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(Argued April 9, 1986 Decided)

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85-6381, 85-6385, 85-6387, 85-6393, 85-6395, 85-6411.

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

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.

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

14 SHERMAN L. COHN, Washington, D.C.;
15 ROBERT A. TAYLOR, JR., Washington,
16 D.C.; RICHARD L. STEAGALL, Peoria,
17 Illinois; BENTON MUSSLEWHITE, Houston,
18 Texas; AVRAM G. ADLER, Philadelphia,
19 Pennsylvania; FRANCIS KELLY,
20 Philadelphia, Pennsylvania (Ashcraft
21 & Gerel, Washington, D.C.; Nicoara &
22 Steagall, Peoria, Illinois; Adler &
23 Kops, Philadelphia, Pennsylvania;
24 James H. Brannon, Jamison & Brannon,
25 Houston, Texas; Joel Rome, Rome &
26 Glaberson, Philadelphia, Pennsylvania;
 Marlene Penny Maynes, Cincinnati,
 Ohio; Richard D. Heidemen,
 Louisville, Kentucky; Stephen L.
 Toney, Werner, Beyer, Lindgren &
 Toney, New London, Wisconsin; Richard
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 Barber, Dallas, Texas; William Beatty,
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 McKnight, Brunswick, Georgia; Richard
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 Minnesota; James H. Davis, Los
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 Yoffey, Newport News, Virginia;
 Richard L. Powell, Augusta, Georgia;

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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 O. 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.

JOHN C. SABETTA, Townley & Updike, New York, New York, for Appellee Monsanto Company.

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

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

Kelley 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 Uniroval, Inc.

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

LAWRENCE G. SAGER, New York, New York; STEPHEN J. SCHLEGEL, Chicago, Illinois (Irving Like, Reilly, Like & Schneider, Babylon, New York; Edward F. Hayes, III, Abruzzo, Clancy & Hayes, Huntington, New York; Clayton P. Gillette, Boston, Massachusetts; Thomas W. Henderson, Henderson & Goldberg, Pittsburgh, Pennsylvania; David J. Dean, Dean, Falanga & Rose, Carle Place, New York; Gene Locks, Greitzer & Locks, Philadelphia, Pennsylvania; Stanley M. Chesley, Waite, Schneider, Bayless & Chesley, Cincinnati, Ohio; Newton B. Schwartz, Houston, Texas; Phillip E. Brown, Hoberg, Finger, Brown, Cox & Molligan, San Francisco, California; John O'Quinn, O'Quinn & Hagans, Houston, Texas, of counsel), for Appellee Plaintiffs' Management Committee.

1 WINTER, Circuit Judge:

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

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

7 I. OVERVIEW AND SUMMARY OF RULINGS

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

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

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

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

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

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

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

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

1 significance of these studies when **compared** with studies of the
2 veterans themselves.

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

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

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

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

25 Finally, doubt about the strength of the **plaintiffs'** claims
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1 exists because of the so-called military contractor defense. The
2 chemical companies sold Agent Orange to the United States
3 government, which used it in waging war against **enemy** forces
4 seeking control of South Vietnam. It would be anomalous for a
5 company to be held **liable by** a state or federal court for selling
6 a product ordered by the federal government, particularly when
7 the company could not control the use of that product. Moreover,
8 military activities involve high stakes, and common concepts of
9 risk averseness are of no relevance. To expose private **companies**
10 generally to lawsuits for injuries arising out of the
11 deliberately risky activities of the military would greatly
12 impair the procurement process and perhaps national security
13 **itself.**

14 An illustration of the many factual and legal difficulties
15 facing the plaintiffs is the dispute among their counsel as to
16 how many "serious" or "strong" claims there are. The Plaintiffs'
17 Management **Committee** ("PMC") estimates a much smaller number than
18 do counsel for the class members who object to the settlement.
19 Neither group has hard evidence to support its estimates. If by
20 "serious" or "strong" one means a case likely to prevail on
21 liability and to result in a substantial **damage** award, then we
22 believe that **every** plaintiff would encounter difficulties in
23 proving causation and even graver problems in overcoming the
24 military contractor defense. If a case is considered "serious"
25 or "strong" because the plaintiff has grave ailments or has died,
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1 then such cases do exist, **although** their numbers **remain** in doubt.
2 What is not in doubt is that the widespread publicity given
3 **allegations** about Agent Orange have led to an **enormous** number of
4 **claims** alleging a large variety of highly common **ailments**. The
5 illnesses claimants now attribute to Agent Orange include not
6 only heart disease, cancer, **and** birth defects, but also
7 confusion, fatigue, anxiety, and spotty tanning.

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

18 The class **certification** and settlement caused the number of
19 claimants and the variety of ailments attributed to Agent Orange
20 to climb dramatically. It also has caused disunity among the
21 plaintiffs and increased the **controversy** surrounding this case.
22 Correspondence to this court indicates that many of the original
23 **plaintiffs**, most of whom joined the motions for class
24 **certification**, were never advised that use of the class action
25 device might lead to their being represented by counsel whom they
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1 did not select and who could settle the case without consulting
2 them. In the midst of this litigation, original class counsel,
3 Yannacone & Associates, asked to be relieved for financial
4 reasons. Control of the class action soon passed to the PMC.
5 Six of the nine members of the PMC advanced money for expenses at
6 a time when the plaintiffs' case, already weak on the law and the
7 facts, was near collapse for lack of resources. This money was
8 furnished under an agreement that provided that three times the
9 amount advanced by each lawyer would be repaid from an eventual
10 fee award. These payments would have priority, moreover, over
11 payments for legal work done on the case.

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

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

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

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

26 Many of the decisions of the district court were appealed,

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

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

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

1 II. DETAILED HISTORY OF PROCEEDINGS

2 1) Early Proceedings

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

14 Although various herbicides were used during the war, Agent
15 Orange was thought to be best suited for the military's purposes
16 and was used most frequently. Agent Orange was a mixture of the
17 herbicides known as 2,4-D and 2,4,5-T.¹ The manufacture of
18 2,4,5-T is said inevitably to result in the production of dioxin,
19 which is alleged to be a highly toxic substance. Whether the
20 trace **elements** of dioxin in Agent Orange were hazardous to
21 persons in sprayed areas is sharply disputed. **Indeed**, the
22 toxicity of dioxin itself remains a controversial issue. See
23 generally P. Schuck, Agent Orange on Trial 16-24 (1986);
24 M. Gough, Dioxin, Agent Orange (1986).

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

1 deceased, in Supreme Court, New York County. The defendants were
2 several chemical companies **alleged** to have manufactured Agent
3 Orange. That case was removed to federal court and then
4 transferred to the **Eastern** District of New York. On January 8,
5 **1979, Reutershan's** estate filed an amended complaint seeking
6 relief on behalf of a class of veterans and their families
7 injured by Agent Orange. Several other complaints alleging
8 similar class claims were filed in late 1978 and early 1979. In
9 March 1979, counsel for **Reutershan's** estate and for defendant Dow
10 Chemical Co. jointly petitioned pursuant to 28 U.S.C. § 1407(c)
11 (1982) for the establishment of a **multidistrict** litigation
12 proceeding. The Judicial Panel on Multidistrict Litigation
13 established In re "Agent Orange" Product Liability Litigation,
14 MDL No. 381, in the Eastern District of New York. The first
15 cases were transferred to the Eastern District on May 8, 1979,
16 and nearly 600 cases have since been transferred. MDL No. 381
17 was assigned to then District Judge Pratt.

18 The third amended class complaint in the case designated by
19 the court as the lead action alleged federal question
20 jurisdiction under the "common law and/or the **statutory** laws of
21 the United States." **Defendants** moved to dismiss this complaint
22 for want of subject matter **jurisdiction**. Judge Pratt adopted the
23 federal common law theory and accordingly denied the motion. In
24 re "Agent Orange" Product Liability Litigation, 506 F. Supp. 737,
25 743-49 (E.D.N.Y. 1979). However, a divided panel of this court
26 reversed. In re "Agent Orange" Product Liability Litigation, 635

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

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

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

21 In re "Agent Orange" Product Liability Litigation, 506 F. Supp.
22 762, 795 (E.D.N.Y. 1980).

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

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

30 The elements of the defense will be uniquely
31 adapted to consideration and **adjudication**,
32 separate and apart from the issues of liability,

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

4 Id.

5 In addition, Judge Pratt stated his intention to certify a
6 class pursuant to Fed. R. Civ. P. 23(b)(3) of "persons who claim
7 injury from exposure to Agent Orange and their spouses, children
8 and parents who claim direct or derivative injury therefrom."

9 Id. at 788. He noted that "it may later prove advantageous to
10 create subclasses for various purposes." Id. Judge Pratt
11 rejected plaintiffs' request for certification of a "limited
12 fund" class action pursuant to Fed. R. Civ. P. 23(b)(1)(B), on
13 the ground that plaintiffs had failed to offer evidence that the
14 defendants were likely to become insolvent if held liable for
15 plaintiffs' injuries. Id. at 789-90.

16 Following eleven months of discovery, defendants Hercules,
17 Thompson Chemical, Riverdale Chemical, Hoffman-Taft, Dow
18 Chemical, TH Agriculture and Nutrition, and Uniroyal again moved
19 for summary judgment on the military contractor defense.
20 Defendants Monsanto and Diamond Shamrock did not join in the
21 motion. Judge Pratt granted summary judgment to Hercules,
22 Thompson Chemical, Riverdale Chemical, and Hoffman-Taft, but
23 denied the motions of Dow Chemical, TH Agriculture and Nutrition,
24 and Uniroyal. In re "Agent Orange" Product Liability Litigation,
25 565 F. Supp. 1263 (E.D.N.Y. 1983). He also concluded that the
26 planned separate trial on the military contractor defense was not

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

7 In 1980, Yannacone & Associates, a consortium of lawyers who
8 banded together for purposes of this litigation, was designated
9 lead counsel for the representatives of the plaintiff class. See
10 506 F. Supp. at 788 n.32. In 1983, the firm of Ashcraft & Gerel
11 and attorneys Benton Musslewhite, Steven Schlegel, and Thomas
12 Henderson joined Yannacone & Associates as lead counsel for the
13 representatives of the class. In September 1983, Yannacone &
14 Associates moved to be relieved of its duties as class counsel,
15 citing an inability to bear the costs associated with the
16 litigation. This motion was granted. Ashcraft & Gerel sought to
17 gain control of the case but failed to do so and withdrew as
18 class counsel. As we describe infra, Musslewhite, Schlegel, and
19 Henderson then recruited additional attorneys to the PMC. See
20 generally Schuck, Agent Orange on Trial at 73-77, 94-95, 102-110.
21 Although not a member of the PMC, Ashcraft & Gerel has continued
22 to represent plaintiffs who have opted out of the class action,
23 certain civilian plaintiffs, and certain class members who object
24 to the settlement.

25 2) Class Certification

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

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

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

17 In re "Agent Orange" Product Liability Litigation, 100 F.R.D.
18 718, 724 (E.D.N.Y. 1983) ("Class Certification Opinion").

19 Chief Judge Weinstein defined the plaintiff class as

20 those persons who were in the United
21 States, New Zealand or Australian
22 Armed Forces at any time from 1961
23 to 1972 who were injured while in or
24 near Vietnam by exposure to Agent
25 Orange or other phenoxy herbicides,
26 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.

27 Id. at 729.

28 In addition, Chief Judge Weinstein certified a Rule
29 23(b)(1)(B) mandatory class on the issue of punitive damages,
30 though not on the ground, previously rejected by Judge Pratt,

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

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

15 100 F.R.D. at 728.

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

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

1 **Administration** "Agent Orange Registry";

2 (2) **Announcements** were to be sent to the major radio and
3 television networks, and to radio stations with a combined
4 coverage of at least one half of the audience in each of the top
5 100 radio markets;

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

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

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

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

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

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

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

18 3) The Settlement

19 In April 1984, Chief Judge Weinstein appointed three special
20 masters - Leonard Garment, Kenneth Feinberg, and David Shapiro
21 -- to assist in negotiations over a settlement of the class
22 action. These negotiations intensified during the weekend before
23 trial. See Schuck, Agent Orange on Trial at 49-66. On May 7,
24 1984, the day the trial was to have begun, the class
25 representatives and the chemical companies agreed to settle the
26

1 class claims for \$180 million. Thereafter, Chief Judge Weinstein
2 conducted eleven days of hearings on the proposed settlement in
3 New York, Atlanta, Houston, Chicago, and San Francisco. At these
4 hearings, nearly 500 witnesses addressed the fairness of the
5 settlement. Chief Judge Weinstein also considered "hundreds of
6 written communications from veterans, members of their families,
7 veterans' organizations and others . . . and read a large part of
8 the relevant literature, taking judicial notice of its
9 substance." In re "Agent Orange" Product Liability Litigation,
10 597 F. Supp. 740, 748 (E.D.N.Y. 1984) ("Settlement Opinion").

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

20 In a lengthy opinion, reported at 597 F. Supp. 740 (E.D.N.Y.
21 1984), Chief Judge Weinstein approved the settlement subject to
22 hearings on counsel fees and preliminary consideration of plans
23 for distribution of the settlement proceeds. Various members of
24 the class appeal from the approval of the settlement on the
25 ground that the \$180 million award is inadequate.
26

1 4) Counsel Fees

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

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

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

9 As noted, the PMC agreement required a trebled return of
10 funds advanced off the top of any fees awarded by the court.
11 Some PMC members therefore stood to receive enormously greater
12 fees than they were awarded by the court, while others stood to
13 receive substantially less. For example, David J. Dean, who was
14 to have served as lead trial counsel and was awarded \$1,424,283
15 in fees by the district court, would receive only \$542,310 under
16 the fee-sharing agreement. In contrast, Newton Schwartz, who was
17 awarded only \$41,886 by the district court, would receive
18 \$513,026 under the agreement.

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

1 5) Distribution of the Settlement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 The court offered a number of examples of the sorts of
9 programs for which the foundation might provide financial
10 support. The projects that might be funded for children with
11 birth defects included "[p]rotection and advocacy services," "[a]
12 public hotline and referral service," "[g]rants to hospitals and
13 clinics," "insurance programs," "vocational training projects,"
14 "grants to establish peer support groups to enable children with
15 birth defects to discuss their problems openly among themselves,"
16 and "[g]rants or loans . . . to families in grave financial need
17 to help pay for essential medical services." Id. at 1438-39.

18 Other possibilities "for funding of classwide services"
19 enumerated by the court included projects to "help class member
20 veterans better obtain and utilize VA services and to monitor the
21 VA and other federal and state services to ensure that they are
22 responsive to the needs of the class," to "increase public
23 awareness of the problems of the class," to provide health
24 information and social service assistance to the class, and to
25 "help members of the class become a more integrated part of
26 society." Id. at 1440.

1 The foundation was to be administered by a board of
2 directors "comprised primarily of Vietnam veterans." Id. at
3 1434. The court would appoint the initial board of directors of
4 between 15 and 45 members, which would thereafter be
5 "self-governing and self-perpetuating." Id. at 1435. Subject
6 only to the general supervisory authority retained by the court,
7 the board would control "every aspect of foundation
8 administration," including "investment and budget decisions,
9 specific funding priorities, a detailed grant application
10 process, the actual grant awards, evaluation mechanisms, and
11 fundraising strategies." Id. The court would play "[a]
12 comparatively modest supervisory role in the operation of the
13 class assistance foundation," while retaining the power to
14 "supervise foundation operations actively and exercise control as
15 necessary to protect the interests of the class." Id. at 1436.

16 Chief Judge Weinstein reappointed Special Master Feinberg to
17 oversee the implementation of the distribution plan. Id. at
18 1400. **However**, no claimants were to receive payments and no
19 services were to be funded until the appellate process was
20 **completed.** Id. at 1451.

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

1 6) Dismissal of the Opt-Out Cases

2 After settling with the class, defendants moved on July 24,
3 1984, for summary judgment against the opt-outs. Chief Judge
4 Weinstein dismissed the opt-outs on the grounds that, inter alia,
5 no plaintiff was able as a matter of law to produce sufficient
6 evidence to allow a trier of fact to find that Agent Orange had
7 caused the particular ailment(s) from which he or she suffered.
8 In re "Agent Orange" Product Liability Litigation, 611 F. Supp.
9 1223, 1256-63 (E.D.N.Y. 1985) ("Opt-Out Opinion"). As a second,
10 independently dispositive ground, Chief Judge Weinstein held that
11 the military contractor defense precluded recovery. Id. at
12 1263-64. Certain opt-out plaintiffs appeal from those
13 decisions.

14 7) Proceedings Against the Government and Miscellaneous Actions

15 The first direct claim against the United States was
16 asserted by veterans who believed that they had been exposed to
17 Agent Orange. Ryan v. Cleland, 531 F. Supp. 724 (E.D.N.Y. 1982).
18 The plaintiffs alleged that the government and certain government
19 officials were liable under the Federal Tort Claims Act ("FTCA"),
20 28 U.S.C. § 1346(b) et seq. > for failing to warn them of the
21 possible dangers associated with exposure to Agent Orange and
22 neglecting to provide proper medical care for those who had been
23 injured by the herbicide. Judge Pratt held that the United
24 States was immune from suit under the FTCA on the failure-to-warn
25 claims because those claims were "incident to and arising out of"
26 the plaintiffs' military service and therefore fell within the

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

6 The government refused to participate in the negotiations
7 that culminated in the settlement of the class action. See
8 Settlement Opinion, 597 F. Supp. at 879 (letter from government
9 counsel to **court**). In the settlement agreement, the plaintiff
10 class and the defendant chemical manufacturers "expressly
11 reserve[d] all rights and claims which they "now have, or may at
12 any time be entitled to assert against the United States,
13 including its offices, departments, agencies, **representatives**,
14 agents and employees." Settlement Agreement ¶ 11, id. at 865.
15 Veterans and their families renewed their efforts to obtain
16 relief from the government following the settlement. In July
17 1984, an Eighth Amended **Complaint** was filed on behalf of a number
18 of named plaintiffs (the "Aguiar plaintiffs") and a proposed
19 plaintiff class composed of veterans who claimed injury from
20 exposure to Agent Orange and their spouses, parents, and
21 children. In an attempt to circumvent the Feres doctrine, the
22 **complaint** alleged that the government and certain government
23 officials had engaged in negligent and intentionally tortious
24 conduct that occurred before, during, and after the veterans'
25 military service.

