, a factor the PMC has abandoned on appeal; their individual and family medical histories; "life style considerations"; and damages. The PMC suggested that the settlement fund might also be used to provide class-wide benefits such as "preventive and genetic counseling, health monitoring, research and [group life and health] insurance."

The Yannacone proposal would have deferred any distribution of the settlement fund to individual claimants pending a survey of "who the Viet Nam veterans are, what their present state of health is, and how many have already died and from what causes." Yannacone urged that a portion of the settlement fund be used to establish a "Viet Nam Veterans Legal Assistance Foundation" to assist class members in obtaining disability benefits from the Veterans' Administration. Yannacone's proposal purported to speak for thousands of veterans and their families who "reaffirm[ed] their original position that the purpose of the Agent Orange litigation was to establish a trust fund for the benefit of all the Agent Orange victims not to benefit any individual veteran at the expense of their [sic] comrades-in-arms."

Special Master Feinberg proposed that the greater part of the settlement fund be distributed to individual veterans and family members in the form of death and disability benefits. The difficulties of establishing a causal link between a claimant's

injuries and exposure to Agent Orange were to be avoided by compensating all claimants who had been exposed to the defoliant and who later died or became disabled as a result of non-traumatic causes. The Special Master proposed that the remainder of the settlement fund be used to provide services to the class as a whole and in particular to children with birth defects.

Chief Judge Weinstein conducted a public hearing on the various distribution plans on March 5, 1985. More than 40 speakers, including members of the PMC, Yannacone, representatives of veterans organizations, and individual class members, participated in the hearing. The PMC and other interested persons were allowed additional time following the hearing to submit written comments on the distribution proposals.

On May 28, 1985, Chief Judge Weinstein issued an order establishing a plan for distribution of the settlement fund. In re "Agent Orange" Product Liability Litigation ("Distribution Opinion"), 611 F. Supp. 1396 (E.D.N.Y. 1985). He adopted with slight modifications the Special Master's proposal, which he described as "an elegant solution [combining] insurance-type compensation to give as much help as possible to individuals who, in general, are most in need of assistance, together with a foundation run by veterans with the flexibility and discretion to take care of individuals and groups most in need of help." Id. at 1400. The plan provided that 75 percent of the $180 million

settlement fund, including accrued interest, would be distributed directly "to exposed veterans who suffer from long-term total disabilities and to the surviving spouses or children of exposed veterans who have died." Id. at 1410-11. A claimant would qualify for compensation by establishing exposure to Agent Orange and death or disability not "predominantly caused by trauma, whether or not self-inflicted." Id. at 1412.

Chief Judge Weinstein offered four reasons for providing individual compensation payments only to disabled veterans and to survivors of deceased veterans. First, because the settlement fund was "not sufficient to satisfy the claimed losses of every class member," id. at 1411, it would be equitable to limit payments to those with the most severe injuries. Second, the payments would be made only to veterans or survivors, and not to children who had suffered birth defects and wives who had suffered miscarriages, because "however slight the suggestion of a causal connection between the veterans' medical problems and Agent Orange exposure, even less evidence supports the existence of an association between birth defects [or miscarriages] and exposure of the father to Agent Orange in Vietnam." Id. Third, claim processing costs would be minimized under the plan because claimants would not be required to prove that they suffered from any particular disease or that the disease was caused by exposure to Agent Orange; the court reasoned that any alternative eligibility criteria would require "[c]reation of a costly new claims-processing bureaucracy" and "impose on the applicant the

enormous burdens of producing volumes of medical records and paying expensive medical and legal fees for complicated processing and testing." Id. Finally, the distribution plan "'obviate[s] the necessity for particularized proof and is 'a fair response to the particular difficulties that this class would have in gathering and presenting evidence of damages.'" Id. (quoting In re Chicken Antitrust Litigation American Poultry, 669 F.2d 228, 240 & n.20 (5th Cir. 1982)).

Chief Judge Weinstein rejected as "essentially arbitrary," id. at 1409, the PMC's plan to provide compensation only for specified diseases. He reasoned that "[n]o factual basis exists for choosing or excluding any disease, since causation cannot be shown for either individual claimants or individual diseases with any appropriate degree of probability." Id. In addition, he concluded that the costs of establishing the existence of particular diseases and applying individual discount factors would be burdensome and expensive for both the fund and the claimant. Id. at 1408-09.

Chief Judge Weinstein set aside most of the remainder of the settlement fund to support a "class assistance foundation" that would "serve as a national focus for Vietnam veterans who are class members to mobilize themselves and others to deal with their medical and related problems." Id. at 1432. The "broad mandates" of the foundation were defined as "to fund projects to aid children with birth defects and their families and alleviate reproductive problems" and "to fund projects to help meet the

service needs of the class as a whole." Id. at 1437. The district judge reasoned that the foundation was "[t]he most practicable and equitable method of distributing benefits" to class members who were neither disabled veterans nor survivors of deceased veterans, because "[d]istribution of thousands of small individual payments would trivialize the beneficial impact of the settlement fund on the needs of the class." Id. at 1431.

The court offered a number of examples of the sorts of programs for which the foundation might provide financial support. The projects that might be funded for children with birth defects included "[p]rotection and advocacy services," "[a] public hotline and referral service," "[g]rants to hospitals and clinics," "insurance programs," "vocational training projects," "grants to establish peer support groups to enable children with birth defects to discuss their problems openly among themselves," and "[g]rants or loans . . . to families in grave financial need to help pay for essential medical services." Id. at 1438-39. Other possibilities "for funding of classwide services" enumerated by the court included projects to "help class member veterans better obtain and utilize VA services and to monitor the VA and other federal and state services to ensure that they are responsive to the needs of the class," to "increase public awareness of the problems of the class," to provide health information and social service assistance to the class, and to "help members of the class become a more integrated part of society." Id. at 1440.

The foundation was to be administered by a board of directors "comprised primarily of Vietnam veterans." Id. at 1434. The court would appoint the initial board of directors of between 15 and 45 members, which would thereafter be "self-governing and self-perpetuating." Id. at 1435. Subject only to the general supervisory authority retained by the court, the board would control "every aspect of foundation administration," including "investment and budget decisions, specific funding priorities, a detailed grant application process, the actual grant awards, evaluation mechanisms, and fundraising strategies." Id. The court would play "[a] comparatively modest supervisory role in the operation of the class assistance foundation," while retaining the power to "supervise foundation operations actively and exercise control as necessary to protect the interests of the class." Id. at 1436.

Chief Judge Weinstein reappointed Special Master Feinberg to oversee the implementation of the distribution plan. Id. at 1400. However, no claimants were to receive payments and no services were to be funded until the appellate process was completed. Id. at 1451.

The PMC filed an appeal and petition for a writ of mandamus/prohibition on August 19, 1986, seeking to overturn the distribution plan. On September 5, 1986, Mr. Yannacone filed a petition for a writ of mandamus/prohibition seeking removal of the PMC as class counsel and implementation of his proposed distribution plan.

6) Dismissal of the Opt-Out Cases

After settling with the class, defendants moved on July 24, 1984, for summary judgment against the opt-outs. Chief Judge Weinstein dismissed the opt-outs on the grounds that, inter alia, no plaintiff was able as a matter of law to produce sufficient evidence to allow a trier of fact to find that Agent Orange had caused the particular ailment(s) from which he or she suffered. In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1223, 1256-63 (E.D.N.Y. 1985) ("Opt-Out Opinion"). As a second, independently dispositive ground, Chief Judge Weinstein held that the military contractor defense precluded recovery. Id. at 1263-64. Certain opt-out plaintiffs appeal from those decisions.

7) Proceedings Against the Government and Miscellaneous Actions

The first direct claim against the United States was asserted by veterans who believed that they had been exposed to Agent Orange. Ryan v. Cleland, 531 F. Supp. 724 (E.D.N.Y. 1982). The plaintiffs alleged that the government and certain government officials were liable under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) et seq.> for failing to warn them of the possible dangers associated with exposure to Agent Orange and neglecting to provide proper medical care for those who had been injured by the herbicide. Judge Pratt held that the United States was immune from suit under the FTCA on the failure-to-warn claims because those claims were "incident to and arising out of" the plaintiffs' military service and therefore fell within the

exception to the government's waiver of sovereign immunity recognized in Feres v. United States, 340 U.S. 135 (1950), and its progeny. 531 F. Supp. at 728. The remainder of the complaint was dismissed on various jurisdictional grounds that are not challenged on appeal.

The government refused to participate in the negotiations that culminated in the settlement of the class action. See Settlement Opinion, 597 F. Supp. at 879 (letter from government counsel to court). In the settlement agreement, the plaintiff class and the defendant chemical manufacturers "expressly reserve[d] all rights and claims which they "now have, or may at any time be entitled to assert against the United States, including its offices, departments, agencies, representatives, agents and employees." Settlement Agreement ¶ 11, id. at 865. Veterans and their families renewed their efforts to obtain relief from the government following the settlement. In July 1984, an Eighth Amended Complaint was filed on behalf of a number of named plaintiffs (the "Aguiar plaintiffs") and *a* proposed plaintiff class composed of veterans who claimed injury from exposure to Agent Orange and their spouses, parents, and children. In an attempt to circumvent the Feres doctrine, the complaint alleged that the government and certain government officials had engaged in negligent and intentionally tortious conduct that occurred before, during, and after the veterans' military service.

Chief Judge Weinstein refused to certify the plaintiffs' claims against the government as a class action, reasoning that "the enormous expenditure required to notify potential class members is not justified given the almost nonexistent possibility of recovery against the government on the merits." In re "Agent Orange" Product Liability Litigation, 603 F. Supp. 239, 242 (E.D.N.Y. 1985). In addition, he stated that class certification would unfairly preclude children with birth defects from bringing suit were future scientific studies to establish the validity of their claims against the government. Id. Chief Judge Weinstein then dismissed all claims against the government by veterans, as well as all derivative claims by veterans' spouses and children on such theories as loss of earnings and services. Agreeing with Judge Pratt that the United States was immune from suit on such claims under Feres, he rejected the plaintiffs' efforts to circumvent the Feres doctrine. Id. at 243-45. An appeal has been taken from that ruling.

Chief Judge Weinstein also concluded that the veterans' wives and children had produced "no evidence of any probative value" demonstrating that their miscarriages and birth defects were caused by Agent Orange or refuting "the government's overwhelming showing of no present proof of causation." Id. at 247. He therefore granted summary judgment to the government with respect to the wives' "direct" claims for independent injuries. However, he dismissed the childrens' direct claims without prejudice, reasoning that "discretion should generally

be exercised in favor of an infant who lacks evidence to support his or her claim but who may obtain such evidence in the future." Id. at 247.[2]

In a related action, two former civilian employees of the University of Hawaii and the widow of a third brought suit against the United States, the manufacturers of Agent Orange, and the former Regents of the University for injuries allegedly sustained during Agent Orange experiments at the University in 1967. In re "Agent Orange" Product Liability Litigation (Fraticelli v. Dow Chemical Co.), 611 F. Supp. 1285 (E.D.N.Y. 1985). Chief Judge Weinstein denied certification of a proposed plaintiff class consisting of 35,000 unnamed residents of Kauai County, Hawaii. He reasoned that the named plaintiffs had failed to demonstrate that they shared a common interest with the remainder of the proposed class. Id. at 1288. Chief Judge Weinstein then disposed of the individual plaintiffs' claims against each of the defendants. He dismissed the claims against the chemical manufacturers and the former Regents, with the exception of the widow's wrongful death claim, as barred by Hawaii's two-year statute of limitations for personal injury actions. Id. at 1288-89. He also dismissed the claims against the former Regents on the ground that Hawaii's workers' compensation statute provides the exclusive remedy against an employer for work-related injuries. Id. at 1289. Finally, he granted summary judgment in favor of all defendants, having found "no admissible evidence that Agent Orange caused plaintiffs'

illnesses." Id. An appeal has been taken.

The defendant chemical manufacturers served third-party complaints against the government for indemnification or contribution in January 1980. Judge Pratt dismissed the third-party complaints in their entirety on the basis of Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), which bars a defendant from obtaining indemnification or contribution from the government for damages paid to a serviceman-plaintiff in circumstances where the serviceman would be barred by Feres from suing the government directly for his injuries. In re "Agent Orange" Product Liability Litigation. 506 F. Supp. 762 (E.D.N.Y. 1980). However, no formal order of dismissal was entered.

Chief Judge Weinstein reconsidered the dismissal of the third-party complaints after he took charge of the Agent Orange litigation. See In re "Agent Orange" Product Liability Litigation, 580 F. Supp. 1242 (E.D.N.Y.), mandamus denied, 733 F.2d 10 (2d Cir.), appeal dismissed, 745 F.2d 161 (2d Cir. 1984). Analyzing the three rationales for the Feres doctrine, Chief Judge Weinstein held that it barred suit against the government only with respect to the claims of the veterans and the derivative claims of their families. 580 F. Supp. at 1247. He therefore reinstated the defendants' third-party complaints against the government as to the direct claims of the veterans' wives and children for their own injuries on the ground that such claims were precluded by neither Feres-Stencel nor by any of the

statutory exceptions to government liability contained in the FTCA. Id. at 1247-56. Chief Judge Weinstein later granted summary judgment to the government on the outstanding third-party claims. In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1221 (E.D.N.Y. 1985). Reasoning that the FTCA precludes recovery against the United States "[i]n the absence of some form of [governmental] misfeasance," he found no such misfeasance in the instant case. Id. at 1223. He thus rejected the defendants' claim that the government had withheld information about Agent Orange from them in the mid-1960s, finding that the defendants and the government had "essentially the same knowledge about possible dangers from dioxin in Agent Orange." Id. An appeal has been taken.

## III. CLASS MEMBERS' OBJECTIONS TO THE SETTLEMENT

We now address the various objections to the maintenance and settlement of the class action made by some class members.

1) Subject Matter Jurisdiction

The third amended complaint alleged that its class action claims were governed, inter alia, by "federal common law" and that the district court therefore had federal question jurisdiction. Judge Pratt agreed. In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 737, 749 (E.D.N.Y. 1979). We reversed, In re "Agent Orange" Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981), and the class action was thereafter maintained solely on the basis of

diversity jurisdiction. Appellants, members of the plaintiff class, now contend that a diversity class action cannot be brought in federal court absent complete diversity of citizenship between all class members and all defendants. It goes without saying that such complete diversity is lacking in this case.

Although we understand the need to preserve issues for further review, we confess a certain surprise at the vigor with which this argument was pressed in this court and the amount of time that was devoted to it at oral argument. It is hornbook law, based on 66 years of Supreme Court precedent, that complete diversity is required only between the named plaintiffs and the named defendants in a federal class action. 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3606, at 424 (2d ed. 1986) ("[t]he courts look only to the citizenship of the representative parties in a class action"). As the Supreme Court noted in Snyder v. Harris, 394 U.S. 332 (1969):

> Under current doctrine, if one member of a class is of diverse citizenship from the class' opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant and have nothing to fear from trying the lawsuit in the courts of their own State. See Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

394 U.S. at 340. See also United States ex rel. Sero v. Preiser, 506 F.2d 1115, 1129 (2d Cir. 1974), cert. denied, 421 U.S. 921 (1975). Thus, if appellants' theory of class action jurisdiction

is to become Law, this must be done by the Supreme Court.

Appellants also argue that even if Snyder v. Harris is good law, three of the named plaintiffs were co-citizens of three of the defendants. They contend that: (1) named plaintiff Michael F. Ryan and defendant Hooker Chemical were citizens of New York; (2) named plaintiff Brian T. Quinn and defendant Riverdale Chemical were citizens of Illinois; and (3) named plaintiff Dan G. Jordan and defendant Diamond Shamrock were citizens of Texas.

Both Hooker Chemical and Riverdale Chemical effectively ceased to be parties to the case before the filing of the final amended class complaint against the Agent Orange manufacturers. Hooker was granted summary judgment in February 1982, on the ground that it did not manufacture Agent Orange. In re "Agent Orange" Product Liability Litigation, 534 F. Supp. 1046, 1052 (E.D.N.Y. 1982). Riverdale's unopposed motion for summary judgment was granted in May 1983. See In re "Agent Orange" Product Liability Litigation, 565 F. Supp. 1263, 1272 (E.D.N.Y. 1983).

Appellants argue that because no Rule 54(b)[3] certification of dismissal was issued as to either Hooker or Riverdale, both defendants remain in the case for purposes of determining diversity jurisdiction. We believe that their view misconstrues Rule 54(b). The Supreme Court has noted that the "obvious purpose" of Rule 54(b) is to provide "an opportunity for litigants to obtain from the District Court a clear statement of

what that court is intending with reference to finality, and if such a direction is denied, the litigant can at least protect himself accordingly." Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 512 (1950). Because the purpose of the rule is thus only to clarify the appealability of an order, a dismissed defendant who fails to obtain a Rule 54(b) certification does not remain a party to the case for purposes of determining diversity.

Appellants' allegation regarding the citizenship of Diamond Shamrock is equally meritless. At the time the action was initiated against Diamond Shamrock, its principal place of business was in Ohio. The fact that it has since moved to Texas, the domicile of named plaintiff Dan Jordan, is irrelevant for diversity purposes. See Smith v. Sperling, 354 U.S. 91, 93 n.1 (1957) ("jurisdiction, once attached, is not impaired by a party's later change of domicile"). Thus, all of appellants' claims that diversity of citizenship is lacking are without merit.

Finally, appellants contend that the district court lacked jurisdiction over the class action because not all members of the class met the $10,000 jurisdictional requirement. See Zahn v. International Paper Co., 414 U.S. 291, 301 (1973) ("[e]ach plaintiff in a Rule 23(b)(3) class action must satisfy the jurisdictional amount, and any plaintiff who does not must be dismissed from the case"). However, "unless the law gives a different rule, the sum claimed by the plaintiff controls if the

claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) (footnotes omitted). Appellants do not argue that any class members made bad faith damage claims. Nor do they offer us any basis for determining whether such claims clearly are for less than the jurisdictional amount. Instead, they claim the district court failed to carry out an obligation to police the damage claims. No such affirmative obligation exists, however, absent some apparent reason to make inquiry. Plaintiffs made "what must be assumed to have been good faith allegations that each of them was entitled to at least $10,000 in damages. Defendants did not challenge the bona fides of these claims, and the district court thus had no reason to inquire further.

2) In Personam Jurisdiction

Appellants contend that the district court was barred by the due process clause of the fifth amendment from exercising personal jurisdiction over class members who lack sufficient contacts with New York as defined in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and its progeny. However, appellants concede, as they must, that Congress may, consistent with the due process clause, enact legislation authorizing the federal courts to exercise nationwide personal jurisdiction. See Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442

(1946) ("Congress could provide for service of process anywhere in the United States"). One such piece of legislation is 28 U.S.C. § 1407 (1982), the raultidistrict litigation statute. In the instant case, the district court was acting pursuant to a valid transfer order of the Judicial Panel on Multidistrict Litigation that was created by that statute. As the Panel has recognized,

> Transfers under Section 1407 are simply not encumbered by considerations of in personam jurisdiction and venue. . . . Following a transfer, the transferee judge has all the jurisdiction and powers over pretrial proceedings in the actions transferred to him that the transferor judge would have had in the absence of transfer.

In re FMC Corp. Patent Litigation, 422 F. Supp. 1163, 1165 (J.P.M.D.L. 1976) (citations omitted). See also In re Sugar Industry Antitrust Litigation, 399 F. Supp. 1397, 1400 (J.P.M.D.L. 1975) (rejecting due process challenge similar to that raised by appellants in the instant case). Appellants' argument therefore fails.

3) Class Certification

Appellants argue that the district court erred in certifying the Rule 23(b)(3) class action. They make the same arguments made by the defendants in petitioning for a writ of mandamus seeking decertification of the class action. See In re Diamond Shamrock Chemicals Co., 725 F.2d 858 (2d Cir.), cert. denied, 465 U.S. 1067 (1984). In denying the mandamus petition, we expressed doubt as to the existence of any issue of fact, let alone a

common issue, regarding "general causation." See 725 F.2d at 860. We also stated, however, that "it seems likely that some common issues, which stem from the unique fact that the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war, can be disposed of in a single trial. The resolution of some of these issues in defendants' favor may end the litigation entirely." Id. at 860-61. Therefore, we denied the petition. We stressed, however, that our scope of review in the mandamus proceeding was limited to the redress of a calculated disregard of governing rules, id. at 860, not the correction of ordinary error, and that the propriety of a class certification might be fully reviewed on a later appeal. Id. at 862. This is that appeal.

Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Existence of the first prerequisite in this case is undisputed. Whether there are problems regarding typicality and adequacy of representation depends upon the nature of the questions of law or fact common to the class. Our view of the

existence of the third and fourth prerequisites is thus influenced by our view of the second.

We must also look to the requirements of Rule 23(b)(3) that:

> the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The comment to Rule 23(b)(3) explicitly cautions against use of the class action device in mass tort cases. See Advisory Committee Note to 1966 Revision of Rule 23(b)(3) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."). Moreover, most courts have denied certification in those circumstances. See, e.g., In re Northern Dist. of Cal. Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847 (9th Cir. 1982), cert. denied, 459 U.S. 1171 (1983); Payton v. Abbott Labs, 100 F.R.D. 336 (D. Mass. 1983); Yandle v. PPG Industries, Inc., 65 F.R.D. 566 (E.D. Tex. 1974); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 83-85 (M.D. Pa.), appeal dismissed, 505 F.2d 729 (3d Cir. 1974).

The present litigation justifies the prevalent skepticism over the usefulness of class actions in so-called mass tort

cases and, in particular, claims for injuries resulting from tox.ic exposure. First, the benefits of a class action have been greatly exaggerated by its proponents in the present matter. For example, much ink has been spilled in this case over the distinction between generic causation -- whether Agent Orange is harmful at all, regardless of the degree or nature of exposure, and what ailments it may cause -- and individual causation -- whether a particular veteran suffers from a particular ailment as a result of exposure to Agent Orange. It has been claimed that the former is an issue that might appropriately be tried in a class action, notwithstanding that individual causation- must be tried separately for each plaintiff if the plaintiff class prevails.

We do not agree. The generic causation issue has three possible outcomes: 1) exposure to Agent Orange always causes harm; 2) exposure to Agent Orange never causes harm; and 3) exposure to Agent Orange may or may not cause harm depending on the kind of exposure and perhaps on other factors. It is indisputable that exposure to Agent Orange does not automatically cause harm. The so-called Ranch Hand Study of Air Force personnel who handled and sprayed the herbicide proved that much beyond a shadow of a doubt in finding no statistically significant differences between their subsequent health histories and those of similar personnel who had not been in contact with Agent Orange. Further, defendants have conceded that some kinds of exposure to Agent Orange may cause harm. They stated at both

the argument of the mandamus petition and the argument of the appeal that Agent Orange, like anything else, including water and peanuts, may be harmful. The epidemiological studies on which defendants rely so heavily prove no more than that Vietnam veterans do not exhibit statistically significant differences in various symptoms when compared with other groups. They in no way exclude the possibility of injury, and tend at best to prove only that, if Agent Orange did cause harm, it was in isolated instances or in cases of unusual exposure.

The relevant question, therefore, is not whether Agent Orange has the capacity to cause harm, the generic causation issue, but whether it did cause harm and to whom. That determination is highly individualistic, and depends upon the characteristics of individual plaintiffs (e.g. state of health, lifestyle) and the nature of their exposure to Agent Orange. Although generic causation and individual circumstances concerning each plaintiff and his or her exposure to Agent Orange thus appear to be inextricably intertwined, the class action would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure.

The second reason for our skepticism is that, with the exception of the military contractor defense, there may be few, if any, common questions of law. Although state law governs the claims of the individual veterans, see In re "Agent Orange" Product Liability Litigation, 635 F.2d at 993-95 (rejecting cause of action under federal common law), Chief Judge Weinstein

decided that there were common questions of law because he predicted that each court faced with an Agent Orange case would resort to a national consensus of product liability law. Chief Judge Weinstein's analysis of the choice of law issues in this action, see In re "Agent Orange" Product Liability Litigation, 580 F. Supp. 690 (E.D.N.Y. 1984), with which we assume familiarity, is bold and imaginative. However, in light of our prior holding that federal common law does not govern plaintiffs' claims, every jurisdiction would be free to render its own choice of law decision, and common experience suggests that the intellectual power of Chief Judge Weinstein's analysis alone would not be enough to prevent widespread disagreement.

Third, the dynamics of a class action in a case such as this may either impair the ability of representative parties to protect the interests of the class or cause the inefficient use of judicial resources. These undesirable results stem from the fact that potential plaintiffs in toxic tort cases do not share common interests because of differences in the strength of their claims. Before the class is certified, it is usually some of the plaintiffs who seek certification and defendants who resist. This is so because many of the plaintiffs' counsel will perceive in a class action efficiencies in discovery, legal and scientific research, and the funding of expenses. When counsel can reasonably expect to become counsel for the class and to share in a substantial award of fees, the incentive to seek certification is greatly enhanced. Defendants will resist certification,

hoping to defeat the plaintiffs individually through application of their greater resources.

All plaintiffs may not desire class certification, however, because those with strong cases may well be better off going it alone. The drum-beating that accompanies a well-publicized class action claiming harm from toxic exposure and the speculative nature of the exposure issue may well attract excessive numbers of plaintiffs with weak to fanciful cases. For example, notwithstanding the grave doubt surrounding the factual basis of the plaintiffs' case, some 240,000 veterans and family members alleging hundreds of different ailments, including many that are both minor and commonplace, have filed claims for payment out of the settlement fund.

If plaintiffs with strong claims remain members of the class, they may see their claims diluted because a settlement attractive to the defendants will in all likelihood occur. Weak plaintiffs, who may exist in very large numbers, stand to gain from even a small settlement. Moreover, once a significant amount of money is on the table, the class attorneys will have an incentive to settle. They may well anticipate that the percentage of this money likely to be awarded as counsel fees will decline after a certain point. If they go to trial, on the other hand, they run the risk of losing the case and receiving no compensation for what may have been an enormous amount of work. There is thus great pressure to settle. Indeed, a settlement in a case such as the instant litigation, dramatically arrived at

just before dawn on the day of trial after sleepless hours of bargaining, seems almost as inevitable as the sunrise. Such a settlement, however, is not likely to lead to a fund that can be distributed among the large number of class members who will assert claims and still compensate the strong plaintiffs for the value of their cases.

Moreover, the ability of the district court to scrutinize the fairness of the settlement is greatly impaired where the legal and factual issues to be determined in the class action are as numerous and complex as they were under the district court's order in the instant case. Similarly, the fashioning of a distribution plan that is both fair to the strong plaintiffs and efficient in adjudicating the large number of claims may be impossible. Only the weakness of the evidence of causation as to all plaintiffs and the strength of the military contractor defense enabled the district court to evaluate the settlement accurately and to fashion an appropriate distribution scheme in the instant matter. We regard those factors as largely coincidental and not to be expected in all toxic exposure cases.

If the strong plaintiffs opt out, however, the efficiencies of a class action may be negative. The class would then consist largely of plaintiffs with weak cases, many or most of which should never have been brought. The defendants would be unlikely to settle with the class because such a settlement with the class would not affect their continuing exposure to large damage awards in the individual cases brought by strong plaintiffs. Both the

class action and the strong cases would then have to be tried.

Were this an action by civilians based on exposure to dioxin in the course of civilian affairs, we believe certification of a class action would have been error. However, we return to the cardinal fact we noted in denying the petition for writ of mandamus, namely that "the alleged damage was caused by a product sold by private manufacturers under contract to the government for use in a war." In re Diamond Shamrock Chemicals Co., 725 F.2d at 860. In that regard, Chief Judge Weinstein noted that:

> Unlike litigations such as those involving DES, Dalkon Shield and asbestos, the trial is likely to emphasize critical common defenses applicable to the plaintiffs' class as a whole. They will include such matters as ... that if any injuries were caused by defendants' product it was because of the particular use and misuse made by the government; and that the government, not the manufacturers were wholly responsible because the former knew of all possible dangers and assumed full responsibility for any damage. . . . It is anticipated that a very substantial portion of a prospective four-month trial will be devoted to just those defenses. Certification would be justified if only to prevent relitigating those defenses over and over again in individual cases.

Class Certification Opinion, 100 F.R.D. at 723.

In our view, class certification was justified under Rule 23(b)(3) due to the centrality of the military contractor defense. First, this defense is common to all of the plaintiffs' cases, and thus satisfies the commonality requirement of Rule 23(a)(2). See Port Authority Police Benevolent Ass'n v. Port

Authority of New York & New Jersey, 698 F.2d 150, 154 (2d Cir. 1983) ("Since plaintiff has satisfied the requirement of a common question of law or fact, Rule 23(a)(2), the denial of class certification must be reversed.") (emphasis added). Second, because the military contractor defense is of central importance in the instant matter for reasons explained in our subsequent discussion of the fairness of the settlement and in our separate opinion affirming the grant of summary judgment against the opt-outs, this issue is governed by federal law, and a class trial in a federal court is a method of adjudication superior to the alternatives. Fed R. Civ. P. 23(b)(3). If the defense succeeds, the entire litigation is disposed of. If it fails, it will not be an issue in the subsequent individual trials. In that event, moreover, the ground for its rejection, such as a failure to warn the government of a known hazard, might well be dispositive of relevant factual issues in those trials.

Appellants argue that the diverse interests of the class make adequate representation virtually impossible. We disagree. If defendants had successfully interposed the military contractor defense, they would have precluded recovery by all plaintiffs, irrespective of the strengths, weaknesses, or idiosyncrasies of their claims. Similarly, the typicality issue disappears because of the virtual identity of all of the plaintiffs' cases with respect to the military contractor defense.

It is true that some of the dynamics that generate pressure for an undesirable settlement will continue to operate in a class

action limited to the military contractor defense. We believe, however, that a district court's ability to scrutinize the fairness of a class settlement is greatly enhanced by narrowing the legal and factual issues to this defense. We are confident, moreover, that such scrutiny will be informed by the court's awareness of the danger of such a settlement occurring. It is also true that the difficulty in fashioning a distribution scheme that does not overcompensate weak claimants and undercompensate strong ones is not alleviated by limiting the class certification to the military contractor defense. However, on balance we believe use of the class action was appropriate, although many potential difficulties were avoided only because all plaintiffs had very weak cases on causation and the military contractor defense was so strong.

