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AUG 05 1993

August 4, 1993

Admiral Elmo R. Zumwalt, Jr.
1500 Wilson Boulevard
Arlington, Virginia 22209

RE: Ivy v. Diamond Shamrock, Agent Orange case before U.S. CA-2nd Cir.

Dear Admiral Zumwalt:

Enclosed is the transcript of the Oral Argument presented by me on February 8, 1993 in the U.S. Court of Appeals for the Second Circuit. After you have had a chance to review the enclosed, please give me a call.

Sincerely,

Benton Musslewhite

Benton Musslewhite KOS

BM/jc

zumwalt.802

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF NEW YORK
---------- X

SHIRLEY IVY, ET. AL,

Appellant,

-against-

Docket No.
92-7575

DIAMOND SHAMROCK, ET. AL.,

Appellee.

---------- X

Heard February 8, 1993
Courtroom #1705
United States Courthouse
40 Foley Square
New York, New York

BEFORE:

HON. AMALYA L. KEARSE
Presiding
Circuit Court Judge
HON. ELLSWORTH VAN GRAAFEILAND
Circuit Court Judge
HON. RICHARD J. CARDAMONE
Circuit Court Judge

(Transcribed From Tape)

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JUDGE KEARSE: We'll hear Ivy against Diamond Shamrock.

MR. HAGER: Good morning, your Honors.

JUDGE KEARSE: Good morning.

MR. HAGER: Robert Hager appearing for appellant Shirley Ivy and the other Ivy appellants in this matter. I understand -- I'm the lead counsel, have filed the lead brief in this case. I understand this morning that because Mr. Musslewhite has insisted on making an appearance and arguing this morning that we've been cut back in time to ten minutes.

JUDGE KEARSE: The Court has ruled that you may have twenty minutes to argue and that Mr. Musslewhite may have ten minutes to argue.

MR. HAGER: I see. I misunderstood the ruling. Thank you, your Honor.

I'd like to address this morning -- this is an appeal from rulings by Judge Weinstein holding that he would not deny -- he would not grant our motion for remand to the Texas State Court and also dismissing the case on grounds that it had been settled in 1984.

Mrs. Ivy and persons similarly situated have injuries which arose after 1984 and their causes of action would have arisen after 1984. The defendants are the chemical companies who produced the herbicide popularly known as agent orange which contained the contaminant dioxin, which is alleged to have been the cause of the injuries of the Ivy appellants.

The issues I'd like to address this morning are three. I'd also like to mention a fourth which is the transfer issue which we tried to preserve through many approaches to the Court, and would like to try to maintain that issue in this appeal as well.

The three other issues, the principal issues we briefed are first, the question of federal jurisdiction which can be broken into two parts. One is there's clearly no removal jurisdiction in this case. The second part of that issue is whether there's any other basis for jurisdiction. All the other bases, potential bases for jurisdiction argued by the defendants, here the appellees on appeal, suffer from the problem that there would be no

basis for personal jurisdiction in those alternative bases for subject matter jurisdiction offered by the appellees.

The second issue is even if the multitude of issues were resolved in favor of the appellees which present an obstacle to these alternative bases of jurisdiction, primarily the question of personal jurisdiction, but also it affects the subject matter jurisdiction because the premise for subject matter jurisdiction for these other alternative grounds rest on the understanding that Mrs. Ivy was, in fact, part of a member of the class in the 1984 settled action. If all the issues concerning notice, representation, potential collusion between the plaintiff's counsel and defense and settlement of the first case, and also the most important issue of whether persons who had not suffered an injury and had no cause of action could be represented in a class action. Now, this has been reserved in the Shato Gay [phonetic] case in this Court for bankruptcy proceedings. Whether some statutory grounds

for permitting uninjured persons or potential future claimants to maintain a claim in bankruptcy but no court, I submit, has ever ruled --

JUDGE VAN GRAAFEILAND: How about mental injury, Counsel?

MR. HAGER: Excuse me, your Honor.

JUDGE VAN GRAAFEILAND: How about mental injury, worry?

MR. HAGER: That was, in fact, raised by Mr. Yannacone under New York law. There are no pleadings of mental injury and, of course, persons like Mrs. Ivy did not have mental injury at that time because they did not know they'd been exposed or knew anything about agent orange.

JUDGE VAN GRAAFEILAND: You mean the soldiers over in Vietnam didn't know they had been exposed?

MR. HAGER: Well, there are many people like our claims about Don Ivy in this case. Mrs. Ivy's affidavit shows that in fact until his cancers actually arose and until he began to ask around about why a young 43 year old

person was getting cancer, he didn't know about agent orange.

JUDGE VAN GRAAFEILAND: They knew that claims were being made, the injury, whether or not they had actually sustained them they still had the worry or the concern that it might have the same result.