26

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

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

1 be exercised in favor of an infant who lacks evidence to support
2 his or her claim but who may obtain such evidence in the future."
3 Id. at 247.²

4 In a related action, two former civilian employees of the
5 University of Hawaii and the widow of a third brought suit
6 against the United States, the manufacturers of Agent Orange, and
7 the former Regents of the University for injuries allegedly
8 sustained during Agent Orange experiments at the University in
9 1967. In re "Agent Orange" Product Liability Litigation
10 (Fratlicelli v. Dow Chemical Co.), 611 F. Supp. 1285 (E.D.N.Y.
11 1985). Chief Judge Weinstein denied **certification** of a proposed
12 plaintiff class consisting of 35,000 unnamed residents of Kauai
13 County, Hawaii. He reasoned that the named plaintiffs had failed
14 to demonstrate that they shared a **common** interest with the
15 remainder of the proposed class. Id. at 1288. Chief Judge
16 Weinstein then disposed of the individual **plaintiffs'** claims
17 against each of the defendants. He dismissed the claims against
18 the **chemical** manufacturers and the former **Regents**, with the
19 exception of the **widow's** wrongful death **claim**, as barred by
20 **Hawaii's** two-year statute of limitations for personal injury
21 actions. Id. at 1288-89. He also dismissed the claims against
22 the former Regents on the ground that **Hawaii's workers'**
23 compensation statute provides the exclusive remedy against an
24 employer for work-related injuries. Id. at 1289. Finally, he
25 granted summary judgment in favor of all defendants, having found
26 "no admissible evidence that Agent Orange caused plaintiffs'

1 illnesses." Id. An appeal has been taken.

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

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

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

14 III. CLASS MEMBERS' OBJECTIONS 15 TO THE SETTLEMENT

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

18 1) Subject Matter Jurisdiction

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

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

6 Although we understand the need to preserve issues for
7 further review, we confess a certain surprise at the vigor with
8 which this argument was pressed in this court and the amount of
9 time that was devoted to it at oral argument. It is hornbook
10 law, based on 66 years of Supreme Court precedent, that **complete**
11 diversity is required only between the named plaintiffs and the
12 named defendants in a federal class action. 13B C. Wright,
13 A. Miller & E. Cooper, Federal Practice and Procedure § 3606, at
14 424 (2d ed. 1986) ("[t]he courts look only to the citizenship of
15 the representative parties in a class action"). As the Supreme
16 Court noted in Snyder v. Harris, 394 U.S. 332 (1969):

17 Under current doctrine, if one member
18 of a class is of diverse citizenship
19 from the **class'** opponent, and no
20 nondiverse members are named parties,
21 the suit may be brought in federal
22 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).

23 394 U.S. at 340. See also United States ex rel. Sero v. Preiser,
24 506 F.2d 1115, 1129 (2d Cir. 1974), cert. denied, 421 U.S. 921
25 (1975). Thus, if appellants' theory of class action jurisdiction
26

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

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

9 Both Hooker Chemical and Riverdale Chemical effectively
10 ceased to be parties to the case before the filing of the final
11 amended class complaint against the Agent Orange **manufacturers.**
12 Hooker was granted summary judgment in February 1982, on the
13 ground that it did not manufacture Agent Orange. In re "Agent
14 Orange" Product Liability Litigation, 534 F. Supp. 1046, 1052
15 (E.D.N.Y. 1982). Riverdale's unopposed motion for summary
16 judgment was granted in May 1983. See In re "Agent Orange"
17 Product Liability Litigation, 565 F. Supp. 1263, 1272 (E.D.N.Y.
18 1983).

19 Appellants argue that because no Rule 54(b)³ certification
20 of dismissal was issued as to either Hooker or Riverdale, both
21 defendants remain in the case for purposes of determining
22 diversity jurisdiction. We believe that their view misconstrues
23 Rule 54(b). The Supreme Court has noted that the "obvious
24 purpose" of Rule 54(b) is to provide "an opportunity for
25 litigants to obtain from the District Court a clear statement of
26

1 what that court is intending with reference to finality, and if
2 such a direction is denied, the litigant can at least protect
3 himself accordingly." Dickinson v. Petroleum Conversion Corp.,
4 338 U.S. 507, 512 (1950). Because the purpose of the rule is
5 thus only to clarify the appealability of an order, a dismissed
6 defendant who fails to obtain a Rule 54(b) certification does not
7 remain a party to the case for purposes of determining
8 diversity.

9 Appellants' allegation regarding the citizenship of Diamond
10 Shamrock is equally meritless. At the time the action was
11 initiated against Diamond Shamrock, its principal place of
12 business was in Ohio. The fact that it has since moved to Texas,
13 the domicile of named plaintiff Dan Jordan, is irrelevant for
14 diversity purposes. See Smith v. Sperling, 354 U.S. 91, 93 n.1
15 (1957) ("jurisdiction, once attached, is not impaired by a
16 party's later change of domicile"). Thus, all of appellants'
17 claims that diversity of citizenship is lacking are without
18 merit.

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

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

16 2) In Personam Jurisdiction

17 Appellants contend that the district court was barred by the
18 due process clause of the fifth amendment from exercising
19 personal jurisdiction over class members who lack sufficient
20 contacts with New York as defined in International Shoe Co. v.
21 Washington, 326 U.S. 310 (1945), and its progeny. However,
22 appellants concede, as they must, that Congress may, consistent
23 with the due process clause, enact legislation authorizing the
24 federal courts to exercise nationwide personal jurisdiction. See
25 Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 442
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1 (1946) ("Congress could provide for service of process anywhere
2 in the United States"). One such piece of legislation is 28
3 U.S.C. § 1407 (1982), the raultidistrict litigation statute. In
4 the instant case, the district court was acting pursuant to a
5 valid transfer order of the Judicial Panel on **Multidistrict**
6 Litigation that was created by that statute. As the Panel has
7 **recognized,**

8 Transfers under Section 1407 are simply
9 not encumbered by considerations of in
10 **personam** jurisdiction and venue. . . .
11 Following a transfer, the transferee
12 judge has all the jurisdiction and powers
13 over pretrial proceedings in the actions
14 **transferred** to him that the transferor
15 judge would have had in the absence of
16 **transfer.**

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

23 3) Class Certification

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

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

14 Rule 23(a) states:

15 One or more members of a class may sue
16 or be sued as representative parties
17 on behalf of all only if (1) the class
18 is so numerous that joinder of all
19 members is **impracticable**, (2) there are
20 questions of law or fact common to the
21 class, (3) the claims or defenses of the
22 representative parties are typical of
23 the claims or defenses of the **class**, and
24 (4) the representative parties will fairly
25 and adequately protect the interests of
26 the class.

21 Existence of the first prerequisite in this case is
22 undisputed. Whether there are problems regarding typicality and
23 adequacy of representation depends upon the nature of the
24 questions of law or fact common to the **class**. Our view of the
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1 existence of the third and fourth prerequisites is thus
2 influenced by our view of the second.

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

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

12 The comment to Rule 23(b)(3) explicitly cautions against use of
13 the class action device in mass tort cases. See Advisory
14 Committee Note to 1966 Revision of Rule 23(b)(3) ("A '**mass**
15 **accident**' resulting in injuries to numerous persons is ordinarily
16 not appropriate for a class action because of the likelihood that
17 significant **questions**, not only of damages but of liability and
18 defenses of liability, would be present, affecting the
19 individuals in different **ways**"). Moreover, most courts have
20 denied **certification** in those **circumstances**. See, e.g., In re
21 Northern Dist. of Cal. Dalkon Shield IUD Products Liability
22 Litigation, 693 F.2d 847 (9th Cir. 1982), **cert. denied**, 459 U.S.
23 1171 (1983); Payton v. Abbott Labs, 100 F.R.D. 336 (D. Mass.
24 1983); Yandle v. PPG Industries, Inc., 65 F.R.D. 566 (E.D. Tex.
25 1974); Boring v. Medusa Portland Cement Co., 63 F.R.D. 78, 83-85
26 (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

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

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

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

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

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

1 decided that there were **common** questions of law because he
2 predicted that each court faced with an Agent Orange case would
3 resort to a national consensus of product liability law. Chief
4 Judge **Weinstein's** analysis of the choice of law issues in this
5 action, see In re "Agent Orange" Product **Liability** Litigation,
6 580 F. Supp. 690 (E.D.N.Y. 1984), with which we assume
7 familiarity, is bold and imaginative. However, in light of our
8 prior holding that federal common law does not govern plaintiffs'
9 claims, every jurisdiction would be free to render its own choice
10 of law decision, and common experience suggests that the
11 intellectual power of Chief Judge Weinstein's analysis alone
12 would not be enough to prevent widespread **disagreement**.

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

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

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

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

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

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

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

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

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

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

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

21 In our view, **class certification** was justified under Rule
22 23(b)(3) due to the centrality of the military contractor
23 defense. First, this defense is common to all of the **plaintiffs'**
24 cases, and thus satisfies the commonality requirement of Rule
25 23(a)(2). See Port Authority Police Benevolent Ass'n v. Port

1 Authority of New York & New Jersey, 698 F.2d 150, 154 (2d Cir.
2 1983) ("Since plaintiff has satisfied the requirement of a
3 common question of law or fact, Rule 23(a)(2), the denial of
4 class **certification** must be **reversed**.") (emphasis added).

5 **Second**, because the **military** contractor defense is of central
6 importance in the instant matter for reasons explained in our
7 subsequent discussion of the fairness of the settlement and in
8 our separate opinion affirming the grant of summary judgment
9 against the opt-outs, this issue is governed by federal law, and
10 a class trial in a federal court is a method of **adjudication**
11 superior to the **alternatives**. Fed R. Civ. P. 23(b)(3). If the
12 defense succeeds, the entire litigation is disposed of. If it
13 fails, it will not be an issue in the subsequent individual
14 trials. In that event, moreover, the ground for its rejection,
15 such as a failure to warn the government of a known **hazard**, might
16 well be dispositive of relevant factual issues in those trials.

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

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

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

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

21 **4) Adequacy of the Notice of the Class Action**

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

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

3 Appellants argue that both the notice required by the
4 district court, see Class Certification Opinion, 100 F.R.D. at
5 729-34, and the notice actually given were insufficient to inform
6 the class members of their rights, most importantly their right
7 to opt out. They contend therefore that the notice failed to
8 meet the requirements of due process and Rule 23(c)(2) and seek
9 an additional notification period as well as an additional
10 opt-out period.

11 The portion of the order that dealt with notice, set out in
12 full in the appendix, adopted a creative approach appropriate to
13 this unique case. It required that letter notice be sent to the
14 92,275 veterans listed in the Agent Orange Registry established
15 by the Veterans' Administration in 1978 to identify potential
16 victims as well as to the 11,256 persons who had filed or
17 intervened in lawsuits or had counsel affiliated with the PMC.
18 The court concluded that these were the only class members who
19 could be identified and located through reasonable effort. Id.
20 at 729-31. The court also required various forms of substitute
21 notice, including announcements in various **servicepersons'** and
22 national publications and on radio and television. In addition,
23 the court directed that a letter be sent to every governor
24 requesting that notice of the lawsuit be provided to any state
25 agencies that might have lists of veterans.

26

1 Rule 23, of course, accords considerable discretion to a
2 district court in fashioning notice to a class, see Reiter v.
3 Sonotone Corp., 442 U.S. 330, 345 (1979), and our standard of
4 review is "the familiar one of whether the District Court was
5 'clearly erroneous' in its factual findings and whether it
6 'abused' its traditional discretion." Albemarle Paper Co. v.
7 Moody. 422 U.S. 405, 424 (1975) (discussing "abuse of discretion"
8 standard in award of back pay under Title VII of Civil Rights Act
9 of 1964). See generally Anderson v. Bessemer City, 470 U.S. 564,
10 573-76 (1985) (elaborating on "clearly erroneous" standard).

11 Rule 23(c)(2) requires only that members of a Rule 23(b)(3)
12 class be given "the best notice practicable under the
13 circumstances, including individual notice to all members who can
14 be identified through reasonable effort." Relying principally
15 upon Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306
16 (1950), appellants nonetheless contend that actual notice to each
17 and every class member was essential. We disagree.

18 In Mullane, the Supreme Court held that notice by
19 publication of pending settlements of accounts was
20 constitutionally sufficient as to trust beneficiaries whose names
21 and addresses were unknown to the trustee. Noting the state's
22 interest "in bringing any issues as to its fiduciaries to a final
23 settlement," id. at 313, and the beneficiary's interest in being
24 apprised of the pendency of settlements in order to "choose for
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1 himself whether to appear or **default**, acquiesce or contest," id.
2 at 314, the Court concluded that notice by publication was
3 permissible as to persons whose whereabouts or interests could
4 not be **determined** through due diligence or whose interests were
5 either conjectural or future. Id. at 317-18. It noted that
6 where the performance of a trustee was the issue, the interests
7 of unknown **beneficiaries** were likely to be protected by the known
8 and notified **beneficiaries**, who had to be provided with mailed
9 notice. The Court **stated**:

10 This type of trust presupposes a large
11 number of small interests. The indi-
12 vidual interest does not stand alone but
13 is identical with that of a class. The
14 rights of each in the integrity of the
15 fund and the fidelity of the trustee
16 are shared by many other **beneficiaries**.
17 Therefore notice reasonably certain to
18 reach most of those interested in
19 objecting is likely to safeguard the
20 interests of all, since any objection
21 sustained would inure to the benefit of
22 all. We think that under such
23 circumstances reasonable risks that
24 notice might not actually reach every
25 beneficiary are justifiable.

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

22 It is true that the claims of the plaintiffs are highly
23 individualistic in a number of respects. The interests of all of
24 the plaintiffs are **identical**, however, with regard to the facts
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1 and the law **relevant** to the military contractor defense. The
2 class members with actual notice therefore would have represented
3 the interests of the class members unaware of the action.

4 Moreover, Chief Judge **Weinstein** found that many of the
5 members of the class were unknown and could not be located
6 through reasonable efforts. That conclusion is a finding of
7 fact, and must be accepted unless clearly **erroneous**. In re
8 Franklin National Bank Securities Litigation, 599 F.2d 1109,
9 1110-11 (2d Cir. 1979). We cannot agree with appellants that all
10 2.4 million Vietnam veterans should have been sent letter notice.
11 First, it is undisputed that far fewer than that number were
12 exposed to Agent Orange. A requirement that notice be given to
13 all Vietnam veterans would thus have been considerably overbroad.
14 **Second**, there is no assurance that such a list could have been
15 compiled through reasonable efforts. Appellants claim that some
16 records kept by the government would have facilitated
17 individualized notice. They concede, however, that there was no
18 easily accessible list of veterans, as there must have been of
19 royalty holders in Phillips Petroleum Co. v. Shutts, 472 U.S. 797
20 (1985), and of odd-lot trading customers in Eisen v. Carlisle &
21 Jacquelin, 417 U.S. 156 (1974). We cannot find, therefore, that
22 such a comprehensive list could reasonably have been compiled.

23 We also note that the second phase of the plan enlisted the
24 aid of the mass media and state governments, an effort that
25 ultimately resulted in letter notice to 20,000 class members in
26

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

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

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

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

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

15 5) Adequacy of Post-Settlement Procedures

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

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

6 Appellants also challenge the validity of the notice of
7 settlement sent to class members. They allege, inter alia, that
8 the notice was defective because it failed to detail a
9 distribution plan. There is, however, no absolute requirement
10 that such a plan be formulated prior to notification of the
11 class. See In re Corrugated Container Antitrust Litigation, 643
12 F.2d 195, 223-24 (5th Cir. 1981), cert. denied, 456 U.S. 998
13 (1982).

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

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

9 6) Adequacy of the Settlement

10 As required by Fed. R. Civ. P, 23(e), Chief Judge Weinetein
11 carefully reviewed the proposed settlement, and gave his approval
12 subject to hearings on **attorneys'** fees and approval of a
13 settlement fund distribution plan. See Settlement Opinion,
14 597 F. Supp. 740 (E.D.N.Y. 1984). He **stated:**

15 The court has been deeply moved by
16 its contact with members of the **plaintiffs'**
17 class from all over the nation and
18 abroad. Many do deserve **better** of their
19 country. Had this court the power to
20 rectify past wrongs -- actual or
21 perceived -- it would do **so**. But no
22 single litigation can lift all of
23 plaintiffs' **burdens**. The legislative
24 and executive branches of government --
25 state and federal -- and the Veterans
26 **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'

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

12 Id. at 747.

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

26 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

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

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

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

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

3 Nevertheless, tort law accords juries wide discretion, and
4 the existence of any substantial number of serious plaintiffs
5 would create a dangerous exposure for the chemical companies. It
6 is true that \$180 million is a lot of money. If even a small
7 number of plaintiffs had gone on to prevail at trial, however,
8 the actual exposure of the chemical companies might well have
9 been measured instead in the billions of dollars. Jury verdicts
10 of several million dollars for disabling ailments or injuries to
11 children are not uncommon. If, in the present litigation, each
12 serious claim had a settlement value of \$500,000, the \$180
13 million would cover only 360 plaintiffs. Indeed, the \$180
14 million is at best only a small multiple of, at worst less than,
15 the fees the chemical companies would have had to pay to their
16 lawyers had they continued the litigation. However large a sum
17 \$180 million may be, therefore, we must conclude that in the
18 circumstances it was essentially a settlement at nuisance value.