We thus conclude that certification of the Rule 23(b)(3) class action was proper. Because our disposition of the appeals from the approval of the settlement and from the grant of summary judgment against the opt-outs excludes any possibility of an award of punitive damages, we need not address the propriety of the certification of a mandatory class under Rule 23(b)(1)(B).

4) Adequacy of the Notice of the Class Action

In addressing the defendants' petition for a writ of mandamus, we noted only that Chief Judge Weinstein's conclusion that the notice ordered was the best practicable under the circumstances was "if not inexorable, . . . arguably correct, at least before the full results [of the notice plan] are known."

In re Diamond Shamrock Chemicals Co., 725 F.2d at 862. Full review is now necessary.

Appellants argue that both the notice required by the district court, see Class Certification Opinion, 100 F.R.D. at 729-34, and the notice actually given were insufficient to inform the class members of their rights, most importantly their right to opt out. They contend therefore that the notice failed to meet the requirements of due process and Rule 23(c)(2) and seek an additional notification period as well as an additional opt-out period.

The portion of the order that dealt with notice, set out in full in the appendix, adopted a creative approach appropriate to this unique case. It required that letter notice be sent to the 92,275 veterans listed in the Agent Orange Registry established by the Veterans' Administration in 1978 to identify potential victims as well as to the 11,256 persons who had filed or intervened in lawsuits or had counsel affiliated with the PMC. The court concluded that these were the only class members who could be identified and located through reasonable effort. Id. at 729-31. The court also required various forms of substitute notice, including announcements in various servicepersons' and national publications and on radio and television. In addition, the court directed that a letter be sent to every governor requesting that notice of the lawsuit be provided to any state agencies that might have lists of veterans.

Rule 23, of course, accords considerable discretion to a district court in fashioning notice to a class, see Reiter v. Sonotone Corp., 442 U.S. 330, 345 (1979), and our standard of review is "the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion." Albemarle Paper Co. v. Moody. 422 U.S. 405, 424 (1975) (discussing "abuse of discretion" standard in award of back pay under Title VII of Civil Rights Act of 1964). See generally Anderson v. Bessemer City, 470 U.S. 564, 573-76 (1985) (elaborating on "clearly erroneous" standard).

Rule 23(c)(2) requires only that members of a Rule 23(b)(3) class be given "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Relying principally upon Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), appellants nonetheless contend that actual notice to each and every class member was essential. We disagree.

In Mullane, the Supreme Court held that notice by publication of pending settlements of accounts was constitutionally sufficient as to trust beneficiaries whose names and addresses were unknown to the trustee. Noting the state's interest "in bringing any issues as to its fiduciaries to a final settlement," id. at 313, and the beneficiary's interest in being apprised of the pendency of settlements in order to "choose for

himself whether to appear or default, acquiesce or contest," id. at 314, the Court concluded that notice by publication was permissible as to persons whose whereabouts or interests could not be determined through due diligence or whose interests were either conjectural or future. Id. at 317-18. It noted that where the performance of a trustee was the issue, the interests of unknown beneficiaries were likely to be protected by the known and notified beneficiaries, who had to be provided with mailed notice. The Court stated:

> This type of trust presupposes a large number of small interests. The individual interest does not stand alone but is identical with that of a class. The rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries. Therefore notice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all, since any objection sustained would inure to the benefit of all. We think that under such circumstances reasonable risks that notice might not actually reach every beneficiary are justifiable.

Id. at 319. Appellants contend that, unlike Mullane, the interests of Agent Orange class members who were unaware of the instant litigation would not be protected by those class members who did receive notice.[4]

It is true that the claims of the plaintiffs are highly individualistic in a number of respects. The interests of all of the plaintiffs are identical, however, with regard to the facts

and the law relevant to the military contractor defense. The class members with actual notice therefore would have represented the interests of the class members unaware of the action.

Moreover, Chief Judge Weinstein found that many of the members of the class were unknown and could not be located through reasonable efforts. That conclusion is a finding of fact, and must be accepted unless clearly erroneous. In re Franklin National Bank Securities Litigation, 599 F.2d 1109, 1110-11 (2d Cir. 1979). We cannot agree with appellants that all 2.4 million Vietnam veterans should have been sent letter notice. First, it is undisputed that far fewer than that number were exposed to Agent Orange. A requirement that notice be given to all Vietnam veterans would thus have been considerably overbroad. Second, there is no assurance that such a list could have been compiled through reasonable efforts. Appellants claim that some records kept by the government would have facilitated individualized notice. They concede, however, that there was no easily accessible list of veterans, as there must have been of royalty holders in Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), and of odd-lot trading customers in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). We cannot find, therefore, that such a comprehensive list could reasonably have been compiled.

We also note that the second phase of the plan enlisted the aid of the mass media and state governments, an effort that ultimately resulted in letter notice to 20,000 class members in

addition to the more than 100,000 given notice in the first phase of the plan. We also take judicial notice of the widespread publicity this litigation has received. Given the great doubt as to whether anyone at all was injured by Agent Orange, the fact that some 240,000 claims have been filed suggests that no practical problem exists as to the adequacy of the notice.

Appellants offer no feasible alternative to the notice plan adopted by the district court for identifying and contacting persons actually exposed to Agent Orange. In this regard, we are informed by the statement of our late colleague Judge Friendly that it is inappropriate to second-guess a district court's class notice procedure, "particularly [where] no alternative method of ascertaining class members' identities has been suggested to us." Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983). In sum, the notice plan adopted by Chief Judge Weinstein was fully adequate under the circumstances.

Appellants also raise numerous objections to the content of the notice given. They contend, for example, that there were discrepancies among the various notices as to whether the class consisted of persons who "claim injury," "were injured," or "can claim injury" from Agent Orange. Such objections provide no basis for us to require the sending of new notice, however, because the essential goal of the notice requirement would have been accomplished by any of the above formulations. Anyone who believed that he or she had suffered injury as a result of

exposure to Agent Orange in Vietnam was on notice of the pendency of a lawsuit and was thus alerted to seek advice from counsel.

Finally, appellants point out that a large number of mailed notices were returned undelivered. In litigation of this sort, such returns must be regarded as inevitable. They also note the alleged failure of class counsel to ensure that all of the publication and broadcast notices were provided in a timely fashion. These omissions occurred in part because of a clerical misunderstanding regarding a stay we granted after denial of the defendants' mandamus petition. See Settlement Opinion, 597, F. Supp. at 756. Moreover, a major effort was made to disseminate notice through the media, and we are convinced that the omissions noted were of little consequence in light of the actual notice and widespread publicity.

5) Adequacy of Post-Settlement Procedures

Appellants argue that Chief Judge Weinstein should have conducted hearings to evaluate the adequacy of the settlement prior to ordering notice of the settlement to the class. We have previously noted in addressing a similar argument that "[t]he question becomes whether or not the District Court had before it sufficient facts intelligently to approve the settlement offer. If it did, then there is no reason to hold an additional hearing on the settlement or to give appellants authority to renew discovery." Grinnell I, 495 F.2d at 462-63. Although appellants have stated in attacking the settlement that Chief Judge Weinstein was too involved in its negotiation, they argue here

that he did not know enough about the settlement to assess its reasonableness. Their argument is totally frivolous. Chief Judge Weinstein was thoroughly informed of the strengths and weaknesses of the parties' positions. No hearing was necessary, therefore.

Appellants also challenge the validity of the notice of settlement sent to class members. They allege, inter alia, that the notice was defective because it failed to detail a distribution plan. There is, however, no absolute requirement that such a plan be formulated prior to notification of the class. See In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 223-24 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982).

The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement. The formulation of the plan in a case such as this is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties and the district court as to prevent either task from being accomplished. Moreover, if a hearing on a settlement must follow formulation of a distribution plan, then

reversal of any significant aspect of the plan on appeal, as has occurred in the instant case with regard to the establishment of a foundation, would require a remand for reconsideration of the settlement, followed by yet another appeal. There is no sound reason to impose such procedural straitjackets upon the settlements of class actions. Finally, we note that Chief Judge Weinstein's approval of the settlement was subject to formulation of and hearings on a plan for distribution.

6) Adequacy of the Settlement

As required by Fed. R. Civ, P, 23(e), Chief Judge Weinetein carefully reviewed the proposed settlement, and gave his approval subject to hearings on attorneys' fees and approval of a settlement fund distribution plan. See Settlement Opinion, 597 F. Supp. 740 (E.D.N.Y. 1984). He stated:

> The court has been deeply moved by its contact with members of the plaintiffs' class from all over the nation and abroad. Many do deserve better of their country. Had this court the power to rectify past wrongs -- actual or perceived -- it would do so. But no single litigation can lift all of plaintiffs' burdens. The legislative and executive branches of government -- state and federal -- and the Veterans Administration, as well as our many private and quasi-public medical and social agencies, are far more capable than this court of shaping the larger remedies and emotional compensation plaintiffs seek.
>
> Within the sharply limited judicial role we must ask whether the settlement of the litigation proposed by the parties'

> representatives is acceptable. For the reasons indicated below we tentatively hold that it is. It gives the class more than it would likely achieve by attempting to litigate to the death. It provides funds to help at least some men, women and children whose hardships will be reduced in some small degree. It does represent a major step in the essential process of reconciliation among ourselves.

Id. at 747.

Our role in scrutinizing the approval of the settlement is limited in light of the district court's extensive knowledge of the parties and their respective cases. As we stated in Grinnell I, "so much respect is accorded the opinion of the trial court in these matters that this court will intervene in *a* judicially approved settlement only when objectors to that settlement have made a clear showing that the District Court has abused its discretion." 495 F.2d at 455 (citations omitted). We also noted that "[t]he proposed settlement cannot be judged without reference to the strength of plaintiffs' claims," and that "[i]f the settlement offer was grossly inadequate . . . it can be inadequate only in light of the strength of the case presented by the plaintiffs." Id.

Appellants argue that the $180 million settlement approved by the district court is woefully inadequate. They contend that the PMC underestimated the strength of the class' case, the total number of claimants, the number with serious claims, and the value of these claims had they been presented to juries. They assert that the principal PMC negotiator estimated that there

were only about 20,000 claims, 3,000 of which were serious in nature. Appellants' own estimate is that there are at least 20,000 serious claims, each worth at least $500,000. Appellants seek to bolster their position by noting that 240,000 veterans have filed claims against the settlement fund.

We view the lack of hard information as to the number of "serious" claims -- apparently a reference to the amount of damage suffered since no individual Agent Orange claim is strong on liability -- as a sign of the weakness of the plaintiffs' case. Those who challenge the settlement, including counsel who have been involved in the litigation for many years, continue merely to speculate about the number of serious claims. That fact supports rather than undermines the settlement.

We are also unimpressed by the use of the total number of claimants as a means of attacking the settlement. The 240,000 claimants specify hundreds of different ailments, some of which, such as anxiety or fatigue, are so common that causation by Agent Orange simply cannot be proved. Moreover, the existence of such a large number of claimants proves nothing. For example, thousands of birth defects in the children of Vietnam veterans exposed to Agent Orange would not statistically differentiate that group from the population generally. See Settlement Opinion, 597 F. Supp. at 789 (quoting JAMA editorial by Bruce B. Dan, M.D.). The irrelevance of the number of claimants results from the fact that every Vietnam veteran who might have been exposed to Agent Orange was invited to file a

claim regarding any and all "adverse health effects." 597 F. Supp. at 869.

Nevertheless, tort law accords juries wide discretion, and the existence of any substantial number of serious plaintiffs would create a dangerous exposure for the chemical companies. It is true that $180 million is a lot of money. If even a small number of plaintiffs had gone on to prevail at trial, however, the actual exposure of the chemical companies might well have been measured instead in the billions of dollars. Jury verdicts of several million dollars for disabling ailments or injuries to children are not uncommon. If, in the present litigation, each serious claim had a settlement value of $500,000, the $180 million would cover only 360 plaintiffs. Indeed, the $180 million is at best only a small multiple of, at worst less than, the fees the chemical companies would have had to pay to their lawyers had they continued the litigation. However large a sum $180 million may be, therefore, we must conclude that in the circumstances it was essentially a settlement at nuisance value.

We believe, however, that the PMC had good reason to view this case as having only nuisance value. Chief Judge Weinstein's opinion sets out the various weaknesses of plaintiffs' case in great and persuasive detail, Settlement Opinion, 597 F. Supp. 740 (E.D.N.Y. 1984), and our discussion assumes familiarity with that opinion.

The difficulties begin with the conceded fact that all of the various ailments afflicting the plaintiffs occur in the

population generally and have known and unknown causes other than exposure to dioxin. Id. at 782-83. Studies based on industrial accidents and experiments with animals suggest that exposure to dioxin may cause various of those ailments. Id. at 780. However, these studies involve different dosages and different species than are involved in this litigation. Studies of Vietnam veterans themselves fail to demonstrate ailments occurring among them at a statistically abnormal rate. See id. at 787-88. The weight of present scientific evidence thus does not establish that personnel serving in Vietnam were injured by Agent Orange. See III Review of Literature on Herbicides, Including Phenoxy Herbicides and Associated Dioxins, II-8 to II-10 (1984) (Joint Appendix Vol. XIII at 5828-29).

The Ranch Hand Study compared health records of Air Force personnel involved in handling and spraying Agent Orange with those of Air Force personnel who performed other tasks. It concluded that there is little difference in the health histories of the two groups. See 597 F. Supp. at 782, 784, 788. Other studies, including many done by federal, state, and foreign governments, compared the incidence of various ailments among Vietnam veterans to their incidence among civilian populations. These studies also concluded there are no statistically significant differences. See id. at 787-95.

Such studies are, of course, not conclusive. The Ranch Hand Study, for example, involved personnel who ate and slept at their

home bases and were able to take regular showers, whereas the plaintiffs were predominantly infantry alleging exposure to Agent Orange through spraying or ingestion of local food and water. Id. at 788. Although it is by no means clear that the plaintiffs suffered greater exposure than did the Air Force personnel who actually handled the herbicide, the circumstances of exposure were clearly different. There are, moreover, some inconclusive anomalies in the Ranch Hand findings. Id.

Conclusions as to the effects of Agent Orange reached by studies comparing Vietnam veterans with civilians are weakened by the fact that portions of the civilian population may also have been exposed to dioxin. See id. at 782 ("as one expert put it, 'all of us have probably been exposed to dioxin at some time'"). The similar incidence of diseases in the two groups thus does not absolve Agent Orange. Nevertheless, the facts that the studies do not exclude the possibility of injury and that evidence of such injury may someday be found cannot obscure the paucity of present evidence that Agent Orange injured the plaintiffs. Indeed, plaintiffs' own evidence of dioxin's toxicity partly undermines their case. That evidence establishes that chloracne is a leading indicator of harmful exposure to dioxin, yet verified cases of chloracne among Vietnam veterans are rare. Id. at 794-95.

At bottom, the individual veterans' cases would consist of oral testimony that each had been in an area where Agent Orange

was used, that studies of industrial accidents and animal experiments show that dioxin is harmful, and that the plaintiff suffers from a particular ailment. Medical testimony would indicate a causal relationship. The defendants' case would consist largely of evidence that each of these ailments has many unknown causes, that most of the ailments usually cannot be attributed to a particular cause, and that each exists among many persons not exposed to Agent Orange. As a concrete example, a plaintiff might testify to presence in an area in South Vietnam where Agent Orange was used and development of a cancer some years later. Medical testimony would again indicate a causal relationship. The defendants would show that thousands of similar cancers without traceable cause are statistically predictable among persons not exposed to Agent Orange and that no greater incidence of such cancers has been found among Vietnam veterans than among the population generally.

The problems of proving causation are thus substantial. This is illustrated by the scientific evidence offered by the opt-outs in response to the defendants' motion for summary judgment.[5] See Opt-Out Opinion, 611 F. Supp. 1223; In re "Agent Orange" Product Liability Litigation (Lilley v. Dow Chemical Co.), 611 F. Supp. 1267 (E.D.N.Y. 1985) (individual opt-out claim brought by veteran's widow). Their experts relied heavily upon studies of industrial accidents and animals that are of marginal relevance to this case. See Opt-Out Opinion,

611 F. Supp. at 1236, 1238. Also, some of the expert opinions as to individual causation were often highly tentative or subject to impeachment. See Lilley v. Dow Chemical Co., 611 F. Supp. at 1273; Opt-Out Opinion, 611 F. Supp. at 1236-38, 1252-54, 1265-66.

The factual weakness of the plaintiffs' case is further revealed by the difficulty of proving details about exposure to Agent Orange. The events in question occurred many years ago, and exposure through ingestion of water or food is a matter of

considerable speculation. Nevertheless, given the nature of the scientific evidence, the character of exposure is a critical element.

Plaintiffs also face formidable legal problems in establishing liability. Each plaintiff would encounter a choice of law issue that might be resolved adversely to his or her claim. As Chief Judge Weinstein recognized, the substantive law of product liability varies from state to state, and the question of which state's law would apply to a particular case is not easily answered. See 580 F. Supp. 690, 693-701 (E.D.N.Y. 1984). See also Class Certification Opinion. 100 F.R.D. 718, 724 (E.D.N.Y. 1983). No single state has an overriding interest in this litigation because the alleged injuries resulted from exposure to toxic materials in a foreign country while the veteran plaintiffs were serving in the armed forces. Chief Judge Weinstein concluded that each tribunal addressing a claim by an individual plaintiff would apply a national consensus law. 580 F. Supp. at 713. Viewed as an academic discussion of an interesting choice of law problem, his analysis is, as we noted, bold and imaginative. Viewed as a prediction of what particular jurisdictions would do in individual cases, however, his conclusion is patently speculative. Moreover, even if a national consensus law were developed and applied, there is no guarantee that it would be favorable to the plaintiffs.

Other legal problems facing the plaintiffs concern the applicability of various state statutes of limitations. These were discussed in detail by Chief Judge Weinstein in his opinion

approving the settlement, 597 F. Supp. 740, 800-816 (E.D.N.Y. 1984), and we have little to add to that discussion other than to express skepticism that all plaintiffs would overcome the defense that their claims were time barred.

Finally, the plaintiffs might have difficulty establishing the liability of any particular defendant because each defendant's version of Agent Orange contained different amounts of dioxin and because the government mixed the products of the various manufacturers in unmarked barrels. It is therefore impossible to attribute the exposure of an individual to Agent Orange to the product of a particular company. It is possible, moreover, that only the herbicide with the greater amounts of dioxin was hazardous. As Chief Judge Weinstein noted in his opinion, id. at 819-33, various legal theories might enable plaintiffs to establish liability against each manufacturer, but there is no guarantee that any of these theories would be adopted.

The plaintiffs had a final and in our view impossible, hurdle to surmount, namely the military contractor defense. The detailed elaboration of our views of that defense can be found in the opinion that discusses the opt-outs' appeal from the grant of summary judgment. We need note here only that in affirming the grant of summary judgment against the opt-outs, we act on our belief that defendants clearly did not breach any duty to inform the government of hazards relating to Agent Orange. First, we agree with Chief Judge Weinstein that a reasonable trier of fact

would have to have found that during the time when the defendants had a duty to inform the government of known hazards, the government had as much knowledge as the defendants of the dangers of dioxin, then relating largely to chloracne and a rare liver disease. See Opt-Out Opinion. 611 F. Supp. at 1263. Second, we believe that the military contractor defense shields defendant contractors from liability where the hazard is wholly speculative. Even if this were a case in which causation was now clear and the issue was whether the hazard was known when Agent Orange was sold to the government, the plaintiffs would have difficulty establishing a breach of a duty to inform. Establishing such a duty on the facts here is impossible, however. In the light of hindsight, some 15 to 20 years after the fact, the weight of present scientific evidence does not establish that personnel in Vietnam were injured by Agent Orange, and there cannot have been a breach of an earlier duty to inform the government of known hazards.

We conclude that all the plaintiffs in this litigation faced formidable hurdles. The settlement was therefore reasonable. We reach this conclusion even though we recognize that the PMC's fee agreement created a conflict of interest that generated impermissible incentives on the part of class counsel to settle, as set forth in Judge Miner's companion opinion. Whatever effect the invalidation of that agreement might have had on a settlement in a strong liability case, it does not affect the instant

settlement because of the grave weaknesses in plaintiffs' case.

Affirmed.

FOOTNOTES

1/ "2,4-D" and "2,4,5-T" are the abbreviated names of 2,4-Dichlorophenoxyacetic acid and 2,4,5-Trichlorophenoxyacetic acid, respectively.

2/ A complaint essentially equivalent to the Eighth Amended Complaint was subsequently filed on behalf of a second group of plaintiffs (the "Adams plaintiffs") in the Southern District of Texas and transferred to the Eastern District of New York. * On June 19, 1986, Chief Judge Weinstein disposed of this action in the same manner as he had disposed of the earlier action against the government. The dismissal of the veterans' claims has been appealed in both actions; however, the summary judgment on the wives' direct claims has been appealed only in the later action.

3/ Fed. R. Civ. P. 54(b) provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not

> terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

47 The PMC challenges appellants' standing to challenge any aspect of the settlement other than its substantive fairness. Master Brief of Appellee Plaintiffs' Management Committee at 66-67. It argues that appellants seek not to advance their own interests, but rather those of, for example, class members who did not receive notice. Due to our disposition of appellants' claims, we are not compelled to address this objection to standing and therefore do not do so.

5/ This evidence came into the record after approval of the settlement. Because it supports appellants' position, they are not prejudiced by our consideration of it.

APPENDIX

Chief Judge Weinstein's order with respect to notice to the members of the class provided as follows:

> (a) Plaintiffs' counsel, at their own expense, shall cause a copy of the written notice, attached as Exhibit A, to be mailed by first class United States mail to all persons who have filed actions as plaintiffs in the District Courts of the United States, or filed actions in state courts later removed to a federal court, which are pending in or have been transferred to this court for consolidated proceedings by the Panel on Multi-District Litigation, together with all persons who have moved to intervene or are intervenors, and each class member presently represented by counsel associated with plaintiffs' management committee who has not yet commenced an action or sought intervention. Mailing of the notice shall take place within 30 days of this Order.
>
> (b) Plaintiffs' counsel, at their own expense, shall cause to be mailed a copy of the written notice to all persons who are currently listed on the United States Government's Veteran's Administration "Agent Orange Registry." This mailing shall take place within 50 days of this Order.
>
> (c) Notice shall be mailed in envelopes that are printed only with the names of the addressee and the Clerk of this Court. Plaintiffs' counsel shall maintain a record of the name and address of each person to whom the notice is, mailed. The record shall be filed with the Clerk of the Court not later than 70 days after the issuance of this Order.
>
> (d) Plaintiffs' counsel, at their own expense, shall obtain a post office box in Smithtown, New York, 11787, in the name of the Clerk of the Court, and advise the court and the parties of the box number not later than 15 days after the issuance of this Order. The

box shall be rented until further order of the court. Plaintiffs' counsel shall on a daily basis review the contents of the post office box and prepare a listing of all exclusion requests received, which shall be available to the court and the parties for inspection and copying, together with the exclusion requests. Plaintiffs' counsel shall send a copy of the notice and the exclusion request form to each person who writes to the Clerk of the Court requesting them. Each day plaintiffs' counsel shall transmit to the court and the parties copies of any communications (other than exclusion requests or requests for forms) that are received at the post office box. Plaintiffs' counsel shall maintain a record, together with the originals, of all mail returned as undelivered.

(e) Plaintiffs' counsel, at their own expense, shall serve a radio and television announcement notice in the form of Exhibit B on the nationwide networks of the American Broadcasting Company, the Columbia Broadcasting System, the Mutual Broadcasting System, the National Broadcasting Company, and the Public Broadcasting and Television Networks and on radio stations with a combined coverage of at least 50 percent of the listener audience in each of the top one hundred radio markets in the United States within 50 days of this Order.

Along with the radio and television notice served upon the nationwide radio and television broadcasting systems and radio stations, plaintiffs' counsel shall request that the notice be read as set forth in Exhibit B without interruption or comment, either alone or in conjunction with the showing on television of the text of Exhibit B. Plaintiffs' counsel shall request that each participating radio and television broadcasting station advise them of the dates and times at which the notice was broadcast or shown.

Within 90 days of this Order, plaintiffs' counsel shall furnish to the court and the parties a report identifying the name and

location of each radio station broadcasting the announcement, if known, and the date and time of each announcement. The court will then determine if further notice is required.

(f) Plaintiffs' counsel, at their own expense, shall publish in the following newspapers and magazines an announcement in two successive weeks (but if publication is monthly, only once) in the form of Exhibit C: the nationwide edition of The New York Times, U.S.A. Today, Time Magazine, the American Legion Magazine, VFW Magazine, Air Force Times, Army Times, Navy Times, and the Leatherneck; the ten largest circulation newspapers in Australia, including The Australian; and the five largest daily circulation newspapers in New Zealand, including The Dominion. Publication shall be completed as soon as practicable, but no later than March 1, 1984. The size of the notice shall be not less than one-eighth, nor more than one-third, of the newspaper or magazine page.

(g) Plaintiffs' counsel shall, at their own expense, obtain a toll-free "800" telephone number in the name of the Clerk of the Court. The number shall be in effect no later than January 1, 1984 to at least May 1, 1984. The number shall be manned on a daily basis, from at least Monday to Friday, 9:00 a.m. to 5:00 p.m., E.S.T., with knowledgeable persons (or a recorded announcement and recording device) who shall tell callers where to write for further information, but who shall not give advice concerning rights and responsibilities in this litigation. A record of those calling and giving their names and addresses shall be kept. Those requesting a copy of Exhibit A shall be sent one. No oral exclusion request shall be taken. Plaintiffs' counsel shall give written instructions to those answering the phone. A copy of such instructions and any recorded announcement shall be filed with the Clerk.

(h) The Clerk of the Court shall send this order and notice to the Governor of each of the states of the United States. He shall respectfully request each Governor to refer

the notice to any state organization created by the executive or legislative branches dealing with the problems of Vietnam veterans and request that the notice be sent to all those known Vietnam veterans who may be members of the class described in the Order, or that a list of names and addresses be supplied to this court so that notice may be mailed by the plaintiffs' counsel. The Clerk shall respectfully request a list of those to whom notice has been sent by any state agency.

* * *

Exhibit A

LEGAL NOTICE TO CLASS MEMBERS
OF PENDENCY OF CLASS ACTION

This notice is given to you pursuant to an Order of the United States District Court for the Eastern District of New York and Rule 23(c)(2) of the Federal Rules of Civil Procedure. It is to inform you of the pendency of a class action in which you may be a member of the class, and of how to request exclusion from the class if you do not wish to be a class member. None of the claims described below have been proven. It is contemplated that a trial by court and jury will take place in this court beginning in May, 1984.

1. There are now pending in the United States District Court for the Eastern District of New York claims brought by individuals who were in the United States, New Zealand, or Australian Armed Forces assigned to or near Vietnam at any time from 1961 to 1972, who allege personal injury from exposure to "Agent Orange" or other phenoxy herbicides, including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin (collectively referred to as "Agent Orange").

2. The plaintiffs include spouses, parents, and children born before January 1, 1984, of the servicepersons who claim direct or derivative injury as a result of exposure.

Plaintiffs include children asserting claims in their own right for genetic injury and birth defects caused by their parents' exposure to "Agent Orange" and other phenoxy herbicides. Wives of veterans exposed to "Agent Orange" in Vietnam seek to recover in their own right for miscarriages. Plaintiffs' theories of liability include negligence, strict products liability, breach of warranty, intentional tort and nuisance. Damage claims of family members include pecuniary loss for wrongful death, loss of society, comfort, companionship, services, consortium, guidance and support. In addition, plaintiffs seek punitive damages for defendants' alleged misconduct in furnishing herbicides to the United States Government.

3. The defendants, who are alleged to have manufactured or sold "Agent Orange" to the United States Government, are Dow Chemical Company, Monsanto Company, T.H. Agriculture & Nutrition Company, Inc., Diamond Shamrock Chemicals Company, Uniroyal, Inc., Hercules Incorporated, and Thompson Chemical Corporation. All the defendants deny that the plaintiffs' alleged injuries were in any way caused by "Agent Orange." They assert that injury, if any, was not caused by a product produced by them. The defendants have challenged these suits on various other grounds including plaintiffs' lack of standing to sue, lack of jurisdiction, statutes of limitation, insufficiency in law, plaintiffs' contributory negligence, and plaintiffs' assumption of known risks. Each has also asserted such affirmative defenses as the "government contract defense" and the Government's misuse of its product. In third-party complaints, the defendants asserted claims against the United States of America seeking indemnification or contribution in the event the defendants are held liable to the plaintiffs. The Government has asserted its power to prevent anyone from suing it.

4. This court has certified a class action in this proceeding under Rule 23(b)(3) of the Federal Rules of Civil Procedure. The plaintiff class consists of those persons who were in the United States, New Zealand,

or Australian Armed Forces assigned to Vietnam at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to "Agent Orange" or other phenoxy herbicides including those composed in whole or in part of 2,4,5-trichlorophenoxyacetic acid or containing some amount of 2,3,7,8-tetrachlorodibenzo-p-dioxin. The class also includes spouses, parents, and children born before January 1, 1984, directly or derivatively injured as a result of the exposure.

The court may reconsider this decision, by decertifying, modifying the definition of the class, or creating subclasses in the light of future developments in the case. The definition does not imply a conclusion that anyone within the class was injured as a result of exposure to any herbicide.

5. The court has also certified a Rule 23(b)(1)(B) class limited to claims for punitive damages. The class includes the same persons as are in the Rule 23(b)(3) class. The court has decided not to permit members of the class to seek exclusion on the issue of punitive damages. You will therefore be bound by the court's rulings on punitive damages whether or not you seek exclusion on the issue of compensatory damages.

6. Trial of the representative plaintiffs' claims is scheduled to commence before Jack B. Weinstein, Chief Judge of the United States District Court for the Eastern District of New York, and a jury on May 7, 1984.

7. If you are a member of the plaintiff class you will be deemed a party to this action for all purposes unless you request exclusion from the Rule 23(b)(3) class action covering compensatory damages.

