Recent Developments in Agent Orange Litigation

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A recent decision by the United States District Court, Eastern District of New York, could harm future Agent Orange litigation. In a "tentative" ruling, the MDL Court entered a summary judgment in favor of the manufacturers of Agent Orange, a chemical used to defoliate the forests of Vietnam.[3] The summary judgment was based upon the manufacturer's claim that they are immune from liability by virtue of the government contractor defense – the manufacturers say that the government made them do it.

Agent Orange was developed from a combination of 2,4-dichlorophenoxyacetic acid (2,4-D) and 2,4,5-trichlorophenoxyacetic acid (2,4,5-T).[4] Prior to the Vietnam War, various formulations of both 2,4-D and 2,4,5-T were sold in the commercial market as weed and brush killers. During the War, the United States government contracted with several chemical-manufacturing companies to produce chemicals to defoliate the thick forests of Vietnam.

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[3] In re Agent Orange, [Ms. Nos. MDL 381, CV 98-6383 (JBW), CV 99-3056 (JBW), February 9, 2004] ___ F. Supp. 2d ____, 2004 WL 231180 (E.D.N.Y. 2004).

[4] "Agent Orange and Cancer: An Overview for Clinicians," Howard Frumkin, MD, DrPh, CA Cancer J Clin 2003; Vol. 53: 245-255; http://caonline.amcancersoc.org/cgi/content/full/53/4/245.

Agent Orange, the primary defoliant used during the War, was produced from equal parts 2,4-D and 2,4,5-T.[5]

The toxicity of Agent Orange results from the production of a contaminant, 2,3,7,8-tetrachlorodibenzo-para-dioxin (also called TCDD and informally known as dioxin), which may be produced under certain conditions during the production process of 2,4,5-T.[6] TCDD can enter the body by breathing contaminated air, eating contaminated food, or by skin contact with contaminated soil or other materials.[7] Vietnam veterans were most likely exposed to TCDD by breathing the TCDD and by skin contact, although drinking from contaminated water and eating contaminated food are also possibilities.[8] The most obvious health effect in those exposed to TCDD is a skin condition known as chloracne. Chloracne is a severe skin disease characterized by acne-like lesions.[9]

Today, TCDD is also known to potentially cause certain cancers in those exposed to the toxic agent. The Department of Health and Human Services (DHHS) has determined that there is sufficient evidence to indicate a causal relationship between exposure to TCDD and certain human cancers.[10] Thus, DHHS characterizes TCDD as a known human carcinogen.[11] The International Agency for Research on Cancer (IARC) has also determined that TCDD is

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[5] Id.
[6] Institute of Medicine, Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides. Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam. Washington: National Academy Press, 1994, http://www.nap.edu/books/0309048877/html/index.html.
[7] Agency For Toxic Substances And Disease Registry, Public Health Statement for Chlorinated Dibenzo-p-dioxins (CDDS), December 1998.
[8] Id.
[9] Id.
[10] The Report On Carcinogens, Tenth Edition, National Toxicology Program, Department of Health and Human Services (2002).
[11] Id.

carcinogenic to people.[12] IARC found increased risks of lung cancer, non-Hodgkin lymphoma, and soft-tissue sarcoma in those exposed to TCDD.[13] New information exposing a link between TCDD and cancer is being reported almost each year. In January 2004, the United States Air Force Surgeon General Office revealed the results of a study which found that certain highly exposed Vietnam veterans had an increased risk of prostate and skin cancer as a result of their exposure to Agent Orange, though these have not been confirmed by other studies.[14]

Between 1962 and 1970, the United States military sprayed herbicides, including Agent Orange, to remove forest cover and destroy crops.[15] In the 1970s, veterans returning home from the War began to report serious illnesses and birth defects in their children.[16] Many of the veterans believed that their exposure to Agent Orange caused their health problems. These concerns resulted in the 1979 filing of a class-action lawsuit against the manufacturers of Agent Orange.[17]

In 1984, the veterans and the manufacturing companies reached a settlement.[18] The settlement provided that the manufacturing companies pay $180 million into a settlement fund, $10 million of which would indemnify the

[12] International Agency for Research on Cancer, Polychlorinated Dibenzo-para-Dioxins, IARC Monographs, Vol. 69 (1997).
[13] Id.
[14] "Study Ties Agent Orange, Melanoma," Washington Post, January 23, 2004; "Study: Agent Orange Linked to Cancer Risk," Associated Press, January 22,2004.
[15] Veterans and Agent Orange, supra.
[16] Id.
[17] Id.
[18] In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984).

defendants against future state court actions alleging the same claims.[19] Payments were to be made for ten years, beginning January 1, 1985 and ending December 31, 1994.[20] The settlement agreement also provided that no payments would be made for death or disability occurring after December 31, 1994.[21] Thus, the settlement agreement did not provide for payments to persons whose injury had not manifested until after the termination of the settlement fund in 1994.