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

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

1 population generally and have known and unknown causes other than
2 exposure to dioxin. Id. at 782-83. Studies based on industrial
3 accidents and experiments with animals suggest that exposure to
4 dioxin may cause various of those ailments. Id. at 780.

5 However, these studies involve **different** dosages and different
6 species than are involved in this litigation. Studies of **Vietnam**
7 veterans themselves fail to demonstrate ailments occurring among
8 them at a statistically abnormal rate. See id. at 787-88. The
9 weight of present scientific evidence thus does not establish
10 that personnel serving in Vietnam were injured by Agent Orange.

11 See III Review of Literature on Herbicides, Including Phenoxy
12 Herbicides and Associated Dioxins, II-8 to II-10 (1984) (Joint
13 Appendix Vol. XIII at 5828-29).

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

24 Such studies are, of course, not conclusive. The Ranch Hand
25 Study, for **example**, involved personnel who ate and slept at their
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1 home bases and were able to take regular **showers**, whereas the
2 plaintiffs were predominantly infantry alleging exposure to Agent
3 Orange through spraying or ingestion of local food and water.
4 Id. at 788. Although it is by no means clear that the plaintiffs
5 suffered greater exposure than did the Air Force personnel who
6 actually handled the herbicide, the circumstances of exposure
7 were clearly different. There **are**, moreover, some inconclusive
8 anomalies in the Ranch Hand findings. Id.

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

24 At bottom, the individual **veterans'** cases would consist of
25 oral **testimony** that each had been in an area where Agent Orange
26

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

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

1 611 F. Supp. at 1236, 1238. Also, some of the expert opinions as
2 to individual causation were often highly tentative or subject to
3 **impeachment**. See **Lilley v. Dow Chemical Co.**, 611 F. Supp. at
4 1273; Opt-Out Opinion, 611 F. Supp. at 1236-38, 1252-54,
5 1265-66.

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

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

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

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

1 approving the settlement, 597 F. Supp. 740, 800-816 (E.D.N.Y.
2 1984), and we have little to add to that discussion other than to
3 express skepticism that all plaintiffs would overcome the defense
4 that their claims were time barred.

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

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

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

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

Affirmed.

1 FOOTNOTES

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3 1/ "2,4-D" and "2,4,5-T" are the abbreviated names of
4 2,4-Dichlorophenoxyacetic acid and 2,4,5-Trichlorophenoxyacetic
5 acid, respectively.
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7 2/ A complaint essentially equivalent to the Eighth Amended
8 Complaint was subsequently filed on behalf of a second group of
9 plaintiffs (the "Adams plaintiffs") in the Southern District of
10 Texas and transferred to the Eastern District of New York. * On
11 June 19, 1986, Chief Judge Weinstein disposed of this action in
12 the same manner as he had disposed of the earlier action against
13 the government. The dismissal of the **veterans'** claims has been
14 appealed in both actions; however, the summary judgment on the
15 wives' direct claims has been appealed only in the later action.
16

17 3/ Fed. R. Civ. P. 54(b) provides:

18 When more than one claim for relief is
19 presented in an action, whether as a
20 claim, **counterclaim**, cross-claim, or
21 third-party claim, or when multiple
22 parties are involved, the court may
23 direct the entry of a final **judgment**
24 as to one or more but fewer than all of
25 the claims or parties only upon an
26 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

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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

1 box shall be rented until further order of
2 the court. Plaintiffs' counsel shall on a
3 daily basis review the contents of the post
4 office box and prepare a listing of all
5 exclusion requests received, which shall be
6 available to the court and the parties for
7 inspection and **copying**, together with the
8 exclusion requests. **Plaintiffs'** counsel
9 shall send a copy of the notice and the
10 exclusion request form to each person who
11 writes to the Clerk of the Court requesting
12 them. Each day plaintiffs' counsel shall
13 transmit to the court and the parties
14 copies of any **communications** (other than
15 exclusion requests or requests for **forms**)
16 that are received at the post office box.
17 Plaintiffs' counsel shall maintain a
18 record, together with the **originals**, of
19 all mail returned as undelivered.

11 (e) **Plaintiffs'** counsel, at their own expense,
12 shall serve a radio and television announce-
13 ment notice in the **form** of Exhibit B on the
14 nationwide networks of the American Broad-
15 casting Company, the Columbia Broadcasting
16 System, the Mutual Broadcasting System, the
17 National Broadcasting Company, and the Public
18 Broadcasting and Television Networks and on
19 radio stations with a combined coverage of
20 at least 50 percent of the listener audience
21 in each of the top one hundred radio markets
22 in the United States within 50 days of this
23 Order.

18 Along with the radio and television notice
19 served upon the nationwide radio and tele-
20 vision broadcasting systems and radio
21 stations, **plaintiffs'** counsel shall request
22 that the notice be read as set forth in
23 Exhibit B without interruption or comment,
24 either alone or in conjunction with the
25 showing **on television** of the text of Exhibit
26 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.

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

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

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

24 (g) Plaintiffs' counsel shall, at their own
25 expense, obtain a toll-free "800" telephone
26 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 respon-
sibilities 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

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

13 * * *

14 Exhibit A

15 LEGAL NOTICE TO CLASS MEMBERS
16 OF PENDENCY OF CLASS ACTION

17 This notice is given to you pursuant to an
18 Order of the United States District Court
19 for the Eastern District of New York and
20 Rule 23(c)(2) of the Federal Rules of Civil
21 Procedure. It is to inform you of the
22 pendency of a class action in which you may
23 be a member of the class, and of how to
24 request exclusion from the class if you do
25 not wish to be a class member. None of the
26 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.

1 Plaintiffs include children asserting claims
2 in their own right for genetic injury and
3 birth defects caused by their parents'
4 exposure to "Agent Orange" and other phenoxy
5 herbicides. Wives of veterans exposed to
6 "Agent Orange" in Vietnam seek to recover
7 in their own right for miscarriages. Plain-
8 tiffs' theories of liability include
9 negligence, strict products liability, breach
10 of warranty, intentional tort and nuisance.
11 Damage claims of family members include
12 pecuniary loss for wrongful death, loss of
13 society, comfort, companionship, services,
14 consortium, guidance and support. In addi-
15 tion, plaintiffs seek punitive damages for
16 defendants' alleged misconduct in furnishing
17 herbicides to the United States Government.

18 3. The defendants, who are alleged to have
19 manufactured or sold "Agent Orange" to the
20 United States Government, are Dow Chemical
21 Company, Monsanto Company, T.H. Agriculture
22 & Nutrition Company, Inc., Diamond Shamrock
23 Chemicals Company, Uniroyal, Inc., Hercules
24 Incorporated, and Thompson Chemical Corporation.
25 All the defendants deny that the plaintiffs'
26 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 indemnifi-
cation 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,

1 or Australian Armed Forces assigned to Vietnam
2 at any time from 1961 to 1972 who were injured
3 while in or near Vietnam by exposure to "Agent
4 Orange" or other phenoxy herbicides including
5 those composed in whole or in part of
6 **2,4,5-trichlorophenoxyacetic acid** or containing
7 some amount of **2,3,7,8-tetrachlorodibenzo-p-dioxin**.
8 The class also includes spouses, parents, and
9 children born before January 1, 1984, directly
10 or derivatively injured as a result of the
11 **exposure**.

12 The court may reconsider this decision, by
13 decertifying, modifying the definition of the
14 class, or creating subclasses in the light of
15 future **developments** in the case. The defini-
16 tion does not imply a conclusion that anyone
17 within the class was injured as a result of
18 exposure to any herbicide.

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

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

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

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

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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

1 Rule 23(b)(1)(B) class on the issue of
2 punitive **damages**. At the time of trial the
3 court will determine whether the facts
4 presented warrant the submission of a
5 punitive damage claim to the jury. In the
6 event that there is a recovery for punitive
7 damages, it will be shared by those plaintiffs
8 who are successful in prosecuting their
9 claims in this or other suits on an appro-
10 priate basis to be **determined** by the court.
11 If you choose to exclude yourself from this
12 class action on the issue of **compensatory**
13 **damages**, you may do so without necessarily
14 losing your right to share in any punitive
15 **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:

12	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
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15	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 O. O'Quinn , Esq. 609 Fannin (Suite 517) Houston, Texas 77002
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19	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
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Newton B. Schwartz, Esq.
Houston Bar Center Building
723 Main (Suite 325)
Houston, Texas 77002

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

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

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

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

I hereby request to be excluded from the class

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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

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

3 For details about your rights in this "Agent
4 Orange" class action lawsuit, call 1-800-____,
5 or write to the Clerk of the United States
6 District Court, Box _____, Smithtown, New York
7 11787. That address again is Clerk of the
8 United States District Court, P.O. Box
9 Smithtown, New York 11787, or call 1-800-_____.

10 **EXHIBIT e**

11 (Newspaper and Magazine Notice)

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

16 If you or anyone in your family can **claim injury,**
17 illness, disease, death or birth defect as a
18 result of exposure to "Agent Orange" or any other
19 herbicide while assigned in or near Vietnam at
20 any time from 1961 to 1972, you are a member of
21 a class in an action brought on your behalf in the
22 United States District Court for the Eastern
23 District of New York unless you take steps to
24 exclude yourself from the class. The class is
25 limited to those who were injured by exposure
26 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,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1118-August Term, 1985

(Argued April 10, 1986 Decided 1987)

Docket No. 85-6365

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

(APPEAL OF DAVID DEAN)

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.

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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.

1 MINER, Circuit Judge:

2
3 Our discussion of the background and procedural history of
4 this Litigation appears in Judge Winter's lead opinion, No.
5 84-6273. This portion of the Agent Orange appeal concerns the
6 district court's approval of a fee sharing **agreement** entered into
7 by the **nine-member Plaintiffs' Management Committee** ("PMC") in
8 **December** of 1983. Under the **agreement**, each PMC member who had
9 advanced funds to the class for general litigation expenses was
10 to receive a threefold return on his investment prior to the
11 distribution of other fees awarded to individual PMC **members** by
12 the district court. In result, the agreement dramatically
13 increased the fees awarded to those PMC members who had advanced
14 funds to the class for expenses, and concurrently decreased the
15 fees awarded to non-investing PMC **members**, who only **performed**
16 legal services for the class.

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

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

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

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

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

7 8 I. BACKGROUND

9
10 In **September** of 1983 Yannacone and Associates withdrew as
11 attorneys for the class, claiming financial and management
12 hardships. The district court then approved appointment of the
13 PMC as new class counsel. The PMC was comprised of three members
14 -- attorneys Stephen Schlegel, Benton Musslewhite and Thomas
15 Henderson. In re "Agent Orange" Product Liability Litigation,
16 571 F. Supp. 481 (E.D.N.Y. 1983). In later months the district
17 court approved the expansion of the PMC to encompass six
18 additional **members**, including appellant David Dean. Dean, a
19 **member** of the original panel of class counsel, had been closely
20 involved with the Agent Orange litigation since its inception in
21 1979. In October of 1983 the district court appointed him to
22 be the attorney responsible for leading the preparation and
23 potential trial of **plaintiffs'** case.

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

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

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

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

6 It was not **until** the PMC submitted its joint fee petition
7 that the court finally learned of the agreement. At the
8 September hearing on the fee petitions, the district judge
9 expressed doubts as to the **agreement's** propriety and requested
10 further briefing on the issue. Faced with the reservations
11 expressed by the district **judge**, the PMC members modified their
12 agreement in December of 1984. The revised agreement, and the
13 one now before **us**, provided that five of the six investing
14 **members** of the PMC each would advance an additional \$50,000 for
15 general litigation expenses, bringing their total investments to
16 \$250,000 each. In return for these **advances**, as well as for the
17 \$200,000 advanced by the sixth investing member, the new
18 agreement provided for the **same** threefold return as did the
19 original agreement. The **fifty-thirty-twenty** percent formula for
20 the distribution of the remaining portion of the fees, however,
21 was eliminated. In its place, the revised agreement called for
22 the **remainder** to be distributed pro rata to each PMC member "in
23 the proportion the **individual's** and/or firm's fee award bears to
24 the total fees **awarded.**"¹ Agent Orange I, 611 F. Supp. at 1454.

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

1 various counsel whose work had benefitted the class, applying the
2 principles of fee distribution in equitable fund actions set
3 forth in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir.
4 1974) ("Grinnell I") and City of Detroit v. Grinnell Corp., 560
5 F.2d 1093 (2d Cir. 1977) ("Grinnell II"). In re "Agent Orange"
6 Product Liability Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985)
7 ("Agent Orange II"). As later amended and supplemented, the
8 district court's decision awarded over \$4.7 million in fees to
9 the nine **members** of the PMC on an individually apportioned basis.
10 David Dean, due to his lengthy **involvement** in the class action
11 and the exceptional quality of his work, **was awarded**
12 **\$1,424,283.75**, or over thirty percent of all fees awarded to the
13 PMC. Each of the six investing members of the PMC was awarded a
14 **much** lower percentage of the entire PMC fee award, with one
15 investor being awarded only \$41,886. The highest award to an
16 investor was \$515,1.63.

17 Once the fee sharing agreement was applied to these awards,
18 however, the amount of fees each PMC member was to receive
19 changed dramatically. In **Dean's** case, application of the
20 agreement reduced his award to \$542,310, a reduction of \$881,973.
21 In contrast, Newton Schwartz, an investing member of the PMC to
22 **whom** the district court awarded \$41,886, was now to receive
23 \$513,026, equivalent to an hourly rate of \$1,224.81. The awards
24 to all other investing members were similarly enhanced and, in
25 turn, the awards to the two other non-investing members were
26 diminished, resulting in a distortion of the district court's

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

4 In May of 1985, Dean moved in the district court to overturn
5 the fee sharing agreement, claiming that it violated professional
6 ethics and did not protect the rights of the class. In a
7 Memorandum and Order issued June 27, 1985, the court denied
8 Dean's motion and upheld the agreement, albeit with some
9 reluctance. The court found, as a factual matter, that no
10 conflict of interest had arisen in the litigation from the fee
11 sharing agreement and, consequently, that the interests of the
12 class in obtaining a fair and reasonable settlement had not been
13 impinged. Agent Orange I, 611 F. Supp. at 1461. Initially, the
14 court recognized its obligation to review the agreement in its
15 capacity as protector of the rights of the plaintiff class. It
16 then went on to examine the propriety of the agreement under DR
17 2-107(A) and DR 5-103 of the ABA Code and the practical effect of
18 the agreement on the PMC's representation of the class.

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

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

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

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

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

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

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

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

22 II. DISCUSSION

23
24
25 **Dean's** appeal presents an issue of first impression:
26 whether an undisclosed, **consensual** fee sharing agreement, which

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

5 At the outset, we note that the fees in this case were
6 awarded pursuant to the equitable fund doctrine, first set forth
7 in Trustees v. Greenough, 105 U.S. 527 (1882), and Central
8 Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885). The
9 underlying rationale for the doctrine is the belief that an
10 attorney who creates a fund for the benefit of a class **should**
11 receive reasonable compensation from the **fund** for his efforts.
12 Central Railroad, 113 U.S. at 125. Because the calculation of
13 fees necessarily will affect the funds available to the **class**,
14 this circuit has adopted a lodestar formula for fee computation.
15 Grinnell II, 560 F.2d at 1099; Grinnell I, 495 F.2d at 471. The
16 lodestar seeks to protect the interests of the class by tying
17 fees to the "actual effort made by the attorney to benefit the
18 class." Grinnell II, 560 F.2d at 1099. Accordingly, fees are
19 calculated by taking the number of hours reasonably billed and
20 multiplying that figure by an hourly rate "normally charged for
21 similar work by attorneys of like skill in the area." *Id.* at
22 1098. Once calculated, the court may, in its discretion,
23 increase or decrease this figure by examining such factors as the
24 quality of counsel's work, the risk of the litigation and the
25 complexity of the issues. *Id.* Discretion to adjust the lodestar
26 figure upward because of superior quality, however, is limited to

1 exceptional situations and must be supported by "specific
2 evidence" and "detailed findings" by the district court.
3 Pennsylvania v. Delaware Valley Citizens' Council for Clear Air,
4 106 S. Ct. 3088, 3098 (1986). Adherence to these principles is
5 essential not only to avoid awarding windfall fees to counsel,
6 but also to "avoid every appearance of having done so," Grinnell
7 I, 495 F.2d at 469.

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

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

1 conflicts substantially with the principles of reasonable.

2 **compensation** in **common** fund actions set forth in Grinnell I and
3 Grinnell II, and that it places class counsel in a potentially
4 conflicting position in relation to the interests of the **class**,
5 we reverse.

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

20 There is authority for a court, under certain **circumstances**,
21 to award a lump sum fee to class counsel in an equitable fund
22 action under the lodestar approach and then to **permit** counsel to
23 divide this lodestar-based fee among themselves under the terms
24 of a private fee sharing agreement. E.g., Ruskay v. Jensen, No.
25 71-3169, slip op. at 10-13 (S.D.N.Y. Sept. 18, 1981); In re Magic
26 Marker Securities Litigation, [1979 Transfer Binder] Fed. Sec. L.