8. If you do not request exclusion from the class by May 1, 1984, you will be considered one of the plaintiffs of this class action for all purposes. You may enter an appearance through counsel of your own choice. You will be represented by counsel for the class representatives unless you choose to enter an appearance through your own legal counsel.

9. Class members who do not request exclusion will receive the benefit of, and will be bound by, any settlement or judgment favorable to the class covering compensatory damages. The class representatives' attorneys fees and costs will be paid out of any recovery of compensatory and other damages obtained by the class members. You will not be charged with costs or expenses whether or not you remain a member of the class. However, if you choose to enter an appearance through your own legal counsel, you will be liable for the legal fees of your personal counsel.

10. Class members who do not request exclusion will be bound by any judgment adverse to the class, and will not have the right to maintain a separate action even if they have already filed their own action.

11. If you wish to remain a member of the class for all purposes, you need do nothing at this stage of the proceedings.

12. If you wish to be excluded from the class for compensatory damages, you must submit a written request for exclusion. For your convenience, the request for exclusion may be submitted on the attached form, entitled "Request for Exclusion," If you received this notice by mail, a Request for Exclusion form should have accompanied it. If you did not receive a Request for Exclusion form, you may obtain a copy by writing to the Clerk of the Court, P.O. Box ___, Smithtown, New York 11787. A written Request for Exclusion may be submitted without using the Request for Exclusion form, but it must refer to the litigation as "In re 'Agent Orange' Product Liability Litigation, MDL No. 381": include your name and address in your statement requesting exclusion. Any request for exclusion must be received on or before May 1, 1984 by the Clerk of the United States District Court for the Eastern District of New York at Post Office Box ___, Smithtown, New York 11787 or at a federal courthouse in the Eastern District of New York.

13. Under the court's Order, all potential plaintiffs are deemed to be members of a

Rule 23(b)(1)(B) class on the issue of punitive damages. At the time of trial the court will determine whether the facts presented warrant the submission of a punitive damage claim to the jury. In the event that there is a recovery for punitive damages, it will be shared by those plaintiffs who are successful in prosecuting their claims in this or other suits on an appropriate basis to be determined by the court. If you choose to exclude yourself from this class action on the issue of compensatory damages, you may do so without necessarily losing your right to share in any punitive damages.

14. The plaintiffs in this class action are represented by a group of attorneys who have been tentatively approved by the Court as the Agent Orange Plaintiffs' Management Committee. Members of this committee include:

Phillip E. Brown, Esq.
Hoberg, Finger, Brown,
Cox & Molligan
703 Market St. (18th Floor)
San Francisco, CA 94103

Thomas W. Henderson, Esq.
Baskin & Sears
Frick Building (10th Fl.)
Pittsburgh, PA 15219

Stanley M. Chesley, Esq.
Waite, Schneider, Bayless
and Chesley Co., L.P.A.
1513 Central Trust Tower
Fourth and Vine Streets
Cincinnati, Ohio 45202

Benton Musselwhite, Esq. &
John 0. O'Quinn, Esq.
609 Fannin (Suite 517)
Houston, Texas 77002

David J. Dean, Esq.
Dean, Falanga & Rose
One Old Country Road
Carle Place, New York 11514

Stephen J. Schlegel, Esq.
Schlegel & Trafelet, Ltd.
One North LaSalle Street
Suite 3900
Chicago, Illinois 60602

Newton B. Schwartz, Esq.
Houston Bar Center Building
723 Main (Suite 325)
Houston, Texas 77002

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David J. Dean, Esq. has been designated by the court as plaintiffs' spokesman. The Management Committee is being aided in its duties of representing the interests of the plaintiffs by other law firms in the United States and abroad.

15. Examination of pleadings and papers. This notice is not all inclusive. References to pleadings and other papers and proceedings are only summaries. For full details concerning the class action and the claims and defenses which have been asserted by the parties, you or your counsel may review the pleadings and other papers filed at the office of the Clerk of the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, on any business day from 9:00 a.m. to 5:00 p.m.

16. Interpretation of this Notice. Except as indicated in the orders and decisions of the United States District Court for the Eastern District of New York, no court has yet ruled on the merits of any of the claims or defenses asserted by the parties in this class action. This notice is not an expression of an opinion by the court as to the merits of any claims or defenses. This notice is being sent to you solely to inform you of the nature of the litigation, your rights and obligations as a class member, the steps required should you desire to be excluded from the class, the court's certification of the class, and the forthcoming trial.

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Robert C. Heinemann
Clerk, United States District
Court for the Eastern District
of New York

DATED: Brooklyn, New York
January 12, 1984

EXCLUSION REQUEST FORM

Clerk
United States District Court
for the Eastern District of New York
P.O. Box ___
Smithtown, New York 11787
Re: In re "Agent Orange" Product Liability
Litigation MDL No. 381

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I hereby request to be excluded from the class

action in the above-captioned matter.

(signature)

Name (print): _____
Address: _____

If not a member of the armed forces who served in or near Vietnam, how are you related to such a serviceperson? _____

Armed Forces unit of serviceperson _____
Armed forces identifying number of serviceperson _____

Period of service in or near Vietnam _____

I learned about this suit by _____

Exhibit B
(Radio and Television Communication)
SPECIAL ANNOUNCEMENT

Were you or anyone in your family on military duty in or near Vietnam at any time from 1961 to 1972? If so, listen carefully to this important message about a pending "Agent Orange" lawsuit that may affect your rights.

If you or anyone in your family claim injury, illness, disease, death, or birth defect as a result of exposure to "Agent Orange," or any other herbicide in or near Vietnam at any time from 1961 to 1972, you are now a member of a class in an action brought on your behalf in the United States District Court for the Eastern District of New York, unless you take steps to exclude yourself. The class is limited to those who were injured by exposure to Agent Orange or any other Herbicide while serving in the armed forces in or near Vietnam at any time from 1961 to 1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit. It has ordered that this message be transmitted to

give as many persons as is practicable notice of this suit.

For details about your rights in this "Agent Orange" class action lawsuit, call 1-800-____, or write to the Clerk of the United States District Court, Box ____, Smithtown, New York 11787. That address again is Clerk of the United States District Court, P.O. Box ____, Smithtown, New York 11787, or call 1-800-____.

EXHIBIT €

(Newspaper and Magazine Notice)

TO ALL PERSONS WHO SERVED IN OR NEAR VIETNAM AS MEMBERS OF THE ARMED FORCES OF THE UNITED STATES, AUSTRALIA AND NEW ZEALAND FROM 1961-1972

If you or anyone in your family can claim injury, illness, disease, death or birth defect as a result of exposure to "Agent Orange" or any other herbicide while assigned in or near Vietnam at any time from 1961 to 1972, you are a member of a class in an action brought on your behalf in the United States District Court for the Eastern District of New York unless you take steps to exclude yourself from the class. The class is limited to those who were injured by exposure to "Agent Orange" or any other herbicide while serving in the armed forces in or near Vietnam at any time during 1961-1972. The class also includes members of families who claim derivative injuries such as those to spouses and children.

The court expresses no opinion as to the merit or lack of merit of the lawsuit.

100 F.R.D. at 729-35,

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1118-August Term, 1985

(Argued April 10, 1986 Decided 1987)

Docket No. 85-6365

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IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

(APPEAL OF DAVID DEAN)

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Before: VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

Appeal from an order and judgment of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) denying appellant's motion to set aside fee sharing agreement under which members of Plaintiffs' Management Committee would receive, from the pool of fees awarded by district court, a threefold return on funds advanced to the class for litigation expenses.

Reversed.

LEON FRIEDMAN, Hempstead, NY for Appellant Dean.

ELIHU INSELBUCH (Gilbert, Segall and Young, New York, NY, Richard B. Schaeffer, New York, NY, of counsel) for Appellee Agent Orange Plaintiffs' Management Committee.

MINER, Circuit Judge:

Our discussion of the background and procedural history of this Litigation appears in Judge Winter's lead opinion, No. 84-6273. This portion of the Agent Orange appeal concerns the district court's approval of a fee sharing agreement entered into by the nine-member Plaintiffs' Management Committee ("PMC") in December of 1983. Under the agreement, each PMC member who had advanced funds to the class for general litigation expenses was to receive a threefold return on his investment prior to the distribution of other fees awarded to individual PMC members by the district court. In result, the agreement dramatically increased the fees awarded to those PMC members who had advanced funds to the class for expenses, and concurrently decreased the fees awarded to non-investing PMC members, who only performed legal services for the class.

David Dean, lead trial counsel for the plaintiff class and a non-investing member of the PMC, challenges the validity of the agreement, to which he was a signatory, contending that it violates DR 5-103 and DR 2-107(A) of the ABA Code of Professional Responsibility ("ABA Code"). The ABA Code provisions prohibit an attorney from acquiring a proprietary interest in an action in which he is involved and from dividing a fee with an attorney who is not a member of his firm, unless such division is made pursuant to client consent and is based upon services performed and responsibility assumed. In addition, Dean asserts that such

an agreement, which premises the size of a fee on the amount advanced for expenses rather than on services rendered, violates the standards and principles developed in this circuit for the award of attorneys' fees in equitable fund class actions and inevitably places class counsel in a position at odds with the interests of the class itself.

Although not informed of the existence of the fee sharing agreement until September of 1984, four months after the parties reached a settlement, the district court approved the agreement, holding that "there is no reason to believe that the existence of the PMC's fee-sharing agreement had any appreciable untoward effect on the decision to settle." In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1452, 1461 (E.D.N.Y. 1985) ("Agent Orange I"). In essence, the court determined that the substantial financial demands placed upon counsel in complex multiparty litigation require flexibility in reviewing internal fee sharing agreements so as not to discourage future represention of large plaintiff classes. At the same time, however, the district judge ruled that, in all future cases, counsel must notify the court of any fee sharing agreement at the time of its inception. In this way, according to the district judge, "the court at the outset can determine whether to permit the fee allocation agreement to stand before any attorney invests substantial time and funds." Id. at 1463.

Because we find that the agreement before us violates established principles governing awards of attorneys' fees in

equitable fund class actions and creates a strong possibility of a conflict of interest between class counsel and those they were charged to represent, we reverse the district court's approval of the agreement. Accordingly, the fees originally allocated by the district court, based on the reasonable value of service actually rendered, will be distributed to the members of the PMC.

## I. BACKGROUND

In September of 1983 Yannacone and Associates withdrew as attorneys for the class, claiming financial and management hardships. The district court then approved appointment of the PMC as new class counsel. The PMC was comprised of three members -- attorneys Stephen Schlegel, Benton Musslewhite and Thomas Henderson. In re "Agent Orange" Product Liability Litigation, 571 F. Supp. 481 (E.D.N.Y. 1983). In later months the district court approved the expansion of the PMC to encompass six additional members, including appellant David Dean. Dean, a member of the original panel of class counsel, had been closely involved with the Agent Orange litigation since its inception in 1979. In October of 1983 the district court appointed him to be the attorney responsible for leading the preparation and potential trial of plaintiffs' case.

In December of 1983, as a means of raising the capital necessary for the maintenance and continuation of the lawsuit, the nine PMC members entered into a written fee sharing

agreement whereby six of the members each promised to advance the class $200,000 for general litigation expenses. The agreement provided that the investing members would be reimbursed threefold from the pool of attorneys' fees awarded to PMC members upon successful completion of the action. The fees remaining in the pool after the investment pay-outs would be distributed pursuant to a fifty-thirty-twenty percent formula: fifty percent of the remainder would be distributed equally among the nine PMC members, thirty percent would be distributed according to the number of hours each member expended in the case, and twenty percent would be distributed in accordance with certain quality and risk factors relating to each PMC member's work in the action, as determined by a majority vote of the PMC. All PMC members, including Dean, signed the agreement. The district court, however, was not notified of its existence.

The action was settled in May of 1984 and the district court, by Order dated June 11, 1984, notified counsel that petitions for attorneys' fees were to be submitted to the court no later than August 31, 1.984. A hearing on the issue of fees was scheduled for late September. In ordering the hearing, the district court waived application of Rule 5 of the Local Rules of the Eastern District of New York requiring notice to the class of all fee applications and fee sharing agreements prior to the hearing on such fee petitions. The court gave as its reasons "the need for continued intensive work by the attorneys until the close of the fairness hearings and . . . the complexity of the

fee applications." Notice of Proposed Settlement of Class Action, reprinted in In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 867 (E.D.N.Y. 1984). When the court waived application of the local rule, it was unaware of the PMC fee sharing agreement.

It was not until the PMC submitted its joint fee petition that the court finally learned of the agreement. At the September hearing on the fee petitions, the district judge expressed doubts as to the agreement's propriety and requested further briefing on the issue. Faced with the reservations expressed by the district judge, the PMC members modified their agreement in December of 1984. The revised agreement, and the one now before us, provided that five of the six investing members of the PMC each would advance an additional $50,000 for general litigation expenses, bringing their total investments to $250,000 each. In return for these advances, as well as for the $200,000 advanced by the sixth investing member, the new agreement provided for the same threefold return as did the original agreement. The fifty-thirty-twenty percent formula for the distribution of the remaining portion of the fees, however, was eliminated. In its place, the revised agreement called for the remainder to be distributed pro rata to each PMC member "in the proportion the individual's and/or firm's fee award bears to the total fees awarded."[1] Agent Orange I, 611 F. Supp. at 1454.

On January 7, 1985, the district court issued a Memorandum and Order awarding over $10 million in fees and expenses to the

various counsel whose work had benefitted the class, applying the principles of fee distribution in equitable fund actions set forth in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) ("Grinnell I") and City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977) ("Grinnell II"). In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985) ("Agent Orange II"). As later amended and supplemented, the district court's decision awarded over $4.7 million in fees to the nine members of the PMC on an individually apportioned basis. David Dean, due to his lengthy involvement in the class action and the exceptional quality of his work, was awarded $1,424,283.75, or over thirty percent of all fees awarded to the PMC. Each of the six investing members of the PMC was awarded a much lower percentage of the entire PMC fee award, with one investor being awarded only $41,886. The highest award to an investor was $515,1.63.

Once the fee sharing agreement was applied to these awards, however, the amount of fees each PMC member was to receive changed dramatically. In Dean's case, application of the agreement reduced his award to $542,310, a reduction of $881,973. In contrast, Newton Schwartz, an investing member of the PMC to whom the district court awarded $41,886, was now to receive $513,026, equivalent to an hourly rate of $1,224.81. The awards to all other investing members were similarly enhanced and, in turn, the awards to the two other non-investing members were diminished, resulting in a distortion of the district court's

individual PMC member fee awards. The total of all fees awarded by the court to the members of the PMC, of course, remained unchanged.[2]

In May of 1985, Dean moved in the district court to overturn the fee sharing agreement, claiming that it violated professional ethics and did not protect the rights of the class. In a Memorandum and Order issued June 27, 1985, the court denied Dean's motion and upheld the agreement, albeit with some reluctance. The court found, as a factual matter, that no conflict of interest had arisen in the litigation from the fee sharing agreement and, consequently, that the interests of the class in obtaining a fair and reasonable settlement had not been impinged. Agent Orange I, 611 F. Supp. at 1461. Initially, the court recognized its obligation to review the agreement in its capacity as protector of the rights of the plaintiff class. It then went on to examine the propriety of the agreement under DR 2-107(A) and DR 5-103 of the ABA Code and the practical effect of the agreement on the PMC's representation of the class.

As to DR 2-107(A), which prohibits an attorney from splitting his fee with another attorney not of the same firm unless he has the consent of his client and the "division is made in proportion to the service performed and responsibility assumed by each," the court determined that the PMC should be viewed as an ad hoc law firm "formed for the purpose of prosecuting the Agent Orange multidistrict litigation," Agent Orange I, 611 F. Supp. at 1458. The court reasoned that the business realities of

the litigation required the PMC to be able to perform those functions ordinarily performed by actual law firms, such as splitting fees among its members. The district court also noted that the Model Rules of Professional Conduct ("Model Rules") adopted by the ABA in 1983, although not adopted in New York, reflect "an increased recognition" of these business realities by permitting fee sharing agreements based upon services rendered or upon written acceptance of joint responsibility by the attorneys if the client is advised of the participation and does not object and the total fee is reasonable. Model Rule 1.5(e). Recognizing the practical problem of client consent in class actions, however, the district court concluded that its duty to protect the rights of the class ordinarily could not be performed unless the attorneys involved notified the court of the existence of such an agreement "as soon as possible," Agent Orange I, 611 F. Supp. at 1459.

As to DR 5-103, which prohibits an attorney from acquiring a proprietary interest in an action in which he is involved, the court found that the investing members acquired no independent interest in the action because the financial return from any initial advance for expenses was to be paid from the fees otherwise awarded to the PMC members, and thus would not affect the class fund. While the court did recognize that a conflict of interest could arise from such an agreement, it cautioned that complex class actions require a more sophisticated analysis of ethical codes than ordinary two-party cases in order not to

"unnecessarily discourage counsel from undertaking the expensive and protracted complex multiparty litigation often needed to vindicate the rights of a class." Id. at 1460. Accordingly, the district court held that a case-by-case analysis of such fee sharing agreements to identify potential conflicts of interest should be adopted.

The court conceded that an agreement of the sort before it conceivably could create an interest on the part of the investors to settle early, regardless of the benefit to, or interest of, the class. This is because an attorney whose fee is based upon the amount of funds advanced for expenses in an action will receive the same fees "whether the case is settled today or five years from now." Id. The court reasoned, however, that any possible interest to settle early would have been offset by the theoretical incentive to extend such litigation created by the lodestar formula and concluded that, as a factual matter, no conflict had arisen here.

The court then set forth five additional, though nondispositive, reasons for approving the agreement. First, the returns on the investments did not affect the class fund, since they were paid from the fee awards of PMC members. Second, the court recognized that the "business" of law will at times require creative, yet ethical, methods for economical and efficient operation. Third, without the funds advanced by the PMC members, it was possible that the litigation would have collapsed and neither the attorneys nor the class would receive any payments.

Fourth, the court noted that the PMC members could have earned substantial returns, though not quite threefold, on these same funds if they had undertaken more traditional investments. Fifth, if the PMC members had received the amount of fees requested in their joint petition, nearly thirty million dollars, the extent of the distortion of the fees by the investment agreement would have been insubstantial.

In sum, the district court determined that the practical needs of this form of litigation required an inventive method of fund raising in order to guarantee effective representation of class rights. At the same time, however, it labeled as "troubling" the PMC's failure to inform the court of the existence of the agreement until months after a settlement had been reached. Id. at 1462. In light of class counsel's fiduciary obligations to the class and the court's role as guardian of class rights in relation to settlement review, the district court found that both the class and the court had a right to be notified of the existence of such an agreement. To this end, the court proclaimed that in all future cases, class counsel would be obligated to make the existence of a fee sharing agreement known to the court at the time of its formation.

## II. DISCUSSION

Dean's appeal presents an issue of first impression: whether an undisclosed, consensual fee sharing agreement, which

adjusts the distribution of court awarded fees in amounts which represent a multiple of the sums advanced by attorneys to a class for litigation expenses, satisfies the principles governing fee awards and is consistent with the interests of the class.

At the outset, we note that the fees in this case were awarded pursuant to the equitable fund doctrine, first set forth in Trustees v. Greenough. 105 U.S. 527 (1882), and Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885). The underlying rationale for the doctrine is the belief that an attorney who creates a fund for the benefit of a class should receive reasonable compensation from the fund for his efforts. Central Railroad, 113 U.S. at 125. Because the calculation of fees necessarily will affect the funds available to the class, this circuit has adopted a lodestar formula for fee computation. Grinnell II, 560 F.2d at 1099; Grinnell I, 495 F.2d at 471. The lodestar seeks to protect the interests of the class by tying fees to the "actual effort made by the attorney to benefit the class." Grinnell II, 560 F.2d at 1099. Accordingly, fees are calculated by taking the number of hours reasonably billed and multiplying that figure by an hourly rate "normally charged for similar work by attorneys of like skill in the area." Id. at 1098. Once calculated, the court may, in its discretion, increase or decrease this figure by examining such factors as the quality of counsel's work, the risk of the litigation and the complexity of the issues. Id. Discretion to adjust the lodestar figure upward because of superior quality, however, is limited to

exceptional situations and must be supported by "specific evidence" and "detailed findings" by the district court. Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 106 S. Ct. 3088, 3098 (1986). Adherence to these principles is essential not only to avoid awarding windfall fees to counsel, but also to "avoid every appearance of having done so," Grinnell I, 495 F.2d at 469.

Of equal importance to our analysis is Fed. R. Civ. P. 23(e), which requires court approval of any settlement of a class action suit and squarely places the court in the role of protector of the rights of the class when such a settlement is reached and attorneys' fees are awarded. Grinnell II, 560 F.2d at 1099. In fulfilling this role, courts should look to the various codes of ethics as guidelines for judging the conduct of counsel. Agent Orange I, 611 F. Supp. at 1456. In addition, where only retrospective review of counsel's conduct is available, courts should not be limited to an examination of the actual effects of such conduct on the litigation, but rather, as the ABA Code and Grinnell I imply, the appearance and potential effect of the conduct should be reviewed as well. See Grinnell I, 495 F.2d at 469; ABA Code of Professional Responsibility Canon 9 (1975).

The ultimate inquiry, therefore, in examining fee agreements and setting fee awards under the equitable fund doctrine and Fed. R. Civ. P. 23(e), is the effect an agreement could have on the rights of a class. Because we find that the agreement here

conflicts substantially with the principles of reasonable compensation in common fund actions set forth in Grinnell I and Grinnell II, and that it places class counsel in a potentially conflicting position in relation to the interests of the class, we reverse.

Initially, it is, beyond doubt that the agreement, by tying the fee to be received by individual PMC members to the amounts each advanced for expenses, completely distorted the lodestar approach to fee awards. In setting fees here, the district judge meticulously examined counsel's fee petitions in accordance with the Grinnell decisions and arrived at individual awards for each PMC member based upon the services that each had provided for the class. By providing for threefold returns of advanced expenses, however, the agreement vitiated these principles. The distortion was so substantial as to increase the fees awarded to one investor by over twelve times that which the district judge had determined to be just and reasonable, and, in a second case, to decrease the otherwise just and reasonable compensation of a non-investor by nearly two-thirds.

There is authority for a court, under certain circumstances, to award a lump sum fee to class counsel in an equitable fund action under the lodestar approach and then to permit counsel to divide this lodestar-based fee among themselves under the terms of a private fee sharing agreement. E.g., Ruskay v. Jensen, No. 71-3169, slip op. at 10-13 (S.D.N.Y. Sept. 18, 1981); In re Magic Marker Securities Litigation, [1979 Transfer Binder] Fed. Sec. L.

Rep. (CCH) 1 97,116, at 96,195 (E.D. Pa. Sept. 16, 1979); Valente v. Pepsico, Inc., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) f 96,921, at 95,863 (D. Del. June 4, 1979), appeal dismissed, 614 F.2d 772 (3d Cir. 1980); In re Ampicillin Antitrust Litigation. 81 F.R.D. 395, 400 (D.D.C. 1978); Del Noce v. Delyar Corp., 457 F. Supp. 1051, 1055 (S.D.N.Y. 1978). We reject this authority, however, to the extent it allows counsel to divide the award among themselves in any manner they deem satisfactory under a private fee sharing agreement. Such a division overlooks the district court's role as protector of class interests under Fed. R. Civ. P. 23(e) and its role of assuring reasonableness in the awarding of fees in equitable fund cases. See Kamens v. Horizon Corp., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) 1 98,007, at 91,218 & n.4 (S.D.N.Y. May 26, 1981); Steiner v. BOC Financial Corp., [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,656, at 98,490 (S.D.N.Y. Oct. 10, 1980); cf. Jones v. Amalgamated Warbasse Houses, Inc., 721 F.2d 881, 884 (2d Cir. 1983) ("if the court finds good reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claims"), cert. denied, 466 U.S. 944 (1984). In addition, this approach overlooks the class attorneys' "duty . . . to be sure that the court, in passing on [the] fee application, has all the facts" as well as their "fiduciary duty to the . . . class not to overreach." Lewis v. Teleprompter Corp., 88 F.R.D. 11, 18 (S.D.N.Y. 1980).

A careful examination of those decisions permitting internal fee sharing agreements to govern the distribution of fees reveals no case where return on investment was a factor. More important, in a number of those cases the courts apparently assumed that the internal fee sharing agreement would be based substantially on services rendered by individual counsel. E.g., Ruskay, slip op. at 14 n.4 ("Since the court has satisfied itself that the proposed distribution will not result in compensation beyond services performed, it declines to overrule the agreement."); In re Ampicillin Antitrust Litigation, 81 F.R.D. at 400 ("Since the fee application purports to be based upon the rates and time spent by the several attorneys, it is presumed that these factors also weigh heavily in this internal agreement.").

Accordingly, while the practice of allowing class counsel to distribute a general fee award in an equitable fund case among themselves pursuant to a fee sharing agreement is unexceptional, we find that any such agreement must comport essentially with those principles of fee distribution set forth in Grinnell I and Grinnell II. This does not mean that a fee sharing agreement must replicate the individual awards made to PMC members under the district court's lodestar analysis. Even after the court makes the allocation, the attorneys may be in a better position to judge the relative input of their brethren and the value of their services to the class. See In re Ampicillin Antitrust Litigation, 81 F.R.D. at 400. Nor does this mean that class counsel need follow, line by line, the lodestar formula in

arriving at an agreement as to fee distribution. Obviously, the needs of large class litigation may at times require class counsel, in assessing the relative value of an individual attorney's contribution, to turn to factors more subjective than a mere hourly fee analysis. It does mean that the distribution of fees must bear some relationship to the services rendered.

In our view, fees that include a return on investment present the clear potential for a conflict of interest between class counsel and those whom they have undertaken to represent. "[W]henever an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents there is a reasonable possibility that some specifically identifiable impropriety will occur." Zylstra v. Safeway Stores, Inc., 578 F.2d 102, 104 (5th Cir. 1978). The concern is not necessarily in isolating instances of major abuse, but rather is "for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 266 (Oct. 8, 1985). Such conflicts are not only difficult to discern from the terms of a particular settlement, but "even the parties may not be aware that [they exist] at the time of their [settlement] discussions," id. This risk is magnified in the class action context, where full disclosure and consent are many times difficult and frequently impractical to obtain. In re Mid-Atlantic Toyota

Antitrust Litigation, 93 F.R.D. 485, 490-91 (D. Md. 1982); Gould v. Lumonics Research Ltd., 495 F. Supp. 294, 297 n.6 (N.D. Ill. 1980).

The district court recognized that the agreement provided an incentive for the PMC to accept an early settlement offer not in the best interests of, the class, because "[a]n attorney who is promised a multiple of funds advanced will receive the same return whether the case is settled today or five years from now." Agent Orange I, 611 F. Supp. at 1460. Given the size and complexity of the litigation, it seems apparent that the potential for abuse was real and should have been discouraged. Unlike the district court, however, we conclude that the risk of such an adverse effect on the settlement process provides adequate grounds for invalidating the agreement as being inconsistent with the interests of the class. The conflict obviously lies in the incentive provided to an investor-attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation. The conflict was especially egregious here, since six of the nine PMC members were investing parties to the agreement.

The district court's factual finding, that the adequacy of the settlement demonstrated that the agreement had no effect on the PMC's conduct, is not dispositive. The district court's

retrospective appraisal of the adequacy of the settlement cannot be the standard for review. The test to be applied is whether, at the time a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed. Review based on a fairness of settlement test would not ensure the protection of the class against potential conflicts of interest, and, more important, would simply reward counsel for failing to inform the court of the existence of such an agreement until after a settlement.

We also reject the district court's finding that its authority to approve settlement offers under Fed. R. Civ. P. 23(e) acts to limit the threat to the class from a potential conflict of interest. At this late stage of the litigation, both class counsel and defendants seek approval of the settlement. The court's attention properly is directed toward the overall reasonableness of the offer and not necessarily to whether class counsel have placed themselves in a potentially conflicting position with the class. It would be difficult indeed for a court at this stage to hold that, regardless of the terms of the settlement, class counsel had not fulfilled its obligation to the class. Given this focus and other administrative concerns that may come to bear, we find the approval authority, in this context, to be insufficient to assure that the ongoing interests of the class are protected. See Alleghany Corp. v. Kirby, 333

F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (at this stage of litigation, "[a]11 the dynamics conduce to judicial approval of such settlements"), cert. dismissed. 384 U.S. 28 (1966); In re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D. at 491 (court authority to review settlement offers not adequate to safeguard against dangers of conflict of interest); Coffee, The Unfaithful Champion; The Plaintiff As Monitor In Shareholder Litigation, 48 Law & Contemp. Probs. 5, 26-27 (Summer 1985) (judicial review not a significant barrier to collusive settlements).

Equally unpersuasive is the district court's determination that the potential incentive to settle early is offset by an incentive, fostered by the lodestar formula, to prolong the litigation. While a number of commentators have asserted that use of the lodestar formula encourages counsel to prolong litigation for the purpose of billing more hours, e.g., Wolfram, The Second Set of Players: Lawyers, Fee Shifting, and the Limit of Proportional Discipline, 47 Law & Contemp. Probs. 293, 302 (Winter 1984), the formula's effect in this regard is far from clear, see Coffee, supra, at 34-35 ("the claim that the lodestar formula results in excessive fees is nonetheless a red herring"); Mowrey, Attorneys Fees In Securities Class Action and Derivative Suits, 3 J. Corp. Law. 267, 343-48 (1978) (attorneys' fees awards by district courts have not risen since adoption of lodestar analysis); see also 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1803, at 508 (1986) (no empirical data

show any incidence of district courts awarding excessive fees). Moreover, the court's authority in reviewing fee petitions and approving or disapproving hours billed in an equitable fund action works as a substantial and direct check on counsel's alleged incentive to procrastinate. In re Equity Funding Corporation of America Securities Litigation. 438 F. Supp. 1303, 1328 (C.D. Cal. 1977); 7B C. Wright, A. Miller & M. Kane, supra, § 1803, at 511. Consequently, we do not view the lodestar system as countervailing the clear interest in early settlement created by the private agreement.

