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Veterans Administration

REFERENCE SLIP

TO (Name or title–Mail routing symbol)	INITIALS–DATE
1. Major Alvin Young (102B)	
2.	
3.	
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REASON FOR REFERENCE

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☐ CONCURRENCE ☐ NECESSARY ACTION ☐ SIGNATURE

REMARKS

SUBJ: Agent Orange Litigation

Attached for your information are copies of Agent Orange Litigation Reports I & II.

Att.

FROM Frederic L. Conway
FREDERIC L. CONWAY (02C)
Special Assistant to the General Counsel

DATE 3/18/82
TEL. EXT. x-3723

VA FORM MAY 1980 3230 EXISTING STOCKS OF VA FORM 3230, AUG 1976, WILL BE USED.

Received 19 Mar 82

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MAR 18 1982
SPECIAL ASST. TO CMD

This is the first of a series of quarterly reports outlining developments in litigation activities impacting on Agent Orange programs of the VA. This first report will briefly describe the nature of the complaint, the relief sought, and the current status of the litigation.

Perhaps the most important case, and one that receives a great deal of media attention, is Chapman, et al. v. Dow Chemical, et al., a case dealing with Agent Orange product liability. A number of veterans and their families have brought suit in various federal district courts against the manufacturers of the components of a variety of herbicides, including Agent Orange, that were used by the military during the war in Vietnam. There are four groups of plaintiffs: Vietnam veterans, their spouses, their parents, and their children. They assert numerous theories of liability, including strict products liability, negligence, breach of warranty, intentional tort and nuisance. Plaintiff veterans seek to recover for personal injuries caused by their exposure to Agent Orange. The family members seek to recover on various derivative claims; some of the children assert claims in their own right for genetic injury and birth defects caused by their parent's exposure to Agent Orange; and some of the veterans' wives seek to recover in their own right for miscarriges.

These actions were consolidated under 28 U.S.C. §1407 for pretrial processing and transferred to the United States District Court for the Eastern Division of New York.

The defendants, seeking indemnification or contribution in the event they are held liable to the plaintiffs, served third party complaints against the United States. In their third party complaints they allege negligence, misuse of product, post-discharge failure to warn, implied indemnity, denial of due process and failure to comply with herbicide registration laws.

The plaintiff had sought redress of their alleged injuries under Federal common law and invoked the "federal question" jurisdiction of the district court. (28 U.S.C. §1331(a).) The defendant chemical manufacturers moved to dismiss the complaint for lack of subject matter jurisdiction, contesting the existence of a federal common law cause of action.

The district court, denying respondents' motion to dismiss the claims for lack of jurisdiction, held that petitioners' claims were governed by federal common law and hence arose under federal law within the meaning of 28 U.S.C. § 1331(a). (In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 737 (E.D. N.Y. 1979)). The district court reasoned that there are significant federal interests in this litigation (id. at 749). It noted the "'distinctively federal'"

relationship between the government and members of the armed forces and remarked that "[t]orts committed by war contractors against soldiers in action constitute 'harms inflicted' on the soldiers and 'interference' with the relationship between soldiers and the government. Such harms and interferences implicate federal interests" (id. at 746, quoting United States. v. Standard Oil Co., 332 U.S. 301, 305-306 (1947)). The court added that "the federal interest in this litigation includes as well the rights of the war contractors since the extent of a contractor's liability undoubtedly will affect future dealings between the contractor and the government" (id. at 747). The court explained (id. at n. 5):

> War contractors might be expected to increase the price of war materials to correspond to any extension in their potential liability. Such adjustments might have a significant effect on the federal treasury. If potential liability increased dramatically, future war contractors might attach conditions to the use of their products, or balk at supplying the military with any products whatsoever. Thus, the government's military capabilities might be affected by this litigation.

Applying state law to petitioners' claims, the court stated, "would burden federal interests by creating uncertainty as to the rights of both veterans and war contractors. It would also be unfair in that essentially similar claims, involving veterans and war contractors identically situated in all

relevant respects, would be treated differently under different state laws" (id. at 784).[1/]

Finally, the district court remarked that while tort claims are traditionally matters for state law, "state law has not considered the complex question of a war contractor's liability to soldiers injuried by toxic chemicals while engaged in combat and serving abroad" (id. at 749). The court concluded that the state interests affected by the application of federal common law to petitioners' claims were slight "(b)ecause state law is no more or less developed as to such claims than federal common law" (ibid.).