1 Rep. (CCH) 1 97,116, at 96,195 (E.D. Pa. Sept. 16, 1979); Valente
2 v. Pepsico, Inc., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH)
3 f 96,921, at 95,863 (D. Del. June 4, 1979), appeal dismissed, 614
4 F.2d 772 (3d Cir. 1980); In re Ampicillin Antitrust Litigation.
5 81 F.R.D. 395, 400 (D.D.C. 1978); Del Noce v. Delyar Corp., 457
6 F. Supp. 1051, 1055 (S.D.N.Y. 1978). We reject this authority,
7 however, to the extent it allows counsel to divide the award
8 among **themselves** in any manner they deem satisfactory under a
9 private fee sharing agreement. Such a division overlooks the
10 district court's role as protector of class interests under Fed.
11 R. Civ. P. 23(e) and its role of assuring reasonableness in the
12 awarding of fees in equitable fund cases. See Kamens v. Horizon
13 Corp., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) 1 98,007,
14 at 91,218 & n.4 (S.D.N.Y. May 26, 1981); Steiner v. BOC Financial
15 Corp., [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,656,
16 at 98,490 (S.D.N.Y. Oct. 10, 1980); cf. Jones v. Amalgamated
17 Warbasse Houses, Inc., 721 F.2d 881, 884 (2d Cir. 1983) ("if the
18 court finds good reason to do so, it may reject an agreement as
19 to attorneys' fees just as it may reject an agreement as to the
20 substantive claims"), cert. denied, 466 U.S. 944 (1984). In
21 addition, this approach overlooks the class attorneys' "duty . . .
22 to be sure that the court, in passing on [the] fee application,
23 has all the facts" as well as their "fiduciary duty to the . . .
24 class not to overreach." Lewis v. Teleprompter Corp., 88 F.R.D.
25 11, 18 (S.D.N.Y. 1980).
26

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

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

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

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

1 Antitrust Litigation, 93 F.R.D. 485, 490-91 (D. Md. 1982); Gould
2 v. Lumonics Research Ltd., 495 F. Supp. 294, 297 n.6 (N.D. Ill.
3 1980).

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

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

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

12 We also reject the district court's finding that its
13 authority to approve settlement offers under Fed. R. Civ. P.
14 23(e) acts to limit the threat to the class from a potential
15 conflict of interest. At this late stage of the litigation, both
16 class counsel and defendants seek approval of the settlement.
17 The court's attention properly is directed toward the overall
18 reasonableness of the offer and not necessarily to whether class
19 counsel have placed themselves in a potentially conflicting
20 position with the class. It would be difficult indeed for a
21 court at this stage to hold that, regardless of the terms of the
22 **settlement**, class counsel had not fulfilled its obligation to the
23 class. Given this focus and other administrative concerns that
24 may come to bear, we find the approval authority, in this
25 context, to be insufficient to assure that the ongoing interests
26 of the class are protected. See Alleghany Corp. v. Kirby, 333

1 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (at this
2 stage of litigation, "[a]ll the dynamics conduce to judicial
3 approval of such **settlements**"), cert. dismissed. 384 U.S. 28
4 (1966); In re Mid-Atlantic Toyota Antitrust Litigation, 93 F.R.D.
5 at 491 (court authority to review settlement offers not adequate
6 to safeguard against dangers of conflict of **interest**); Coffee,
7 The Unfaithful Champion; The Plaintiff As Monitor In Shareholder
8 Litigation, 48 Law & Contemp. Probs. 5, 26-27 (Summer 1985)
9 (judicial review not a significant barrier to collusive
10 **settlements**).

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

1 show any incidence of **district** courts awarding excessive fees).
2 **Moreover**, the court's authority in reviewing fee petitions and
3 approving or disapproving hours billed in an equitable fund
4 action works as a substantial and direct check on **counsel's**
5 alleged incentive to procrastinate. In re Equity Funding
6 Corporation of America Securities Litigation. 438 F. Supp. 1303,
7 1328 (C.D. Cal. 1977); 7B C. Wright, A. Miller & M. Kane, supra,
8 § 1803, at 511. **Consequently**, we do not view the lodestar system
9 as countervailing the clear interest in early **settlement** created
10 by the private **agreement**.

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

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

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

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

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

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

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

7
8 III. CONCLUSION

9
10 Having **determined** that the fee sharing agreement violates
11 the principles for awarding fees in an equitable fund action and
12 places class counsel in a position potentially in conflict with
13 the interests of the class which they represent, we reverse. We
14 award all the PMC members the fees to which the district court
15 determined that they were entitled.
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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.

	<u>Amount of Fees Awarded by District Court</u>	<u>Amount of Fees Awarded Under the Agreement</u>	<u>Net Effect of the Agreement</u>
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
1	Schwartz (investor)	41,886	513,026	+ 471,140
	O'Quinn (investor)	132,576	541,128	+ 408,552
2	Brown (investor)	348,331	608,162	+ 259,831
	Locks (investor)	487,208	651,339	+ 164,171
3	Chesley (investor)	475,080	647,534	+ 172,456
	Henderson (investor)	515,163	659,975	+ 144,812

4 Brief for Appellant at 8.

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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

IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION

(APPEAL OF ATTORNEYS' FEE AWARDS)

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.

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

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

10 BENTON MUSSLEWHITE, Houston, TX,
11 Pro Se.

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

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

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

22 (Greitzer and Locks, Philadelphia, PA,
23 Neil R. Peterson, Philadelphia, PA,
24 of counsel) for Appellants Greitzer and
25 Locks, Schlegel & Trafelet, Henderson
26 & 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.

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1 MINER, Circuit Judge:

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3 Our discussion of the background and procedural history of
4 the litigation appears in Judge **Winter's** lead opinion, No.
5 84-6273. The nine members of the **Plaintiffs'** Management
6 **Committee** ("PMC") and various outside counsel appeal, on a number
7 of **grounds**, the district court's decision setting **attorneys'** fees.
8 On June 18, 1985, the district court issued an **amended** order,
9 awarding over seven million dollars in fees and three million
10 dollars in expenses to eighty-eight attorneys and law firms
11 involved in the action. In re "Agent Orange" Product Liability
12 Litigation, 611 F. Supp. 1296 (E.D.N.Y. 1985) ("Agent Orange").
13 The nine members of the **PMC**, individually and as a group,
14 challenge the district court's use of a national hourly rate in
15 calculating the fee awards under the lodestar formula set forth
16 in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)
17 ("Grinnell I"), and City of Detroit v. Grinnell Corp., 560 F.2d
18 1093 (2d Cir. 1977) ("Grinnell II"), the level of the quality
19 multipliers it set, and its failure to apply a risk multiplier to
20 the fee awards and to credit certain hours and expenses. Four
21 outside counsel challenge the district court's findings as to the
22 value of their work to the class and the decision to abrogate
23 various contingency fee arrangements between counsel and certain
24 class members. For the reasons set forth below, we affirm in
25 part and reverse in part.
26

I. BACKGROUND

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

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

- 24 1. Court Time: One half of the time requested for
25 review of court orders was **permitted** on the ground that
26 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

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

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

14 **3. Educational Reading:** Time for review of scientific
15 materials relating to the causation issue and other
16 issues in the case was awarded on a fifty percent basis
17 on the ground that such knowledge could be used by
18 counsel in future cases.

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

25 **5. Document Preparation:** All time for review and
26 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.

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

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

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

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

17 Id. at 1321-22, 1351.

18 Following these guidelines and applying the lodestar formula
19 for calculating **attorneys'** fees in an equitable fund action, see
20 Grinnell I, 495 F.2d at 471, the district court awarded
21 \$10,767,443.63 in individual fees and expenses to various counsel
22 who, in the court's view, had **performed** work beneficial to the
23 class. In arriving at the lodestar figure, the court employed
24 national hourly rates of \$150 for the work of a partner, \$100 for
25 the work of an associate, and \$125 for the work of a law
26 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.

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

3 4 II. DISCUSSION

5 A. PMC Members

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7 The district court awarded the individual members of the PMC
8 an aggregate of \$4,713,635.50 in fees and \$650,356.97 in
9 individual expenses. In addition, the court awarded the PMC, as
10 a whole, expenses in the sum of \$1,711,155.87. These attorneys
11 now raise four specific challenges to their individual awards.
12

13 1. National Hourly Rates

14
15 Faced with a flood of fee petitions from counsel located in
16 all regions of the country, the district court utilized national
17 hourly rates for calculating the fee awards for each attorney.
18 While it recognized that the general rule for fee calculation in
19 this circuit requires the use of "the hourly rate normally
20 charged for similar work by attorneys of like skill in the area,"
21 Grinnell II, 560 F.2d at 1098, the district court noted that
22 special problems arise "in applying this general standard in a
23 complex raultidistrict litigation that is national in scope,
24 involves counsel from all over the country and extends over many
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1 years during which the rates for particular lawyers and classes
2 of lawyers are changing," Agent Orange, 611 F. Supp. at 1308.

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

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

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

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

1 in which he practices. See, e.g., In re Fine Paper, 751 F.2d at
2 590-91 (classifying application of national hourly rates as legal
3 error on the grounds that the district court presented no
4 evidentiary basis for their establishment and such rates ignored
5 the market rates that the attorneys would **command** in their
6 respective **communities**). Relying on large class action cases in
7 other circuits where courts have awarded varying rates to counsel
8 **from** different localities, e.g., In re Equity Funding Corp. of
9 America Securities Litigation, 438 F. Supp. 1303 (C.D. Cal.
10 1977), they argue **that**, while the task may be a difficult **one**,
11 other jurisdictions routinely undertake it.

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

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

4 While at least one circuit looks to the rates **employed** in
5 the area in which the attorney practices, Cunningham v. City of
6 McKeesport, 753 F.2d .262, 267 (3d Cir. 1985), we traditionally
7 have interpreted Grinnell I and Grinnell II as requiring use of
8 the hourly rates employed in the district in which the reviewing
9 court sits, Polk v. New York State Department of Correctional
10 Services, 722 F.2d 23, 25 (2d Cir. 1983). We generally have
11 adhered to this rule whether the attorney involved was local or
12 non-local. Id.; accord Donnell v. United States, 682 F.2d 240,
13 251-52 (D.C. Cir. 1982), cert. denied, 459 U.S. 1204 (1983);
14 Chrapliwy v. Uniroyal, Inc., 670 F.2d 760, 768-69 (7th Cir.
15 1982), cert. denied, 461 U.S. 956 (1983); Avalon Cinema Corp. v.
16 Thompson. 689 F.2d 137, 140-41 (8th Cir. 1982) (in **banc**). We and
17 other circuits have strayed from this rule only in the rare case
18 where the "special expertise" of non-local counsel was essential
19 to the case, it was clearly shown that local counsel was
20 unwilling to take the case, or other special **circumstances**
21 existed. Polk, 722 F.2d at 25; Avalon Cinema, 689 F.2d at
22 140-41.

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

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

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

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

1 an approach would pose an administrative nightmare for: the '
2 district court. As the district judge here noted, " [s]implicity
3 becomes an especially important goal in a complex case involving
4 a hundred or more fee applications and tens of thousands of pages
5 of supporting documentation and requiring a number of years for
6 prosecution during which rates for particular attorneys and
7 geographic locations change in different ways." Agent Orange,
8 611 F. Supp. at 1308. While administrative interests normally
9 should not be the primary concern of a court in formulating
10 substantive rules of review, we observe that the attorney-by-
11 attorney approach recommended by the PMC simply would overtax the
12 capacity of a district court to review fee petitions adequately.
13 Cf. New York Association for Retarded Children v. Carey, 711 F.2d
14 1136, 1146 (2d Cir. 1983) (burden-saving measures may be taken by
15 district court in light of voluminous fee petitions).

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

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

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

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

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

24 2. Quality Multipliers

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

10 The decision to allow a quality multiplier rests in **the**
11 sound discretion of the district court, Hensley v. Eckerhart, 461
12 U.S. 424, 437 (1983); Grinnell II, 560 F.2d at 1098, due to
13 "the district court's superior understanding of the litigation
14 and the desirability of avoiding frequent appellate review of
15 what essentially are factual matters." Hensley, 461 U.S. at 437.
16 The Supreme Court, however, in Blum v. Stenson, 465 U.S. 886, 899
17 (1984), and more recently in Pennsylvania v. Delaware Valley
18 Citizens' Council for Clear Air, 106 S. Ct. 3088 (1986), has
19 severely restricted those instances in which a district court may
20 allow such a **multiplier**.²

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

1 Accordingly, the Court concluded that an **adjustment** to the
2 lodestar figure for such a factor would only be proper in "the
3 rare case where the fee applicant offers specific evidence to
4 show that the quality of service rendered was superior to that
5 one reasonably should expect in light of the hourly rates charged
6 and that the success was 'exceptional.'" Id. (emphasis added).
7 In Delaware Valley Citizens' Council, a decision concerning
8 application of the lodestar analysis to a fee award under section
9 304(d) of the Clean Air Act, 42 **U.S.C.A.** § 7604(d) (West 1983),
10 the Court reaffirmed the narrow approach taken in Blum, declaring
11 that calculating fee awards under the lodestar analysis "leaves
12 very little room for enhancing the award based on '[counsel's]
13 post-engagement **performance.**" Delaware Valley Citizens' Council,
14 106 S. Ct. at 3098.

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

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

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

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

21 3. Risk Multiplier

22 The district court declined to award a risk multiplier to
23 any attorney involved in the case. It reasoned that risk of
24 success should not be judged solely from the vantage point of
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1 whether a **complete** recovery at the conclusion of the action is
2 viable, but also should include an evaluation of the likelihood
3 that the parties will reach a **settlement**. In this regard, the
4 court noted that it was probable that the defendant **chemical**
5 **companies** would settle the case "to avoid the further burden of
6 litigation and to improve their respective financial pictures."
7 Agent Orange, 611 F. Supp. at 1311. The court also recognized
8 that awarding risk multipliers in a case such as Agent Orange,
9 which held out little chance for a victory on the **merits** but a
10 significant chance of settlement, would fuel the filing of
11 nuisance litigation "in which **settlement becomes** the main object
12 and attorney fee awards an overpowering **motivating** force." Id.

13 **Furthermore**, the court indicated that strict application of
14 inversely proportionate risk multipliers to cases such as Agent
15 Orange, which it described as a high-risk case of highly
16 questionable merit, would lead to a confounding disparity in the
17 treatment of cases falling just above and just below the standard
18 for frivolousness under Fed. R. Civ. P. 11. Attorneys in
19 successful cases bordering on the frivolous, yet falling just
20 above the proscriptions of Rule 11, would be awarded the highest
21 risk multipliers, since the risk of success in such cases
22 obviously would be great. In contrast, counsel in similar cases
23 falling just below Rule 11's **proscriptions**, would not only
24 receive no risk multiplier, but also would be subject to
25 court-imposed sanctions for having brought such a case.
26

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

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

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

3 We have labeled the risk-of-success factor as "perhaps the
4 foremost" factor to be considered under the second prong of the
5 lodestar analysis. Grinnell I, 495 F.2d at 471. The multiplier
6 takes into account **the** realities of a legal practice by rewarding
7 counsel for those successful cases in which the probability of
8 success was slight and yet the time invested in the case was
9 substantial. Id.; see 7B C. Wright, A. Miller & M. Kane, Federal
10 Practice and Procedure § 1803, at 524-27 (1986). As the chance
11 of success on the merits or by **settlement** increases, the
12 **justification** for using a risk multiplier decreases. Grinnell I,
13 495 F.2d at 471. The need for this type of **multiplier** is
14 magnified when the "diminutive character of the individual
15 claims" forces counsel to bring the action on a class basis. 7B
16 C. Wright, A. Miller & M. Kane, supra, § 1803, at 527. Without
17 the prospect of **some** consideration for the risks and
18 uncertainties of the action, "the necessary incentive [for
19 prosecuting such a suit] would be lacking and a **major** weapon for
20 enforcing various public policies would be blunted." Id.

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

1 Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 27 (D.C. Cir.
2 1984), cert. denied, 105 S. Ct. 3488 (1985). This, in turn,
3 would provide an incentive for counsel to flood "the courts with
4 unmeritorious litigation," McKinnon v. City of Berwyn, 750 F.2d
5 **1383**, 1392 (7th Cir. 1984), "leading . . . to a situation in
6 which every conceivable claim would be litigated, subject only to
7 the ability of the courts to handle the burden," Laffey, 746 F.2d
8 at 27; accord Leubsdorf, The Contingency Factor in Attorney Fee
9 Awards, 90 Yale L.J. 473, 491 (1981). The net result, of course,
10 would be a dilution of the judiciary's ability to handle **those**
11 cases with potentially meritorious claims.

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

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

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

3 Besides **matters** of public policy, the **settlement** itself
4 presents a rationale for denying **counsel's** request. While today
5 we hold that the settlement falls within the range of
6 reasonableness under Fed. R. Civ. P. 23, we are aware that the
7 \$180 million settlement provides a very small return to the class
8 in light of the claims asserted. In our estimation, the
9 relatively small size of the settlement reflects class **counsel's**
10 realization of the extreme difficulty they would incur in
11 overcoming the inherent weaknesses of their case, in particular
12 the military contractor defense, and the defendant **chemical**
13 **companies' realization that** they could end a **burdensome**
14 litigation at very low cost. Award of a risk multiplier in such
15 **circumstances**, as the district court reasoned, only would further
16 the unwelcome prospect of nuisance litigation being brought in
17 federal courts.

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

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

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

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

7 We find no abuse of discretion here. The critical inquiry
8 when reviewing hours billed to the **common** fund in a class action
9 is whether the work performed resulted in a benefit to the class.
10 See Grinnell II. 560 F.2d at 1099. In **determining** which hours
11 were beneficial, we note that there "are no hard-and-fast rules,"
12 Siegal v. Merrick, 619 F.2d 160, 164 n.9 (2d Cir. 1980), but that
13 "[a]mple authority supports reduction in the lodestar figure for
14 overstaffing as well as for other forms of duplicative or
15 inefficient work," id. Moreover, we and other circuits have held
16 that in cases in which substantial **numbers** of voluminous fee
17 petitions are filed, the district court has the authority to make
18 across-the-board percentage cuts in hours "as a practical means
19 of trimming fat from a fee **application.**" Carey, 711 F.2d at
20 1146; accord Ohio-Sealy Mattress Manufacturing Co. v. Sealy Inc.,
21 776 F.2d 646, 657 (7th Cir. 1985); Copeland v. Marshall, 641 F.2d
22 880, 903 (D.C. Cir. 1980) (in banc). But see In re Fine Paper,
23 751 F.2d at 596 (court must identify with some specificity any
24 disallowed hours). Under such **circumstances**, no item-by-item
25 accounting of the hours disallowed is necessary or desirable.
26 Ohio-Sealy. 776 F.2d at 658.