Additionally, potential conflicts of interest in class contexts are not examined solely for the actual abuse they may cause, but also for potential public misunderstandings they may cultivate in regard to the interests of class counsel. Susman v. Lincoln American Corp., 561 F.2d 86, 95 (7th Cir. 1977); Prandini v. National Tea Co., 557 F.2d 1015, 1017 (3d Cir. 1977). While today we hold that the settlement reached here falls within that range of reasonableness permissible under Fed. R. Civ. P. 23(e), we are not insensitive to the perception of many class members and the public in general that it does not adequately compensate the individual veterans and their families for whatever harm Agent Orange may have caused. To be sure, the settlement does not provide the individual veteran or his family substantial compensation. Given the facts of this settlement, the potentially negative public perception of an agreement that awards an investing PMC member over twelve times the amount the

district court has determined to be the value of his services to the class provides additional justification for invalidating the agreement and applying the lodestar formula.

We find the various additional rationales for approving the fee sharing agreement set out in the district court's decision equally unpersuasive. First, the fact that the returns on the advanced expenses did not directly affect the class fund is of little consequence, since we have already determined that the district court's responsibility under Grinnell I and Grinnell II, as well as under Fed. R. Civ. P. 23(e), goes beyond concern for only the overall amount of fees awarded and requires attention to the fees allocated to individual class counsel. Second, while we sympathize with counsel regarding the business decisions they must make in operating an efficient and manageable practice and agree that a certain flexibility on the court's part is essential, we are not inclined to extend this flexibility to encompass situations in which the bases for awarding fees in an equitable fund action are so clearly distorted. Third, whether this class action would have collapsed without an agreement calling for a threefold return is a matter of speculation. Any such collapse, however, would have been due to the pervasive weaknesses in the plaintiffs' case. Fourth, we find wholly unconvincing the district court's suggestion that the investors could have made a sizeable return on their funds if they had invested them in other ventures. We take notice of the fact that a threefold return on one's money is a rather generous return in

any market over a short period of time. Fifth, while the effect of this fee sharing agreement might have been dwarfed to the point of insignificance if the fees awarded to counsel had been much greater, this simply is too speculative to defend the agreement as not affecting the interests of the class. Finally, we do not find class counsel to have formed an ad hoc partnership. They merely are a group of individual lawyers and law firms associated in the prosecution of a single lawsuit, and they lack the ongoing relationship that is the essential element of attorneys practicing as partners.

We do agree with the district court's ruling that in all future class actions counsel must inform the court of the existence of a fee sharing agreement at the time it is formulated. This holding may well diminish many of the dangers posed to the rights of the class. Only by reviewing the agreement prospectively will the district courts be able to prevent potential conflicts from arising, either by disapproving improper agreements or by reshaping them with the assistance of counsel to conform more closely with the principles of Grinnell I and Grinnell II. In the present case, however, where the district court was not made aware of the agreement, and the potential for a conflict of interest arising was substantial, the adoption of a rule for future cases in no way alleviates the fatal flaws of this agreement and does not offset the need for its invalidation.

Although appellant Dean is successful on this appeal, his conduct has been far from praiseworthy. He freely consented to

the formation of the agreement in December of 1983 and later to its revision in 1984. He did not even inform the district court of the existence of the agreement or of his objections to it until long after the settlement was reached. If he had called the agreement into question immediately, a great deal of time and expense could have been saved.

## III. CONCLUSION

Having determined that the fee sharing agreement violates the principles for awarding fees in an equitable fund action and places class counsel in a position potentially in conflict with the interests of the class which they represent, we reverse. We award all the PMC members the fees to which the district court determined that they were entitled.

FOOTNOTES

1. The agreement, in pertinent part, provided as follows:

> When and if funds are received, either by the AOPMC or individual members thereof, the first priority distribution will be to distribute to Messrs. Brown, Chesley, Henderson, Locks, O'Quinn and Schwartz, an amount equivalent to the actual monies expended for which these six signatories were responsible toward the common advancement of the litigation up to $250,000.00 with a multiplier of three (i.e., none of these six individuals will receive more than $750,000.00 each), which shall be paid to them for having secured the funds for the AOPMC and to Messrs. Dean, Schlegel and Musslewhite an amount equivalent to the actual monies expended by these three signatories toward the common advancement of litigation up to $50,000.00 with a multiplier of three (i.e., none of these three signatories will receive more than $150,000.00 each). Any additional expenses will be reimbursed without a multiplier as ordered by the Court.
>
> All of the expenses plus the appropriate multiplier will be deducted from the total fees and expenses awarded by the Court to all of the AOPMC firms. The remaining fees will then be distributed pro rata to each signatory in the proportion the individual's and/or firm's fee award bears to the total fees awarded.

In Re Agent Orange Product Liability Litigation, 611 F. Supp. 1452, 1454 (E.D.N.Y. 1985) (quoting Revised Fee-Sharing Agreement, Dec. 13, 1984).

2. The effect of the fee sharing agreement on the district court's fee awards to the individual PMC members is shown by the following chart.

| | Amount of Fees Awarded by District Court | Amount of Fees Awarded Under the Agreement | Net Effect of the Agreement |
|---|---|---|---|
| Dean (noninvestor) | $1,424,283 | $542,310 | -$881,973 |

| | | | |
|---|---|---|---|
| Schlegel (noninvestor) | 944,448 | 393,312 | - 549,136 |
| Musslewhite (noninvestor) | 344,657 | 206,991 | - 137,666 |
| Schwartz (investor) | 41,886 | 513,026 | + 471,140 |
| O'Quinn (investor) | 132,576 | 541,128 | + 408,552 |
| Brown (investor) | 348,331 | 608,162 | + 259,831 |
| Locks (investor) | 487,208 | 651,339 | + 164,171 |
| Chesley (investor) | 475,080 | 647,534 | + 172,456 |
| Henderson (investor) | 515,163 | 659,975 | + 144,812 |

Brief for Appellant at 8.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1097-August Terra, 1985

(Argued April 10, 1986 Decided 1987)

Docket Nos. 85-6305, 85-6325, 85-6343, 85-6345, 85-6347, 85-6351, 85-6353, 85-6355, 85-6357, 85-6359, 85-6361, 85-6363, 85-6383, 85-6389, 85-6397

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IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

(APPEAL OF ATTORNEYS' FEE AWARDS)

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Before: VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

Appeal from an order and judgment of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) awarding fees to those counsel who performed services beneficial to the class. Various counsel challenge the court's use of national hourly rates, the level of quality multipliers allowed, and the failure to award a risk multiplier and to credit certain hours and expenses.

Affirmed in part and reversed in part.

PAUL M. BERNSTEIN, New York, NY (Bernstein Litowitz Berger & Grossmann, New York, NY, Edward A. Grossmann and Penny P. Domow, New York, NY, of counsel) for Appellant Agent Orange Plaintiffs' Management Committee.

EDWARD F. HAYES, III, Huntington, NY for Appellants McMillan, Bigg, Lonnie, Davison and MacLaren.

BENTON MUSSLEWHITE, Houston, TX, Pro Se.

ROBERT A. TAYLOR, JR., Washington, DC (Ashcraft & Gerel, Wayne M. Mansulla, Washington, DC, of counsel) for Appellant Ashcraft & Gerel.

LEON FRIEDMAN, Hempstead, NY for Appellants Dean, Falanga & Rose.

(Henderson & Goldberg, Pittsburgh, PA, Thomas W. Henderson and Antonio D. Pyle, Pittsburgh, PA, of counsel) for Appellant Henderson & Goldberg, P.C.

(Greitzer and Locks, Philadelphia, PA, Neil R. Peterson, Philadelphia, PA, of counsel) for Appellants Greitzer and Locks, Schlegel & Trafelet, Henderson & Goldberg, O'Quinn, Hagan & Whitman, Newton B. Schwartz, P.C., Waite, Schneider, Bayless & Chesley and Hoberg, Finger, Brown, Cox & Milligan.

(Edward J. Nowakoski, West Caldwell, NJ, of counsel) for Appellant Kraft & Hughes.

(Sullivan & Associates, Daniel C. Sullivan and Gregory A. Stayart, Chicago, IL, of counsel) for Appellant Sullivan & Associates, Ltd.

(Stephen J. Schlegel, Chicago, IL) Pro Se.

(Richard D. Heideman, A. Thomas Johnson, Heideman Law Offices, Louisville, KY, of counsel) for Appellant Estate of Lowell M. Coffey.

(Townley & Updike, New York, NY, Richard J. Barnes and John E. Sabetta, New York, NY, of counsel) for Appellee Monsanto Company.

(Kelley Drye & Warren, New York, NY, William M. Crowley and Patricia C. Tui, New York, NY, of counsel) for Appellee Hercules Incorporated.

MINER, Circuit Judge:

Our discussion of the background and procedural history of the litigation appears in Judge Winter's lead opinion, No. 84-6273. The nine members of the Plaintiffs' Management Committee ("PMC") and various outside counsel appeal, on a number of grounds, the district court's decision setting attorneys' fees. On June 18, 1985, the district court issued an amended order, awarding over seven million dollars in fees and three million dollars in expenses to eighty-eight attorneys and law firms involved in the action. In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985) ("Agent Orange"). The nine members of the PMC, individually and as a group, challenge the district court's use of a national hourly rate in calculating the fee awards under the lodestar formula set forth in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) ("Grinnell I"), and City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977) ("Grinnell II"), the level of the quality multipliers it set, and its failure to apply a risk multiplier to the fee awards and to credit certain hours and expenses. Four outside counsel challenge the district court's findings as to the value of their work to the class and the decision to abrogate various contingency fee arrangements between counsel and certain class members. For the reasons set forth below, we affirm in part and reverse in part.

## I. BACKGROUND

In May of 1984, on the eve of trial, a settlement was reached with the chemical company defendants, calling for the establishment of a $180 million dollar fund for the benefit of the class. By order dated June 11, 1984, the district court required fee petitions to be filed no later than August 31, 1984, and scheduled hearings on the petitions for the early fall. Notice of Proposed Settlement of Class Action, reprinted in In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 867 (E.D.N.Y. 1984). Pursuant to this procedure, well over 100 attorneys and law firms filed petitions, claiming tens of thousands of hours of work performed for the benefit of the class. The fee petitions fell into three categories: those filed by the nine members of the PMC; those filed by members of Yannacone and Associates, the original consortium of attorneys in charge of the action; and those filed by attorneys not connected with any court-appointed entity representing the class.

In reviewing fee petitions, the district court developed guidelines falling into two categories -- one covering the hours to be credited for work performed and the other covering the expenses to be reimbursed. The hourly guidelines were as follows:

> 1. Court Time: One half of the time requested for review of court orders was permitted on the ground that the majority of court orders were made in open court or after extensive briefing. Telephone conference time with court personnel was awarded in full, except that no time was awarded for conferences relating to

internal management difficulties of the PMC. Attendance at, and preparation for, court hearings was awarded in full. Review of hearing transcripts was awarded in full for those attorneys attending the hearing. Nonattending attorneys were awarded for only half such time. Travel to and from hearings and court appearances also was awarded on a fifty percent basis.

2. Management Committee Meetings: All time for PMC meetings on substantive issues was permitted. Travel to and from such meetings was awarded on a fifty percent basis. No time was awarded for meetings on nonsubstantive topics. The same division was made for telephone conferences among PMC members.

3. Educational Reading: Time for review of scientific materials relating to the causation issue and other issues in the case was awarded on a fifty percent basis on the ground that such knowledge could foe vised by counsel in future cases.

4. Depositions: Half of the time was awarded for travel to and from depositions, for attendance by nonparticipating attorneys, and for review and reading. All time for preparing and summarizing depositions was granted. No limit on the length of depositions was enforced.

5. Document Preparation: All time for review and preparation of legal documents was awarded, except that those hours used to prepare documents concerning internal PMC organizational issues were not credited.

6. Mail: If a short period of time for review of a substantial amount of mail was requested, no time was awarded under the assumption that counsel simply was opening the mail. If a lengthy period of time was claimed for review of only a few letters, all time was credited under the assumption that counsel was reviewing a letter brief.

7. Intra-Firm Conferences: This time was credited on a fifty percent basis when related to substantive issues.

Agent Orange. 611 F. Supp. at 1320-21, 1350-51. The expense guidelines were as follows:

1. Travel: Documented expenses for hotels were reimbursed at ninety dollars per day. Meals were reimbursed at fifty dollars per day and twenty dollars

per day if *the* attorney was in his home city.

2. Paralegal Time: Paralegals were treated as an expense and reimbursed at a rate of twenty dollars per hour.

3. Out-of-Pocket Expenses: Telephone, mailing, duplication and similar expenses were reimbursed in full if adequately documented.

4. Percentage Approval: When counsel submitted adequate documentation to prove expenses but were unable to establish that those expenses were all related to compensable activity, expenses were reimbursed on a percentage basis.

5. Fees for Non-Causation Experts: A cap of $5,000 per expert was set on the ground that their input was not substantial and not reasonably related to class interests.

Id. at 1321-22, 1351.

Following these guidelines and applying the lodestar formula for calculating attorneys' fees in an equitable fund action, see Grinnell I, 495 F.2d at 471, the district court awarded $10,767,443.63 in individual fees and expenses to various counsel who, in the court's view, had performed work beneficial to the class. In arriving at the lodestar figure, the court employed national hourly rates of $150 for the work of a partner, $100 for the work of an associate, and $125 for the work of a law professor. Agent Orange, 611 F. Supp. at 1326. The court, in its discretion, further applied quality multipliers, ranging from 1.50 to 1.75, to the fees allowed various members of the PMC and other counsel who had exhibited exceptional skill in the litigation and settlement negotiations. Id. at 1328. The district judge, however, declined to apply a risk multiplier to the lodestar figure. Id.

Not satisfied with these awards, two groups of attorneys, including the PMC, now raise numerous objections on appeal.

## II. DISCUSSION

### A. PMC Members

**The district court awarded the individual members of the PMC an aggregate of $4,713,635.50 in fees and $650,356.97 in individual expenses. In addition, the court awarded the PMC, as a whole, expenses in the sum of $1,711,155.87. These attorneys now raise four specific challenges to their individual awards.**

#### 1. National Hourly Rates

Faced with a flood of fee petitions from counsel located in all regions of the country, the district court utilized national hourly rates for calculating the fee awards for each attorney. While it recognized that the general rule for fee calculation in this circuit requires the use of "the hourly rate normally charged for similar work by attorneys of like skill in the area," Grinnell II, 560 F.2d at 1098, the district court noted that special problems arise "in applying this general standard in a complex raultidistrict litigation that is national in scope, involves counsel from all over the country and extends over many

years during which the rates for particular lawyers and classes of lawyers are changing," Agent Orange, 611 F. Supp. at 1308.

Specifically, the court pointed out that if the general rule were interpreted to require imposition of the rates normally imposed within the district, the rule would make little sense in the context of this action, given that the vast majority of counsel involved were non-local. Alternatively, if the rule were interpreted to require imposition of varying rates depending upon the location of each counsel's practice, the district judge perceived that such a rule would minimize the court's familiarity with the rates to be awarded, require an almost unworkable case-by-case review of such rates, and consistently benefit non-local counsel at the expense of the class fund. The district judge concluded that in large multiparty litigation, where substantial numbers of specialized non-local attorneys are involved, utilization of a national hourly rate is appropriate because it "recognizes the national character of the lawsuit and of class counsel while retaining a vitally important administrative simplicity together with an essential neutrality of result as between fee applicants and fund beneficiaries." Id. at 1309.

Relying on five separate sources, the district court developed the national rates to be applied in this action. First, the court considered data compiled in the National Law Journal Directory of the Legal Profession (B. Gerson, M. Liss & P. Cunningham eds. 1984), a periodical that provided rate

information concerning law firms of fifty or more attorneys throughout the country as of March 1983. Second, the court reviewed the submissions of counsel, in particular the defendants' Memorandum Concerning Plaintiffs' Lawyers' Applications for Attorneys' Fees and for Reimbursement of Expenses, which provided further information on national rates. Third, the court reviewed various surveys of law firm economics, dated 1980 through 1984, and other periodicals relating to the manner in which firms bill their clients. Fourth, the court took notice of its own experience in setting fee awards in class actions. Finally, the district judge reviewed recent fee awards by other courts to understand more fully the manner in which other jurisdictions set appropriate rates. Agent Orange, 611 F. Supp. at 1325-28 (citing, inter alia, In re Fine Paper Antitrust Litigation, 751 F.2d 562, 590 n.22 (3d Cir. 1984); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 955-56 (1st Cir. 1984)). From an analysis of this data, the district court arrived at national hourly rates of $150 for partners, $100 for associates and $125 for law professors.

The members of the PMC challenge the use of national rates on the ground that they do not comport with the principles governing attorneys' fee awards in equitable fund actions. They assert that the practice in this and other circuits required the court to review independently the hourly rate for each attorney in order to ensure that he was compensated at a level commensurate with that of other counsel of like skill in the area

in which he practices. See, e.g., In re Fine Paper, 751 F.2d at 590-91 (classifying application of national hourly rates as legal error on the grounds that the district court presented no evidentiary basis for their establishment and such rates ignored the market rates that the attorneys would command in their respective communities). Relying on large class action cases in other circuits where courts have awarded varying rates to counsel from different localities, e.g., In re Equity Funding Corp. of America Securities Litigation, 438 F. Supp. 1303 (C.D. Cal. 1977), they argue that, while the task may be a difficult one, other jurisdictions routinely undertake it.

In passing on the efficacy of national hourly rates, we note that fees in this action were awarded under the equitable fund doctrine, which seeks to ensure that counsel who have performed services beneficial to the class receive fair and just compensation for their respective efforts. Trustees v. Greenough, 105 U.S. 527, 536 (1882). In order to provide counsel with such compensation and, at the same time, temper these awards to prevent windfalls, we have adopted a lodestar formula for calculating fees in equitable fund and statutory fee contexts. Grinnell II, 560 F.2d at 1099; Grinnell I, 495 F.2d at 469-71. Under the formula, the district court initially multiplies the number of hours reasonably billed by the hourly rate normally charged for equivalent work by similarly-skilled attorneys in the area. Grinnell II, 560 F.2d at 1098. Once calculated, the district court then may, in its discretion, upwardly or

downwardly adjust this figure by considering such factors as the quality of counsel's work, the probability of success of the litigation and the complexity of the issues. Id.

While at least one circuit looks to the rates employed in the area in which the attorney practices, Cunningham v. City of McKeesport, 753 F.2d .262, 267 (3d Cir. 1985), we traditionally have interpreted Grinnell I and Grinnell II as requiring use of the hourly rates employed in the district in which the reviewing court sits, Polk v. New York State Department of Correctional Services, 722 F.2d 23, 25 (2d Cir. 1983). We generally have adhered to this rule whether the attorney involved was local or non-local. Id.; accord Donnell v. United States, 682 F.2d 240, 251-52 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 768-69 (7th Cir. 1982), cert. denied, 461 U.S. 956 (1983); Avalon Cinema Corp. v. Thompson. 689 F.2d 137, 140-41 (8th Cir. 1982) (in banc). We and other circuits have strayed from this rule only in the rare case where the "special expertise" of non-local counsel was essential to the case, it was clearly shown that local counsel was unwilling to take the case, or other special circumstances existed. Polk, 722 F.2d at 25; Avalon Cinema, 689 F.2d at 140-41.

Accordingly, the issue for review here is whether the district court erred in deviating from this established precedent. While we concede that such conduct in the ordinary case would constitute legal error and require recalculation of the lodestar,

we conclude that, in an exceptional multiparty case such as this, where dozens of non-local counsel from all parts of the country are involved, public policy and administrative concerns call for the district court to be given the necessary flexibility to impose a national hourly rate when an adequate factual basis for calculating the rate exists.

An examination of the alternatives to the use of national rates in large multiparty class actions of this sort readily establishes the necessity for affording district courts this discretion. Use of our forum rule would distort dramatically the purposes of the lodestar calculation itself -- to ensure fair and just compensation to counsel and to prevent the award of windfall fees. This distortion would occur because, in cases in which the vast majority of attorneys involved are non-local, the forum rule necessarily will either overcompensate or undercompensate a substantial number of non-local attorneys. Undercompensation could deny counsel their right to fair and just fees; overcompensation would not be consistent with the need to prevent windfalls. Adherence to the forum rule in cases in which the inherent limitations of the rule are magnified, i.e., where few local counsel and vast numbers of non-local counsel are involved, therefore, makes little sense.

Resort to a varying approach, depending upon the area in which the individual practices, fares no better. In an action of the magnitude of Agent Orange, in which well over one hundred fee petitions were filed by counsel throughout the country, such

an approach would pose an administrative nightmare for the district court. As the district judge here noted, "[s]implicity becomes an especially important goal in a complex case involving a hundred or more fee applications and tens of thousands of pages of supporting documentation and requiring a number of years for prosecution during which rates for particular attorneys and geographic locations change in different ways." Agent Orange, 611 F. Supp. at 1308. While administrative interests normally should not be the primary concern of a court in formulating substantive rules of review, we observe that the attorney-by-attorney approach recommended by the PMC simply would overtax the capacity of a district court to review fee petitions adequately. Cf. New York Association for Retarded Children v. Carey, 711 F.2d 1136, 1146 (2d Cir. 1983) (burden-saving measures may be taken by district court in light of voluminous fee petitions).

Although not a panacea, the use of national hourly rates in exceptional multiparty cases of national scope, where dozens of non-local counsel are involved, appears to be the best available method of ensuring adherence to the principles of the lodestar analysis. The risk of overcompensation or undercompensation on a large scale, apparent under the forum rule, is somewhat neutralized, while, at the same time, the administrative burden on the district court, apparent under the varying rate rule, is reduced to a manageable level. In granting the district court this discretion, however, we caution that such rates should be employed only in the exceptional case presenting problems similar

to those presented here. We further caution that, even in similar cases, national hourly rates should be employed only when the district court is presented with an adequate evidentiary basis on which to fix such rates. Once the court is satisfied with the evidence, it should make clear, factual findings that support its determination.

We are aware that at least one circuit has rejected the imposition of national hourly rates on the ground that they do not comport with the lodestar principle. In re Fine Paper, 751 F.2d at 591. To the extent, however, that the Third Circuit's decision was based upon the fact that the national rates employed did not comport with that circuit's rule requiring the hourly rate to reflect the rate normally charged in the locale in which counsel practices, we already have rejected its analysis by following a forum rate rule. See Polk, 722 F.2d at 25. In addition, In re Fine Paper, though not entirely clear on this point, may be read to condemn only national hourly rates not based on an adequate evidentiary record. The Third Circuit, in reversing the district court's adoption of such rates, indicated that the district court there had not referred to any evidence supporting the existence of such rates, 751 F.2d at 590, and noted that "the subject is not one on which judicial notice is appropriate," id. If read in that context, our decision is in accord with that of the Third Circuit, since we limit the utilization of national rates to those instances in which an adequate evidentiary basis exists. Finally, even assuming that

In re Fine Paper stands for an absolute prohibition on the imposition of national hourly rates, we note that, subsequent to that decision, the Third Circuit Task Force on Court Awarded Attorney Fees, organized at the behest of the Chief Judge of that Circuit, recommended that the court permit the utilization of such rates in exceptional cases. Court Awarded Attorney Fees, Third Circuit Task Force, 108 F.R.D. 237, 260-62 (Oct. 8, 1985).[1]

Given our determination that the utilization of national hourly rates in limited circumstances is proper, we further conclude that the district court did not abuse its discretion in calculating the specific hourly rates in the present case. In its decision, the court set forth the five bases upon which it computed these rates. The PMC does not challenge specifically those bases and we find little reason to question them. Hourly rates for counsel in this action were difficult to calculate because the majority of attorneys involved normally would have been compensated through contingency fee arrangements rather than on an hourly basis. Difficulties aside, however, the district judge, in our view, took adequate steps to ensure a fair and just hourly rate of compensation. We therefore hold that the national hourly rates of $150 for partners, $100 for associates and $125 for law professors constituted an element of fair and just compensation for counsel in the context of this case.

2. Quality Multipliers

Having computed the initial lodestar figure, the district court awarded discretionary quality multipliers of 1.5, and in one case 1.75, to six members of the PMC on the ground that these attorneys had exhibited exceptional skills in the litigation and settlement negotiations. The six PMC recipients now challenge the level of the multipliers as being unjustifiably low and further challenge the district court's failure to award quality multipliers in connection with the fees of the three other PMC members.

The decision to allow a quality multiplier rests in the sound discretion of the district court, Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Grinnell II, 560 F.2d at 1098, due to "the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." Hensley, 461 U.S. at 437. The Supreme Court, however, in Blum v. Stenson, 465 U.S. 886, 899 (1984), and more recently in Pennsylvania v. Delaware Valley Citizens' Council for Clear Air, 106 S. Ct. 3088 (1986), has severely restricted those instances in which a district court may allow such a multiplier.[2]

In Blum, a decision concerning application of the lodestar analysis to a fee award under 42 U.S.C. § 1988, the Court determined that factors such as quality of representation are presumed to be fully reflected in the initial lodestar figure, derived by multiplying the number of hours reasonably billed by the court-established hourly rate. Blum, 465 U.S. at 899.

Accordingly, the Court concluded that an adjustment to the lodestar figure for such a factor would only be proper in "the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was 'exceptional.'" Id. (emphasis added). In Delaware Valley Citizens' Council, a decision concerning application of the lodestar analysis to a fee award under section 304(d) of the Clean Air Act, 42 U.S.C.A. § 7604(d) (West 1983), the Court reaffirmed the narrow approach taken in Blum, declaring that calculating fee awards under the lodestar analysis "leaves very little room for enhancing the award based on [counsel's] post-engagement performance." Delaware Valley Citizens' Council, 106 S. Ct. at 3098.

Given these pronouncements, the issue, in our view, is not whether the quality multipliers awarded by the district court here were set too low, but rather whether they should have been awarded at all. In what we consider to be a close case, we conclude that the district court did not abuse its discretion in awarding the multipliers for quality to six of the PMC members, or in failing to award them to the other three members.

The district court specifically found that these six attorneys, as well as several outside counsel who have not appealed, deserved to be awarded quality multipliers at various rates because each had "demonstrated an unusual degree of skill in presenting complex and often novel issues to the court," Agent

Orange, 611 F. Supp. at 1328, or had "shown a level of organization and efficiency that goes beyond what is usually expected," id. Under ordinary circumstances, even assuming the high level of work performed by counsel here, we would be constrained to reverse the district court's award in light of the severe restrictions set forth in Blum and Delaware Valley Citizens' Council. While the work indeed may have been of high quality, the presumption is that such factors already are reflected in the initial lodestar figure.

In this case, however, we find that the use of a national hourly rate skews the normal lodestar analysis enough to require consideration of quality factors in order to satisfy the requirements of just and fair compensation. While we affirm the use of national rates in the present case, we realize that such rates inherently cannot be calculated as precisely as those under the forum rule, or those under the varying locale rule. Consequently, the Blum and Delaware Valley Citizens' Council presumption of inclusion of quality factors within the initial lodestar figure should not, in our view, apply to those instances in which the district court utilizes this less precise analysis.

### 3. Risk Multiplier

The district court declined to award a risk multiplier to any attorney involved in the case. It reasoned that risk of success should not be judged solely from the vantage point of

whether a complete recovery at the conclusion of the action is viable, but also should include an evaluation of the likelihood that the parties will reach a settlement. In this regard, the court noted that it was probable that the defendant chemical companies would settle the case "to avoid the further burden of litigation and to improve their respective financial pictures." Agent Orange, 611 F. Supp. at 1311. The court also recognized that awarding risk multipliers in a case such as Agent Orange, which held out little chance for a victory on the merits but a significant chance of settlement, would fuel the filing of nuisance litigation "in which settlement becomes the main object and attorney fee awards an overpowering motivating force." Id.

Furthermore, the court indicated that strict application of inversely proportionate risk multipliers to cases such as Agent Orange, which it described as a high-risk case of highly questionable merit, would lead to a confounding disparity in the treatment of cases falling just above and just below the standard for frivolousness under Fed. R. Civ. P. 11. Attorneys in successful cases bordering on the frivolous, yet falling just above the proscriptions of Rule 11, would be awarded the highest risk multipliers, since the risk of success in such cases obviously would be great. In contrast, counsel in similar cases falling just below Rule 11's proscriptions, would not only receive no risk multiplier, but also would be subject to court-imposed sanctions for having brought such a case.

Finally, the court took note that, as a matter of public policy, the need to utilize a risk multiplier in a given case must be viewed in relation to the equally important concerns of judicial administration and legal morality. To this end, the refusal to allow a multiplier here would force the legal community "to think at least twice before initiating sprawling, complicated cases of highly questionable merit that will consume time, expense and effort on the part of all concerned, including the courts, in a degree vastly disproportionate to the results eventually obtainable." Id. at 1312. While such a policy would not reward the filing of these questionable cases, the court did note that counsel's entitlement to a lodestar award without a multiplier would nonetheless serve adequately to encourage attorneys to represent plaintiffs in cases of this nature.

The PMC challenges the district court's failure to allow a risk multiplier on the ground that it does not comport with principles of just and fair compensation. While conceding that plaintiffs' case would have been difficult to prove, the PMC members strongly take exception to the district court's description of the action as being of dubious or questionable merit. As to the probability of the parties reaching a settlement in the action, the PMC members point to the fact that such a settlement was not reached until the eve of trial, and label as "economic suicide" the notion that they advanced funds and spent thousands of hours working on the case with some inner

assurance that defendants would make a reasonable settlement proposal because of the bothersome nature of the litigation.

We have labeled the risk-of-success factor as "perhaps the foremost" factor to be considered under the second prong of the lodestar analysis. Grinnell I, 495 F.2d at 471. The multiplier takes into account the realities of a legal practice by rewarding counsel for those successful cases in which the probability of success was slight and yet the time invested in the case was substantial. Id.; see 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1803, at 524-27 (1986). As the chance of success on the merits or by settlement increases, the justification for using a risk multiplier decreases. Grinnell I, 495 F.2d at 471. The need for this type of multiplier is magnified when the "diminutive character of the individual claims" forces counsel to bring the action on a class basis. 7B C. Wright, A. Miller & M. Kane, supra, § 1803, at 527. Without the prospect of some consideration for the risks and uncertainties of the action, "the necessary incentive [for prosecuting such a suit] would be lacking and a major weapon for enforcing various public policies would be blunted." Id.