Daniel Stephenson and Joe Isaacson are Vietnam veterans. Stephenson served both on the ground in Vietnam and as a helicopter pilot.[22] Isaacson served as a crew chief in the Air Force, and worked at a base for airplanes which sprayed Agent Orange.[23] Both say that they were exposed regularly to Agent Orange during their service. Stephenson was diagnosed with multiple myeloma, a bone marrow cancer, in 1998 and Isaacson was diagnosed with non-Hodgkin's lymphoma in 1996.[24] In August 1998, Isaacson filed suit in New Jersey state court against the chemical manufacturers who produced and sold Agent Orange to the United States Government. Stephenson followed, filing suit in February 1999, in the Western District of Louisiana. The Isaacson case was removed and both cases were transferred to the Eastern District of New York as a part of MDL 381.[25]

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[19] Id. at 863-65.
[20] Ryan v. Dow Chem. Co. (In re "Agent Orange" Prod. Liab. Litig.), 611 F. Supp. 1396, 1417 (E.D.N.Y. 1985), rev'd in part on other grounds, In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 179 (2d Cir. 1987).
[21] Id.
[22] Stephenson v. Dow Chemical Co., et al., 273 F.3d 249 (2d Cir. 2001).
[23] Id.
[24] Id.
[25] Id. at 255-56.

The defendant manufacturers moved to dismiss the cases under Federal Rule of Civil Procedure 12(b)(6), arguing that Stephenson and Isaacson's claims were barred by the 1984 class action settlement and final judgment.[26] The plaintiffs responded that they were inadequately represented in the previous litigation, raising due process concerns.[27] The Court granted the defendants' motion, concluding that the lawsuit was an impermissible collateral attack on the prior settlement.[28] However, the Second Circuit disagreed.

Prior to the Second Circuit's review of the Stephenson and Isaacson decisions, the United States Supreme Court had released Amchem Products, Inc. v. Windsor[29] and Ortiz v. Fibreboard Corporation.[30] In Amchem the Supreme Court addressed a challenge to the class certification of an asbestos settlement. The class would have included both individuals who were presently injured as well as individuals who had only been exposed to asbestos without any present manifestation of injury. The objectors argued that claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel because of the conflicting interests of both groups.[31] For instance, the objectors argued that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding.[32]

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[26] Id. at 256.
[27] Id. at 256-57.
[28] Id. at 256.
[29] 521 U.S. 591 (1997).
[30] 527 U.S. 815 (1999).
[31] Amchem, 521 U.S. at 607-08.
[32] Id. at 606.

Agreeing with the Third Circuit Court of Appeals, the Supreme Court noted that the case presented a situation in which "named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses."[33] The Court held that certification under these circumstances was improper because "the interests of those within the single class are not aligned."[34] While the critical goal for the currently injured included obtaining immediate payments, this goal conflicted with the interests of exposure-only plaintiffs, which was to ensure an ample, inflation-protected fund for the future.[35] Because of the conflicting interests of the class members, the court held that certification had been improper pursuant to Federal Rules of Civil Procedure 23(a) and (b).[36]

In Ortiz, the Supreme Court again considered the certification of a settlement-only class fund, this time in the context of a limited fund class under Rule 23(b)(1)(B). In holding that class certification was impermissible, the Court reiterated its holding in Amchem stating that "it is obvious after Amchem that a class divided between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."[37]

Relying upon Amchem and Ortiz, the Second Circuit concluded that Stephenson and Isaacson's interests could not have been adequately

[33] Id. at 626.
[34] Id.
[35] Id.
[36] Id. at 622-28.