1 Here, the fee petitions, to say the least, were voluminous,
2 consisting of tens of thousands of pages of billing sheets and
3 other exhibits. To suggest that the district court could not
4 take advantage of percentage reductions in such a context would
5 be absurd. In reviewing these across-the-board **cuts**, we find
6 nothing that we could classify as an abuse of discretion.
7 Moreover, it is not unusual for hours of travel **time**, deposition
8 **time** and other quasi-administrative items to be compensated at
9 lower rates. E.g., Sun Publishing Co. v. Mecklenburg News, Inc.,
10 594 F. Supp. 1512, 1520 (E.D. Va. 1984); Steinberg v. Carey, 470
11 F. Supp. 471, 479-80 (S.D.N.Y. 1979). But see Crumbaker v. Merit
12 Systems Protection Board, 781 F.2d 191, 193-94 (Fed. Cir. 1986)
13 (reasonable travel **time** should be **compensated** at the same rate as
14 other working time). The district judge gave reasons, though
15 somewhat generalized, for each percentage cut that he made. We
16 find these to be an adequate reflection of the benefit that the
17 class derived from **counsel's** work.

18 We also find no abuse of discretion in the district **court's**
19 guidelines for expenses. Counsel are entitled to reimbursement
20 only for those expenses incurred in the course of work that
21 benefitted the class. In re Armored Car Antitrust Litigation,
22 472 F. Supp. 1357, 1388-89 (N.D. Ga. 1979), modified and remanded
23 on other grounds, 645 F.2d 488 (5th Cir. 1981). Overstaffing and
24 other extravagances are not recoverable. Id.

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

1 to the class and were "uniformly inadequate" suggests that the
2 court in fact was generous in setting the cap for fees to these
3 experts at \$5,000 each. Report and **Recommendation** of United
4 States Magistrate, Re: Fee Petitions, appendixed to and
5 incorporated in Agent Orange, 611 F. Supp. 1296, 1351 (1985). We
6 also find no abuse of discretion in the district court's
7 determination that expenses connected with those hours disallowed
8 as not being beneficial to the class should not be **reimbursed**.
9 See In re Fine Paper Antitrust Litigation, 98 F.R.D. 81, 85 (E.D.
10 Pa. 1983), rev'd on other grounds. 751 F.2d 562 (3d Cir. 1984).
11 Finally, although we concede that under certain **circumstances** it
12 may be appropriate not to treat paralegal time as an expense in a
13 large class action, see Dorfman v. First Boston Corp., 70 F.R.D.
14 366, 374-75 (E.D. Pa. 1976), we note that the district court in
15 so doing was **simply** following our prior directive, see Grinnell
16 I, 495 F.2d at 473. We decline to reevaluate that rule here.

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18 **B. Outside Counsel**

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20 **1. Ashcraft & Gerel**

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

1 \$46,233.18. The district court limited the fees and expenses to
2 the work performed between the above dates. Pursuant to the
3 recommendation of the Magistrate, **Ashcraft & Gerel's** fee and
4 expense awards then were increased to \$138,788 and \$54,897.39.
5 This increase **primarily** reflected the recommendation of the
6 Magistrate that review of Ashcraft & Gerel's work not be limited
7 to the short time period, but should include as well the period
8 prior to March of 1983.

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

19 In adopting the Magistrate's **recommendations**, however, the
20 district court offset the fee awarded to Ashcraft & Gerel against
21 the benefits obtained by the firm's many opt-out clients from
22 "the use of discovery materials assembled through the
23 multidistrict discovery process and paid for by the class." Id.
24 at 1343. The district court further found that the value of such
25 services for the opt-outs far exceeded the **firm's** services to the
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1 class. **Consequently**, the court abrogated any fee award to the
2 **firm**, but **maintained** the modified expense award.

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

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

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

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

6 2. Sullivan & Associates

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

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

24 3. Australian Counsel

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

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

14 4. Kraft & Hughes

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17 Kraft & **Hughes**, a New Jersey firm peripherally involved in
18 the litigation, challenges the district **court's** award. The court
19 awarded the firm \$2,425 in fees and \$3,935.48 in expenses. The
20 firm now argues that this is no **more** than the out-of-pocket costs
21 of its involvement and substantially undercredits its
22 contribution to the litigation. Moreover, the firm contends that
23 it was improper for the district court to abrogate the
24 contingency fee agreements that the firm had with a number of
25 class **members**.
26

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

7 It is well established that a district court, pursuant to
8 its **rulemaking** authority or on an ad hoc basis, may review a
9 contingency fee agreement. Boston and Maine Corp. v. Sheehan,
10 Phinney, Bass & Green, P.A., 778 F.2d 890, 896 (1st Cir. 1985);
11 Dunn v. H.K. Porter Co., 602 F.2d 1105, 1108 (3d Cir. 1979).
12 When dealing with an equitable fund action, "the court has an
13 even greater necessity to review the fee agreement for [Fed. R.
14 Civ. P. 23(e)] imposes upon it a responsibility to protect the
15 interests of the class members from abuse." Dunn, 602 F.2d at
16 1109. That is exactly what the district court did here in
17 requiring counsel, prior to receiving fees from the **settlement**,
18 to certify that he or it had retained no fees or expenses **from**
19 any class members. We find no basis to overrule the district
20 **court's** decision in this regard.

21 III. CONCLUSION

22 To summarize: we affirm the district court's utilization of
23 national hourly rates and conclude that they may be used in
24 the circumstances revealed here. We further **affirm** the district
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1 court's award of quality multipliers to various counsel, and the
2 district court's denial of risk multipliers. We affirm the
3 district court's decision regarding hours credited and expenses
4 reimbursed to the PMC. We reverse the decision to offset
5 Ashcraft & Gerel's fee against the use of the raultidistrict
6 discovery materials by the firm's opt-out clients and order the
7 reinstatement of the previously approved fee without allowance
8 for a risk multiplier. As to all other aspects of the district
9 court's decision respecting attorneys' fees, we affirm.

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FOOTNOTES

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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.

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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

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

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

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

3 VICTOR J. YANNAcone, JR., Patchogue,
4 New York, for Petitioners in No.
5 86-3042 and Appellants in No. 86-6171.

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

8 WINTER, Circuit Judge:

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

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

26 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

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

5 The Special Master argues that the PMC's pending appeal is
6 also untimely because it was noticed on August 19, 1986, more than
7 60 days after the distribution plan was adopted on May 28, 1985.
8 However, important aspects of the distribution plan remained to be
9 decided as of the earlier date, including, for example, the means
10 of compensating veterans from Australia and New Zealand, 611 F.
11 Supp. at 1443-45; the criteria for establishing a claimant's
12 exposure to Agent Orange, id. at 1417; and the entities that were
13 to implement and administer the individual payment program, id. at
14 1427. Moreover, Chief Judge Weinstein apparently did not view the
15 entire distribution plan as final until July 31, 1986, when he
16 entered an order pursuant to Fed. R. Civ. P. 54(b) designed to
17 "constitute a final judgment upon this Court's Distribution
18 Opinion of May 28, 1985."

19 We do not believe that appellants were faced with the choice
20 of appealing from the May 28 order or not at all. Whether that
21 order was appealable is of great doubt. It was not a collateral
22 order that "did not make any step toward final disposition of the
23 merits of the case and will not be merged in final judgment,"
24 Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546
25 (1949). Unlike such a collateral order, the May 28 order could
26 be effectively reviewed as part of the final judgment. Id. See

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

3 Even if the May 28 order was appealable under Cohen, there is
4 still no reason to bar an appeal from the July 31 order, which was
5 clearly intended by the district court to be final. See 15 C.

6 Wright, A. Miller & E. Cooper, Federal Practice & Procedure
7 § 3909, at 452 n.38 (1976) ("There is often little reason to deny
8 review on appeal from a clearly final judgment on the theory . . .
9 that an earlier order that did not terminate the entire proceeding
10 was nonetheless so final as to have been appealable. Doctrines
11 designed to facilitate intermediate appeals to avoid hardship
12 often do not serve any corresponding interest in protecting
13 opposing parties and the courts against delayed appeals.").

14 Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950), is a
15 rare case in which the Supreme Court dismissed an appeal on the
16 ground that it should have been filed prior to the entry of final
17 judgment. The instant case is distinguishable from Dickinson in
18 at least two respects, however. First, the order that would have
19 been appealable in Dickinson dismissed all claims raised by the
20 appellant. The Court thus noted that the appellant's interests
21 "could not possibly have been affected" by any action that
22 remained to be taken by the district court. Id. at 515. In
23 contrast, the plaintiffs here continued to have an active interest
24 in the litigation after the May 28 decision. Second, the Court
25 recognized in Dickinson that the case had arisen before the
26 adoption of Rule 54(b), a provision with the "obvious purpose" of

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

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

10 2. General Principles

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

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

1 "tort-based" recovery by individuals; Mr. Yannacone's clients want
2 the fund devoted largely to establishing a foundation; the
3 district court adopted a compensation based scheme to distribute
4 the bulk of the fund with the remainder to be used to establish a
5 foundation. See P. Schuck, Agent Orange on Trial 211-13, 220
6 (1986).

7 The district court was not bound to choose among only those
8 plans offered by class members who spoke out. Rather, it had to
9 "exercise its independent judgment to protect the interests of
10 class absentees, regardless of their apparent indifference," In re
11 Traffic Executive Association -- Eastern Railroads, 627 F.2d 631 ,
12 634 (2d Cir. 1980), as well as to protect the interests of more
13 vocal members of the class. The district judge therefore had
14 discretion to adopt whatever distribution plan he determined to be
15 in the best interests of the class as a whole notwithstanding the
16 objections of class counsel, see, e.g., Distribution Opinion, 611
17 F. Supp. at 1409 (criticizing distribution plan proposed by PMC on
18 ground that "too great a share of the fund would go to lawyers and
19 medical experts"); Plummer v. Chemical Bank, 668 F.2d 654, 659 (2d
20 Cir, 1982) (district courts cannot rely solely on "the arguments
21 and recommendations of counsel" in evaluating propriety of class
22 settlements), or of a large number of class members. See
23 TBK Partners, Ltd. v. Western Union Corp., 675 F.2d 456, 462 (2d
24 Cir. 1982) (holding in shareholders' derivative suit that even
25 "majority opposition . . . cannot serve as an automatic bar to a
26 settlement that a district judge after weighing all the strengths

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

8 3. Choice of Law

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

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

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

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

21 4. Payments for Death or Disability of Exposed Veterans

22 The PMC contends that the district court abused its
23 discretion in compensating individual disabled veterans and
24 families of deceased veterans without requiring "a particularized
25 showing of individual causation and injuries." 611 F. Supp. at
26 1402. The PMC argues that a portion of the settlement fund will

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

5 Chief Judge Weinstein did not deem necessary proof that a
6 veteran's death or disability resulted from exposure to Agent
7 Orange¹ because he found the available evidence insufficient to
8 establish which non-traumatic injuries could have been caused by
9 Agent Orange and which could not. In other words, as between
10 exposed veterans suffering from diseases for which the PMC would
11 provide compensation and exposed veterans suffering from other
12 non-traumatic diseases, the district court concluded that the
13 former had no stronger claim for benefits than the latter because
14 "causation cannot be shown for either individual claimants or
15 individual diseases with any appropriate degree of probability."
16 611 F. Supp. at 1409.

17 Chief Judge Weinstein did not abuse his discretion in
18 adopting a distribution plan that reflected this conclusion. He
19 was not obligated to adopt a plan that conformed to a theory of
20 the relationship between Agent Orange and certain diseases that
21 has little or no scientific basis. Further, he could take into
22 account the very substantial countervailing evidence that Agent
23 Orange was not harmful to any personnel in Vietnam. See In re
24 "Agent Orange" Product Liability Litigation, 597 F. Supp. 740,
25 782-95 (E.D.N.Y. 1984) ("Settlement Opinion") (reviewing
26 scientific data on effects of Agent Orange and concluding that

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

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

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

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

9 In sum, given the inconclusive state of the scientific
10 evidence as to what injuries, if any, were caused by Agent Orange,
11 the district court did not abuse its discretion in holding that
12 all exposed veterans who have suffered non-traumatic death or
13 disability have stated "colorable legal claims against defendants
14 . . . [sufficient] to allow them to share in the settlement fund."
15 In re Chicken Antitrust Litigation American Poultry, 669 F.2d 228,
16 238 (5th Cir. 1982), quoted in Distribution Opinion, 611 F. Supp.
17 at 1411.

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

1 5. Class Assistance Programs

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

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

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

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

8 Second, we were particularly concerned in Eisen that the
9 availability of "fluid class recovery" would have allowed
10 plaintiffs to satisfy the manageability requirements of Rule 23
11 where they otherwise could not. The damages to the average class
12 member in Eisen were estimated at no more than \$3.90, see 479 F.2d
13 at 1010, and, as counsel for the named plaintiff conceded, "[i]f
14 each [member] had to present his own personal claim for damages,
15 the class, indeed, would not be manageable." Id. at 1017. We
16 foresaw that such an unwarranted relaxation of the manageability
17 requirements would have induced plaintiffs to pursue "doubtful"
18 class claims for "astronomical amounts" and thereby "generate
19 . . . leverage and pressure on defendants to settle." Id. at
20 1019. However, the instant case, unlike Eisen, was maintainable
21 as a class action regardless of the form of recovery available to
22 the plaintiff class. Accordingly, our concern in Eisen that the
23 availability of a particular form of recovery would vastly enlarge
24 the number of class actions in the federal courts is not present
25 in the instant case.

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

1 arises out of a pretrial settlement. As the Supreme Court has
2 recognized, a district court may "provide[] broader relief [in an
3 action that is resolved before trial] than the court could have
4 awarded after a trial." Local Number 93, International
5 Association of Firefighters v. City of Cleveland, 106 S. Ct.
6 3063, 3077 (1986). Indeed, we have previously recognized that
7 some "fluidity" is permissible in the distribution of settlement
8 proceeds. See Beecher v. Able, 575 F.2d at 1016 n.3; West,
9 Virginia v. Chas. Pfizer & Co., Inc., 314 F. Supp. 710, 728
10 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d dr.), cert. denied, 404
11 U.S. 871 (1971).

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

26 We are unwilling for several reasons to permit the

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

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

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

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

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

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

15 6. Yannacone Petition for Writ of Mandamus/Prohibition

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

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

1 lead counsel for the class. Nevertheless, his present petition
2 reveals a fundamental misunderstanding of the nature of a class
3 action. A plaintiff who joins in a class action, as many
4 plaintiffs did through Mr. Yannacone, gives up his or her right to
5 control the litigation in return for the economies of scale
6 available under Fed. R. Civ. P. 23. In the related context of a
7 shareholders' derivative suit, we have rejected any notion that
8 "each individual plaintiff and lawyer must be permitted to do what
9 he pleases in litigation as complex as this, and can behave in
10 total disregard of the interest of other litigants and of the
11 class." Farber v. Riker-Maxson Corp., 442 F.2d 457, 459 (2d Cir.
12 1971) (per curiam).

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

26 Mr. Yannacone has failed even to suggest, much less

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

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

15 Affirmed in part, reversed in part, and remanded for further
16 proceedings in accordance with this opinion.
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3 FOOTNOTES

4 1/ The court adopted the Social Security Act's definition of
5 "disability," namely an "inability to engage in any substantial
6 gainful activity by reason of any medically determinable physical
7 or mental impairment which can be expected to result in death or
8 which has lasted or can be expected to last for a continuous
9 period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A)
10 (1982). The court provided that "[a]ny veteran claimant certified
11 as disabled by the Social Security Administration will be
12 considered disabled for purposes of the payment program, unless
13 the disability was predominantly caused by a traumatic, accidental
14 or self-inflicted injury." 611 F. Supp. at 1413. A claimant who
15 has not been found disabled by the Social Security Administration
16 may still qualify for payments by submitting satisfactory medical
17 evidence to the disbursing authority; in such cases, "the payment
18 program will take into account, as evidence, a Social Security
19 determination that the veteran is not disabled, or certifications
20 of disability from other entities such as the Veterans
21 Administration or private insurers." Id.

22 2/ The plan would require a claimant to make "[s]ome substantial
23 showing of exposure" to Agent Orange, 611 F. Supp. at 1415, by
24 demonstrating that he held a job involving direct handling or
25 application of Agent Orange," id. at 1416, or that he "was present
26 in a sprayed area when the spraying occurred" or in or near such

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

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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

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

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.

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Valley 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

1 prove that a particular ailment was caused by Agent Orange, see
2 Opt-Out Opinion, 611 F. Supp. at 1260-63; Lilley Opinion, 611 F.
3 Supp. at 1284-85, that no plaintiff could prove which defendant
4 had manufactured the Agent Orange that allegedly caused his or her
5 injury, see Opt-Out Opinion, 611 F. Supp. at 1263; Lilley Opinion.
6 611 F. Supp. at 1285, and that all the claims were barred by the
7 military contractor defense. See Opt-Out Opinion, 611 F. Supp. at
8 1263-64; Lilley Opinion. 611 F. Supp. at 1285.