The problem with risk multipliers, however, is that they tend to reward counsel for bringing actions of dubious merit. If such multipliers are awarded on a perfectly proportionate basis, i.e., the greater the chance that the case would not succeed the higher the multiplier, "the net effect . . . would be to make a marginal case as attractive to bring as a very strong case."

Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 27 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 3488 (1985). This, in turn, would provide an incentive for counsel to flood "the courts with unmeritorious litigation," McKinnon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984), "leading . . . to a situation in which every conceivable claim would be litigated, subject only to the ability of the courts to handle the burden," Laffey, 746 F.2d at 27; accord Leubsdorf, The Contingency Factor in Attorney Fee Awards, 90 Yale L.J. 473, 491 (1981). The net result, of course, would be a dilution of the judiciary's ability to handle those cases with potentially meritorious claims.

A court, therefore, in adjudging whether to award a risk multiplier, should examine closely the nature of the action in order to determine whether, as a matter of public policy, it is the type of case worthy of judicial encouragement. In our view, the case here clearly is not and, consequently, we agree with the district court's decision not to impose a risk multiplier.

From the outset, the factual and legal difficulties hindering the successful prosecution of plaintiffs' case have been staggering. Factual evidence of causation has been at best tenuous and, if not for the last-minute settlement, the military contractor defense would have prevented class members from realizing any recovery at all. When these significant weaknesses in plaintiffs' case are viewed in light of the sheer magnitude of the action and the thousands of hours of court time that this type of action requires, it becomes clear that the federal courts

should not actively encourage the bar to file such dubious actions in the future.

Besides matters of public policy, the settlement itself presents a rationale for denying counsel's request. While today we hold that the settlement falls within the range of reasonableness under Fed. R. Civ. P. 23, we are aware that the $180 million settlement provides a very small return to the class in light of the claims asserted. In our estimation, the relatively small size of the settlement reflects class counsel's realization of the extreme difficulty they would incur in overcoming the inherent weaknesses of their case, in particular the military contractor defense, and the defendant chemical companies' realization that they could end a burdensome litigation at very low cost. Award of a risk multiplier in such circumstances, as the district court reasoned, only would further the unwelcome prospect of nuisance litigation being brought in federal courts.

In denying class counsel their requested multiplier, we note that each attorney has received the fair value of his services to the class under the lodestar analysis. An additional award of a risk multiplier not only would provide excessive compensation but would encourage counsel to accept similar matters for litigation in the future. We find no reason to do more to encourage litigation that could substantially occupy the federal judiciary in matters of little merit.

4. Hours and Expenses

The PMC members challenge the district court's guidelines on the grounds that they improperly failed to credit certain hours and reimburse certain expenses. Specifically, they challenge the court's, decision to disallow fifty percent of the time spent on reading scientific literature, to disallow fifty percent of the time spent on travel, to disallow a portion of the time spent reviewing mail and on the telephone, to disallow fifty percent of the time spent reviewing depositions, and to disallow a substantial amount of post-settlement work; As to expenses, they challenge the court's decision to reduce expenses by a percentage when such expenses could not be connected with compensable activity, to set a maximum fee for noncausation expert witnesses, and to treat paralegals as a cost. In sum, they allege that, taken together, if not separately, such radical deductions in their hours and expenses billed constituted an abuse of the court's discretion.

The district court is given broad discretion in setting fee awards. Hensley, 461 U.S. at 437; Carey, 711 F.2d at 1146. We cannot reverse a district court's finding in this regard merely because we might have weighed the information provided in the fee petitions differently or might have found more of the hours billed as being beneficial to the class. Cf. Anderson v. Bessemer City, 105 S. Ct. 1504, 1511-12 (1985). The district judge is in the best position to weigh the respective input of

counsel, considering its "superior understanding of the litigation." Hensley, 461 U.S. at 437. Accordingly, we will reverse a district court's findings as to which hours to compensate "only when it is apparent that the size of the award is out of line with the degree of effort reasonably needed to prevail in the litigation." Carey, 711 F.2d at 1146.

We find no abuse of discretion here. The critical inquiry when reviewing hours billed to the common fund in a class action is whether the work performed resulted in a benefit to the class. See Grinnell II. 560 F.2d at 1099. In determining which hours were beneficial, we note that there "are no hard-and-fast rules," Siegal v. Merrick, 619 F.2d 160, 164 n.9 (2d Cir. 1980), but that "[a]mple authority supports reduction in the lodestar figure for overstaffing as well as for other forms of duplicative or inefficient work," id. Moreover, we and other circuits have held that in cases in which substantial numbers of voluminous fee petitions are filed, the district court has the authority to make across-the-board percentage cuts in hours "as a practical means of trimming fat from a fee application." Carey, 711 F.2d at 1146; accord Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc., 776 F.2d 646, 657 (7th Cir. 1985); Copeland v. Marshall, 641 F.2d 880, 903 (D.C. Cir. 1980) (in banc). But see In re Fine Paper, 751 F.2d at 596 (court roust identify with some specificity any disallowed hours). Under such circumstances, no item-by-item accounting of the hours disallowed is necessary or desirable. Ohio-Sealy. 776 F.2d at 658.

Here, the fee petitions, to say the least, were voluminous, consisting of tens of thousands of pages of billing sheets and other exhibits. To suggest that the district court could not take advantage of percentage reductions in such a context would be absurd. In reviewing these across-the-board cuts, we find nothing that we could classify as an abuse of discretion. Moreover, it is not unusual for hours of travel time, deposition time and other quasi-administrative items to be compensated at lower rates. E.g., Sun Publishing Co. v. Mecklenburg News, Inc., 594 F. Supp. 1512, 1520 (E.D. Va. 1984); Steinberg v. Carey, 470 F. Supp. 471, 479-80 (S.D.N.Y. 1979). But see Crumbaker v. Merit Systems Protection Board, 781 F.2d 191, 193-94 (Fed. Cir. 1986) (reasonable travel time should be compensated at the same rate as other working time). The district judge gave reasons, though somewhat generalized, for each percentage cut that he made. We find these to be an adequate reflection of the benefit that the class derived from counsel's work.

We also find no abuse of discretion in the district court's guidelines for expenses. Counsel are entitled to reimbursement only for those expenses incurred in the course of work that benefitted the class. In re Armored Car Antitrust Litigation, 472 F. Supp. 1357, 1388-89 (N.D. Ga. 1979), modified and remanded on other grounds, 645 F.2d 488 (5th Cir. 1981). Overstaffing and other extravagances are not recoverable. Id.

Given this standard, the district court's finding that the reports of the non-causation witnesses were of only marginal use

to the class and were "uniformly inadequate" suggests that the court in fact was generous in setting the cap for fees to these experts at $5,000 each. Report and Recommendation of United States Magistrate, Re: Fee Petitions, appendixed to and incorporated in Agent Orange, 611 F. Supp. 1296, 1351 (1985). We also find no abuse of discretion in the district court's determination that expenses connected with those hours disallowed as not being beneficial to the class should not be reimbursed. See In re Fine Paper Antitrust Litigation, 98 F.R.D. 81, 85 (E.D. Pa. 1983), rev'd on other grounds, 751 F.2d 562 (3d Cir. 1984). Finally, although we concede that under certain circumstances it may be appropriate not to treat paralegal time as an expense in a large class action, see Dorfman v. First Boston Corp., 70 F.R.D. 366, 374-75 (E.D. Pa. 1976), we note that the district court in so doing was simply following our prior directive, see Grinnell I, 495 F.2d at 473. We decline to reevaluate that rule here.

B. Outside Counsel

1. Ashcraft & Gerel

Ashcraft & Gerel, a Washington, D.C. law firm that assisted the PMC in this action between March of 1983 and October of 1983, appeals the district court's fee and expense award. In its initial fee calculations, the district court awarded Ashcraft & Gerel fees in the amount of $78,935 and expenses in the amount of

$46,233.18. The district court limited the fees and expenses to the work performed between the above dates. Pursuant to the recommendation of the Magistrate, Ashcraft & Gerel's fee and expense awards then were increased to $138,788 and $54,897.39. This increase primarily reflected the recommendation of the Magistrate that review of Ashcraft & Gerel's work not be limited to the short time period, but should include as well the period prior to March of 1983.

The Magistrate's recommendation, adopted by the district court, also reflected a negative quality multiplier of .25 on the ground that in 1983 the firm had withdrawn from the litigation when the PMC refused its request to be given exclusive control of the action. When the firm withdrew, other counsel involved were forced to perform numerous services that Ashcraft & Gerel already had performed. The Magistrate thus concluded that the firm "failed to discharge [its] burden when it decided to cease work on the case, thereby requiring other attorneys to duplicate its work." Agent Orange, 611 F. Supp. at 1367.

In adopting the Magistrate's recommendations, however, the district court offset the fee awarded to Ashcraft & Gerel against the benefits obtained by the firm's many opt-out clients from "the use of discovery materials assembled through the multidistrict discovery process and paid for by the class." Id. at 1343. The district court further found that the value of such services for the opt-outs far exceeded the firm's services to the

class. Consequently, the court abrogated any fee award to the firm, but maintained the modified expense award.

While we find that the district court's award of fees and expenses prior to abrogation reflects fair and just compensation for Ashcraft & Gerel's services to the class, we conclude that abrogation of the fee. award constituted an abuse of discretion. In analyzing the general problem of individual use of discovery materials, the district court properly determined that, in return for the use of discovery materials obtained in the raultidistrict litigation, such individual plaintiffs "could be assessed a reasonable fee, to be paid back into the fund as their fair share of the legal expenses assumed by the class." Id. at 1317. The court then suggested two ways in which this could be done. First, the court could require counsel in the opt-out cases to report to the district court any fee received from the opt-out plaintiffs so that the court could deduct the appropriate amount. Id. Second, the court could assess the opt-out plaintiffs for the cost of the discovery at the time they made use of it. Id.

Neither of these means of assessment permitted the court to offset Aschcraft & Gerel's opt-out clients' payments for use of discovery materials, against fees awarded to the firm for its representation of class members. The fee awarded the firm here has no relation to services performed for the opt-outs. Abrogation of the fee, therefore, has the net effect of relieving the class from its responsibility to pay Ashcraft & Gerel fair and just compensation for services it provided, rather than

assessing the opt-out plaintiffs for use of the discovery materials.

Accordingly, we conclude that Ashcraft & Gerel should be awarded the fee that the district court, accepting the Magistrate's Recommendation, determined to be fair and just.

2. Sullivan & Associates

Sullivan & Associates, a law firm primarily involved in the litigation during the early days of the action, challenges the district court's fee award on the ground that the court improperly determined that much of its work was not beneficial to the class. The district court awarded the firm $52,311 in fees and $20,573.08 in expenses. The court, upon recommendation of the Magistrate, denied the firm's motion to supplement the award. The court found that the hours requested were excessive and that the firm had spent most of its time furthering the interests of its opt-out clients.

After reviewing the district court's calculations, we conclude that there was no abuse of discretion. The district court was in a much better position to determine whether the work performed by the firm benefitted the class. For the same reasons as given in section II(A)(4), supra, we find no basis upon which to question the district court's figures.

3. Australian Counsel

William T. McMillan, Ross V. Lonnie, Paul J. Davison, Roger L. MacLaren, and Michael S. Bigg, all Australian attorneys, appeal the district court's awards of fees and expenses. The district court awarded McMillan $3,650 in fees and $27,178.34 in expenses, Lonnie no fees and $3,055.93 in expenses, Davison no fees and $2,042.08 in expenses, MacLaren no fees and $3,683.39 in expenses, and Bigg $5,700 in fees and $22,561.76 in expenses. The basis for the challenge to these awards is that they do not adequately reflect the services that counsel performed for the class.

We again find no abuse of discretion. Appellants have given us no adequate reason to question the district court's calculations and we decline to do so.

4. Kraft & Hughes

Kraft & Hughes, a New Jersey firm peripherally involved in the litigation, challenges the district court's award. The court awarded the firm $2,425 in fees and $3,935.48 in expenses. The firm now argues that this is no more than the out-of-pocket costs of its involvement and substantially undercredits its contribution to the litigation. Moreover, the firm contends that it was improper for the district court to abrogate the contingency fee agreements that the firm had with a number of class members.

Kraft & Hughes concedes in its presentation to this court that it cannot establish the factual findings of the district court to be clearly erroneous. Consequently, the firm bases its appeal primarily on the ground that its fee agreements with its clients, as a matter of law, should not have been abolished. We find this argument, however, to be without merit.

It is well established that a district court, pursuant to its rulemaking authority or on an ad hoc basis, may review a contingency fee agreement. Boston and Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A., 778 F.2d 890, 896 (1st Cir. 1985); Dunn v. H.K. Porter Co., 602 F.2d 1105, 1108 (3d Cir. 1979). When dealing with an equitable fund action, "the court has an even greater necessity to review the fee agreement for [Fed. R. Civ. P. 23(e)] imposes upon it a responsibility to protect the interests of the class members from abuse." Dunn, 602 F.2d at 1109. That is exactly what the district court did here in requiring counsel, prior to receiving fees from the settlement, to certify that he or it had retained no fees or expenses from any class members. We find no basis to overrule the district court's decision in this regard.

## III. CONCLUSION

To summarize: we affirm the district court's utilization of national hourly rates and conclude that they may be used in the circumstances revealed here. We further affirm the district

court's award of quality multipliers to various counsel, and the district court's denial of risk multipliers. We affirm the district court's decision regarding hours credited and expenses reimbursed to the PMC. We reverse the decision to offset Ashcraft & Gerel's fee against the use of the raultidistrict discovery materials by the firm's opt-out clients and order the reinstatement of the previously approved fee without allowance for a risk multiplier. As to all other aspects of the district court's decision respecting attorneys' fees, we affirm.

FOOTNOTES

1. The Task Force made its recommendation in the context of certain statutory fee cases. It also recommends the abolition of the lodestar formula for equitable fund cases and suggests such fees be based upon a percentage of the recovery. 108 F.R.D. at 254-59.

2. Blum and Delaware Valley Citizens' Council are statutory fee cases whereas here fees were awarded under the equitable fund doctrine. While the lodestar formula applies to both types of cases, equitable fund cases may afford courts more leeway in enhancing the lodestar, given the absence of any legislative directive.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 328, 306, 329, 330, 331 August Terra, 1986

(Argued October 1, 1986 Decided )

Docket Nos. 86-3039, 86-3042, 86-6171, 86-6173, 86-6174

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IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION
MDL No. 381

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B e f o r e: VAN GRAAFEILAND, WINTER, and MINER, Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, in Multidistrict Litigation No. 381, establishing a plan for distribution of the settlement fund in the Agent Orange class action litigation. .

Affirmed in part, reversed in part, and remanded.

Petition for writ of mandamus or prohibition seeking removal of the Plaintiffs' Management Committee as class counsel.

Denied.

NEIL R. PETERSON, Philadelphia, Pennsylvania (Greitzer and Locks, Philadelphia, Pennsylvania, Thomas W. Henderson, Henderson & Goldberg, Pittsburgh, Pennsylvania, of counsel), for Petitioner-Appellant Plaintiffs' Management Committee in Nos. 86-3039 and 86-6173; for Respondent-Appellee in Nos. 86-3042 and 86-6171.

KENNETH R. FEINBERG, Washington, D.C. (Kaye, Scholer, Fierman, Hays & Handler, Washington, D.C., of

counsel), as Amicus Curiae at the request of the court.

VICTOR J. YANNACONE, JR., Patchogue, New York, for Petitioners in No. 86-3042 and Appellants in No. 86-6171.

Benton Musslewhite, Houston, Texas, for Appellants in No. 86-6174.

WINTER, Circuit Judge:

This opinion addresses challenges by the Plaintiffs' Management Committee ("PMC") and by certain plaintiffs represented by Victor Yannacone to Chief Judge Weinstein's adoption of a plan for the distribution of the fund established as a result of the class settlement with the defendant chemical companies. See In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1396 (E.D.N.Y. 1985) ("Distribution Opinion"). Because no party to this litigation is adverse to the PMC, we requested that Special Master Kenneth Feinberg defend the district court's distribution order essentially in the role of an amicus curiae. A detailed discussion of the development and selection of the distribution plan appears in the first of this series of opinions, familiarity with which is assumed.

Certain plaintiffs represented by Mr. Yannacone have also filed a petition for writ of mandamus or prohibition to have the PMC removed as class counsel. That issue is also addressed herein.

1. The Timeliness of the Pending Appeals

A party seeking to appeal a final decision of a district court in any case where, as here, the United States is a party

must file a notice of appeal within 60 days after entry of the decision. Fed. R. App. P. 4(a)(1). The notice of appeal filed by Mr. Yannacone is concededly untimely. That appeal is therefore dismissed.

The Special Master argues that the PMC's pending appeal is also untimely because it was noticed on August 19, 1986, more than 60 days after the distribution plan was adopted on May 28, 1985. However, important aspects of the distribution plan remained to be decided as of the earlier date, including, for example, the means of compensating veterans from Australia and New Zealand, 611 F. Supp. at 1443-45; the criteria for establishing a claimant's exposure to Agent Orange, id. at 1417; and the entities that were to implement and administer the individual payment program, id. at 1427. Moreover, Chief Judge Weinstein apparently did not view the entire distribution plan as final until July 31, 1986, when he entered an order pursuant to Fed. R. Civ. P. 54(b) designed to "constitute a final judgment upon this Court's Distribution Opinion of May 28, 1985."

We do not believe that appellants were faced with the choice of appealing from the May 28 order or not at all. Whether that order was appealable is of great doubt. It was not a collateral order that "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment," Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 , 546 (1949). Unlike such a collateral order, the May 28 order could be effectively reviewed as part of the final judgment. Id. See

also Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171-72 (1974).

Even if the May 28 order was appealable under Cohen, there is still no reason to bar an appeal from the July 31 order, which was clearly intended by the district court to be final. *See* 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3909, at 452 n.38 (1976) ("There is often little reason to deny review on appeal from a clearly final judgment on the theory . . . that an earlier order that did not terminate the entire proceeding was nonetheless so final as to have been appealable. Doctrines designed to facilitate intermediate appeals to avoid hardship often do not serve any corresponding interest in protecting opposing parties and the courts against delayed appeals."). Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950), is a rare case in which the Supreme Court dismissed an appeal on the ground that it should have been filed prior to the entry of final judgment. The instant case is distinguishable from Dickinson in at least two respects, however. First, the order that would have been appealable in Dickinson dismissed all claims raised by the appellant. The Court thus noted that the appellant's interests "could not possibly have been affected" by any action that remained to be taken by the district court. Id. at 515. In contrast, the plaintiffs here continued to have an active interest in the litigation after the May 28 decision. Second, the Court recognized in Dickinson that the case had ar-isen before the adoption of Rule 54(b), a provision with the "obvious purpose" of

"reduc[ing] as far as possible the uncertainty and the hazard assumed by a litigant who either does or does not appeal from a judgment of the character we have here." Id. at 512. The Court therefore expressly refused to "try to lay down rules to embrace any case but this." Id.

Accordingly, we conclude that the PMC's appeal from the district court's distribution plan was timely filed. We therefore need not consider the PMC's petition for a writ of mandamus, which raises the same issues.

2. General Principles

District courts enjoy "broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably." Beecher v. Able, 575 F.2d 1010, 1016 (2d Cir. 1978). In reviewing allocations of class settlements, therefore, we will disturb the scheme adopted by the district court only upon a showing of an abuse of discretion.

In the present case, a relatively modest settlement fund must be allocated equitably among a large and diverse group of claimants. There are 240,000 claimants dispersed throughout the United States, Australia, and New Zealand. They suffer from an immense variety of ailments and have different medical and financial needs. Having pursued a number of often inconsistent goals in this litigation, they are as sharply divided over the distribution of the settlement fund as they are over its adequacy. The PMC seeks what it regards as a conventional scheme for

"tort-based" recovery by individuals; Mr. Yannacone's clients want the fund devoted largely to establishing a foundation; the district court adopted a compensation based scheme to distribute the bulk of the fund with the remainder to be used to establish a foundation. *See* P. Schuck, Agent Orange on Trial 211-13, 220 (1986).

The district court was not bound to choose among only those plans offered by class members who spoke out. Rather, it had to "exercise its independent judgment to protect the interests of class absentees, regardless of their apparent indifference," In re Traffic Executive Association -- Eastern Railroads, 627 F.2d 631, 634 (2d Cir. 1980), as well as to protect the interests of more vocal members of the class. The district judge therefore had discretion to adopt whatever distribution plan he determined to be in the best interests of the class as a whole notwithstanding the objections of class counsel, see, e.g., Distribution Opinion, 611 F. Supp. at 1409 (criticizing distribution plan proposed by PMC on ground that "too great a share of the fund would go to lawyers and medical experts"); Plummer v. Chemical Bank, 668 F.2d 654, 659 (2d Cir, 1982) (district courts cannot rely solely on "the arguments and recommendations of counsel" in evaluating propriety of class settlements), or of a large number of class members. See TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462 (2d Cir. 1982) (holding in shareholders' derivative suit that even "majority opposition . . . cannot serve as an automatic bar to a settlement that a district judge after weighing all the strengths

and weaknesses of a case and the risks of litigation, determines to be manifestly reasonable"). See also Cotton v. Hinton. 559 F.2d 1326 (5th Cir. 1977) (approving settlement over objections of counsel purporting to represent almost 50 percent of class); Bryan v. Pittsburgh Plate Glass Co., 494 F.2d 799 (3d Cir.) (approving settlement over objections of almost 20 percent of class), cert. denied, 419 U.S. 900 (1974).

3. Choice of Law

In adopting a distribution plan that departed from traditional tort principles by not requiring "a particularized showing of individual causation and injuries," id. at 1402, the district court held that such a plan would be consistent with "the consensus of state law," id. at 1403, that figured in its certification of a class action. In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718 (E.D.N.Y. 1983).

In the mandamus proceeding, we expressed "considerable skepticism" as to whether such a consensus would emerge among Che states with respect to the legal rules applicable to the plaintiffs' claims. In re Diamond Shamrock Chemicals Co., 725 F.2d 858, 861 (2d Cir.), cert. denied, 465 U.S. 1067 (1984). In the first of this series of opinions we have stated that the district court's conclusion as to the national consensus was Co be praised more for its analysis than for its utility as a predictor of what various courts would do.

However, our disagreement with use of the national consensus in certifying a class does not foreclose its use as a method of

establishing criteria for distributing a class settlement fund. As another Court of Appeals has observed in the class action context, "the allocation of an inadequate fund among competing complainants is a traditional equitable function, using 'equity' to denote not a particular type of remedy, procedure, or jurisdiction but a mode of judgment based on broad ethical principles rather than narrow rules." Curtiss-Wright Corp. v. Helfand, 687 F.2d 171, 174 (7th Cir. 1982) (citation omitted) (citing Zients v. La Morte, 459 F.2d 628, 630 (2d Cir. 1972)). Use of a single national standard, regardless of what law various courts might have chosen in Agent Orange cases, is a permissible method of disbursing the fund. An individual claimant state-by-state approach would seriously deplete the portion of the fund going directly to veterans by diverting a substantial amount to lawyers and to the adjudicators necessary to implement the PMC's complex scheme. The diversion might be so great as to reduce benefits for all claimants, including those who would be subject to the most favorable state laws. We thus agree with the approach of the district court on this question, although on a different rationale.

4. Payments for Death or Disability of Exposed Veterans

The PMC contends that the district court abused its discretion in compensating individual disabled veterans and families of deceased veterans without requiring "a particularized showing of individual causation and injuries." 611 F. Supp. at 1402. The PMC argues that a portion of the settlement fund will

thereby be distributed to undeserving claimants whose injuries were not caused by Agent Orange. Even if that outcome is the case, we do not believe that it is a grounds for altering the distribution scheme.

Chief Judge Weinstein did not deem necessary proof that a veteran's death or disability resulted from exposure to Agent Orange[1] because he found the available evidence insufficient to establish which non-traumatic injuries could have been caused by Agent Orange and which could not. In other words, as between exposed veterans suffering from diseases for which the PMC would provide compensation and exposed veterans suffering from other non-traumatic diseases, the district court concluded that the former had no stronger claim for benefits than the latter because "causation cannot be shown for either individual claimants or individual diseases with any appropriate degree of probability." 611 F. Supp. at 1409.

Chief Judge Weinstein did not abuse his discretion in adopting a distribution plan that reflected this conclusion. He was not obligated to adopt a plan that conformed to a theory of the relationship between Agent Orange and certain diseases that has little or no scientific basis. Further, he could take into account the very substantial countervailing evidence that Agent Orange was not harmful to any personnel in Vietnam. See In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 782-95 (E.D.N.Y. 1984) ("Settlement Opinion") (reviewing scientific data on effects of Agent Orange and concluding that

"all that can be said is that persuasive evidence of causality has not been produced"). He could also consider the substantial difficulty of proving that any particular plaintiff was injured by Agent Orange in making an equitable allocation of the limited settlement fund. See Curtiss-Wright Corp., 687 F.2d at 174-75 (equitable allocation of a class action settlement fund may be accomplished over party's objection without "resolv[ing] trial-type issues of liability" based on district court's independent "weigh[ing of] the relative deservedness" of claimants). Moreover, he was correct in seeking a distribution scheme governed by criteria that are relatively easy and inexpensive to apply.

Furthermore, as became clear at oral argument, the PMC itself would no longer require proof that a veteran was actually exposed to Agent Orange in order to qualify a claimant for benefits under its distribution plan. Thus, servicepersons who spent their entire tour of duty far away from sprayed areas could receive payments under the PMC plan merely by developing any of the 24 medical conditions that the PMC claims are associated with Agent Orange. In contrast, the district court's plan would require some evidence of exposure.[2] Even if the district court's distribution plan is overbroad with regard to ailments, that fact hardly renders it less desirable than the PMC's plan, which is clearly overbroad with regard to exposure.

We further note that the distribution plan adopted by the district court does not entirely disregard traditional tort

principles of causation. For example, it provides payments only to veterans who have become disabled from non-traumatic, non-accidental, non-self-inflicted causes and to the survivors of veterans who have died from such causes. Consequently, a veteran who died or became disabled as a result of an auto collision, a gunshot wound, or a narcotic overdose, all causes clearly unrelated to Agent Orange exposure, would have no claim to payments from the settlement fund.

In sum, given the inconclusive state of the scientific evidence as to what injuries, if any, were caused by Agent Orange, the district court did not abuse its discretion in holding that all exposed veterans who have suffered non-traumatic death or disability have stated "colorable legal claims against defendants . . . [sufficient] to allow them to share in the settlement fund." In re Chicken Antitrust Litigation American Poultry, 669 F.2d 228, 238 (5th Cir. 1982), quoted in Distribution Opinion, 611 F. Supp. at 1411.

We emphasize that the district court is free to alter the distribution plan in the future to simplify it even more or to clarify standards as concrete issues arise. We also ask the district court to review its procedures for establishing exposur to Agent Orange in light of Attachments 2 and 3 to the PMC's r brief and recent news reports concerning the possible discov a biological "fingerprint" left in veterans' blood by diox Researchers Report Finding Telltale Sign of Agent Orange Times, Sept. 18, 1986, § A at 28, col. 3 (late city fi

5. Class Assistance Programs

We turn now to the district court's proposal to establish "a class assistance foundation . . . to fund projects and services that will benefit the entire class." 611 F. Supp. at 1432. The PMC contends that use of the settlement fund for class assistance programs would contravene the decisions of this court in Eisen v. Carlisle & Jacquelin. 479 F.2d 1005 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1974) (remedy proposed before finding of liability in order to make class manageable; rejected because it benefitted future odd-lot investors rather than past investors who had suffered loss), and Van Gemert v. Boeing Co.. 553 F.2d 812 (2d Cir. 1977) (rejecting proposal that would have permitted unclaimed portion of damage award to be paid to class members who had already been made whole).

We do not believe that the district court was necessarily foreclosed by Eisen and Van Gemert from using a portion of the settlement fund to provide programs for the class as a whole. The instant case is, of course, distinguishable from Eisen and Van Gemert in several important respects.

First, the class that will benefit from the district court's distribution plan is essentially equivalent to the class that claims injury from Agent Orange. That was not the case in either Eisen or Ven Gemert. In Eisen, the proposed recovery scheme would primarily have benefitted not the class of persons who claimed injury from prior odd-lot transactions but instead a class of persons who would engage in such transactions in the future. In

Van Gemert, the proposal at issue would have distributed the unclaimed portion of a damage award to class members who had already recovered their losses in full, a group the court characterized as a "next best class." 553 F.2d at 815. Hence, the distribution plan adopted by Chief Judge Weinstein simply lacks the sort of "fluidity" between the class claiming injury and the class receiving recovery that existed in Eisen and Van Gemert.

Second, we were particularly concerned in Eisen that the availability of "fluid class recovery" would have allowed plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not. The damages to the average class member in Eisen were estimated at no more than $3.90, see 479 F.2d at 1010, and, as counsel for the named plaintiff conceded, "[i]f each [member] had to present his own personal claim for damages, the class, indeed, would not be manageable." Id. at 1017. We foresaw that such an unwarranted relaxation of the manageability requirements would have induced plaintiffs to pursue "doubtful" class claims for "astronomical amounts" and thereby "generate . . . leverage and pressure on defendants to settle." Id. at 1019. However, the instant case, unlike Eisen, was maintainable as a class action regardless of the form of recovery available to the plaintiff class. Accordingly, our concern in Eisen that the availability of a particular form of recovery would vastly enlarge the number of class actions in the federal courts is not present in the instant case.

Finally, the instant case, unlike Eisen and Van Gemert,

arises out of a pretrial settlement. As the Supreme Court has recognized, a district court may "provide[] broader relief [in an action that is resolved before trial] than the court could have awarded after a trial." Local Number 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3077 (1986). Indeed, we have previously recognized that some "fluidity" is permissible in the distribution of settlement proceeds. See Beecher v. Able, 575 F.2d at 1016 n.3; West Virginia v. Chas. Pfizer & Co., Inc., 314 F. Supp. 710, 728 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d dr.), cert. denied, 404 U.S. 871 (1971).