represented because no provision was made for post 1994 claimants nor was there separate representation for these plaintiffs.[38] Rather, the settlement fund was permitted to terminate in 1994. According to the Court, "[b]ecause the prior litigation purported to settle all future claims, but only provided for recovery for those whose death or disability was discovered prior to 1994, the conflict between Stephenson and Isaacson and the class representatives becomes apparent."[39] The Court vacated the district court's dismissal, holding that Stephenson and Isaacson were not bound by the prior settlement because both had been inadequately represented.[40]

The defendants subsequently appealed to the United States Supreme Court, arguing that the class members were precluded from re-litigating the issue of adequacy of representation when class members had what they termed to be a full opportunity to opt out, object and appeal, and after the lower courts had determined that the class representatives adequately represented the class as a whole.[41] Gerson Smoger of Smoger & Associates argued on behalf of the plaintiffs.[42] In a per curiam two-paragraph decision, the Supreme Court affirmed the Second Circuit with respect to Stephenson (the Isaacson decision was vacated on grounds that the All Writs Act was not a proper basis for removal).[43] The opinion cleared the way for plaintiffs who had not been diagnosed with their injuries prior to the termination of the settlement fund in 1994, to bring suit

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[37] Ortiz, 527 U.S. at 856.
[38] Stephenson, 273 F.3d at 260-61.
[39] Id. at 260.
[40] Id. at 261.
[41] Dow Chemical Company v. Stephenson, 539 U.S. 111 (2003).
[42] Gerson Smoger is Chair-elect of STEP and serves on the Association of Trial Lawyers of America Executive Committee.

against the chemical manufacturers of Agent Orange. The Court's decision was a victory for veterans whose Agent Orange-related injuries had not manifested until the mid-nineties.

Although the Stephenson decision breathed new life into Agent Orange litigation, the victory may have been short-lived. Seven months later, the district court entered a tentative summary judgment in favor of the manufacturing companies, staying its decision until October 12, 2004, in order to give the plaintiffs an additional six months for discovery.[44] The Court based its summary judgment order entirely upon the government contractor defense.

The government contractor defense provides for federal preemption of state law claims where state law significantly conflicts with a federal interest.[45] In Boyle v. United Technologies Corp., the United States Supreme Court held that the procurement of equipment by the United States military is a "uniquely federal" interest, triggering the government contractor defense.[46] The defense provides immunity from liability for contractor's acting at the government's request. Specifically in regard to design defects in military equipment, the defense provides immunity from liability for contractors when: "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to

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[43] Id.
[44] In re Agent Orange, ___ F. Supp. 2d at ____, 2004 WL 231180, at *37.
[45] See Boyle v. United Technologies Corp., 487 U.S. 500 (1988).
[46] Id. 505-08.

the United States."[47] Contractors seeking to invoke the government contractor defense are in essence saying, "I am not liable because the Government made me do it."

The Stephenson and Isaacson defendants each argued that they were entitled to a summary judgment based upon the government contractor defense. In determining whether the plaintiff's were barred from pursuing their tort claims, the district court first outlined the history of the procurement of Agent Orange on behalf of the United States military.[48] Although the district court's opinion was based primarily on the affidavits and documents submitted on behalf of only one defendant, Diamond Shamrock Corporation (Diamond), the Court concluded that the facts supporting the government contractor defense were the same for each of the defendants.[49] Based upon its examination of the Diamond documents, the Court found that the contracts between Diamond and the Government set forth or incorporated by reference detailed specifications for the Agent Orange to be supplied to the Government and the 2,4-D and 2,4,5-T the product contained.[50]

According to the Court, the Government also strictly and precisely defined the markings that were to be placed on the barrels of Agent Orange supplied by defendants, prohibiting the placement of warnings on the barrels.[51] The Court found that the specifications were promulgated by the Government and that Diamond had fully complied with them. The Court also found that the Government required Diamond to provide it with Diamond's entire output of the

[47] Id. at 512.
[48] In re Agent Orange, ___ F.Supp.2d at ___, 2004 WL 231180 at *18-25.
[49] Id. at ___, 2004 WL 231180, at *18.
[50] Id.

chemical 2,4,5-T acid, that Diamond had been directed to accelerate delivery of existing Agent Orange orders, and that the Government had the company to increase its production capacity because of an Agent Orange shortage. Further, the Court concluded that the Government had controlled access to the chemical 2,4,5-T, allowing its use only in the production process of Agent Orange.[52] Thus, the Court concluded that the defendants had met the first and second prongs of the government contractor defense, the Government provided reasonably precise specifications and the Agent Orange conformed to those specifications.