9 The district court's determination that individual causation
10 could not be proven was based largely on its conclusion that the
11 expert opinions submitted by the opt-out plaintiffs were
12 inadmissible. Chief Judge Weinstein held that the opinions lacked
13 a reliable basis and were therefore inadmissible under Fed. R.
14 Evid. 703.² See Opt-Out Opinion, 611 F. Supp. at 1243-55;
15 Lilley Opinion. 611 F. Supp. at 1280-83. He also found that the
16 opinions were so unreliable that the danger of prejudice
17 substantially outweighed their probative value under Fed. R. Evid.
18 403.3 See Opt-Out Opinion, 611 F. Supp. at 1255-56; Lilley
19 Opinion, 611 F. Supp. at 1283.

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

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

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

23 Our consideration of the military contractor defense has been
24 greatly impaired by the inexplicable and **unjustifiable** failure of
25 the opt-outs' counsel to brief the issue even though it was a
26

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

12 We believe that federal law shields a contractor from
13 liability for injuries caused by products ordered by the govern-
14 ment for a distinctly military use, so long as it informs the
15 government of known hazards or the information possessed by the
16 government regarding those hazards is equal to that possessed by
17 the contractor. The military contractor defense has been the
18 subject of several recent judicial decisions, see Boyle v. United
19 Technologies Corp., 792 F.2d 413, 414-15 (4th Cir. 1986), cert.
20 granted, 107 S. Ct. 872 (1987) (No. 86-492); Tozer v. LTV Corp.,
21 792 F.2d 403 (4th Cir. 1986), petition for cert. filed, 55
22 U.S.L.W. 3337 (U.S. Oct. 23, 1986) (No. 86-674); Shaw v. Grumman
23 Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), petition for cert.
24 filed, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529); Bynum
25 v. FMC Corp., 770 F.2d 556 (5th Cir. 1985); Tillett v. J.I. Case
26 Co., 756 F.2d 591, 596-600 (7th Cir. 1985); Koutsoubos v. Boeing

1 Vertol, 755 F.2d 352 (3d Cir.)» cert. denied, 106 S. Ct. 72
2 (1985); McKay v. Rockwell Int'l Corp., 704 F.2d 444 (9th Cir.
3 1983), cert. denied, 464 U.S. 1043 (1984), and has figured
4 prominently in the instant litigation, see In re Diamond Shamrock
5 Chemicals Co., 725 F.2d 858, 861 (2d Cir.), cert. denied, 465 U.S.
6 1067 (1984); In re "Agent Orange" Product Liability Litigation,
7 597 F. Supp. at 847-50; 580 F. Supp. 690, 701-05 (E.D.N.Y. 1984);
8 565 F. Supp. 1263 (E.D.N.Y. 1983); 534 F. Supp. 1046, 1053-58
9 (E.D.N.Y. 1982); 506 F. Supp. 762, 792-96 (E.D.N.Y. 1980). Our
10 rationale for the defense is similar to that recently expressed by
11 the Court of Appeals for the Fourth Circuit:

12 Traditionally, the government
13 contractor defense shielded a contractor
14 from liability when acting under the
15 direction and authority of the United
16 States. Yearsley v. W.A. Ross Constr.
17 Co., 309 U.S. 18, 20, 60 S. Ct. 413,
18 414, 84 L.Ed. 554 (1940). In its
19 original form, the defense covered only
20 construction projects, McKay v. Rockwell
21 Int'l Corp., 704 F.2d 444, 448 (9th Cir.
22 1983). cert. denied, 464 U.S. 1043, 104
23 S. Ct. 711, 79 L.Ed.2d 175 (1984). Its
24 application to military contractors,
25 however, serves more than the historic
26 purpose of not imposing liability on a
contractor who has followed specifica-
tions required or approved by the United
States government. It advances the
separation of powers and safeguards
the process of military procurement.

23 Tozer, 792 F.2d at 405.

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

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

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

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

16 We also note that, absent the shield of the military
17 contractor defense, the legal exposure of the contractor would be
18 much greater than the exposure of a **manufacturer** that sells to a
19 private corporation that uses its product. In the latter case,
20 the user corporation will also be a defendant and bear some or all
21 of the exposure. Under Feres v. United States, 340 U.S. 135
22 (1950), and Stencel Aero Engineering Corp. v. United States, 431
23 U.S. 666 (1977), however, the government cannot be sued and need
24 not even cooperate with the contractor in defending personal
25 injury litigation. Obtaining discovery from the government as a
26 non-party might be difficult or even barred by a claim of national

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

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

15 1. That the government established
16 the **specifications** for "Agent Orange";

17 2. That the "Agent Orange"
18 manufactured by the defendant met the
19 government's **specifications** in all
20 material respects; and

21 3. That the government knew as
22 much as or **more** than the defendant about
23 the hazards to people that accompanied
24 use of "Agent Orange".

25 In re "Agent Orange" Product Liability Litigation, 534 F. Supp. at
26 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

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

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

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

17 A plaintiff would be required to prove,
18 along with the other elements of his
19 **cause of action**, that the hazards to
20 **him** that accompanied use of Agent
21 Orange were, or reasonably should have
22 been known, to the **defendant**. The
23 burden would then shift to each
24 individual defendant to prove (1)
25 that the government knew as much as
26 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 know-
ledge 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.

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

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

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

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

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

10 The use of Agent Orange in Vietnam was believed **necessary** to
11 deny enemy forces the benefits of jungle concealment along
12 transportation and power lines and near friendly base areas. Its
13 success as a herbicide saved many, perhaps thousands of, lives.
14 At the time of its use, both the government and the chemical
15 companies possessed information indicating that dioxin posed some
16 danger to humans. Indeed, there is evidence that the chemical
17 companies feared that the presence of dioxin in Agent Orange might
18 lead the government to restrict the sale of pesticides and
19 herbicides in the civilian market. See P. Schuck, Agent Orange on
20 Trial 85-86 (1986). However, the knowledge of the government and
21 the chemical companies related to chloracne and certain forms of
22 liver damage, ailments now known to be very rare among Vietnam
23 veterans, and not to the numerous other ailments alleged in the
24 instant litigation. Moreover, for the reasons stated in Chief
25 Judge Weinstein's opinions, see Opt-Out Opinion, 611 F. Supp. at
26 1263; Settlement Opinion, 597 F. Supp. at 795-99, we agree that

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

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

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

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

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

20 The VA and the Congress thus continue to act on the factual
21 conclusion that Agent Orange was hazardous, if at all, only with
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1 regard to chloracne and PCT. We believe these actions further
2 demonstrate that the military decision to use Agent Orange was
3 fully informed. To hold the chemical companies liable in such
4 circumstances would be unjust to them and would create a
5 devastating precedent so far as military procurement is
6 concerned.

7 Affirmed.

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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.

1 6/ The opt-outs' brief states in a footnote:

2 Plaintiffs have placed in the
3 appendix a number of documents and
4 deposition excerpts which were
5 submitted in opposition to defendants'
6 motions for summary judgment [sic].
7 Those documents and deposition excerpts
8 raise clear questions of material
9 fact. The Court's attention is
10 respectfully commended to JA. 1717-24,
11 1759-1808, 2019-2356, 2392-2560,
12 2568-71. Plaintiffs regret that page
13 constraints do not permit further
14 comment on those documents. See,
15 Master Class Action Brief, pp. 69-70.

16 We cannot agree that an editing of this 75-page brief, which e'an
17 hardly be described as tightly written, would not have permitted a
18 discussion of the military contractor issue.
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UNITED STATES COURT OF APPEALS
For the Second Circuit

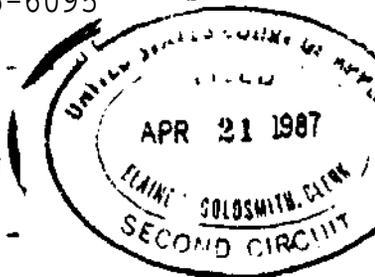
Nos. 1077, 1078, 1079 -- August Term, 1985

(Argued April 10, 1986

Decided APR 21 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. RINEBARGER, individually and as guardian ad litem for IAN L. RINEBARGER, STRA 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 litem 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.

DANIEL C. BATTS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

LOUGHERY, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

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,

1 .J.), dismissing so-called "Agent Orange" complaints against the
2 United States. **Dismissed** in part and **affirmed** in part.

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

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

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

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

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

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

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

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

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

25 VAN GRAAFEILAND, Circuit Judge:

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

84-6273.

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

6 At the outset **of this** litigation, ingenious counsel,
7 concerned that they might not be able to state a claim for relief
8 under the Federal Tort Claims Act, 28 **U.S.C.** § 2671 et seq.
9 ("**FTCA**"), **attempted** to invoke federal court jurisdiction by also
10 alleging constitutional and civil rights violations, mandamus and
11 equitable jurisdiction. These additional grounds for the
12 exercise of jurisdiction were properly rejected by the district
13 court. Ryan v. Cleland, 531 F. Supp. 724, 730-33 (E.D.N.Y.
14 1982); see Chappell v. Wallace, 462 U.S. 296 (1983). They have
15 not been asserted on this appeal. Appellants' claims now before
16 us are predicated solely on the provisions of the FTCA.

17 Because the case comes to us in a rather peculiar posture,
18 familiarity with the administrative claim requirements of the
19 FTCA is necessary for an understanding of the discussion that
20 **follows.** The administrative **claim requirements** of the FTCA, 28
21 U.S.C. S 2675(a), prohibit an action seeking **money** damages from
22 the United States for personal injury or death unless the
23 claimant has first presented the claim to the appropriate federal
24 agency and it has been denied. Interpretative regulations
25 provide that the claim must be presented in **writing** by the
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1 injured person or his duly authorized agent or legal representa-
2 tive and must be for "money damages in a sum certain." 28 C.F.R.
3 §§ 14.2(a), 14.3(b). Section 2401(b) of 28 U.S.C. sets up a
4 two-year limitation period for the filing of claims.

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

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

21 persons who were in the United States,
22 New Zealand or Australian Armed Forces
23 and assigned to Vietnam during the
24 hostilities from 1961 to 1972, who
25 claim injury from exposure to Agent
26 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

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

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

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

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

3 The **Government** contends at the outset that the appeal should
4 be dismissed as academic because class **certification** was denied
5 in the instant action and there is no individual appellant.
6 "Instead", the Government **argues**, "this appeal is brought by
7 Committee counsel acting exclusively as a pro bono fiduciary for
8 a decidedly uncertified class, many or most of whose numbers
9 disavow the **complaint**." This, we think, misstates the legal issue
10 which the Management Committee's unusual procedure has created.
11 The denial of class **certification** does not preclude individual
12 plaintiffs properly before the court from pressing their own
13 **claims**, 7B C. Wright, A. Miller & M. Kane, Federal Practice and
14 Procedure § 1795 at 322. These may include an appellate
15 challenge to the denial of class **certification**. United Airlines,
16 Inc. v. McDonald, 432 U.S. 385, 393 (1977). The question, then,
17 is not whether the individual party-plaintiffs could make an
18 effective decision to appeal, but whether the Management
19 Committee had the authority to make this decision for them. See
20 Massachusetts v. Feeney, 429 U.S. 66 (1976) (per curiam). Insofar
21 as the first and third notices of appeal are concerned, we think
22 that the question must be answered in the negative. The Agent
23 Orange Plaintiffs' Management Committee claims to represent a
24 class, an uncertified class at that, not any individual
25 plaintiffs.
26

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

7 Mr. Moyer and I, on behalf of the **AOPMC**,
8 represent the **class**, as opposed to any
9 particular individuals on this appeal.
10 The only exception is that Mr. **Moyer's**
11 firm represents additionally and in-
12 dividually all the plaintiffs in the
13 Aguiar matter (82-780). However, only
14 class issues are here being raised on
15 behalf of those plaintiffs.

16 After some intervening explanatory **paragraphs**, the letter
17 concluded:

18 This explains why we are withdrawing
19 the third issue pertaining to wives'
20 independent claims for **miscarriages**.
21 The District Court's determination in
22 that regard could not apply to the
23 class and any appeal thereof would
24 have to be in individual cases in
25 which we have no authorization to
26 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

1 administrative prerequisites of suit have not been satisfied by
2 or on behalf of each individual claimant. See, e.g., Keene Corp.
3 v. United States, 700 F.2d 836, 841 (2d Cir.), cert. denied, 464
4 U.S. 864 (1983); Lunsford v. United States, 570 F.2d 221, 224-27
5 (8th Cir. 1977); Commonwealth of Pennsylvania v. National Ass'n
6 of Flood Insurers, 520 F.2d 11, 23-25 (3d Cir. 1975); Luria v.
7 Civil Aeronautics Board, 473 F. Supp. 242 (S.D.N.Y. 1979); Kantor
8 v. Kahn, 463 F. Supp. 1160, 1162-64 (S.D.N.Y. 1979); Founding
9 Church of Scientology v. Director, FBI, 459 F. Supp. 748, 754-56
10 (D.D.C. 1978).

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

21 In an effort to allege a viable cause of action, plaintiffs'
22 counsel assign their claims of government wrongdoing to three
23 separate time periods -- pre-induction, in-service, and post-
24 service. The pre-induction claims are based largely upon an
25 alleged failure to warn of the Agent Orange health hazards to
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1 which the inductees would be exposed. The in-service claims deal
2 with the allegedly **negligent** acts that led to and accompanied the
3 actual exposure. The post-service allegations deal with the
4 **Government's** failure to warn plaintiffs of the health hazards
5 they faced and to treat or **monitor** the **treatment** for plaintiffs'
6 Agent Orange-related illnesses. All of these claims were
7 summarily rejected by the district court. 603 F. Supp. at
8 242-45.

9 The ultimate policy decision to use Agent Orange was made by
10 President Kennedy. 603 F. Supp. at 244. **He**, of course, was*
11 Commander in Chief of the Armed Forces with "decision-making
12 **responsibility** in the area of **military** operations." DaCosta v.
13 Laird, 471 F.2d 1146, 1154 (2d Cir. 1973). However, in making
14 decisions of this nature, the President does not act alone.
15 Article I, section 8 of the Constitution empowers Congress to
16 "raise and support Armies" and to "make Rules for the **Government**
17 and Regulation of the land and naval Forces." See Rostker v.
18 Goldberg, 453 U.S. 57, 59 (1981). Pursuant to that authority,
19 Congress has designated the Department of Defense as an Executive
20 Department of the United States, 10 U.S.C. § 131, and has
21 directed the Secretary of Defense, with the assistance of the
22 Joint Chiefs of Staff and advisory committees and panels, to make
23 **recommendations** and reports to Congress concerning existing and
24 proposed weapon **systems**, 10 U.S.C. §§ 139, 141, 174. Congress
25 also has created the office of Under **Secretary** of Defense for
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1 Research and Engineering, whose duties include supervising all
2 research and engineering activities in the Department of Defense
3 and advising the Secretary on scientific and technical matters,
4 10 U.S.C. § 135. Absent a substantial constitutional issue, the
5 wisdom of the decisions made by these concurrent branches of the
6 Government should **not** be subject to judicial review.

7 Orderly government requires that the
8 judiciary be as scrupulous not to inter-
9 fere with **legitimate Army matters** as the
 Army must be scrupulous not to intervene
 in judicial matters.

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

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

16 It would be difficult to think of a
17 clearer **example** of the type of **governmental**
18 action that was intended by the Constitution
19 to be left to the political branches directly
20 responsible -- as the Judicial Branch is not
21 -- to the electoral process. Moreover, it is
22 difficult to conceive of an area of govern-
23 mental activity in which the courts have less
24 competence. The complex, subtle, and pro-
25 fessional decisions as to the composition,
26 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 **responsi-**
 bility for these decisions is appropriately
 vested in branches of the government which
 are periodically subject to electoral
 accountability. It is this power of over-

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

5 Id. at 10-11.

6 Two well-established doctrines make the foregoing principles
7 of restraint peculiarly applicable to the instant FTCA actions,
8 which ask the judiciary to pass judgment upon the discretionary
9 military decisions involving Agent Orange. The first of **these** is
10 the so-called "discretionary function" exception to the
11 **Government's** waiver of **immunity** under the FTCA, 28 U.S.C.
12 § 2680(a), which we discuss in the Hogan v. Dow Chemical opinion,
13 Nos. 85-6223, 85-6341, filed herewith. There, we hold that the
14 Government was performing a discretionary function while
15 **field-testing** Agent Orange in Hawaii. The second is the
16 so-called "Feres doctrine", originating in the seminal case of
17 Feres v. United States, 340 U.S. 135 (1950), which **prohibits** the
18 judiciary from imposing liability upon the United States for
19 injuries to **servicemen** that "arise out of or are in the course of
20 activity incident to **service**." Id. at 146. There is little
21 difference between these doctrines as they relate to the facts of
22 the instant case. Both apply to discretionary military
23 decisions. Perkins v. Rumsfeld, 577 F.2d 366, 368 (6th Cir.
24 1978); Builders Corp. of America v. United States, 320 F.2d 425
25 (9th Cir. 1963), cert. denied, 376 U.S. 906 (1964). Both
26

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

8 Appellants have concentrated their attack on Feres which,
9 they say, consists of "perversely overstretched trappings of
10 sovereign immunity", "warped logic", and "balderdash".
11 Confronted with the affirmation of the Feres holding in United
12 States v. Shearer, supra, which followed the filing of
13 appellants' original brief, appellants assert in their reply
14 brief that Chief Justice Burger, who wrote Shearer, "rambled into
15 Feres as dictum." Although Feres has not been without its
16 properly less caustic critics, see, e.g., Bozeman v. United
17 States, 780 F.2d 198, 200 (2d Cir. 1985), it remains the law of
18 the land and is binding on this Court. Id. at 202. See also
19 Chappell v. Wallace, supra, 462 U.S. 296, and Stencel Aero
20 Engineering Corp. v. United States, 431 U.S. 666, 673-74
21 (1977).