We thus conclude that a district court may, in order to maximize "the beneficial impact of the settlement fund on the needs of the class," 611 F. Supp. at 1431, set aside a portion of the settlement proceeds for programs designed to assist the class. However, we believe that the district court must in such circumstances designate and supervise, perhaps through a special master, the specific programs that will consume the settlement proceeds. The district court failed to do so in the instant case. Instead, it provided that the board of directors of a class assistance foundation would control, inter alia, "investment and budget decisions, specific funding priorities, . . . [and] the actual grant awards," id. at 1435, and that the court would retain only "[a] comparatively modest supervisory role" in such decisionmaking. Id. at 1436.

We are unwilling for several reasons to permit the

distribution of any settlement proceeds to a largely independent foundation. First, while a district court is permitted broad supervisory authority over the distribution of a class settlement, see Beecher v. Able, 575 F.2d at 1016, there is no principle of law authorizing such a broad delegation of judicial authority to private parties. We perceive no assurance that the "self-governing and self-perpetuating" board of directors of the class assistance foundation, or any other such body that might be devised by the court, will possess the independent, disinterested judgment required to allocate limited funds to benefit the class as a whole. One of the district court's prime functions in distributing such a fund is to protect the less vocal and less activist members of the class. The proposed foundation is not well designed to perform that function. Moreover, given the very evident discord among various veterans as to the use of the settlement fund, we see great hazards in transferring that discord to a foundation having permanent control over portions of that fund. There is a great danger that the fund would be expended in ways that generate more controversy than benefits and would create even more frustration among a group already frustrated enough by perceived political and legal setbacks. However unique it may be, this is an action for personal injuries, and we believe that only direct judicial supervision can assure that the settlement fund is expended for appropriate purposes.

We acknowledge the strong sentiment among some veterans for the creation of such a foundation. We also note, however, their great expectations for the foundation are similar to the

expectations that prompted this class action litigation. Those latter expectations were frustrated when confronted with the reality of legal proceedings. Great expectations underlying the foundation proposal still exist because the concrete tasks to be undertaken by it remain unclear, and the reality of hard and controversial choices concerning use of the fund has not yet been confronted.

Moreover, we are concerned that the broad mandate given the class assistance foundation, which must remain an arm of the court however loosely connected, would permit settlement proceeds to be expended on activities inconsistent with the judicial function. For example, activities to "help class member veterans better obtain and utilize VA services" and to "increase public awareness of the problems of the class," id. at 1440, might include political advocacy. We do not believe that the proceeds of a court-administered settlement ought to be used for such a purpose.

Finally, we are concerned that, even given the expressed intention to allow the foundation great latitude, the district court and this court would repeatedly be asked to intervene in foundation decisions alleged not to benefit the class. When such claims are made, they call for greater scrutiny than is contemplated by the district court's exercise of only a "modest supervisory role." In addition, endless legal argument over the disbursement of the settlement fund would simply prolong the suffering and frustrations of the class.

We explicitly note, however, that the district court may in the exercise of its discretion and after consultation with veterans' groups undertake to use portions of the fund for class assistance programs that are consistent with the nature of the underlying action and with the judicial function. Accordingly, the district court on remand may designate in detail such programs and provide for their supervision. A reserve fund for as yet undefined programs may be established. Alternatively, the court may reallocate any or all of the funds earmarked for the class assistance foundation to augment the awards to individual class members. The court may choose either to increase the awards to disabled veterans and the survivors of deceased veterans or to provide awards to other class members who have suffered less than total disability.

6. Yannacone Petition for Writ of Mandamus/Prohibition

The petition for a writ of mandamus or prohibition filed by Mr. Yannacone seeks the removal of the PMC as lead counsel. Mr. Yannacone contends that a "conflict of interest" exists between the PMC and the plaintiff class, as evidenced by the differences between the distribution plan submitted by the PMC and the plan submitted by Mr. Yannacone. He also argues that the plaintiffs are entitled to "a reasonable opportunity to be heard through counsel of their own choosing who can and will speak independently on their behalf." The petition is frivolous. .

We note that Mr. Yannacone was among the attorneys who first sought class certification and that he served for some time as the

lead counsel for the class. Nevertheless, his present petition reveals a fundamental misunderstanding of the nature of a class action. A plaintiff who joins in a class action, as many plaintiffs did through Mr. Yannacone, gives up his or her right to control the litigation in return for the economies of scale available under Fed. R. Civ. P. 23. In the related context of a shareholders' derivative suit, we have rejected any notion that "each individual plaintiff and lawyer must be permitted to do what he pleases in litigation as complex as this, and can behave in total disregard of the interest of other litigants and of the class." Farber v. Riker-Maxson Corp., 442 F."2d 457, 459 (2d Cir. 1971) (per curiam).

The selection of lead counsel for the plaintiff class is left to the discretion of the district court "guided by the best interests of [the class], not the entrepreneurial initiative of the named plaintiffs' counsel." Cullen v. New York State Civil Service Commission, 566 F.2d 846, 849 (2d Cir. 1977). "Unless there are exceptional circumstances, . . . the exercise of discretion should be left untouched by the appellate court." Id. See also Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc., 455 F.2d 770, 775 (2d Cir. 1972) ("'we do not -- indeed may not -- issue mandamus with respect to orders resting in the district court's discretion, save in most extraordinary circumstances'") (quoting Donlon Industries, Inc. v. Forte, 402 F.2d 935, 937 (2d Cir. 1968)).

Mr. Yannacone has failed even to suggest, much less

establish, any "exceptional circumstances" that might warrant removal of the PMC as lead counsel. Indeed, he has suggested nothing more than a difference of opinion between the PMC and himself with respect to the appropriate distribution of the settlement fund. Moreover, these differences were fully aired before the district court, which thoroughly evaluated the merits of each plan in the course of its distribution opinion. See 611 F. Supp. at 1403-10.

Finally, even if we were to order the removal of the PMC as lead counsel, we have no reason whatsoever to expect the dispfict court to appoint Mr. Yannacone to take its place. We have even less than no reason to expect the district court to abandon its own distribution plan in favor of the plan proposed by Mr. Yannacone. Accordingly, the petition is denied.

Affirmed in part, reversed in part, and remanded for further proceedings in accordance with this opinion.

FOOTNOTES

1/ The court adopted the Social Security Act's definition of "disability," namely an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A) (1982). The court provided that "[a]ny veteran claimant certified as disabled by the Social Security Administration will be considered disabled for purposes of the payment program, unless the disability was predominantly caused by a traumatic, accidental or self-inflicted injury." 611 F. Supp. at 1413. A claimant who has not been found disabled by the Social Security Administration may still qualify for payments by submitting satisfactory medical evidence to the disbursing authority; in such cases, "the payment program will take into account, as evidence, a Social Security determination that the veteran is not disabled, or certifications of disability from other entities such as the Veterans Administration or private insurers." Id.

2/ The plan would require a claimant to make "[s]ome substantial showing of exposure" to Agent Orange, 611 F. Supp. at 1415, by demonstrating that he held a job involving direct handling or application of Agent Orange," id. at 1416, or that he "was present in a sprayed area when the spraying occurred" or in or near such

an area within some specified period thereafter. Id. at 1417. The court would rely primarily on the HERBS tape, a computerized record of herbicide dissemination missions in Vietnam, to determine the exposure of ground troops to Agent Orange. However, "[b]ecause the HERBS tape does not account for all possible exposures," veterans who could not establish exposure on the basis of the HERBS tape would be able to present alternative evidence of exposure to "an independent board of review." Id.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1085, 1095, 1104 August Term, 1985

(Argued April 9, 1986 Decided )

Docket Nos. 85-6163, 85-6269, 85-6337

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IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION
MDL No. 381

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B e f o r e: VAN GRAAFEILAND, WINTER, and MINER, Circuit Judges.

Appeals from a grant of summary judgment by the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, in multidistrict litigation No. 381, dismissing claims against Agent Orange manufacturers by Vietnam veterans and members of their families who opted out of the Agent Orange class action litigation.

We affirm on the ground that the plaintiffs' claims are barred by the military contractor defense.

ROBERT A. TAYLOR, JR. and WAYNE M. MANSULLA, Washington, D.C. (Ashcraft & Gerel, Washington, D.C., of counsel), for Plaintiffs-Appellants.

RICHARD J. BARNES, New York, New York (Townley & Updike, New York, New York, of counsel), for Appellee Monsanto Company.

Cadwalader, Wickersham & Taft, New York, New York, for Appellee Diamond Shamrock Chemicals Company.

Rivkin, Radler, Dunne & Bayh, Garden City, New York, for Appellee The Dow Chemical Company.

Velley Drye & Warren, New York, New York, for Appellee Hercules Incorporated.

Clark, Gagliardi & Miller, White Plains, New York, for Appellee TH Agriculture & Nutrition Company, Inc.

Shea & Gould, New York, New York, for Appellee Uniroyal, Inc.

Budd, Larner, Kent, Gross, Picillo, Rosenbaum, Greenberg & Sade, Short Hills, New Jersey, for Appellee Thompson Chemicals Corporation.

WINTER, Circuit Judge:

This opinion addresses the disposition of 287 appeals in cases brought by plaintiffs who chose to opt out of the Agent Orange class action. These cases remained in the Eastern District of New York after the class settlement as a result of the multidistrict referral. Chief Judge Weinstein granted summary judgment against each of the opt-out plaintiffs, most of whom now appeal.[1] To avoid repetition, this opinion assumes familiarity with the discussion of the fairness of the settlement in the first of this series of opinions, No. 84-6273, and with Chief Judge Weinstein's opinions reported at: 597 F. Supp. 740, 775-99, 819-50 (E.D.N.Y. 1984) ("Settlement Opinion"); 611 F. Supp. 1223 (E.D.N.Y. 1985) ("Opt-Out Opinion"); and 611 F. Supp. 1267 (E.D.N.Y. 1985) ("Lilley Opinion").

After they had settled with the class, the defendant chemical companies moved for summary judgment against the opt-out plaintiffs. Chief Judge Weinstein granted the motion on the alternative dispositive grounds that no opt-out plaintiff could

prove that a particular ailment was caused by Agent Orange, see Opt-Out Opinion, 611 F. Supp. at 1260-63; Lilley Opinion, 611 F. Supp. at 1284-85, that no plaintiff could prove which defendant had manufactured the Agent Orange that allegedly caused his or her injury, see Opt-Out Opinion, 611 F. Supp. at 1263; Lilley Opinion, 611 F. Supp. at 1285, and that all the claims were barred by the military contractor defense. See Opt-Out Opinion, 611 F. Supp. at 1263-64; Lilley Opinion, 611 F. Supp. at 1285.

The district court's determination that individual causation could not be proven was based largely on its conclusion that the expert opinions submitted by the opt-out plaintiffs were inadmissible. Chief Judge Weinstein held that the opinions lacked a reliable basis and were therefore inadmissible under Fed. R. Evid. 703.[2] See Opt-Out Opinion, 611 F. Supp. at 1243-55; Lilley Opinion, 611 F. Supp. at 1280-83. He also found that the opinions were so unreliable that the danger of prejudice substantially outweighed their probative value under Fed. R. Evid. 403.[3] See Opt-Out Opinion, 611 F. Supp. at 1255-56; Lilley Opinion, 611 F. Supp. at 1283.

The district court's determination that no plaintiff could prove which defendant caused his or her particular illness was based on the undisputed facts that the amount of dioxin in Agent Orange varied according to its manufacturer and that the government often mixed the Agent Orange of different manufacturers and always stored the herbicide in unlabeled barrels. See Opt-Out Opinion, 611 F. Supp. at 1263 (citing Settlement Opinion, 597 F.

Supp. at 816-44). The court also rejected sub silentio various theories of enterprise and alternative liability that it had discussed in evaluating the settlement. See Settlement Opinion. 597 F. Supp. at 820-28. We do not address either of these grounds for the grant of summary judgment because we affirm on the military contractor defense.[4]

The district court granted summary judgment on military contractor grounds because it found no genuine factual dispute as to whether the government possessed as much information as the chemical companies about possible hazards of Agent Orange at * pertinent times. See Opt-Out Opinion, 611 F. Supp. at 1263. This information concerned an association between dioxin exposure and cases of chloracne and liver damage. We agree with the district court that the information possessed by the government at pertinent times was as great as, or greater than, that possessed by the chemical companies. We add a further reason for affirming the grant of summary judgment based on the military contractor defense. Even today, the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam, even with regard to chloracne and liver damage. The chemical companies therefore could not have breached a duty to inform the government of hazards years earlier.

Our consideration of the military contractor defense has been greatly impaired by the inexplicable and unjustifiable failure of the opt-outs' counsel to brief the issue even though it was a

dispositive ground for the grant of summary judgment.[5] On appeal, their brief offers only the conclusory statement that "[t]he district court clearly committed error in holding that the government contract defense presented no genuine issues of material fact." We are then referred to 569 pages of deposition excerpts and documents, which are said to "raise clear questions of material fact."[6] No explanation is given of the relevance of these materials, however, and we are left in ignorance of appellants' view of the legal contours of the defense. Appellees, having no discussion to which they might respond, also do not address the issue.

We believe that federal law shields a contractor from liability for injuries caused by products ordered by the government for a distinctly military use, so long as it informs the government of known hazards or the information possessed by the government regarding those hazards is equal to that possessed by the contractor. The military contractor defense has been the subject of several recent judicial decisions, see Boyle v. United Technologies Corp., 792 F.2d 413, 414-15 (4th Cir. 1986), cert. granted, 107 S. Ct. 872 (1987) (No. 86-492); Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986), petition for cert. filed, 55 U.S.L.W. 3337 (U.S. Oct. 23, 1986) (No. 86-674); Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), petition for cert. filed, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529); Bynum v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillett v. J.I. Case Co., 756 F.2d 591, 596-600 (7th Cir. 1985); Koutsoubos v. Boeing

Vertol, 755 F.2d 352 (3d Cir.)» cert. denied, 106 S. Ct. 72 (1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir. 1983), cert. denied, 464 U.S. 1043 (1984), and has figured prominently in the instant litigation, see In re Diamond Shamrock Chemicals Co., 725 F.2d 858, 861 (2d Cir.), cert. denied, 465 U.S. 1067 (1984); In re "Agent Orange" Product Liability Litigation, 597 F. Supp. at 847-50; 580 F. Supp. 690, 701-05 (E.D.N.Y. 1984); 565 F. Supp. 1263 (E.D.N.Y. 1983); 534 F. Supp. 1046, 1053-58 (E.D.N.Y. 1982); 506 F. Supp. 762, 792-96 (E.D.N.Y. 1980). Our rationale for the defense is similar to that recently expressed by the Court of Appeals for the Fourth Circuit:

> Traditionally, the government contractor defense shielded a contractor from liability when acting under the direction and authority of the United States. Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 20, 60 S. Ct. 413, 414, 84 L.Ed. 554 (1940). In its original form, the defense covered only construction projects, McKay y. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983). cert. denied, 464 U.S. 1043, 104 S. Ct. 711, 79 L.Ed.2d 175 (1984). Its application to military contractors, however, serves more than the historic purpose of not imposing liability on a contractor who has followed specifications required or approved by the United States government. It advances the separation of powers and safeguards the process of military procurement.

Tozer, 792 F.2d at 405.

Subjecting military contractors to full tort liability would inject the judicial branch into political and military decisions that are beyond its constitutional authority and institutional competence. See Gilligan v. Morgan, 413 U.S. 1, 10 (1973) ("The

complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.") (emphasis in original). The allocation of such decisions to other branches of government recognizes that military service, in peace as well as in war, is inherently more dangerous than civilian life. Civilian judges and juries are not competent to weigh the cost of injuries caused by a product against the cost of avoidance in lost military efficiency. Such judgments involve the nation's geopolitical goals and choices among particular tactics, the need for particular technologies resulting therefrom, and the likely tactics, intentions, and risk-averseness of potential enemies. Moreover, military goods may utilize advanced technology that has not been fully tested. See McKay. 704 F.2d at 449-50 ("in setting specifications for military equipment, the United States is required by the exigencies of our defense effort to push technology towards its limits and thereby to incur risks beyond those that would be acceptable for ordinary consumer goods"). Whereas judges and juries may demand extensive safety testing for goods marketed in the civilian sector, such testing could impose costs and delays inconsistent with military imperatives.

The procurement process would also be severely impaired if military contractors were exposed to liability for injuries arising from the military's use of their products. Military contractors produce goods for the government according to

specifications provided by the government and for uses determined by the government. As long as the government is aware of known hazards, the decision to take the risk is made by the government, and it would be destructive of the procurement process and thereby detrimental to national security itself to hold manufacturers liable for injuries caused by the military's use of their products. Costs of procurement would escalate if contractors were exposed to liability. Contractors would find insurance difficult or impossible to procure, and bankruptcies might occur among companies supplying products essential to national security. Firms would take steps to avoid entering into government contracts, including resort to litigation. The effect on procurement would be particularly acute where claims of toxic exposure might be made and the number of potential claimants would be impossible to determine.

We also note that, absent the shield of the military contractor defense, the legal exposure of the contractor would be much greater than the exposure of a manufacturer that sells to a private corporation that uses its product. In the latter case, the user corporation will also be a defendant and bear some or all of the exposure. Under Feres v. United States, 340 U.S. 135 (1950), and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977), however, the government cannot be sued and need not even cooperate with the contractor in defending personal injury litigation. Obtaining discovery from the government as a non-party might be difficult or even barred by a claim of national

security privilege. The military contractor thus faces the great exposure of being the sole "deep pocket" available. In the instant matter, for example, the United States has avoided all claims against it and has refused to participate in settlement negotiations. Moreover, while the Veterans' Administration ("VA") and the Congress have declined to recognize any ailments other than chloracne and porphyria cutanea tarda ("PCT"), a rare liver disorder, as related to Agent Orange exposure, see infra, the chemical companies found it prudent to pay $180 million notwithstanding the weakness of the plaintiffs' case.

At various stages in this litigation, Judge Pratt and Chief Judge Weinstein articulated somewhat different standards to govern the military contractor defense. Judge Pratt stated that each defendant would be required to prove the following elements:

> 1. That the government established the specifications for "Agent Orange";
>
> 2. That the "Agent Orange" manufactured by the defendant met the government's specifications in all material respects; and
>
> 3. That the government knew as much as or more than the defendant about the hazards to people that accompanied use of "Agent Orange".

In re "Agent Orange" Product Liabiilty Litigation, 534 F. Supp. at 1055. In elaborating on the third element, Judge Pratt stated that a defendant could not employ the defense if it "was aware of hazards that might reasonably have affected the government's decision about the use of 'Agent Orange,'" id. at 1057, but failed

I to disclose them to the government. Id. at 1058.

After discovery and various motions, Judge Pratt concluded that disputes of material fact were involved in determining the third element -- the relative knowledge possessed by the government and the chemical companies. See In re "Agent Orange" Product Liability Litigation. 565 F. Supp. at 1275. However, he concluded that all defendants were entitled to summary judgment with respect to the first two elements -- tkat the government established the specifications for Agent Orange and that the Agent Orange manufactured by the defendants met these specifications in all material respects. See id. at 1274.

In approving the settlement, Chief Judge Weinstein addressed the military contractor defense as a potential bar to recovery *by* the plaintiffs. See Settlement Opinion, 597 F. Supp. at 843-50. While adopting the first two elements of the defense as defined by Judge Pratt, he modified the third element as follows:

> A plaintiff would be required to prove, along with the other elements of his cause of action, that the hazards to him that accompanied use of Agent Orange were, or reasonably should have been known, to the defendant. The burden would then shift to each individual defendant to prove (1) that the government knew as much as or more than that defendant knew or reasonably should have known about the dangers of Agent Orange or (2), even if the government had had as much knowledge as that defendant should have had, it would have ordered production of Agent Orange in any event and would not have taken steps to reduce or eliminate the hazard.

Id. at 849. "In practical terms," Chief Judge Weinstein explained, this standard means "that a defendant would not be liable despite the fact that it negligently produced a defective product if it could show either that the government knew of the defect or that it would not have acted any differently even if it had known." Id. at 850.

We need not define the precise contours of the defense because we believe that under any formulation, and regardless of which party bears the burden of proof, the defendants here were entitled to summary judgment.

Agent Orange was a product whose use required a balancing of the risk to friendly personnel against potential military advantage. That balancing was the exclusive responsibility of military professionals and their civilian superiors. The responsibility of the chemical companies was solely to advise the government of hazards known to them of which the government was unaware so that the balancing of risk against advantage was informed.

Given the purpose of the duty to inform, a hazard that triggers this duty must meet a two-pronged test. First, the existence of the hazard must be based on a substantial body of scientific evidence. A court addressing a motion for summary judgment based on the military contractor defense must thus look to the weight of scientific evidence in determining the existence of a hazard triggering the duty to inform. The hazard cannot be established by mere speculation or idiosyncratic opinion, even if

that opinion is held by one who qualifies as an expert under Fed. R. Evid. 702. A military contractor is no more obligated to inform the government of speculative risks than it is entitled to claim speculative benefits. Second, the nature of the danger to friendly personnel created by the hazard must be serious enough to call for a weighing of the risk against the expected military benefits. Otherwise, the hazard would not be substantial enough to influence the military decision to use the product. Neither prong of the test is satisfied in the case of Agent Orange.

The use of Agent Orange in Vietnam was believed necessary to deny enemy forces the benefits of jungle concealment along transportation and power lines and near friendly base areas. Its success as a herbicide saved many, perhaps thousands of, lives. At the time of its use, both the government and the chemical companies possessed information indicating that dioxin posed some danger to humans. Indeed, there is evidence that the chemical companies feared that the presence of dioxin in Agent Orange might lead the government to restrict the sale of pesticides and herbicides in the civilian market. See P. Schuck, Agent Orange on Trial 85-86 (1986). However, the knowledge of the government and the chemical companies related to chloracne and certain forms of liver damage, ailments now known to be very rare among Vietnam veterans, and not to the numerous other ailments alleged in the instant litigation. Moreover, for the reasons stated in Chief Judge Weinstein's opinions, see Opt-Out Opinion, 611 F. Supp. at 1263; Settlement Opinion, 597 F. Supp. at 795-99, we agree that

the critical mass of information about dioxin possessed by the government during the period of Agent Orange's use in Vietnam was as great as or greater than that possessed by the chemical companies. Nevertheless, the government continued to order and use Agent Orange. The second prong of the test is therefore not met.

Because of the paucity of scientific evidence that Agent Orange was in fact hazardous, the first prong also is not met. This is not a case in which a hazard is known to have existed in hindsight and the issue is whether the defendant had sufficient knowledge at an earlier time to trigger an obligation to inform. Rather, this is a case in which subsequent study indicates the absence of any substantial hazard and therefore negates any claim that the chemical companies breached a prior duty to inform.

When Agent Orange was being used in Vietnam, there was some evidence, possessed as we have said by both the government and the chemical companies, relating chloracne and liver damage to exposure to dioxin. Of course, the fact that dioxin may injure does not prove the same of Agent Orange, which contained only trace elements of dioxin. The precise hazard of the herbicide, if any, was thus a matter of speculation at the time of its use. Now, some 15 to 25 years after military personnel were exposed to Agent Orange, we have considerably more information about the effects of Agent Orange. As noted in our opinion upholding the settlement, No. 84-6273, and explained in greater detail in the district court's opinions approving the settlement, 597 F. Supp. at 787-95, and granting summary judgment against the opt-outs, 611

F. Supp. at 1231-34, epidemiological studies of those very personnel and their families fail to show that Agent Orange was hazardous, even with regard to chloracne and liver damage. While the decisions to use Agent Orange were being made, the most relevant question was not, "What will dioxin do to animals?" or even, "What will dioxin do to humans exposed to it in industrial accidents?" The most relevant question was, "What will Agent Orange do to friendly personnel exposed to it?" The epidemiological studies ask the latter question in hindsight and answer, "Nothing harmful so far as can be told." The fact that the epidemiological studies do not exclude the possibility of harm in isolated or unusual cases or in future cases is of no moment because it does not constitute evidence material to the military decisions in question. Hardly any product of military usefulness is known to be absolutely risk free. Consequently, the existence of a hazard of which the government should have been informed remains unproven to this date, long after the relevant events. Indeed, although chloracne is a leading indicator of exposure to dioxin, it is very rare among Vietnam veterans. Accordingly, there never was information about material hazards that should have been imparted by the chemical companies to the government.

The military decision to use Agent Orange was, therefore, not ill-informed, much less ill-informed as a result of any action by the chemical companies. This conclusion is underscored by the actions of the VA and the Congress in addressing claims by veterans asserting injury by Agent Orange. The VA has recognized only chloracne and PCT as ailments related to Agent Orange. By May 1984, it had granted only 13 chloracne and two PCT claims. It later concluded that none of the 13 chloracne claims actually involved chloracne. See Settlement Opinion, 597 F. Supp. at 856 (citing remarks of Senator Cranston). In adopting the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984), Congress declined to compensate veterans claiming exposure to Agent Orange for ailments other than chloracne and PCT. It thus rejected earlier versions of the Act that would have compensated such veterans for other medical conditions, including soft tissue sarcomas and birth defects. See M. Gough, Dioxin. Agent Orange 225 (1986); Settlement Opinion. 597 F. Supp. at 855-57 (E.D.N.Y. 1984) (discussing earlier legislation).

The VA and the Congress thus continue to act on the factual conclusion that Agent Orange was hazardous, if at all, only with

regard to chloracne and PCT. We believe these actions further demonstrate that the military decision to use Agent Orange was fully informed. To hold the chemical companies liable in such circumstances would be unjust to them and would create a devastating precedent so far as military procurement is concerned.

Affirmed.

FOOTNOTES

1/ The appellants include Anna M. Lilley, an opt-out plaintiff against whom summary judgment was granted in a separate opinion. See In re "Agent Orange" Product Liability Litigation, 611 F. Supp. 1267 (E.D.N.Y. 1985) ("Lilley Opinion").

2/ Fed. R. Evid. 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

3/ Fed. R. Evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

4/ Twenty-eight appellants made no evidentiary submission in response to the motion for summary judgment. We affirm those appeals on causation as well as military contractor grounds.

5/ Counsel have also failed to brief the second ground for granting summary judgment, the indeterminate defendant issue.

6/ The opt-outs' brief states in a footnote:

> Plaintiffs have placed in the appendix a number of documents and deposition excerpts which were submitted in opposition to defendants' motions for summary jugdment [sic]. Those documents and deposition excerpts raise clear questions of material fact. The Court's attention is respectfully commended to JA. 1717-24, 1759-1808, 2019-2356, 2392-2560, 2568-71. Plaintiffs regret that page constraints do not permit further comment on those documents. See, Master Class Action Brief, pp. 69-70.

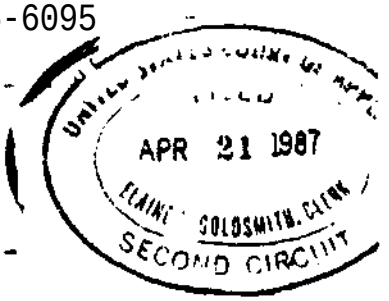
We cannot agree that an editing of this 75-page brief, which e'an hardly be described as tightly written, would not have permitted a discussion of the military contractor issue.

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 1077, 1078, 1079 -- August Term, 1985

(Argued April 10, 1986 Decided APR 2 1 1987 )

Docket Nos. 85-6091, 85-6093, 85-6095




IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

PHILIP J. AGUIAR; WESLEY L. BELL; ROBERT BLAKE, II, individually and as guardian ad litem for JESSICA L. BLAKE; RICK L. BUTLER; ANTHONY A. DE RAPS; JAMES K. EFISHOFF; JUAN H. GONZALES; CHARLES V HALL; WILLIE N. HOWARD; CLIFFORD N. HUCKABAY, individually and as guardian ad litem for GINA MARIE HUCKABAY; RAY C. JONES; GLEN J. MARTIN, JR.; TIMOTHY J. MC CORMICK; MICHAEL J. MC TIGHE; BEVERLY NEHMER, individually and as guardian ad litem for RICHARD ALLAN NEHMER; CLARENCE A. PERRY, individually and as guardian ad litem for SHON CARLOS PERRY and BRANDON VIDAL PERRY; ALVIN G. RINEBARGEF individually and as guardian ad litem for IAN L. RINEBARGER, STRAI K. RINEBARGER, and BROGUE C. RINEBARGER; ROBERT EL. L, SHIPPEN; LLOYD W. SNYDER; JOE VALENZUELA; WILLIAM G. WAMSLEY; JAMES A. ABERNATHY; FRANCES J. BARNES; RICHARD A. BUNKER; JOHN F. BISSELL; RUFUS DIAGLE; MERLE J. FULTON-SCOTT; RICHARD A. GARCIA; ROBERT W. GILLESPIE; KATHLEEN E. GILLESPIE; JIMMY L. GILYARD; ROOSEVELT GIVENS; RANDOLPH HARRIS; SAM HAYNES; JOHN MANKOWSKI; MICHAEL L. MATTHEWS; TOMMY L. NEWTON; ALLAN L. NYHART; JOHN T. PEEFF; ANDREW D. ROMEROI; RAUL G. SCHOENSTEIN; JOHN R. SHAW, III; JOHN L. SHUMPERT; GEORGE T. SOUZA; PETER S. TIFFANY; JOSEPH L. VARGAS; WAYNE C. YOUNG; GERRIE CLAY, individually and as guardian ad liter for TREALIFA CLAY and PENNIE CLAY; each of said plaintiffs individually and as representative of all those similarly situated,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA; JOSEPH MAXWELL CLELAND, Administrator, United States Veterans Administration, and his successors, ROBERT E. NIMMO and HARRY N. WALTERS; GUY MC MICHAEL, General Counsel, United States Veterans Administration, and his successor, JOHN MURPHY; DONALD CUSTIS, Chief Medical Director, United States Veterans Administration, and the Acting Chief, JOHN GRONVALL; CHARLES PECKARSKY, Chief Benefits Director, United States Veterans Administration, and his successor, DOROTHY STARBUCK; and the

VETERANS ADMINISTRATION of the UNITED STATES and other departments and agencies of the United States Government, as their several interests may appear, and successors to the above officials, as necessary,

Defendants-Appellees.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

DAN FORD, and his wife, CHRISTINA FORD; individually, and as members and representatives of a class,

Plaintiffs-Appellants,,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

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DANIEL C. BATTS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

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LOUGHERY, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

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BEFORE: VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

Appeal from a summary judgment of the United States District Court for the Eastern District of New York (Weinstein,

(E.D.N.Y.J.), dismissing so-called "Agent Orange" complaints against the United States. Dismissed in part and affirmed in part.