In regard to the awareness by the Government of the dangers of Agent Orange, the Court found that, through the Government's own experiments and its investigation of the injuries resulting from the production of 2,4,5-T at Monsanto's plant in Nitro, West Virginia, (one of the defendants in the litigation) the Government knew that dioxin (TCDD) was present in 2,4,5-T, that it was present in Agent Orange as produced by Diamond and the other defendants, and that dioxin was carcinogenic and might cause other diseases.[53] The Court noted that the President's Advisory Committee, an organization within the White House, had discussed the presence of dioxin as a possible toxic contaminant in Agent Orange in 1963, 1965, and at other times.[54] Further, the Court considered information indicating that the Government had contemplated building its own Agent Orange manufacturing plant and believed that it could develop a new

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[51] Id. at ___, 2004 WL 231180, at *24.
[52] Id. at ___, 2004 WL 231180, at *19-20.
[53] Id. at ___, 2004 WL 231180, at *21-22.
[54] Id. at ___, 2004 WL 231180, at *22.

technology that would reduce, control or prevent the formulation of dioxin.[55] In sum, the Court concluded that the knowledge possessed by the government – "albeit somewhat speculative as to the actual hazard, if any, posed by Agent Orange … was far greater than that possessed by defendants."[56] Thus, the Court concluded that the defendants also met the third prong of the government contractor defense.

In addition to the design defect claims, the Court also considered whether the government contractor defense barred the plaintiffs' failure to warn claims. The requirements for meeting the government contractor defense in failure to warn cases are: "(1) government control over the nature of product warnings; (2) compliance with the Government's directions; and (3) communication to the Government of all product dangers known to it but not to the Government."[57] Because the Government forbade the placement of warnings on the barrels, the defendants conformed to the government order that there be no product warnings on the Agent Orange, and, according to the Court, the Government knew substantially more about the possible dangers of Agent Orange than defendants, the Court held that each element of the government contractor defense as it related to the plaintiffs' failure-to-warn claim had been established.[58]

Finally, the Court determined that the plaintiff's manufacturing defect claim could not stand because the defendants conformed to the government's precise

[55] Id. at ___, 2004 WL 231180, at *23.
[56] Id. at ___, 2004 WL 231180, at *24.
[57] Id. at ___, 2004 WL 231180, at *31.
[58] Id. at ___, 2004 WL 231180, at *36.

specifications.[59] According to the Court, the government was aware of alternative manufacturing processes that might have potentially mitigated the presence of dioxin in Agent Orange, however, the government failed to specify another production process.[60]

In sum, the Court entered a summary judgment in favor of the defendants on the government contractor defense, but stayed the order because the plaintiffs had yet to conduct discovery as the Court issued its order shortly after the cases were remanded by the Second Circuit and before discovery could be conducted.[61] Therefore, the Court stayed its decision until October 12, 2004, granting the plaintiffs six months for discovery on the issues posed by the government contractor defense.

If after additional discovery, the Court enters a final order granting the defendants a summary judgment, that decision could preclude further Agent Orange litigation, because the decision is being made by the MDL Court, which derogated virtually all Agent Orange cases to itself in a companion decision.[62] In the Isaacson decision,[63] the MDL Court reversed its prior decision in Ryan v. Dow Chemical Co.[64] By reversing that decision the Court determined that all state court actions were properly removed under the Federal Officer Removal Statute, Section 1442(a). The Court's summary judgment decision is significant for all Agent Orange litigation because Agent Orange cases that are being

[59] Id.
[60] Id.
[61] Id. at ___, 2004 WL 231180 * at 37.
[62] In re Agent Orange [Ms. No. MDL 381, No. 98-CV-6383 JBW, February 9, 2004] ___ F. Supp.2d ___, 2004 WL 231187 (E.D.N.Y. 2004).
[63] Id.
[64] 781 F. Supp. 934 (E.D.N.Y. 1992).

removed are transferred under MDL 381, making the Court's decision determinative not only for Isaacson but for all cases transferred to MDL 381.

Finally, whether the Court affirms its tentative decision or reverses that tentative decision, an appellate proceeding in the Second Circuit will follow, as the Court has stated that it will certify all decisions in October for appeal.