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

1 bars recovery. See, e.g., Healy v. United States, 192 F. Supp.
2 325 (S.D.N.Y.), aff'd on opinion below, 295 F.2d 958 (2d Cir.
3 1961); Satterfield v. United States, 788 F.2d 395, 399 n.3 (6th
4 Cir. 1986); Joseph v. United States, 505 F.2d 525 (7th Cir.
5 1974); Glorioso v. United States, 331 F. Supp. 1 (N.D. Miss.
6 1971); Redmond v. United States, 331 F. Supp. 1222 (N.D. Ill.
7 1971).

8 Application of the discretionary function rule leads
9 ineluctably to the same result. Dalehite v. United States, 346
10 U.S. 15 (1953), the leading case in this field, involved, among
11 other things, a failure to warn. Id. at 42, 46-47. Lower courts
12 which follow Dalehite have reached the same result. See Ford v.
13 American Motors Corp., 770 F.2d 465 (5th Cir. 1985); Cisco v.
14 United States, 768 F.2d 788, 789 (7th Cir. 1985); Begav v. United
15 States, 768 F.2d 1059, 1066 (9th Cir. 1985); Shuman v. United
16 States, 765 F.2d 283, 291 (1st Cir. 1985); General Public
17 Utilities Corp. v. United States, 745 F.2d 239, 243, 245 (3d Cir.
18 1984), cert. denied, 469 U.S. 1228 (1985); Green v. United
19 States. 629 F.2d 581, 585-86 (9th Cir. 1980).

20 If the Feres doctrine is to have any meaning at all, the
21 claim for in-service injuries is a classic case for its
22 application. At issue is a decision of the veterans' highest
23 military superiors that was designed to help the veterans in
24 fighting the armed conflict in which they were engaged. "Here,
25 the parties do not dispute that the government's motives in using
26

1 Agent Orange in southeast Asia were valid military objectives:
2 defoliate jungle growth to deprive enemy forces of ground cover
3 and destroy enemy crops to restrict enemy's food supplies." 506
4 F. Supp. at 779; see also 603 F. Supp. at 244. We find no merit
5 whatever in appellants' argument that the Government should be
6 estopped from relyin'g on Feres because, in subsequently opposing
7 certain veterans' **claims** for benefits, the Government argued that
8 their injuries were not service related, while it contends here
9 that the same injuries were "incident to service." This is a
10 distortion of the Government's position, which is **that, if** the
11 veterans' injuries were caused by exposure to Agent Orange, a
12 contention which the Government consistently **has** rejected, they
13 were "incident to service". See also Henninger v. United States,
14 473 F.2d 814, 816 (9th Cir.), cert. denied, 414 U.S. 519 (1973),
15 regarding the inapplicability of the doctrine of estoppel in FTCA
16 cases.

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

23 We agree with both **Judge** Pratt and Chief Judge Weinstein
24 that the veterans' claims for post-service injuries are
25 inseparably entwined with and directly related to their military
26

1 service. See 506 F. Supp. at 779 and 603 F. Supp. at 244-45.
2 The majority of other Circuits would rule similarly. See, e.g.,
3 Heilman v. United States, 731 F.2d 1104, 1108 (3d Cir. 1984);
4 Gaspard v. United States, 713 F.2d 1097, 1100-01 (5th Cir. 1983),
5 cert. denied, 466 U.S. 975 (1984); Lombard v. United States, 690
6 F.2d 215, 220-23 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118
7 (1983); Laswell v. Brown, 683 F.2d 261, 264-67 (8th Cir. 1982),
8 cert. denied, 459 U.S. 1210 (1983). See also Kosak v. United
9 States, 465 U.S. 848, 854 (1984).

10 We are not persuaded by **plaintiffs' attempts** to **frame** a*
11 theory of independent post-service **wrongdoing** to bring their
12 **claims** within the ambit of United States v. Brown, 348 U.S. 110
13 (1954), and cases such as Broudy v. United States, 661 F.2d 125
14 (9th Cir. 1981), and Stanley v. United States, 786 F.2d 1490
15 (11th Cir.), cert. granted, 107 S. Ct. 642 (1986), which follow
16 Brown. The district court did not **simply** reject plaintiffs'
17 **373-paragraph** complaint as an inadequate pleading; the
18 Government's motion was in the alternative, i.e., for dismissal
19 or **summary judgment**, 603 F. Supp. at 241, and the district court
20 granted **summary judgment**, id. at 248. If anything is clear after
21 reviewing an appellate record of over 16,000 **pages**, reading
22 hundreds of pages of briefs, and listening to two full days of
23 oral argument, it is that the weight of present scientific
24 evidence does not establish that Agent Orange injured **military**
25 **personnel** in **Vietnam**. Plaintiffs cannot disguise this fact by
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1 what the district court termed "'inventive presentation or artful
2 pleading.'" 603 F. Supp. at 245.

3 The very paucity of proof concerning the possible
4 deleterious effects of Agent Orange made the decision whether to
5 issue a nationwide health warning even more clearly an exercise
6 of discretion. The reasoning of the discretionary function cases
7 cited in connection with our discussion of pre-induction failure
8 to warn is equally applicable here. See In re Consolidated U.S.
9 Atmospheric Testing Litigation, 616 F. Supp. 759, 774-77 (N.D.-
10 Cal. 1985). In considering the discretionary function exception,
11 we are not bound to apply common law tort rules concerning the
12 duty to warn as they may differ from State to State. Since the
13 discretionary function exception of the FTCA does not exist in
14 private tort litigation, "state tort standards cannot adequately
15 control those governmental decisions in which, to be effective,
16 the decision-maker must look to considerations of public policy
17 and not merely to established professional standards or to
18 standards of general reasonableness." Hendry v. United States,
19 418 F.2d 774, 783 (2d Cir. 1969). See Mitchell v. United States,
20 787 F.2d 466, 468 (9th Cir. 1986).^{2/}

21 CONCLUSION

22 Insofar as the appeals purport to be taken on behalf of a
23 class, they are dismissed. Insofar as the appeals purport to be
24 taken on behalf of individuals, the judgment appealed from is
25 affirmed. No costs to the Government on the appeals.
26

FOOTNOTES

1 1/ The Agent Orange Plaintiffs' Management Committee is the
2 successor to a committee appointed in 1930 to represent a
3 tentatively certified plaintiffs' class in an action against the
4 chemical companies. See In re "Agent Orange" Product Liability
5 Litigation, supra, 506 F. Supp. at 788; 534 F. Supp. 1046,
6 1052-53; 611 F. Supp. 1452, 1454.

7
8 27 Insofar as appellants' post-service claims allege failure of
9 the Veterans Administration to provide adequate medical
10 treatment, we agree with Judge Pratt that appellants seek
11 precisely the type of judicial review that Congress, in enacting
12 33 U.S.C. § 211(a), expressly prohibited. See Ryan v. Cleland,
13 531 F. Supp. 724, 731 (E.D.N.Y. 1982). See also Pappanikolaou
14 v. Administrator of the Veterans Admin., 762 F.2d 8 (2d Cir.) (per
15 curiam), cert. denied, 106 S. Ct. 150 (1985); Hartmann v. United
16 States, 615 F. Supp. 446, 443-50 (E.O.N.Y. 1985); H.R. No.
17 91-1166, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code
18 Cong. & Ad. News 3723, 3729-31.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 343

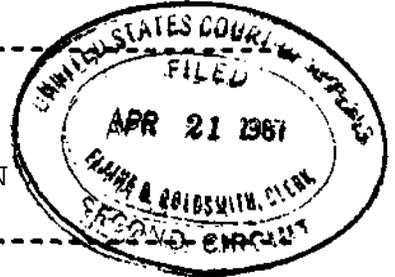
August Terra, 1986

(Argued October 1, 1986

Decided APR 21 1987

Docket No. 86-6127

IN RE: "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION



THOMAS ADAMS, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

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

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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.

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

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

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

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

18 The following cases are typical of those arising in the
19 "ancillary or derivative claims" jurisdictions: Hinkie v. United
20 States, 715 F.2d 96 (3d Cir. 1983), cert. denied, 465 U.S. 1023
21 (1984); Mondelli v. United States, 711 F.2d 567 (3d Cir. 1983),
22 cert. denied, 465 U.S. 1021 (1984); Lombard v. United States, 690
23 F.2d 215 (D.C. Cir. 1982), cert. denied, 462 U.S. 1118 (1983);
24 Scales v. United States, 685 F.2d 970 (5th Cir. 1982), cert.
25 denied, 460 U.S. 1082 (1983); Laswell v. Brown, 683 F.2d 261 (3th
26 Cir. 1982), cert. denied, 459 U.S. 1210 (1983); Monaco v. United

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

10 One of the cases in the "non-derivative or independent .
11 claims" group, a case which moved through this Court, was Harrison
12 v. United States, 479 F. Supp. 529 (D. Conn. 1979), aff'd without
13 opinion, 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828
14 (1980). This was a suit for loss of consortium by a **serviceman's**
15 wife, who resided in Michigan where her claim was considered to be
16 separate and distinct from that of her husband. Applying the
17 Feres rationale as reaffirmed and strengthened in Stencel, supra,
18 then Chief **Judge** Clarie held that it barred the claim of the
19 serviceman's wife. He said:

20 There has been no **suggestion** in the
21 legislative history of the Act that
22 Congress was aware that the Tort
23 Claims Act might be interpreted in
24 such an anomalous manner that a
25 serviceman-husband performing his
26 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.

1 479 F. Supp. at 535. The following cases from other "non-
2 derivative or independent claims" jurisdictions are in accord:
3 Gaspard v. United States, 713 F.2d 1097 (5th Cir. 1983), cert.
4 denied, 466 U.S. 975 (1984); De Font v. United States, 453 F.2d
5 1239 (1st Cir.), cert. denied. 407 U.S. 910 (1972); United States
6 v. Lee, 400 F.2d 558 (9th Cir. 1968), cert. denied. 393 U.S. 1053
7 (1969); Van Sickel v. United States, 285 F.2d 87 (9th Cir. 1960);
8 Sigler v. LeVan, 485 F. Supp. 185 (D. Md. 1980).

9 Of particular interest is an action brought in the United
10 States District Court for the Eastern District of Pennsylvania in
11 1982 by Louise Shearer, the mother of a deceased serviceman. In
12 Pennsylvania, a cause of action for wrongful death, 42 Pa. C.S.A.
13 § 8301, is possessed by certain specified relatives of the
14 deceased, who recover in their own behalf and not as beneficiaries
15 of the deceased's estate. McClinton v. White, 285 Pa. Super. 271,
16 278 (1981), vacated on other grounds, 497 Pa. 610 (1982). With
17 obvious reference to section 8301, the district court held that
18 "[t]he Feres doctrine applies in cases in which a personal
19 representative brings an action under a state death statute which
20 is not derivative in nature, but is an original and distinct cause
21 of action granted to such individuals to recover damages sustained
22 by them by reason of the wrongful death of the decedent." 576
23 F. Supp. 672, 673 n.1. Finding that plaintiff's allegations of
24 wrongdoing "relate directly to decisions of military personnel
25 made in the course of the performance of ~~their~~ military duty," id.
26 at 674, the court granted summary judgment dismissing the

1 complaint. The Court of Appeals for the Third Circuit reversed
2 without discussing the Pennsylvania wrongful death statute, 723
3 F.2d 1102 (3d Cir. 1983), but was in turn reversed by the Supreme
4 Court in United States v. Shearer, 473 U.S. 52 (1985), a decision
5 that is considered to be a major reaffirmation of Feres and
6 Stencel. The Supreme Court stated that plaintiff's allegation of
7 wrongdoing "goes directly to the 'management' of the military",
8 that it "would require Army officers 'to testify in court as to
9 each other's decisions and actions'", and that "[t]o permit this
10 type of suit would mean that commanding officers would have to
11 stand prepared to convince a civilian court of the wisdom of a
12 wide range of military and disciplinary decisions." 105 S. Ct. at
13 3043-44.

14 These were simply restatements and affirmations of language
15 used time and again by the lower courts that have denied recovery
16 by family members. See, e.g., Hinkie, 715 F.2d at 98; Mondelli,
17 711 F.2d at 568-69; Lombard, 690 F.2d at 223-26; Monaco, 661 F.2d
18 at 133-34; Scales, 685 F.2d at 970-74.

19 Where, as here, the military decision is of such a nature
20 that it properly may be termed a discretionary function, denial of
21 recovery by both military and nonmilitary personnel is doubly
22 warranted. Abraham v. United States, 465 F.2d 881 (5th Cir.
23 1972); Maynard v. United States, 430 F.2d 1264 (9th Cir. 1970).
24 Like the Court of Appeals for the District of Columbia, "[w]e will
25 not permit a suit for damages occasioned by activities that are
26 not meaningfully separable from a protected discretionary

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

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

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

14 No costs to any party.
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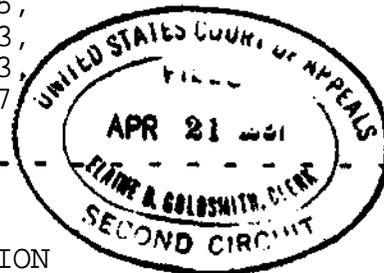
UNITED STATES COURT OF APPEALS
For the Second Circuit

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



IN RE "AGENT ORANGE"
PRODUCT LIABILITY LITIGATION

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.,
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United States Attorney for the Eastern
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Appellee United States of America.

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The Dow Chemical Company.

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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.,
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Company.

Morton Silberman, Clark, Gagliardi & Miller,
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Defendant-Appellant T H Agriculture &
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Counsel, for Defendant-Appellant Thompson
Chemicals Corporation.

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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.

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

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

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

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

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

15 The greater the scope of a military decision and the more
16 far-reaching its effect, the more it assumes the aspects of a
17 political **determination**, which, in and of itself, is not subject
18 to judicial second-guessing, Chicago & Southern Air Lines, Inc.
19 v. Waterman Steamship Corp., 333 U.S. 103, 111 (1948). See,
20 e.g., DaCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973)
21 (President Nixon's tactical decision to mine North Vietnam
22 harbors held to create a non-justiciable political question);
23 Holtzman v. Schlesinger, 484 F.2d 1307, 1310 (2d Cir. 1973)
24 (bombing of Cambodia held to involve diplomatic and military
25 expertise not vested in judiciary and thus political in nature),
26

1 cert. denied. 416 U.S. 936 (1974); Pauling v. McNamara, 331 F.2d
2 796, 798-99 (D.C. Cir. 1963)(**explosion** of nuclear bombs held to
3 constitute a large matter of basic national policy and to present
4 no judicially cognizable **issue**), cert. denied, 377 U.S. 933
5 (1964). See also In re "Agent Orange" Product Liability
6 Litigation, Nos. 85-6091, 85-6093, 85-6095, at 7-13. As the
7 bombing in Cambodia was designed to protect United States
8 **military** and civilian personnel from a "grave risk of personal
9 injury or death", Holtzman, supra, 484 F.2d at 1311 n.1, so also
10 was the President's decision to use Agent Orange to defoliate
11 Vietnamese jungle trails, a decision in which the South
12 Vietnamese **military**, to some extent at least, participated.
13 Recognizing as we must that our judicial system is ill-equipped
14 to handle service-related tort claims involving hundreds of
15 thousands of soldiers, we believe that it is in massive cases
16 such as the instant one where the Feres doctrine is best
17 applied.

18 Once the continuing vitality of the Feres doctrine is
19 acknowledged, see, e.g., United States v. Shearer, 473 U.S. 52
20 (1985); H.R. Rep. No. 97-384, 97th Cong., 1st Sess. 5 (1981),
21 reprinted in 1981 U.S. Code Cong. & Ad. News 2692, 2695,
22 recognition of Stencel as binding authority against recovery by
23 appellants inevitably must follow. A court considering the
24 merits of **appellants' claims** would be required to answer the same
25 questions concerning the discretionary **military** and political
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1 decisions of the Executive and Legislative Branches of Government
2 that it would not feel qualified to answer in suits by individual
3 servicemen. Stencel, supra, 431 U.S. at 673.

4 The litigation would take virtually the
5 identical form in either case, and at
6 issue would be the degree of fault, if
7 any, on the part of the Government's
8 agents and the effect upon the service-
9 man'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.

10 Id.

11 Moreover, a recovery by appellants in the instant case would
12 violate well-established principles of tort law. Appellants
13 contend that they are entitled to recover both contribution and
14 indemnity from the Government. In support of this contention,
15 they advance a most unique theory of law, i.e., that they are
16 entitled to recover even though the claims they settled were
17 without merit. Both appellants and the Government have
18 contended, and continue to contend, that Agent Orange did not
19 cause the injuries of which the plaintiffs complain. "Third
20 party defendants as well as third party plaintiffs agree that
21 Agent Orange cannot be shown to have caused any injury to any
22 member of the class." 611 F. Supp. at 1222. Nonetheless,
23 appellants assert that they are entitled to reimbursement from
24 the Government. They say that "[t]he district court's finding
25 that there is no proof that Agent Orange caused harm is not
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1 relevant here." They argue that the very absence of liability
2 justifies recovery against the **Government**, asserting that "[t]he
3 overwhelming evidence in the record that Agent Orange caused no
4 harm provides strong **justification** for spreading the risk."
5 Whether we view **appellants'** claims against the Government as
6 seeking contribution or indemnity, we find no merit in the above
7 contentions. See HS Equities, Inc. v. Hartford Accident &
8 Indemnity Co., 609 F.2d 669, 674 (2d Cir. 1979).

9 Contribution is the proportionate sharing of liability among
10 tortfeasors. Ingham v. Eastern Air Lines, Inc., 373 F.2d 227,
11 240 n.12 (2d Cir.), cert. denied, 389 U.S. 931 (1967).

12 "Typically, a right to contribution is recognized when two or
13 more persons are liable to the **same** plaintiff for the same injury
14 and one of the joint tortfeasors has paid more than his fair
15 share of the common liability." Northwest Airlines, Inc. v.
16 Transport Workers Union of America, 451 U.S. 77, 87-88 (1981).