Respondents appealed under 28 U.S.C. § 1292(b), and a divided panel of the Court of Appeals reversed (In re "Agent Orange" Product Liability Litigation, 635 F.2d 987 (2nd Cir. 1980)). The majority concluded, for two reasons, that there was no "identifiable federal

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1/ The district court qualified its ruling by noting: "A lone veteran suing the supplier of a single piece of defective military machinery would implicate only a minimal federal interest. . . . But [in] this litigation . . . [t]he estimated number of involved veterans ranges from thousands to millions, and the estimated potential liability . . . ranges from millions to billions of dollars. As the number of veterans and the size of the claims against the war contractors increase so the federal interest in this litigation expands" (id. at 741). In this connection the district court cited three cases -- Whitaker v. Harvell-Kilgore Corp. 418 F.2d 1010 (5th Cir. 1969), Boeing Airplane Co. v. Brown, 291 F. 2d 310 (9th Cir. 1961), and Adams v. General Dynamics Corp., 405 F. Supp. 1020 (N.D. Cal. 1975) -- in which state law apparently was applied to servicemen's claims against defense contractors without any discussion of whether federal law should apply. Each of these claims arose from a single event, none of which occurred during armed conflict. See also Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3 (1975).

policy at stake in this litigation that warrants the creation of federal common law. . . ." (id. at 993). First, the majority said, "since this litigation is between private parties and no substantial rights or duties of the government hinge on its outcome, there is no federal interest in uniformity for its own sake . . . . [Therefore t]he fact that application of state law may produce a variety of results is of no moment" (id. at 993-994).

Second, the Court of Appeals distinguished other cases in which federal common law was applied on the ground that in those cases "the government's substantive interest in the litigation (was) essentially mono(lithic), in that it (was) concerned only with preserving the federal fisc" (id. at 994). By contrast, the court stated (ibid.):

> [H]ere the government has two interests; and here the two interests have been placed in sharp contrast with one another. Thus, the government has an interest in the welfare of its veterans . . . . But the government also has an interest in the suppliers of its material; imposition, for example, of strict liability as contended for by plaintiffs would affect the government's ability to procure material without the exaction of significantly higher prices, or the attachment of onerous conditions, or the demand of indemnification or the like.

The Court reasoned that "it is properly left to Congress in the first instance to strike the balance between the conflicting interests of the veterans and the contractors . . . ." (id. at 944). Accordingly, the Court concluded that "while the federal government has obvious interests in the welfare of the parties to the litigation, its interest in the outcome of the litigation, i.e., in how the parties' welfares should be balanced, is as yet undetermined. . . . In the present litigation the federal policy is not yet identifiable" (id. at 995).

For this reason, the majority held that state law governed petitioners' claims and accordingly that the district court lacked federal question jurisdiction.

Chief Judge Feinberg dissented. He endorsed the district court's view that the government has a substantial interest in the litigation, that the servicemen's claims should be treated uniformly, and that a federal determination of the novel issues involved in the case would not displace any well-established body of state law.

A petition for a writ of certiorari was denied by the Supreme Court on December 14, 1981. The United States had submitted an amicus brief taking the position that there is no basis for concluding that the plaintiff's claims arise under federal common law.

After the Court of Appeals' ruling, the district court held further proceedings on petitioners' claims. In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D. N.Y. 1980). The court's jurisdiction over these proceedings rested on diversity of citizenship, as provided in 28 U.S.C. § 1332. See 506 F. Supp. at 782-783 & n. 30, 786. Our understanding is that a significant number of plaintiffs will not be able to bring diversity suits in federal district court.

At these proceedings, respondents asserted an affirmative defense based on federal law. They claimed that the policies underlying the Defense Production Act, 50 U.S.C. App. 2061 et seq., and their status as government contractors (see Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940)), barred petitioners' claims. The district court stated that it was "satisfied that such a . . . defense exists and has possible application to the facts at bar." It denied respondents' motion for summary judgment, however, on the ground that respondents would have to establish certain facts about their relationship to the government in order to invoke the defense. 506 F. Supp. at 796. The court scheduled a trial on this issue "at the threshold of this action," before trial on liability. Id. at 796, 785.