JOAN M. BERNOTT, Special Litigation Counsel, Torts Branch, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Ass't Att'y Gen., Arvin Maskin, U.S. Att'y, Washington, D.C., and Raymond J. Dearie, United States Attorney for the Eastern District of New York, of Counsel), for Defendant-Appellee United States of America.

NEIL R. PETERSON, Philadelphia, Pa. (Gene Locks, Greitzer and Locks, Philadelphia, Pa., of Counsel), for Plaintiffs-Appellants.

David W. Moyer and Philip E. Brown, Hoberg, Finger, Brown, Cox & Molligan, San Francisco, Ca., of Counsel), for Plaintiffs-Appellants.

Thomas Henderson, Pittsburgh, Pa. (Henderson & Goldberg, Pittsburgh, Pa., of Counsel), for Plaintiffs-Appellants.

David J. Dean, Carle Place, N.Y. (Dean, Falanga & Rose, Carle Place, N.Y., of Counsel), for Plaintiffs-Appellants.

John O'Quinn, Houston, Texas (O'Quinn, Hagan & Whitman, Houston, Texas, of Counsel), for Plaintiffs-Appellants.

Stanley M. Chesley, Cincinnati, Ohio (Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio, of Counsel), for Plaintiffs-Appellants.

Newton B. Schwartz, Houston, Texas, for Plaintiffs-Appellants.

Stephen J. Schlegel, Chicago, Ill. (Schlegel & Trafelet, Chicago, Ill., of Counsel), for Plaintiffs-Appellants.

VAN GRAAFEILAND, Circuit Judge:

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, No. 84-6273.

In addition to the numerous individual claims spawned by Agent Orange, two large class actions were brought. The first, against the chemical companies, was settled. The second, against the United States, was dismissed, and the dismissal is being challenged on this appeal.

At the outset of this litigation, ingenious counsel, concerned that they might not be able to state a claim for relief under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"), attempted to invoke federal court jurisdiction by also alleging constitutional and civil rights violations, mandamus and equitable jurisdiction. These additional grounds for the exercise of jurisdiction were properly rejected by the district court. Ryan v. Cleland, 531 F. Supp. 724, 730-33 (E.D.N.Y. 1982); see Chappell v. Wallace, 462 U.S. 296 (1983). They have not been asserted on this appeal. Appellants' claims now before us are predicated solely on the provisions of the FTCA.

Because the case comes to us in a rather peculiar posture, familiarity with the administrative claim requirements of the FTCA is necessary for an understanding of the discussion that follows. The administrative claim requirements of the FTCA, 28 U.S.C. S 2675(a), prohibit an action seeking money damages from the United States for personal injury or death unless the claimant has first presented the claim to the appropriate federal agency and it has been denied. Interpretative regulations provide that the claim must be presented in writing by the

injured person or his duly authorized agent or legal representative and must be for "money damages in a sum certain." 28 C.F.R. §§ 14.2(a), 14.3(b). Section 2401(b) of 28 U.S.C. sets up a two-year limitation period for the filing of claims.

Shortly after the original class action was brought in 1979, the plaintiffs moved to be relieved of the requirement of filing separate claims in order to protect their individual rights. Then District Judge George Pratt, to whom the case was assigned, correctly held that the filing requirements were jurisdictional in nature and that the court could not order the Government to ignore the statutory requirements. In re "Agent Orange" Produce Liability Litigation, 506 F. Supp. 757, 760-61 (E.D.N.Y. 1980). As might have been expected, plaintiffs' attorneys thereafter concentrated most of their fire on the chemical companies.

However, after the class action against the chemical companies was settled in 1984, an "Eighth Amended Complaint" was filed against the Government and certain Government officials on behalf on the above-captioned "Aguiar" group of plaintiffs and Dan and Christina Ford. The complaint identified a proposed class as:

> persons who were in the United States, New Zealand or Australian Armed Forces and assigned to Vietnam during the hostilities from 1961 to 1972, who claim injury from exposure to Agent Orange (and other phenoxy herbicides) and their spouses, parents and children born before September 1, 1984 (or such other later date as may be fixed by

this Court) who claim direct, indirect, independent or derivative injury as a result of such exposure.

In a Memorandum Order and Judgment, 603 F. Supp. 239, Chief Judge Weinstein, who succeeded Judge Pratt, denied the plaintiffs' motion for class certification, id. at 242, and granted the Government's motion for summary judgment against "all claims direct or derivable of the veterans and their wives and against all of the children's derivative claims" and dismissed the direct claims of the children without prejudice. Id. at 248.

Three notices of appeal then were filed. The caption of the first contained the names of all the above-captioned plaintiffs-appellants. It was filed by the "Agent Orange Plaintiffs' Management Committee", which did not identify itself as representing any of the individual plaintiffs-appellants in this action against the Government.[1/] The caption of the second contained only the names of the first group of plaintiffs-appellants above named, beginning with "Aguiar" and ending with "Clay", and was filed by the firm of Hoberg, Finger, Brown, Cox & Molligan as "Attorneys for Plaintiffs". The third caption contained only the names of the cases referred to in the district court's opinion as having been "previously dismissed", beginning with "Loughery v. United States" and concluding with "Xirau v. Dow Chemical Co.". 603 F. Supp. at 248-49. This notice of appeal also was filed by the Agent Orange Plaintiffs' Management

Committee, which did not describe itself as the attorney for any of the plaintiffs in that group of cases.

The Government contends at the outset that the appeal should be dismissed as academic because class certification was denied in the instant action and there is no individual appellant. "Instead", the Government argues, "this appeal is brought by Committee counsel acting exclusively as a pro bono fiduciary for a decidedly uncertified class, many or most of whose numbers disavow the complaint." This, we think, misstates the legal issue which the Management Committee's unusual procedure has created. The denial of class certification does not preclude individual plaintiffs properly before the court from pressing their own claims, 7B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1795 at 322. These may include an appellate challenge to the denial of class certification. United Airlines, Inc. v. McDonald, 432 U.S. 385, 393 (1977). The question, then, is not whether the individual party-plaintiffs could make an effective decision to appeal, but whether the Management Committee had the authority to make this decision for them. See Massachusetts v. Feeney, 429 U.S. 66 (1976)(per curiam). Insofar as the first and third notices of appeal are concerned, we think that the question must be answered in the negative. The Agent Orange Plaintiffs' Management Committee claims to represent a class, an uncertified class at that, not any individual plaintiffs.

The above described second notice of appeal presents a stronger case for appealability, since it was filed by attorneys claiming to represent all of the individual plaintiffs in the Aguiar group. However, counsel for the Management Committee proceeded to muddy the waters with regard to this appeal with a letter to the Court Clerk in which he stated:

> Mr. Moyer and I, on behalf of the AOPMC, represent the class, as opposed to any particular individuals on this appeal. The only exception is that Mr. Moyer's firm represents additionally and individually all the plaintiffs in the Aguiar matter (82-780). However, only class issues are here being raised on behalf of those plaintiffs.

After some intervening explanatory paragraphs, the letter concluded:

> This explains why we are withdrawing the third issue pertaining to wives' independent claims for miscarriages. The District Court's determination in that regard could not apply to the class and any appeal thereof would have to be in individual cases in which we have no authorization to proceed and no attorney-client relationship.

If the foregoing statements are correct -- and it does appear that the arguments in appellants' briefs are confined to class issues rather than those of any individual plaintiff -- this appeal can be quickly disposed of. It is well established that neither the district court nor this Court has jurisdiction over a Federal Tort Claims class action where, as here, the

administrative prerequisites of suit have not been satisfied by or on behalf of each individual claimant. See, e.g., Keene Corp. v. United States, 700 F.2d 836, 841 (2d Cir.), cert. denied, 464 U.S. 864 (1983); Lunsford v. United States. 570 F.2d 221, 224-27 (8th Cir. 1977); Commonwealth of Pennsylvania v. National Ass'n of Flood Insurers, 520 F.2d 11, 23-25 (3d Cir. 1975); Luria v. Civil Aeronautics Board, 473 F. Supp. 242 (S.D.N.Y. 1979); Kantor v. Kahn, 463 F. Supp. 1160, 1162-64 (S.D.N.Y. 1979); Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748, 754-56 (D.D.C. 1978).

Assuming that the appeals herein were intended to, and did, include the individual party-plaintiffs' claims, we nonetheless would have no jurisdiction to consider the claims of those plaintiffs who had not met the administrative prerequisites of suit. Although we might remand those cases to the district court for a determination as to which, if any, of the plaintiffs in this group had complied with the FTCA's administrative claim requirements, we see no purpose in doing this if the district court acted correctly in dismissing the cases on the merits. We believe that it did.

In an effort to allege a viable cause of action, plaintiffs' counsel assign their claims of government wrongdoing to three separate time periods -- pre-induction, in-service, and post-service. The pre-induction claims are based largely upon an alleged failure to warn of the Agent Orange health hazards to

which the inductees would be exposed. The in-service claims deal with the allegedly negligent acts that led to and accompanied the actual exposure. The post-service allegations deal with the Government's failure to warn plaintiffs of the health hazards they faced and to treat or monitor the treatment for plaintiffs' Agent Orange-related illnesses. All of these claims were summarily rejected by the district court. 603 F. Supp. at 242-45.

The ultimate policy decision to use Agent Orange was made by President Kennedy. 603 F. Supp. at 244. He, of course, was* Commander in Chief of the Armed Forces with "decision-making responsibility in the area of military operations." DaCosta v. Laird, 471 F.2d 1146, 1154 (2d Cir. 1973). However, in making decisions of this nature, the President does not act alone. Article I, section 8 of the Constitution empowers Congress to "raise and support Armies" and to "make Rules for the Government and Regulation of the land and naval Forces." See Rostker v. Goldberg, 453 U.S. 57, 59 (1981). Pursuant to that authority, Congress has designated the Department of Defense as an Executive Department of the United States, 10 U.S.C. § 131, and has directed the Secretary of Defense, with the assistance of the Joint Chiefs of Staff and advisory committees and panels, to make recommendations and reports to Congress concerning existing and proposed weapon systems, 10 U.S.C. §§ 139, 141, 174. Congress also has created the office of Under Secretary of Defense for

Research and Engineering, whose duties include supervising all research and engineering activities in the Department of Defense and advising the Secretary on scientific and technical matters, 10 U.S.C. § 135. Absent a substantial constitutional issue, the wisdom of the decisions made by these concurrent branches of the Government should not be subject to judicial review.

> Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

Chappell v. Wallace, supra, 462 U.S. at 301, quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

In Gilligan v. Morgan, 413 U.S. 1 (1973), in which the Court reversed a Circuit Court order directing a district court to examine the "pattern of training, weaponry and orders in the Ohio National Guard", id. at 4, Chief Justice Burger said:

> It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible -- as the Judicial Branch is not -- to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of over-

> sight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the Court of Appeals failed to give appropriate weight to this separation of powers.

Id. at 10-11.

Two well-established doctrines make the foregoing principles of restraint peculiarly applicable to the instant FTCA actions, which ask the judiciary to pass judgment upon Che discretionary military decisions involving Agent Orange. The first of these is the so-called "discretionary function" exception to the Government's waiver of immunity under the FTCA, 28 U.S.C. § 2680(a), which we discuss in the Hogan v. Dow Chemical opinion, Nos. 85-6223, 85-6341, filed herewith. There, we hold that the Government was performing a discretionary function while field-testing Agent Orange in Hawaii. The second is the so-called "Feres doctrine", originating in the seminal case of Feres v. United States, 340 U.S. 135 (1950), which prohibits the judiciary from imposing liability upon the United States for injuries to servicemen that "arise out of or are in the course of activity incident to service." Id. at 146. There is little difference between these doctrines as they relate to the facts of the instant case. Both apply to discretionary military decisions. Perkins v. Rumsfeld, 577 F.2d 366, 368 (6th Cir. 1978); Builders Corp. of America v. United States, 320 F.2d 425 (9th Cir. 1963), cert. denied, 376 U.S. 906 (1964). Both

preclude judicial "second-guessing" in FTCA litigation of discretionary legislative and executive decisions such as those that were made concerning Agent Orange. See United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984)(the discretionary function exception) and United States v. Shearer, 473 U.S. 52, 57-59 (1985)(the Feres doctrine).

Appellants have concentrated their attack on Feres which, they say, consists of "perversely overstretched trappings of sovereign immunity", "warped logic", and "balderdash". Confronted with the affirmation of the Feres holding in United States v. Shearer, supra, which followed the filing of appellants' original brief, appellants assert in their reply brief that Chief Justice Burger, who wrote Shearer, "rambled into Feres as dictum." Although Feres has not been without its properly less caustic critics, see, e.g., Bozeman v. United States, 780 F.2d 198, 200 (2d Cir. 1985), it remains the law of the land and is binding on this Court. Id. at 202. See also Chappell v. Wallace, supra, 462 U.S. 296, and Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 673-74 (1977).

The recovery which the veterans seek for pre-induction negligence is dependent upon and inseparably intertwined with the injuries they allegedly sustained while in service. In a situation such as this, overwhelming authority holds that Feres

bars recovery. See, e.g., HeaLy v. United States, 192 F. Supp. 325 (S.D.N.Y.), aff'd on opinion below, 295 F.2d 958 (2d Cir. 1961); Satterfield v. United States, 788 F.2d 395, 399 n.3 (6th Cir. 1986); Joseph v. United States, 505 F.2d 525 (7th Cir. 1974); Glorioso v. United States, 331 F. Supp. 1 (N.D. Miss. 1971); Redmond v. United States, 331 F. Supp. 1222 (N.D. Ill. 1971).

Application of the discretionary function rule leads ineluctably to the same result. Dalehite v. United States, 346 U.S. 15 (1953), the leading case in this field, involved, among other things, a failure to warn. Id. at 42, 46-4.7. Lower courts which follow Dalehite have reached the same result. See Ford v. American Motors Corp., 770 F.2d 465 (5th Cir. 1985); Cisco v. United States, 768 F.2d 788, 789 (7th Cir. 1985); Begay v. United States, 768 F.2d 1059, 1066 (9th Cir. 1985); Shuman v. United States, 765 F.2d 283, 291 (1st Cir. 1985); General Public Utilities Corp. v. United States, 745 F.2d 239, 243, 245 (3d Cir. 1984), cert. denied, 469 U.S. 1228 (1985); Green v. United States. 629 F.2d 581, 585-86 (9th Cir. 1980).

If the Feres doctrine is to have any meaning at all, the claim for in-service injuries is a classic case for its application. At issue is a decision of the veterans' highest military superiors that was designed to help the veterans in fighting the armed conflict in which they were engaged. "Here, the parties do not dispute that the government's motives in using

Agent Orange in southeast Asia were valid military objectives: defoliate jungle growth to deprive enemy forces of ground cover and destroy enemy crops to restrict enemy's food supplies." 506 F. Supp. at 779; see also 603 F. Supp. at 244. We find no merit whatever in appellants' argument that the Government should be estopped from relyin'g on Feres because, in subsequently opposing certain veterans' claims for benefits, the Government argued that their injuries were not service related, while it contends here that the same injuries were "incident to service." This is a distortion of the Government's position, which is that, if the veterans' injuries were caused by exposure to Agent Orange, a contention which the Government consistently has rejected, they were "incident to service". See also Henninger v. United States, 473 F.2d 814, 816 (9th Cir.), cert. denied, 414 U.S. Sl9 (1973), regarding the inapplicability of the doctrine of estoppel in FTCA cases.

In Dalehite v. United States, supra, 346 U.S. at 37, the Court said, "That the cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed." The same statement may be made with regard to Agent Orange. The discretionary function exception clearly is applicable to the veterans' in-service injuries.

We agree with both Judge Pratt and Chief Judge Weinstein that the veterans' claims for post-service injuries are inseparably entwined with and directly related to their military

service. See 506 F. Supp. at 779 and 603 F. Supp. at 244-45. The majority of other Circuits would rule similarly. See, e.g., Heilman v. United States, 731 F.2d 1104, 1108 (3d Cir. 1984); Gaspard v. United States, 713 F.2d 1097, 1100-01 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); Lombard v. United States, 690 F.2d 215, 220-23 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); Laswell v. Brown, 683 F.2d 261, 264-67 (8th Cir. 1982), cert. denied, 459 U.S. 1210 (1983). See also Kosak v. United States, 465 U.S. 848, 854 (1984).

We are not persuaded by plaintiffs' attempts to frame a* theory of independent post-service wrongdoing to bring their claims within the ambit of United States v. Brown, 348 U.S. 110 (1954), and cases such as Broudy v. United States, 661 F.2d 125 (9th Cir. 1981), and Stanley v. United States, 786 F.2d 1490 (11th Cir.), cert. granted, 107 S. Ct. 642 (1986), which follow Brown. The district court did not simply reject plaintiffs' 373-paragraph complaint as an inadequate pleading; the Government's motion was in the alternative, i.e., for dismissal or summary judgment, 603 F. Supp. at 241, and the district court granted summary judgment, id. at 248. If anything is clear after reviewing an appellate record of over 16,000 pages, reading hundreds of pages of briefs, and listening to two full days of oral argument, it is that the weight of present scientific evidence does not establish that Agent Orange injured military personnel in Vietnam. Plaintiffs cannot disguise this fact by

what the district court termed "'inventive presentation or artful pleading.'" 603 F. Supp. at 245.

The very paucity of proof concerning the possible deleterious effects of Agent Orange made the decision whether to issue a nationwide health warning even more clearly an exercise of discretion. The reasoning of the discretionary function cases cited in connection with our discussion of pre-induction failure to warn is equally applicable here. See In re Consolidated U.S. Atmospheric Testing Litigation, 616 F. Supp. 759, 774-77 (N.D. Cal. 1985). In considering the discretionary function exception, we are not bound to apply common law tort rules concerning the duty to warn as they may differ from State to State. Since the discretionary function exception of the FTCA does not exist in private tort litigation, "state tort standards cannot adequately control those governmental decisions in which, to be effective, the decision-maker must look to considerations of public policy and not merely to established professional standards or to standards of general reasonableness." Hendry v. United States, 418 F.2d 774, 783 (2d Cir. 1969). See Mitchell v. United States, 787 F.2d 466, 468 (9th Cir. 1986).[2/]

## CONCLUSION

Insofar as the appeals purport to be taken on behalf of a class, they are dismissed. Insofar as the appeals purport to be taken on behalf of individuals, the judgment appealed from is affirmed. No costs to the Government on the appeals.

FOOTNOTES

1/ The Agent Orange Plaintiffs' Management Committee is the successor to a committee appointed in 1930 to represent a tentatively certified plaintiffs' class in an action against the chemical companies. See In re "Agent Orange" Product Liability Litigation, supra, 506 F. Supp. at 788; 534 F. Supp. 1046, 1052-53; 611 F. Supp. 1452, 1454.

2/ Insofar as appellants' post-service claims allege failure of the Veterans Administration to provide adequate medical treatment, we agree with Judge Pratt that appellants seek precisely the type of judicial review that Congress, in enacting 33 U.S.C. § 211(a), expressly prohibited. See Ryan v. Cleland, 531 F. Supp. 724, 731 (E.D.N.Y. 1982). See also Pappanikoloaou v. Administrator of the Veterans Admin., 762 F.2d 8 (2d Cir.) (per curiam), cert. denied, 106 S. Ct. 150 (1985); Hartmann v. United States, 615 F. Supp. 446, 443-50 (E.O.N.Y. 1985); H.R. No. 91-1166, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 3723, 3729-31.

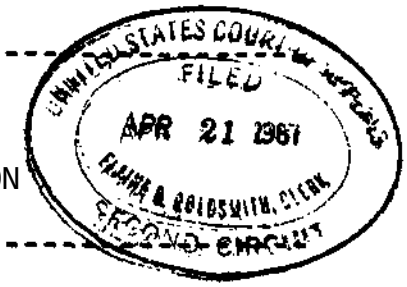
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 343 August Terra, 1986

(Argued October 1, 1986 Decided APR 21 1987

Docket No. 86-6127

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IN RE: "AGENT ORANGE"

PRODUCT LIABILITY LITIGATION

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THOMAS ADAMS, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

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BEFORE: VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

Appeal from order and judgment of the United States District Court for the Eastern District of New York (Weinstein, C.J.) dismissing post-settlement Agent Orange claims. Judgment affirmed except as to the grant of summary judgment dismissing the so-called direct claims of wives and children. Summary judgment as to said direct claims vacated and these claims remitted to the district court with instructions to dismiss them for lack of jurisdiction.

BENTON MUSSLEWHITE, Houston, Texas, for Plaintiffs-Appellants.

ROBERT C. LONGSTRETH, Trial Attorney, Torts Branch, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Ass't Att'y Gen., Washington, D.C., Andrew J. Maloney, United States Attorney for the Eastern District of

New York, and Joan M. Bernott, Special Litigation Counsel, Washington, D.C., of counsel), for Defendant-Appellee United States of America.

VAN GRAAFEILAND, Circuit Judge:

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, No. 84-6273.

Following settlement of the class action against the chemical companies and the dismissal of all claims against the Government, this action was commenced in the United States District Court for the Southern District of Texas. In January of 1986 it was transferred to the Eastern District of New York by the Judicial Panel on Multidistrict Litigation, and on June 19, 1986 the complaint, like those that preceded it, was dismissed. The claims of the veterans and the derivative claims of their wives and children were dismissed for lack of jurisdiction. The direct claims of the wives and children were dismissed by way of summary judgment for lack of proof of medical causal relation. We hold that the direct claims of the wives and children, like those of the veterans themselves, should have been dismissed for lack of jurisdiction.

In companion Agent Orange opinions filed herewith, we define the Government's decision to use Agent Orange as a military decision, a political decision and the exercise of a discretionary function. These definitions were arrived at by scrutinizing the nature of the governmental action, not the identity of the person challenging it. "There are twelve exceptions to the [Federal Tort Claims] Act, but they relate to the cause of injury rather than to the character of a claimant who may seek to recover damages for his injuries." Feres v. United States, 177 F.2d 535, 536-37 (2d Cir. 1949), aff'd, 340 U.S. 135 (1950). It would be anomalous, for example, to characterize a governmental decision as political or discretionary in an action brought by a serviceman but as

apolitical or mandatory in an action brought by the serviceman's wife or child. When a challenged decision falls within all three of the above categories, military, political and discretionary, it is imperative that a court look primarily to the "cause of injury rather than to the character of a claimant." However, even when the decision properly may be placed in only one of the three categories, a court should use great circumspection in deciding whether it is the type of governmental action that should be subjected to judicial second-guessing.

Some of the post-Feres cases brought by wives, widows and children of servicemen have had their origin in States where the plaintiffs' claims are held to be ancillary or derivative to those of the servicemen. Others have arisen in States where the plaintiffs' causes of action have been held to be independent of those of the servicemen. The result in most cases is the same -- the claims are held barred by Feres and Stencel Aero Engineering Corp. v. United States. 431 U.S. 666 (1977).

The following cases are typical of those arising in the "ancillary or derivative claims" jurisdictions: Hinkie v. United States, 715 F.2d 96 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984); Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983), cert. denied, 465 U.S. 1021 (1984); Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983); Scales v. United States, 685 F.2d 970 (5th Cir." 1982), cert. denied, 460 U.S. 1082 (1983); Laswell v. Brown, 683 F.2d 261 (3th Cir. 1982), cert. denied, 459 U.S. 1210 (1983); Monaco v. United

States, 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982); Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975). This Court is in accord. Kohn v. United States, 680 F.2d 922 (2d Cir. 1982). "As Stencel itself illustrates, civilian status alone is not sufficient to lift the bar under Feres when a claim involves the same issues as if a serviceman himself sued, for then the relevant policy considerations apply with equal force." Id. at 926 (citing Monaco, supra).

One of the cases in the "non-derivative or independent claims" group, a case which moved through this Court, was Harrison v. United States, 479 F. Supp. 529 (D. Conn. 1979), aff'd without opinion, 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980). This was a suit for loss of consortium by a serviceman's wife, who resided in Michigan where her claim was considered to be separate and distinct from that of her husband. Applying the Feres rationale as reaffirmed and strengthened in Stencel, supra, then Chief Judge Clarie held that it barred the claim of the serviceman's wife. He said:

> There has been no suggestion in the legislative history of the Act that Congress was aware that the Tort Claims Act might be interpreted in such an anomalous manner that a serviceman-husband performing his military duty would be denied recovery against the Government whose employee's negligence may have caused him serious injury, while his spouse is allowed recovery as a consequence of the same set of facts.

479 F. Supp. at 535. The following cases from other "non-derivative or independent claims" jurisdictions are in accord: Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); De Font v. United States, 453 F.2d 1239 (1st Cir.), cert. denied. 407 U.S. 910 (1972); United States v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied. 393 U.S. 1053 (1969); Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960); Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980).

Of particular interest is an action brought in the United States District Court for the Eastern District of Pennsylvania in 1982 by Louise Shearer, the mother of a deceased serviceman. In Pennsylvania, a cause of action for wrongful death, 42 Pa. C.S.A. § 8301, is possessed by certain specified relatives of the deceased, who recover in their own behalf and not as beneficiaries of the deceased's estate. McClinton v. White, 285 Pa. Super. 271, 278 (1981), vacated on other grounds, 497 Pa. 610 (1982). With obvious reference to section 8301, the district court held that "[t]he Feres doctrine applies in cases in which a personal representative brings an action under a state death statute which is not derivative in nature, but is an original and distinct cause of action granted to such individuals to recover damages sustained by them by reason of the wrongful death of the decedent." 576 F. Supp. 672, 673 n.1. Finding that plaintiff's allegations of wrongdoing "relate directly to decisions of military personnel made in the course of the performance of their military duty," id. at 674, the court granted summary judgment dismissing the

complaint. The Court of Appeals for the Third Circuit reversed without discussing the Pennsylvania wrongful death statute, 723 F.2d 1102 (3d Cir. 1983), but was in turn reversed by the Supreme Court in United States v. Shearer, 473 U.S. 52 (1985), a decision that is considered to be a major reaffirmation of Feres and Stencel. The Supreme Court stated that plaintiff's allegation of wrongdoing "goes directly to the 'management' of the military", that it "would require Army officers 'to testify in court as to each other's decisions and actions'", and that "[t]o permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions." 105 S. Ct. at 3043-44.

These were simply restatements and affirmations of language used time and again by the lower courts that have denied recovery by family members. See, e.g., Hinkie, 715 F.2d at 98; Mondelli, 711 F.2d at 568-69; Lombard, 690 F.2d at 223-26; Monaco, 661 F.2d at 133-34; Scales, 685 F.2d at 970-74.

Where, as here, the military decision is of such a nature that it properly may be termed a discretionary function, denial of recovery by both military and nonmilitary personnel is doubly warranted. Abraham v. United States, 465 F.2d 881 (5th Cir. 1972); Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970). Like the Court of Appeals for the District of Columbia, "[w]e will not permit a suit for damages occasioned by activities that are not meaningfully separable from a protected discretionary

function." Gray v. Bell, 712 F.2d 490, 516 (D.C. Cir. 1983), cert. denied, 465 U.S. 1100 (1984).

In a companion opinion filed herewith, 85-6153 et seq., we discuss the political nature of the President's decision to authorize the use of Agent Orange and point to that factor as a third cogent reason why there should be no second-guessing by the judiciary.

The judgment of the district court is affirmed except as to that portion which dismisses the so-called direct claims of the wives and children by way of summary judgment. That portion of the judgment is vacated, and the wives' and childrens' so-called direct claims are remanded to the district court with instructions to dismiss them for lack of jurisdiction.

No costs to any party.

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UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 1083, 1087, 1088, 1089, 1090, 1092, 1093,
1094, 1096, 1125, 1126 -- August Terra, 1985

(Argued April 10, 1986 Decided APR 21 1987 )

Docket Nos. 85-6153, 85-6165,
85-6225, 85-6231, 85-6263,
85-6287, 85-6289, 85-6293,
85-6295, 85-6375, 85-6377


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IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

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THE DOW CHEMICAL COMPANY, DIAMOND SHAMROCK CHEMICALS COMPANY, HERCULES INCORPORATED, MONSANTO COMPANY, T H AGRICULTURE & NUTRITION COMPANY, INC., THOMPSON CHEMICALS CORPORATION and UNIROYAL, INC.

Defendants-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

BEFORE: VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Weinstein, C.J.) dismissing all of appellants' third-party claims against the United States for contribution or indemnity under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Affirmed.

JOAN M. BERNOTT, Special Litigation Counsel, Torts Branch, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Ass't Att'y Gen., Washington, D.C., and Raymond J. Dearie, United States Attorney for the Eastern District of New York, of Counsel), for Appellee United States of America.

LEONARD L. RIVKIN, Garden City, New York (Rivkin, Radler, Dunne & Bayh, Garden City, N.Y., of Counsel), for Defendant-Appellant The Dow Chemical Company.

Wendell B. Alcorn, Jr., Cadwalader, Wickersham & Taft, N.Y., N.Y., of Counsel, for Defendant-Appellant Diamond Shamrock Chemicals Company.

William Krohley, Kelley Drye & Warren, N.Y., N.Y., of Counsel, for Defendant-Appellant Hercules Incorporated.

John Sabetta, Townley & Updike, N.Y., N.Y., of Counsel, for Defendant-Appellant Monsanto Company.

Morton Silberman, Clark, Gagliardi & Miller, White Plains, N.Y., of Counsel, for Defendant-Appellant T H Agriculture & Nutrition Company, Inc.

David R. Gross, Edwin R. Matthews, and Budd, Larner, Kent, Gross, Picillo, Rosenbaum, Greenberg & Sade, Short Hills, N.J., of Counsel, for Defendant-Appellant Thompson Chemicals Corporation.

Judy Spanier, Shea & Gould, N.Y., N.Y., of Counsel, for Defendant-Appellant Uniroyal, Inc.

VAN GRAAFEILAND, Circuit Judge:

Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, No. 84-6273.

In this opinion, we address the third-party claims of the chemical companies ("appellants") against the United States which were dismissed by the district court. 611 F. Supp. 1221. For the reasons that follow, we conclude that the district court did not err in thus disposing of the claims.