17 "Contribution rests upon a finding of concurrent fault." Cooper
18 Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106, 115 (1974).

19 Where, as here, a third-party plaintiff insists that it is not at
20 fault, it cannot contend successfully that the third-party
21 defendant is a joint tortfeasor. Southern Surety Co. v.
22 Commercial Casualty Ins. Co., 31 F.2d 817, 819 (3d Cir.), cert.
23 denied, 280 U.S. 577 (1929); 18 Am. Jur. 2d Contribution §§ 121,
24 127; 18 C.J.S. Contribution § 3.

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

15 Even if New York law held a private person
16 liable, that fact would not be dispositive of
17 the question of the United **States'** liability
18 in this case, because the language of § 1346(b),
19 the jurisdictional provision, does not expand
20 the limited waiver set forth in §§ 2674 et seq.
21 Rather, § 1346(b) is expressly made "[s]ubject
22 to the provisions of" §§ 2671-2680, and the
23 liability that a state would impose on a
24 private individual may not, under § 2674, be
25 imposed on the government except in "like
26 **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

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

3 Caban v. United States, 728 F.2d 68, 73-74 (2d Cir. 1984); see
4 Arvanis v. Noslo Engineering Consultants, Inc., 739 F.2d 1287,
5 1292 (7th Cir. 1984), cert. denied, 469 U.S. 1191 (1985).

6 Feres created a bar against recovery that was substantive,
7 not procedural, Lockheed Aircraft Corp. v. United States, 460
8 U.S. 190, 197 n.8 (1983), and has been held in **some** cases to go
9 to the very jurisdiction of the court, Labash v. United States
10 Department of the Army. 668 F.2d 1153, 1154-55 (10th Cir.) (citing
11 United States v. Testan, 424 U.S. 392, 399 (1976)), cert. denied,
12 456 U.S. 1008 (1982). It precludes appellants from recovering
13 the contribution they seek. See Hillier v. Southern Towing Co.,
14 714 F.2d 714, 721-22 (7th Cir. 1983); Carter v. City of Cheyenne,
15 649 F.2d 827, 828-30 (10th Cir. 1981); Certain Underwriters at
16 Lloyd's v. United States. 511 F.2d 159, 163 (5th Cir. 1975);
17 Newport Air Park, Inc. v. United States, 419 F.2d 342, 346-47
18 (1st Cir. 1969); Maddux v. Cox, 382 F.2d 119, 124 (8th Cir.
19 1967).

20 The result would be the same if appellants sought indemnity
21 on a tort theory of active-passive negligence or primary-
22 secondary liability. If the district court is precluded from
23 second-guessing the wisdom and propriety of the discretionary
24 military and political decisions at issue herein, it hardly is in
25 a position to decide whether the Government was guilty of active
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1 or passive negligence. **Moreover**, a finding of either primary or
2 secondary liability is inappropriate when established law says
3 that there can be no finding of liability at all. "For the
4 United States to be the active wrongdoer, however, it must first
5 be a wrongdoer." Hillier v. Southern Towing Co., supra, 714 F.2d
6 at 721 (citing Slattery v. Marra Bros., Inc., 186 F.2d 134, 139
7 (2d Cir.)(L. Hand, C.J.), cert. denied, 341 U.S. 915 (1951)).

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

21 Our review of the record places us in complete accord with
22 Chief Judge Weinstein's findings that "[t]he government and
23 [appellants] had essentially the same knowledge about possible
24 dangers from dioxin in Agent Orange" and that "[appellants']
25 position that they were unaware of the possible dangers of Agent
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1 Orange and were **misled** to their detriment by the **government's**
2 failure to reveal what it knew in the **mid-1960's** has no basis in
3 fact." 611 F. Supp. at 1223. In view of **the** "years of
4 discovery" that preceded the dismissal of **appellants'** third-party
5 claims, 611 F. Supp. 1223, 1260, it is inconceivable that
6 appellants would not have uncovered and disclosed to the district
7 court any governmental knowledge of hazardous effects that might
8 have precluded such dismissal. Instead of coming forward with
9 factual support for the theory they now espouse, appellants have
10 argued from the outset that there is no **medical** causal relation
11 between Agent Orange and **plaintiffs'** injuries. Although
12 appellants are **permitted** some inconsistency in their pleadings,
13 Fed. R. Civ. P. **8(e)(2)**, when those pleadings are put to the
14 test by a motion for summary **judgment**, appellants must, after
15 adequate time for discovery, "make a showing sufficient to
16 establish the existence of an element essential to [their] case,
17 and on which [they] will bear the burden of proof at trial."
18 Celotex, **supra**, 106 S. Ct. at 2553. On the present record,
19 appellants have not shown any knowledge on the part of the
20 Government, exclusive or otherwise, that Agent Orange was a
21 competent producing cause of the **plaintiffs'** injuries.

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

22 We find no merit in appellants' contention that the
23 protection against liability provided by Feres and Stencel
24 applies only to the **Government** and not to its officials,
25 Chappell v. Wallace, 462 U.S. 296 (1983); Rotko v. Abrams, 338
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1 F. Supp. 46 (D. Conn. 1971), aff'd on opinion below, 455 F.2d 992
2 (2d Cir. 1972); Hefley v. Textron, Inc., 713 F.2d 1487, 1491
3 (10th Cir. 1983), or that it does not apply to claims of
4 constitutional **infringement**, Trerice v. Pedersen, 769 F.2d 1398,
5 1400-01 (9th Cir. 1985). We also find no merit in the contention
6 of appellant, Thompson Chemical Corporation, that the district
7 court erred in not specifically considering its claim of a
8 contractual right of **reimbursement**. The provision giving rise to
9 this claim was contained in a contract providing for
10 participation by Thompson in the proposed modification of a
11 government-owned facility at **Weldon** Spring, Missouri, which would
12 have enabled that facility to produce Agent Orange. Because no
13 Agent Orange ever was produced at the Weldon Spring plant, there
14 were no Agent Orange deaths or injuries "arising out of the
15 performance of this contract" which would bring the contractual
16 indemnification clause into play. This being so, we need not
17 respond to the Government's contention that the proper tribunal
18 to hear **Thompson's** contract claim was the Court of Claims. See
19 Hefley, supra. 713 F.2d at 1492; 28 U.S.C. §§ 1346(a)(2) and
20 1491.

21 Dismissal of **appellants'** third-party claims against the
22 Government was proper. The order and judgment of dismissal are
23 **affirmed**.
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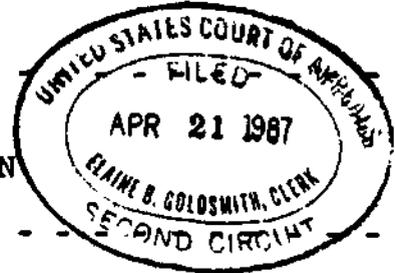
UNITED STATES COURT OF APPEALS
For the Second Circuit

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.

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.

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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.

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

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

1 interminably delayed if the participants were permitted to
2 disobey court orders with little fear of sanction. In litigation
3 of such epic proportions as this, it is particularly important
4 that "the most severe in the spectrum of sanctions provided by
5 statute or rule must be available to the district court . . . ,
6 not merely to penalize those whose conduct may be deemed to
7 warrant such a sanction, but to deter those who might be tempted
8 to such conduct in the absence of such a deterrent." National
9 Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639,
10 643 (1976); see United States Freight Co. v. Penn Central Transp.
11 Co., 716 F.2d 954 (2d Cir. 1983)(per curiam); Trans World
12 Airlines, Inc. v. Hughes, 332 F.2d 602, 615 (2d Cir. 1964), cert.
13 dismissed, 380 U.S. 248 and 249 (1965). The judgment of the
14 district court is affirmed.

15 THE HAWAIIAN APPEALS

16 In 1967, while James Oshita, Masao Takatsuki and William J.
17 Fraticelli were working for the University of Hawaii at its
18 College of Tropical Agriculture and Human Resources, they
19 allegedly sustained injuries caused by exposure to Agent Orange
20 which was being tested in the fields by University employees.
21 All three filed **Worker's Compensation claims**, Oshita and
22 Fraticelli in 1979 and Takatsuki in 1981, and all were awarded
23 benefits. Fraticelli died in April 1981. On January 12, 1981,
24 Oshita and Takatsuki presented administrative **claims** to the
25 United States pursuant to 28 U.S.C. S 2401(b); no such claim has
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1 been filed by **Fratricelli's** widow, Clara. On January 11, 1982,
2 **Oshita, Takatsuki,** and Clara Fraticelli, on behalf of herself and
3 her **husband's** estate, commenced this suit in the United States
4 District Court for the District of Hawaii seeking relief not only
5 for **themselves** but also for a proposed class consisting of
6 everyone on the Island of **Kauai** who had been exposed to Agent
7 Orange. In addition to the several chemical companies which
8 allegedly manufactured the injurious herbicide, the complaint
9 named as defendants ten Regents or former Regents of the
10 University of Hawaii, together with the United States and its
11 Department of Defense. Over the objection of the **plaintiffs,** the
12 case was transferred to the Eastern District of New York by the
13 Judicial Panel on **Multidistrict** Litigation.

14 In Hawaii, an action for personal injuries must be brought
15 within two **years** after the cause of action accrues. Haw. Rev.
16 Stat. § 657-7. A claim accrues under this statute when the
17 plaintiff discovers or reasonably should have discovered the
18 complained of act, the injury and the **causal** connection between
19 the two. **Yamaguchi v. Queen's Medical Center**, 65 Haw. 84, 648
20 **P.2d** 689 (1982). The district court held **that,** insofar as the
21 **plaintiffs'** personal injury claims were concerned, the two-year
22 statute started to run no later than 1979, and appellants concede
23 that the Hawaiian statute, standing alone, would have barred
24 their **common-law,** personal injury claims prior to the bringing of
25 their suits in 1982. However, relying on American Pipe &
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1 Constr. Co. v. Utah, 414 U.S. 538 (1974), and Crown. Cork & Seal
2 Co., Inc. v. Parker, 462 U.S. 345 (1983), they contend that the
3 running of the statute was tolled by the bringing of the
4 principal Agent Orange class action. This reliance is
5 misplaced.

6 The limitation periods of American Pipe and Crown, Cork were
7 derived from federal statutes. Here, we are dealing with
8 **Hawaii's** limitation statutes. Because none of them provides for
9 tolling in a situation such as exists here, it is doubtful that
10 either American Pipe or Crown, Cork can be treated as applicable
11 precedent. See Chardon v. Fumero Soto, 462 U.S. 650, 660-62
12 (1983); Board of Regents v. Tomanio, 446 U.S. 478, 483-86 (1980);
13 Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 466-67
14 (1975).

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

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

17 From the very outset, the district court recognized the
18 principal Agent Orange class action as one brought on behalf of
19 "Vietnam war veterans and members of their families claiming to
20 have suffered damage as a result of the veterans' exposure to
21 herbicides in **Vietnam**." 506 F. Supp. 762, 768. This recognition
22 was based upon a fair reading of the original class action
23 complaints. The class which the district court certified
24 consisted of such **veterans**, their **spouses**, **parents**, and children,
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1 who were injured **as a** result of the **veterans'** Vietnam exposure.
2 100 F.R.D. 718, 731-32.

3 The intent of the American Pipe rule is to preserve the
4 individual right to sue of the members of a proposed class until
5 the issue of class **certification** has been decided. Crown, Cork,
6 supra, 462 U.S. at 354 (Powell, J., **concurring**). Its purpose is
7 not to toll the statute of limitations for persons such as these
8 Hawaiian plaintiffs who were not members of either the proposed
9 or certified class. The district court did not err therefore **in**
10 dismissing the personal injury claims as against the chemical
11 companies and the University of Hawaii Regents. However, because
12 **Mrs. Fraticelli's** cause of action for the wrongful death of her
13 husband did not accrue until his death in 1981, Haw. Rev. Stat.
14 § 663-3, her action against the chemical companies, brought in
15 1982, was not barred by the two-year personal injury statute of
16 **limitations**, Haw. Rev. Stat. § 657-7.

17 Dismissal of all personal injury and related wrongful death
18 claims against the Regents was required because the Hawaiian
19 compensation statute provides the exclusive remedy against fellow
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1 employees for work-related injuries. Haw. Rev. Stat. § 386-5.
2 **Appellants'** claim under 42 U.S.C. § 1983 against the **Regents**,
3 based on the same injuries, is so devoid of merit, see Daniels v.
4 Williams, 106 S. Ct. 662 (1986); McClary v. O'Hare, 786 F.2d 83
5 (2d Cir. 1986), that appellants do not even contend on appeal
6 that their action against the Regents should be reinstated.

7 Although the timeliness of actions against the United States
8 is not governed by the Hawaiian statute of **limitations**, section
9 2401(b) of 28 U.S.C. provides time limitations that are more '
10 restrictive in that they are jurisdictional **in** nature. That
11 section provides in substance that a tort claim against the
12 United States is barred unless made in writing to the appropriate
13 federal agency within two years after the claim accrues and an
14 action is brought thereon within six **months** after the claim is
15 denied. The burden is on the plaintiff to both plead and prove
16 compliance with the statutory requirements. McNutt v. General
17 Motors Acceptance Corp., 298 U.S. 178, 182 (1936); Altman v.
18 Connally, 456 F.2d 1114, 1116 (2d Cir. 1972) (**per curiam**); Bruce
19 v. United States, 621 F.2d 914, 918 (8th Cir. 1980); Clayton v.
20 Pazcoquin, 529 F. Supp. 245, 247-49 (W.D. Pa. 1981). In the
21 absence of such compliance, a district court has no subject
22 matter jurisdiction over the **plaintiff's** claim. Wyler v. United
23 States. 725 F.2d 156, 159 (2d Cir. 1983).

24 Plaintiffs' complaint does not allege that the filing
25 **requirements** of section 2401(b) were complied with. Moreover, it
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1 appears to be conceded that Mrs. Fraticelli did not file a claim
2 for her **husband's** death. Because of Mrs. **Fraticelli's** failure to
3 **file**, her complaint against the United States should have been
4 dismissed for lack of jurisdiction. Gallick v. United States,
5 542 F. Supp. 188, 191 (M.D. Pa. 1982). **However**, the Government
6 concedes that Oshita and Takatsuki filed claims, and therefore
7 the complaint could be amended upon remand to allege that fact.
8 Accordingly, we will assume an amendment and address their claims
9 on the **merits.**^{1/}

10 A well-recognized exception to the **Government's** waiver of
11 immunity for tort liability is the "discretionary **function**"
12 exception found in 28 **U.S.C.** § 2680(a). The governmental acts of
13 which the Hawaiian plaintiffs complain fall within this
14 exception. It cannot be seriously contended that the decision to
15 use Agent Orange as a defoliant was anything but a discretionary
16 act. In pursuance of this decision, the **Government** entered into
17 a contract with the University of Hawaii to perform field tests
18 with the herbicide. Plaintiffs, who claim to have been injured
19 during the course of those field tests, cannot remove them **from**
20 the category of discretionary functions by vague and irrelevant
21 allegations of negligent labeling, shipping, handling, etc. See
22 Dalehite v. United States, 346 U.S. 15, 37-45 (1953); First
23 National Bank in Albuquerque v. United States, 552 F.2d 370,
24 374-77 (10th dr.), cert. denied, 434 U.S. 835 (1977).

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

5 Dalehite involved vast claims for damages
6 against the United States arising out of
7 a disastrous explosion of ammonium nitrate
8 fertilizer, which had been produced and
9 distributed under the direction of the
10 United States for export to devastated
11 areas occupied by the Allied **Armed** Forces
12 after World War II. Numerous acts of the
13 Government were charged as negligent: the
14 cabinet-level decision to institute the
15 fertilizer export program, the failure to
16 experiment with the fertilizer to determine
17 the possibility of explosion, the drafting
18 of the basic plan of manufacture, and the
19 failure properly to police the storage and
20 loading of the fertilizer.

21 The Court concluded that these allegedly
22 negligent acts were governmental duties
23 protected by the discretionary function
24 exception and held the action barred by
25 § 2680(a).

26 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.

1 United States, 768 F.2d 788, 789 (7th Cir. 1985); Begay v. United
2 States, 768 F.2d 1059, 1062-66 (9th Cir. 1985); General Public
3 Utilities Corp. v. United States, 745 F.2d 239, 243, 245 (3d Cir.
4 1984), cert. denied, 105 S. Ct. 1227 (1985); Green v. United
5 States, 629 F.2d 581, 585-86 (9th Cir. 1980).

6 The **dismissal** of appellant **Hogan's** complaint pursuant to
7 Fed. R. Civ. P. 37(b)(2) is **affirmed**. The summary judgment in
8 favor of appellees and against appellants, **Oshita** and Takatsuki,
9 is affirmed. The **chemical** companies moved for **summary** judgment
10 against Mrs. Fraticelli on the ground that her claim was barred
11 by the military contractor defense. The district court did not
12 rule upon this **claim**, and we address it only in general terms.
13 Mr. Fraticelli was a civilian. **Nevertheless**, his exposure to
14 Agent Orange occurred after the United States government had
15 purchased the herbicide and while the government was testing it
16 for military use. We believe, therefore, that the military
17 contractor defense, as discussed in Judge **Winter's** opinion
18 affirming summary judgment against the opt-out plaintiffs, No.
19 85-6163, applies to Mrs. **Fraticelli's claim**. We vacate the
20 dismissal of her claim and remand to the district court for a
21 determination on the motion for summary judgment. The summary
22 judgment **dismissing** Fraticelli's cause of action against the
23 United States is vacated and this cause of action is remanded to
24 the district court with instructions to dismiss for lack of
25 jurisdiction. No costs to any party.

FOOTNOTE

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

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