In addition, the district court dismissed respondents' third-party complaint against the United States. The court ruled that the holding in the case of Feres v. United States, 340 U.S. 135 (1950), would bar this action against the United States. The Feres case held that under the doctrine of sovereign immunity, the United States is not liable for injuries incurred by service-members which arise out of or are in the course of activity incident to military service. The court also held that in that case that the Federal Tort Claims Act (28 U.S.C. § 1346(b) et. seq.) did not constitute a waiver of sovereign immunity from liability for these types of injuries.

The district court further ruled that third party claims such as the one brought by the chemical manufacturers were also barred. In reaching this conclusion, the court cited Stencil Aero Engineering Corporation v. United States, 431 U.S. 666 (1977), which held that "the right of a third party to recover in an indemnity action against the United States . . . must be limited by the rationale of Feres where the injured party is a serviceman."

Regarding derivitive claims of spouses, parents, and children, the district court ruled that the Feres doctrine also bars suits by a servicemember's family for damages resulting from injuries the servicemember suffered incident to and arising out of military service.

Concerning the alleged failure to warn, the court ruled that any post-discharge failure to warn would not be sufficiently separate and distinct from the underlying claim for injury occuring incident to or arising out of military service as to remove it from the Feres doctrine.

With regards to the remaining complaints brought by the chemical manufacturers, the court ruled that it lacked jurisdiction to consider them, the proper forum being the Court of Claims.

Judge Pratt did indicate that his holdings would not affect the claims of veterans who allege improper medical care rendered after military service for a condition allegedly

resulting from Agent Orange exposure. Also, in an unusual footnote, Judge Pratt cautioned that "the views expressed and the rulings made in the decision are not entirely free from doubt." Accordingly, he advised that any plaintiff who believes he or she has a valid claim against the United States should protect his or her interest by filing a claim form (Standard Form 95) with the proper Federal agency.2/

The district court also certified the Agent Orange litigation against the chemical manufacturers as a class action and began the implementation of a plan for managing this highly complex case.

Ryan et al. v. Cleland et al. takes up where Chapman leaves off. In this case, Vietnam veterans, their spouses, their children, and their parents have brought suit against a number of VA officials. A variety of allegations are made about the knowledge of VA officials and the actions those officials did or did not take. First, it is alleged that these officials failed to provide information to veterans regarding the hazards associated with exposure to "toxic synthetic chemicals" such as 2,3,7, 8 - TCDD (dioxin).

2/ As a result of this comment, the VA received about 10,000 such claims from veterans as well as the spouses, children, and parents of veterans. Only about five percent of these claims allege wrongdoing on the part of the VA. The remainder were forwarded to the Department of Defense for processing.

Secondly, it is claimed that the VA failed to provide adequate medical care and treatment, including genetic counseling, to Vietnam veterans and their families, thereby subjecting them to unreasonable risk of sustaining personal injuries and damages.

Third, it is alleged that the officials of the VA engaged in negligent, wanton and reckless conduct. Specifically, it is claimed that these officials knew a variety of "facts" about the harmful effects of exposure to dioxin and the actions taken or recommended by a number of organizations, both government and private at home and abroad, to reduce the risks of exposure. In this regard, it is also alleged that VA officials conspired to conceal from the plaintiff the deleterious effects of exposure and have actively misrepresented the extent of the risks of exposure.

Fourth, unspecified constitutional torts are alleged to have been committed by the named VA officials.

Fifth, the "individual defendant bureaucrats" are claimed to have conspired to disseminate false and misleading information to persuade individuals not to assert their rights and pursue their legal remedies against the war contractors and the United States.

Finally, the defendants are alleged to have conspired to overmedicate Vietnam combat veterans with psychotropic drugs and to ignore symptoms of serious diseases being experienced by the plaintiffs.

Among the reliefs sought is a declaration that the defendants have a fiduciary obligation to notify the plaintiffs of the dangerous properties of the chemicals to which they were exposed. Also sought are an order compelling the United States to join (as plaintiff) in the lawsuit against the chemical manufacturers or, alternatively, declare that the plaintiffs may proceed as private attorneys general against the chemical manufacturers to seek reimbursement for the cost of providing care and compensation to the afflicted veterans. Other forms of declaratory and injunctive relief are also demanded. Similar complaints have been filed across the country and have been consolidated for pretrial procedures and motion under the multi-district litigation procedure.