Transfer of the first batch of Agent Orange cases to the Eastern District of New York pursuant to the Multidistrict Litigation Statute, 28 U.S.C. § 1407, was followed promptly by a variety of motions, one of which was addressed to appellants' third-party complaints. Relying largely on Stencel Aero Engineering Corp. v. United States. 431 U.S. 666 (1977), then District Judge Pratt granted the Government's motion to dismiss the third-party pleadings. 506 F. Supp. 762, 772-74, 798. However, Judge Pratt did not enter a final order to that effect. See 534 F. Supp. 1046, 1050-51.

In 1984, Chief Judge Weinstein, responding to appellants' motion for reconsideration of Judge Pratt's order, amended the order by granting the Government's motion to dismiss "only as to the claims by the veterans and the derivative claims by their family members." He denied the Government's motion insofar as it involved the "independent claims of the plaintiffs' wives and children." 580 F. Supp. 1242, 1244. However, following settlement of the class action against appellants, Chief Judge Weinstein granted the Government's motion to dismiss that portion of the third-party complaint which involved the independent claims of the wives and children. 611 F. Supp. at 1222. Thus,

all third-party claims against the Government in the instant action were dismissed.

Appellants now ask this Court to reverse the order and judgment of dismissal, insisting that the Government should reimburse them in whole or in part for the $180 million they paid pursuant to the settlement agreement. They ask us to reject the Stencel holding and the Feres doctrine upon which it was based, see Feres v. United States, 340 U.S. 135 (1950), contending that Feres should not be applied to the "massive tort claims alleged in this unique litigation." We believe that the exact converse is true, and that the Feres doctrine was specifically intended to apply to the "[s]ignificant risk of accidents and injuries [that] attend such a vast undertaking" as is involved herein. Stencel, supra, 431 U.S. at 672.

The greater the scope of a military decision and the more far-reaching its effect, the more it assumes the aspects of a political determination, which, in and of itself, is not subject to judicial second-guessing, Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948). See, e.g., DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973) (President Nixon's tactical decision to mine North Vietnam harbors held to create a non-justiciable political question); Holtzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973) (bombing of Cambodia held to involve diplomatic and military expertise not vested in judiciary and thus political in nature),

cert. denied. 416 U.S. 936 (1974); Pauling v. McNamara, 331 F.2d 796, 798-99 (D.C. Cir. 1963)(explosion of nuclear bombs held to constitute a large matter of basic national policy and to present no judicially cognizable issue), cert. denied, 377 U.S. 933 (1964). See also In re "Agent Orange" Product Liability Litigation, Nos. 85-6091, 85-6093, 85-6095, at 7-13. As the bombing in Cambodia was designed to protect United States military and civilian personnel from a "grave risk of personal injury or death", Holtzman, supra, 484 F.2d at 1311 n.1, so also was the President's decision to use Agent Orange to defoliate Vietnamese jungle trails, a decision in which the South Vietnamese military, to some extent at least, participated. Recognizing as we must that our judicial system is ill-equipped to handle service-related tort claims involving hundreds of thousands of soldiers, we believe that it is in massive cases such as the instant one where the Feres doctrine is best applied.

Once the continuing vitality of the Feres doctrine is acknowledged, see, e.g., United States v. Shearer, 473 U.S. 52 (1985); H.R. Rep. No. 97-384, 97th Cong., 1st Sess. 5 (1981), reprinted in 1981 U.S. Code Cong. & Ad. News 2692, 2695, recognition of Stencel as binding authority against recovery by appellants inevitably must follow. A court considering the merits of appellants' claims would be required to answer the same questions concerning the discretionary military and political

decisions of the Executive and Legislative Branches of Government that it would not feel qualified to answer in suits by individual servicemen. Stencel, supra, 431 U.S. at 673.

> The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions.

Id.

Moreover, a recovery by appellants in the instant case would violate well-established principles of tort law. Appellants contend that they are entitled to recover both contribution and indemnity from the Government. In support of this contention, they advance a most unique theory of law, i.e., that they are entitled to recover even though the claims they settled were without merit. Both appellants and the Government have contended, and continue to contend, that Agent Orange did not cause the injuries of which the plaintiffs complain. "Third party defendants as well as third party plaintiffs agree that Agent Orange cannot be shown to have caused any injury to any member of the class." 611 F. Supp. at 1222. Nonetheless, appellants assert that they are entitled to reimbursement from the Government. They say that "[t]he district court's finding that there is no proof that Agent Orange caused harm is not

relevant here." They argue that the very absence of liability justifies recovery against the Government, asserting that "[t]he overwhelming evidence in the record that Agent Orange caused no harm provides strong justification for spreading the risk." Whether we view appellants' claims against the Government as seeking contribution or indemnity, we find no merit in the above contentions. See HS Equities, Inc. v. Hartford Accident & Indemnity Co., 609 F.2d 669, 674 (2d Cir. 1979).

Contribution is the proportionate sharing of liability among tortfeasors. Ingham v. Eastern Air Lines, Inc., 373 F.2d 227, 240 n.12 (2d Cir.), cert. denied, 389 U.S. 931 (1967). "Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77, 87-88 (1981). "Contribution rests upon a finding of concurrent fault." Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 115 (1974). Where, as here, a third-party plaintiff insists that it is not at fault, it cannot contend successfully that the third-party defendant is a joint tortfeasor. Southern Surety Co. v. Commercial Casualty Ins. Co., 31 F.2d 817, 819 (3d Cir.), cert. denied, 280 U.S. 577 (1929); 18 Am. Jur. 2d Contribution §§ 121, 127; 18 C.J.S. Contribution § 3.

Assuming that appellants would abandon their "no-fault" stance if their third-party action were tried, they nonetheless could not recover contribution from the Government. The Court in Feres, supra, 340 U.S. at 141-42, held that the effect of the Tort Claims Act was "to waive immunity from recognized causes of action" but that "no American law . . . ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." In effect, the Court thus was holding that there was no judicially established standard of care against which the alleged negligence of a serviceman's superior officers could be measured. See Laird v. Nelms, 406 U.S. 797, 800-801 (1972); Donham v. United States, 536 F.2d 765, 774-75 (8th Cir. 1976), aff'd sub nom. Stencel Aero Engineering Corp. v. United States, supra, 431 U.S. 666.

> Even if New York law held a private person liable, that fact would not be dispositive of the question of the United States' liability in this case, because the language of § 1346(b), the jurisdictional provision, does not expand the limited waiver set forth in §§ 2674 et seq. Rather, § 1346(b) is expressly made "[s]ubject to the provisions of" §§ 2671-2680, and the liability that a state would impose on a private individual may not, under § 2674, be imposed on the government except in "like circumstances." The "like circumstances" language in § 2674 means that "the liability assumed by the Government . . . is that created by 'all the circumstances,' not that which a few of the circumstances might create." Feres v. United States, 340 U.S. 135, 142, 71 S. Ct. 153, 157, 95 L. Ed. 152 (1950). Thus, notwithstanding any circumstances in which state law would hold a private person liable for his acts, if those circumstances are in

> any material respect not "like" those in which the government's act occurred, there has been no FTCA waiver of sovereign immunity.

Caban v. United States, 728 F.2d 68, 73-74 (2d Cir. 1984); see Arvanis v. Noslo Engineering Consultants, Inc., 739 F.2d 1287, 1292 (7th Cir. 1984), cert. denied, 469 U.S. 1191 (1985).

Feres created a bar against recovery that was substantive, not procedural, Lockheed Aircraft Corp. v. United States, 460 U.S. 190, 197 n.8 (1983), and has been held in some cases to go to the very jurisdiction of the court, Labash v. United States Department of the Army. 668 F.2d 1153, 1154-55 (10th Cir.)(citing United States v. Testan, 424 U.S. 392, 399 (1976)), cert. denied, 456 U.S. 1008 (1982). It precludes appellants from recovering the contribution they seek. See Hillier v. Southern Towing Co., 714 F.2d 714, 721-22 (7th Cir. 1983); Carter v. City of Cheyenne, 649 F.2d 827, 828-30 (10th Cir. 1981); Certain Underwriters at Lloyd's v. United States. 511 F.2d 159, 163 (5th Cir. 1975); Newport Air Park, Inc. v. United States, 419 F.2d 342, 346-47 (1st Cir. 1969); Maddux v. Cox, 382 F.2d 119, 124 (8th Cir. 1967).

The result would be the same if appellants sought indemnity on a tort theory of active-passive negligence or primary-secondary liability. If the district court is precluded from second-guessing the wisdom and propriety of the discretionary military and political decisions at issue herein, it hardly is in a position to decide whether the Government was guilty of active

or passive negligence. Moreover, a finding of either primary or secondary liability is inappropriate when established law says that there can be no finding of liability at all. "For the United States to be the active wrongdoer, however, it must first be a wrongdoer." Hillier v. Southern Towing Co., supra, 714 F.2d at 721 (citing Slattery v. Marra Bros., Inc., 186 F.2d 134, 139 (2d Cir.)(L. Hand, C.J.), cert. denied, 341 U.S. 915 (1951)).

Appellants seek to avoid the preclusive effect of Stencel by arguing that the governmental wrongdoing upon which they base their claim to indemnity was directed against them rather than against the servicemen, and that, therefore, it is irrelevant whether the servicemen have a right of recovery against the Government. Their contention, in substance, is that the Government compelled them to manufacture Agent Orange in accordance with government specifications while suppressing information concerning Agent Orange's hazardous nature known only to the Government. Bearing in mind the burden imposed upon appellants by the Government's motion for summary judgment, see Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2552-53 (1986), we find neither factual nor legal basis for this contention.

Our review of the record places us in complete accord with Chief Judge Weinstein's findings that "[t]he government and [appellants] had essentially the same knowledge about possible dangers from dioxin in Agent Orange" and that "[appellants'] position that they were unaware of the possible dangers of Agent

Orange and were misled to their detriment by the government's failure to reveal what it knew in the mid-1960's has no basis in fact." 611 F. Supp. at 1223. In view of the "years of discovery" that preceded the dismissal of appellants' third-party claims, 611 F. Supp. 1223, 1260, it is inconceivable that appellants would not have uncovered and disclosed to the district court any governmental knowledge of hazardous effects that might have precluded such dismissal. Instead of coming forward with factual support for the theory they now espouse, appellants have argued from the outset that there is no medical causal relation between Agent Orange and plaintiffs' injuries. Although appellants are permitted some inconsistency in their pleadings, Fed. R. Civ. P. 8(e)(2), when those pleadings are put to the test by a motion for summary judgment, appellants must, after adequate time for discovery, "make a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial." Celotex, supra, 106 S. Ct. at 2553. On the present record, appellants have not shown any knowledge on the part of the Government, exclusive or otherwise, that Agent Orange was a competent producing cause of the plaintiffs' injuries.

Assuming for the argument only that there is sufficient substance in appellants' above-described contention to permit

their third-party action to go to trial, the very proof that would be necessary to support that contention on trial would also establish appellants' right to a government contract defense. That defense, which also is discussed in detail in 85-6163 filed herewith, provides in substance that a manufacturer who, in time of war, supplies materials to the Army in accordance with government specifications, is not liable for injuries resulting from a defect in the specifications. Accordingly, the same facts that, in appellants' view, would warrant their recovery against the Government, would preclude a recovery by the plaintiffs against appellants. The district judge could not properly announce inconsistent findings of fact and conclusions of law on this issue in order to make the government contract defense inapplicable. 89 C.J.S. Trial § 636. If appellants have a valid claim against the Government, there can be no liability on their part, potential or actual, against which the Government should be required to indemnify them. See The Toledo, 122 F.2d 255 (2d Cir.), cert. denied, 314 U.S. 689 (1941); Tankrederiet Gefion A/S v. Hyman-Michaels Co., 406 F.2d 1039, 1042 (6th Cir. 1969); Trojcak v. Wrynn, 45 A.D.2d 770 (1974)(mem.)(citing Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 218 (1903)).

We find no merit in appellants' contention that the protection against liability provided by Feres and Stencel applies only to the Government and not to its officials, Chappell v. Wallace, 462 U.S. 296 (1983); Rotko v. Abrams, 338

F. Supp. 46 (D. Conn. 1971), aff'd on opinion below, 455 F.2d 992 (2d Cir. 1972); Hefley v. Textron, Inc., 713 F.2d 1487, 1491 (10th Cir. 1983), or that it does not apply to claims of constitutional infringement, Trerice v. Pedersen, 769 F.2d 1398, 1400-01 (9th Cir. 1985). We also find no merit in the contention of appellant, Thompson Chemical Corporation, that the district court erred in not specifically considering its claim of a contractual right of reimbursement. The provision giving rise to this claim was contained in a contract providing for participation by Thompson in the proposed modification of a government-owned facility at Weldon Spring, Missouri, which would have enabled that facility to produce Agent Orange. Because no Agent Orange ever was produced at the Welden Spring plant, there were no Agent Orange deaths or injuries "arising out of the performance of this contract" which would bring the contractual indemnification clause into play. This being so, we need not respond to the Government's contention that the proper tribunal to hear Thompson's contract claim was the Court of Claims. See Hefley, supra. 713 F.2d at 1492; 28 U.S.C. §§ 1346(a)(2) and 1491.

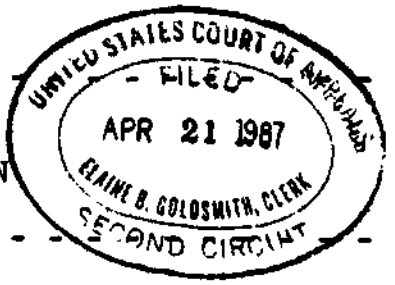
Dismissal of appellants' third-party claims against the Government was proper. The order and judgment of dismissal are affirmed.

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 1084, 1110, 1111, .1137 -- August Term, 1985

(Argued April 10, 1986 Decided APR 21 1987 )

Docket Nos. 85-6161, 85-6223,
85-6339, 85-6341




IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

GERALD HOGAN, M.D.,

Plaintiff-Appellant,

v.

THE DOW CHEMICAL COMPANY; DIAMOND SHAMROCK CHEMICALS COMPANY; HERCULES INCORPORATED; MONSANTO COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.; and UNIROYAL, INC.

Defendants-Appellees.

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CLARA FRATICELLI, et al.,

Plaintiffs-Appellants,

v.

THE DOW CHEMICAL COMPANY; DIAMOND SHAMROCK CHEMICALS COMPANY; HERCULES INCORPORATED; MONSANTO COMPANY; T H AGRICULTURE & NUTRITION COMPANY, INC.; UNIROYAL, INC.; THE UNITED STATES OF AMERICA; and TEN FORMER REGENTS OF THE UNIVERSITY OF HAWAII,

Defendants-Appellees.

BEFORE: VAN GRAAFEILAND, WINTER and MINER, Circuit Judges.

Appeals from summary judgments and a Rule 37(b)(2) dismissal of the United States District Court for the Eastern

District of New York (Weinstein, C.J.) entered in favor of defendants in actions brought by civilian plaintiffs seeking recovery for injuries allegedly sustained through exposure to Agent Orange. Dismissal of Hogan action pursuant to Fed. R. Civ. P. 37(b)(2) affirmed. Summary judgment in favor of appellees and against appellants, Oshita and Takatsuki, affirmed. Dismissal of appellant Fraticelli's claim against appellee chemical companies vacated and matter remanded to district court for further proceedings. Summary judgment dismissing Fraticelli's cause of action against the United States vacated and this cause of action remanded to the district court with instructions to dismiss for lack of jurisdiction.

ROBERT A. TAYLOR, JR., Washington, D.C. (Wayne M. Mansulla and Ashcraft & Gerel, Washington, D.C., of Counsel), for Plaintiffs-Appellants.

ROBERT C. LONGSTRETH, Trial Attorney, Torts Branch, Civil Division, Department of Justice, Washington, D.C. (Richard K. Willard, Ass't Att'y Gen., Washington, D.C., Raymond J. Dearie, United States Attorney for the Eastern District of New York, and Joan M. Bernott, Special Litigation Counsel, Washington, D.C., of Counsel), for Defendant-Appellee United States of America.

JOHN C. SABETTA, New York, N.Y. (Townley & Updike, N.Y., N.Y., of Counsel), for Defendant-Appellee Monsanto Company.

LEONARD L. RIVKIN, Garden City, N.Y. (Rivkin, Radler, Dunne & Bayh, Garden City, N.Y., of Counsel), for Defendant-Appellee The Dow Chemical Company.

STEVEN S. MICHAELS, Deputy Attorney General, State of Hawaii, Honolulu, Hawaii, (Corinne K.A. Watanabe, Attorney General, State of Hawaii, Honolulu, Hawaii, of Counsel), for Defendants-Appellees Regents of the University of Hawaii.

Clark, Gagliardi & Miller, White Plains, N.Y., on the brief, for Defendant-Appellee T H Agriculture & Nutrition Company, Inc.

Shea & Gould, N.Y., N.Y., on the brief, for Defendant-Appellee Uniroyal, Inc.

Kelley Drye & Warren, N.Y., N.Y., on the brief, for Defendant-Appellee Hercules Incorporated.

VAN GRAAFEILAND, Circuit Judge:

The above captioned appeals raise a number of issues distinct from that of causal relation, the dominant issue in most Agent Orange cases, and will be disposed of largely on the basis of those unrelated issues. The appeals are from a dismissal pursuant to Fed. R. Civ. P. 37(b)(2) and from summary judgments, granted by Chief Judge Weinstein of the United States District Court for the Eastern District of New York in opinions reported at 611 F. Supp. 1290 and 611 F. Supp. 1285. The Rule 37(b)(2) dismissal was against Dr. Gerald Hogan, a resident of Nevada. The summary judgments dismissed the complaints of three residents of Hawaii, James K. Oshita and Masao Takatsuki, who sue for personal injuries, and Clara Fraticelli, who sues for the wrongful death of her husband, William. Our discussion of the background and procedural history of this litigation appears in Judge Winter's lead opinion, No. 84-6273. For purposes of convenience, the appeals were briefed and argued together.

THE HOGAN APPEAL

In 1966, Gerald Hogan, a thirty-five-year old doctor, spent four months in Vietnam under contract with the United States Agency for International Development. For one month, he worked at a civilian hospital in Da Nang. During the remaining three months, he was a patient in a United States hospital in the same city. He now claims that a variety of illnesses from which he suffers were caused by exposure to Agent Orange which had accumulated on the clothing of native patients or was carried by dust in the air.

In 1981, Dr. Hogan sued to recover for his injuries, and, in

due course, his case became part of the raultidistrict litigation in the Eastern District of New York. On March 15, 1985, the magistrate appointed by Chief Judge Weinstein to control discovery ordered that Dr. Hogan's oral deposition be taken on March 21 and 22. The deposition was commenced in the yard of Dr. Hogan's home but was discontinued after several hours when Dr. Hogan, claiming that he was suffering from cardiac arrhythmia (an alteration in the rhythm of the heart beat), refused to continue. The magistrate ordered plaintiff examined by an independent physician, who reported that the deposition could be continued without adversely affecting the plaintiff's health. Nonetheless, with a conceded understanding of the possible consequences of his refusing to continue with the deposition, Dr. Hogan refused. The district court found that plaintiff's claim of ill health was unfounded, "an excuse to prevent being embarrassed by a searching deposition", and a "blatant attempt to frustrate discovery." 611 F. Supp. at 1294-95.

In view of the district court's factual findings, which are not clearly erroneous, and Dr. Hogan's awareness of the consequences of his refusal to obey the magistrate's order, we reject Dr. Hogan's contention that the district court erred in dismissing his complaint. Although dismissal unquestionably was strong medicine, the "[h]arshest of all . . . orders," Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979), disposition of the almost unprecedented volume of Agent Orange cases would be

interminably delayed if the participants were permitted to disobey court orders with little fear of sanction. In litigation of such epic proportions as this, it is particularly important that "the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court . . . , not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976); see United States Freight Co. v. Penn Central Transp. Co., 716 F.2d 954 (2d Cir. 1983)(per curiam); Trans World Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert. dismissed, 380 U.S. 248 and 249 (1965). The judgment of the district court is affirmed.

THE HAWAIIAN APPEALS

In 1967, while James Oshita, Masao Takatsuki and William J. Fraticelli were working for the University of Hawaii at its College of Tropical Agriculture and Human Resources, they allegedly sustained injuries caused by exposure to Agent Orange which was being tested in the fields by University employees. All three filed Worker's Compensation claims, Oshita and Fraticelli in 1979 and Takatsuki in 1981, and all were awarded benefits. Fraticelli died in April 1981. On January 12, 1981, Oshita and Takatsuki presented administrative claims to the United States pursuant to 28 U.S.C. S 2401(b); no such claim has

been filed by Fraticelli's widow, Clara. On January 11, 1982, Oshita, Takatsuki, and Clara Fraticelli, on behalf of herself and her husband's estate, commenced this suit in the United States District Court for the District of Hawaii seeking relief not only for themselves but also for a proposed class consisting of everyone on the Island of Kauai who had been exposed to Agent Orange. In addition to the several chemical companies which allegedly manufactured the injurious herbicide, the complaint named as defendants ten Regents or former Regents of the University of Hawaii, together with the United States and its Department of Defense. Over the objection of the plaintiffs, the case was transferred to the Eastern District of New York by the Judicial Panel on Multidistrict Litigation.

In Hawaii, an action for personal injuries must be brought within two years after the cause of action accrues. Haw. Rev. Stat. § 657-7. A claim accrues under this statute when the plaintiff discovers or reasonably should have discovered the complained of act, the injury and the causal connection between the two. Yamaguchi v. Queen's Medical Center, 65 Haw. 84, 648 P.2d 689 (1982). The district court held that, insofar as the plaintiffs' personal injury claims were concerned, the two-year statute started to run no later than 1979, and appellants concede that the Hawaiian statute, standing alone, would have barred their common-law, personal injury claims prior to the bringing of their suits in 1982. However, relying on American Pipe &

Constr. Co. v. Utah, 414 U.S. 538 (1974), and Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983), they contend that the running of the statute was tolled by the bringing of the principal Agent Orange class action. This reliance is misplaced.

The limitation periods of American Pipe and Crown, Cork were derived from federal statutes. Here, we are dealing with Hawaii's limitation statutes. Because none of them provides for tolling in a situation such as exists here, it is doubtful that either American Pipe or Crown, Cork can be treated as applicable precedent. See Chardon v. Fumero Soto, 462 U.S. 650, 660-62 (1983); Board of Regents v. Tomanio, 446 U.S. 478, 483-86 (1980); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466-67 (1975).

We note, however, Justice Rehnquist's categorical statement in his Chardon dissent that "[i]f the law of a particular State was that the pendency of a class action did not toll the statute of limitations as to unnamed class members, there seems little question but that the federal rule of American Pipe would nonetheless be applicable." 462 U.S. at 667. Assuming that for "the purposes of litigatory efficiency served by class actions", Johnson, supra, 421 U.S. at 467 n.12, the district court agreed with this observation, Oshita's and Takatsuki's claims against the chemical companies still were properly barred.

In American Pipe, the Court declared the pertinent tolling

rule to be that the commencement of a class action tolls the applicable statute of limitations "as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. In the instant case, the principal Agent Orange action upon which these personal injury claimants base their claim of tolling was certified as a class action and continued as such until it was settled. These Hawaiian claimants never became part of that action. Instead, as stated above, they attempted unsuccessfully to initiate their own class action on behalf of the populace of Kauai. Moreover, their attorney, in an affidavit opposing the removal of their action to the Eastern District of New York, stated that the issues involved in the Hawaiian plaintiffs' suit were "substantially different" from those in the other actions and that the causes of action were "separate and distinct" from those in the already-removed actions. To some extent, at least, he was correct.

From the very outset, the district court recognized the principal Agent Orange class action as one brought on behalf of "Vietnam war veterans and members of their families claiming to have suffered damage as a result of the veterans' exposure to herbicides in Vietnam." 506 F. Supp. 762, 768. This recognition was based upon a fair reading of the original class action complaints. The class which the district court certified consisted of such veterans, their spouses, parents, and children,

who were injured as a result of the veterans' Vietnam exposure. 100 F.R.D. 718, 731-32.

The intent of the American Pipe rule is to preserve the individual right to sue of the members of a proposed class until the issue of class certification has been decided. Crown, Cork, supra, 462 U.S. at 354 (Powell, J., concurring). Its purpose is not to toll the statute of limitations for persons such as these Hawaiian plaintiffs who were not members of either the proposed or certified class. The district court did not err therefore in dismissing the personal injury claims as against the chemical companies and the University of Hawaii Regents. However, because Mrs. Fraticelli's cause of action for the wrongful death of her husband did not accrue until his death in 1981, Haw. Rev. Stat. § 663-3, her action against the chemical companies, brought in 1982, was not barred by the two-year personal injury statute of limitations, Haw. Rev. Stat. § 657-7.

Dismissal of all personal injury and related wrongful death claims against the Regents was required because the Hawaiian compensation statute provides the exclusive remedy against fellow

employees for work-related injuries. Haw. Rev. Stat. § 386-5. Appellants' claim under 42 U.S.C. § 1983 against the Regents, based on the same injuries, is so devoid of merit, see Daniels v. Williams, 106 S. Ct. 662 (1986); McClary v. O'Hare, 786 F.2d 83 (2d Cir. 1986), that appellants do not even contend on appeal that their action against the Regents should be reinstated.

Although the timeliness of actions against the United States is not governed by the Hawaiian statute of limitations, section 2401(b) of 28 U.S.C. provides time limitations that are more restrictive in that they are jurisdictional in nature. That section provides in substance that a tort claim against the United States is barred unless made in writing to the appropriate federal agency within two years after the claim accrues and an action is brought thereon within six months after the claim is denied. The burden is on the plaintiff to both plead and prove compliance with the statutory requirements. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 182 (1936); Altman v. Connally, 456 F.2d 1114, 1116 (2d Cir. 1972) (per curiam); Bruce v. United States, 621 F.2d 914, 918 (8th Cir. 1980); Clayton v. Pazcoquin, 529 F. Supp. 245, 247-49 (W.D. Pa. 1981). In the absence of such compliance, a district court has no subject matter jurisdiction over the plaintiff's claim. Wyler v. United States, 725 F.2d 156, 159 (2d Cir. 1983).

Plaintiffs' complaint does not allege that the filing requirements of section 2401(b) were complied with. Moreover, it

appears to be conceded that Mrs. Fraticelli did not file a claim for her husband's death. Because of Mrs. Fraticelli's failure to file, her complaint against the United States should have been dismissed for lack of jurisdiction. Gallick v. United States, 542 F. Supp. 188, 191 (M.D. Pa. 1982). However, the Government concedes that Oshita and Takatsuki filed claims, and therefore the complaint could be amended upon remand to allege that fact. Accordingly, we will assume an amendment and address their claims on the merits.[1/]

A well-recognized exception to the Government's waiver of immunity for tort liability is the "discretionary function" exception found in 28 U.S.C. § 2680(a). The governmental acts of which the Hawaiian plaintiffs complain fall within this exception. It cannot be seriously contended that the decision to use Agent Orange as a defoliant was anything but a discretionary act. In pursuance of this decision, the Government entered into a contract with the University of Hawaii to perform field tests with the herbicide. Plaintiffs, who claim to have been injured during the course of those field tests, cannot remove them from the category of discretionary functions by vague and irrelevant allegations of negligent labeling, shipping, handling, etc. See Dalehite v. United States, 346 U.S. 15, 37-45 (1953); First National Bank in Albuquerque v. United States, 552 F.2d 370, 374-77 (10th dr.), cert. denied, 434 U.S. 835 (1977).

The Supreme Court's holding in Dalehite is summarized well in United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 810-11 (1984), where Chief Justice Burger, writing for the Court, said:

> Dalehite involved vast claims for damages against the United States arising out of a disastrous explosion of ammonium nitrate fertilizer, which had been produced and distributed under the direction of the United States for export to devastated areas occupied by the Allied Armed Forces after World War II. Numerous acts of the Government were charged as negligent: the cabinet-level decision to institute the fertilizer export program, the failure to experiment with the fertilizer to determine the possibility of explosion, the drafting of the basic plan of manufacture, and the failure properly to police the storage and loading of the fertilizer.
>
> The Court concluded that these allegedly negligent acts were governmental duties protected by the discretionary function exception and held the action barred by § 2680(a).

In Varig, the Court held that the failure of Federal Aviation Administration employees to check certain potentially dangerous items in certifying the safety of an airplane was the exercise of a discretionary function for which the Government was not liable. 467 U.S. at 820.

These two decisions teach us that, where, as here, the Government is performing a discretionary function, the fact that discretion is exercised in a negligent manner does not make the discretionary function exception inapplicable. See also Cisco v.

United States, 768 F.2d 788, 789 (7th Cir. 1985); Begay v. United States, 768 F.2d 1059, 1062-66 (9th Cir. 1985); General Public Utilities Corp. v. United States, 745 F.2d 239, 243, 245 (3d Cir. 1984), cert. denied, 105 S. Ct. 1227 (1985); Green v. United States, 629 F.2d 581, 585-86 (9th Cir. 1980).

The dismissal of appellant Hogan's complaint pursuant to Fed. R. Civ. P. 37(b)(2) is affirmed. The summary judgment in favor of appellees and against appellants, Oshita and Takatsuki, is affirmed. The chemical companies moved for summary judgment against Mrs. Fraticelli on the ground that her claim was barred by the military contractor defense. The district court did not rule upon this claim, and we address it only in general terms. Mr. Fraticelli was a civilian. Nevertheless, his exposure to Agent Orange occurred after the United States government had purchased the herbicide and while the government was testing it for military use. We believe, therefore, that the military contractor defense, as discussed in Judge Winter's opinion affirming summary judgment against the opt-out plaintiffs, No. 85-6163, applies to Mrs. Fraticelli's claim. We vacate the dismissal of her claim and remand to the district court for a determination on the motion for summary judgment. The summary judgment dismissing Fraticelli's cause of action against the United States is vacated and this cause of action is remanded to the district court with instructions to dismiss for lack of jurisdiction. No costs to any party.

FOOTNOTE

1/ If addressed on the merits, Mrs. Fraticelli's claim would be disposed of in the same manner as Oshita's and Takatsuki's.