The United States responded to the complaint by filing a motion to dismiss. Action on the motion is currently pending.

In White v. Cleland, the plaintiffs allege certain violations of the Administrative Procedure Act by the VA with regard to the issuance of an internal instruction document relating to the processing of disability claims involving exposure to herbicides (particularly Agent Orange) during the Vietnam conflict without soliciting public comment. The plaintiffs have argued that the document, identified internally as a Program Guide, sets forth rules concerning the handling of Agent Orange

compensation claims. Consequently, it is argued, the VA violated the requirements of the Administrative Procedure Act (5 U.S.C. §§552 and 553) regarding rule making, particularly with respect to providing the public with an opportunity to comment on the content of the Program Guide.

The Veterans Administration has taken the position that the Program Guide is not regulatory but rather informative and educational. As such, it is argued, it is not required to submit the Program Guide for public comment prior to the distribution to the field for guidance. The Program Guide is characterized as informational, designed to inform agency employees of the existing state of factual knowledge and, to a lesser degree, the state of the law. Cross motions for summary judgment have been filed and action is pending on it.

In a related case, Gott v. Cleland, 80-0906, D.D.C., Sept. 30, 1981, a similar Program Guide concerning the handling of radiation-related cases has been found to be in the nature of a rule or regulation, and, as such, subject to the requirements of the APA mandating notice and an opportunity for public comment. In this case, the VA had published the contents of the Guide for public notice, but not for public comment. The district court concluded that the failure to solicit public comment violated the APA and, therefore, invalidated its use as regulations. This case is currently under appeal.

Plaintiffs filed a motion to amend the judgment to include an order requiring the VA to readjudicate claims which had been denied while the Program Guide had been in use. This motion was successfully opposed.

FREDERIC L. CONWAY
Special Assistant to
the General Counsel

In re "Agent Orange" Product Liability Litigation, M.D.L. 381.

The district court issued a series of pretrial orders and decisions in this litigation between the plaintiff veterans and the defendant chemical manufacturers. The most significant ruling came in response to the defendant's motion for summary judgment based on what has been termed the "Government contract defense." They argued that liability may not be imposed upon them for injuries arising out of the Government's use of "Agent Orange," ("Agent Orange" denotes all herbicides used in Southeast Asia during the relevant period of the Vietnam conflict) because the defendants had manufactured "Agent Orange" under contract with the United States Government and in strict compliance with its specifications.

The court, upon consideration of the arguments raised by the parties to the litigation, set forth three elements which, if proved by the defendants, would insulate them from liability. First, it must be demonstrated that the Government established the specifications for "Agent Orange". Second, it must be shown that the "Agent Orange" manufactured by the defendants meet the Government's specifications in all material respects. Finally, the defendants must prove that the Government knew as much as or more than the defendants about the hazards of the product being purchased.

This last element would not impose a duty on the supplier to perform any testing that was not included in the specifications but it would require the supplier to share with the Government any information it had about the hazards of the herbicides being purchased. If the knowledge level between the defendant suppliers and the Government is at least in balance, the defendants are then shielded by the Government contract defense from liability for damages resulting from use of the herbicides supplied pursuant to and in compliance with Government contract specifications.

This case will now enter into a process of "intensive discovery" in preparation for phase one of this litigation, a trial on the Government contract defense.

Ryan v. Cleland, Civ. No. 81-0055 (E.D. N.Y.)

The district court ruled favorably on the Government's motion to dismiss this action which was based on a series of allegations against the VA and certain named officials. The court, in granting the Government's motion, stated that the action fell within 38 U.S.C. §211(a) which bars judicial review of the VA's interpretation or application of a particular VA statute in the absence of a valid constitutional claim. The plaintiffs had attempted to plead a variety of constitutional violations which the court did not accept. The court also rejected the Federal Tort Claims Act (FTCA) as a jurisdictional basis because the FTCA provides relief only in the form of monetary damages and the plaintiffs were seeking declaratory and injunctive relief.