MR. HAGER: Not in the case of Don Ivy. Our facts should be taken as true for purposes of appeal from summary judgment, and our allegations are in the case of Don Ivy, and many others, that they really did not know about the effects of agent orange, that it had any particular effects until they suffered the injury and then began to inquire and then realize that there were other people suffering from similar injuries and formulated the concept that their injuries were due to agent orange.

A person like Don Ivy -- accepting our facts as true for purposes of the appeal from the summary judgment, he had no mental worry at all. He had put Vietnam far behind him. In fact, in his life he was successful. He

had a car dealership and was a successful business man essentially, and had really forgotten about Vietnam until he got his very early cancers that were unusual. His doctor told him you're too young Don to get these cancers. Something's wrong here. He talked to his Congressman. It was his Congressman actually who told him about -- you were a Vietnam veteran; those kinds of injuries have been affecting other Vietnam veterans, and he went on from there to investigate and found out.

JUDGE VAN GRAAFEILAND: It's your position then that the chemical companies put $180 million into this settlement only to cover people who were actually injured; is that what you're saying?

MR. HAGER: They knew that at the time.

JUDGE VAN GRAAFEILAND: Oh, Counsel, come on. You think that they'd pay that kind of money?

MR. HAGER: It's not very much money, your Honor. That worked out to be $32 --

JUDGE VAN GRAAFEILAND: $180 million is

not very much money?

MR. HAGER: Not for thousands of persons with very serious injuries, your Honor, deaths, total disabilities and other very serious injuries.

JUDGE VAN GRAAFEILAND: I didn't get the impression there were a lot of them with total disabilities, Counsel, at that time.

MR. HAGER: There have been 20 -- your Honor --

JUDGE VAN GRAAFEILAND: Were there?

MR. HAGER: About 25,000 according to the records of the Court that have paid only for death and total disability, and they paid off as I understand it about 25,000 claims that would fall in that category, and I'm not --

JUDGE VAN GRAAFEILAND: This is on behalf of all afterwards, Counsel. At that time there was a very serious medical question whether there were any injuries.

MR. HAGER: That's correct, your Honor.

JUDGE VAN GRAAFEILAND: And that was one of the reasons -- one of the basis on which

Judge Weinstein granted summary judgments.

MR. HAGER: That's absolutely correct, your Honor.

JUDGE VAN GRAAFEILAND: Now you come in and say there were people that were totally disabled at that time. That's not true.

MR. HAGER: Oh, I think that there were persons who were totally disabled at that time. Whether the proof was there at that time that could have gone before a jury and convinced a jury, now that's a question that Judge Weinstein addressed and this Court did not address on the appeal if you recall. But I absolutely agree that at the time Judge Weinstein found there was insufficient evidence.

We have put into evidence through affidavits of an EPA scientist accumulating all of the current data that has occurred -- the studies since 1984 up to date and our scientist, who is an EPA scientist, an authority on dioxin, tells us that since 1984 the evidence now is here and we are ready to go before a jury and prove our case. In fact,

last year was the first award on a dioxin injury. So that now dioxin claims are actually being recognized by juries and judgments are being granted. So the factual situation is very different today in 1993 then it was in 1984 because of the science --

JUDGE VAN GRAAFEILAND: I understand what the situation is today. I'm very familiar with it, Counsel. But we're talking what the situation was when this case was settled.

MR. HAGER: I agree. When it was settled Judge Weinstein found that there is inadequate evidence. This Court refused to address that question on appeal. So it's an open question left open on appeal.

This Court approved the settlement which amounted to approximately $3,200 had been granted for disabilities and death claims. That's the average award, approved that settlement as a nuisance value settlement which I think was appropriate. It was the words of the Court, I think it was appropriate words.

JUDGE CARDAMONE: In Paragraph 8 of the settlement agreement I have in front of me - I've forgotten the page here - but it says "The class specifically includes persons who have not yet manifested injury."

MR. HAGER: There's a missing word, your Honor. To turn that phrase into the ruling, the intended suggestion; the word there that's missing is "all." It's absolutely correct as a matter of fact that there were cases that have been filed. Mr. Yannacone filed --

JUDGE KEARSE: You're not suggesting that that quote was inaccurate, are you?

MR. HAGER: Not at all. That's an accurate quote. In fact --

JUDGE KEARSE: There's a word missing that you wish was there?

MR. HAGER: No, I would not assert it. The defendants, the appellees would insert the word "all" before that phrase to say that all uninjured parties were members of the class. The truth of the matter was, the fact was that phrase.

JUDGE KEARSE: It says "it includes

persons who've not yet manifested --

MR. HAGER: And that's correct.

JUDGE KEARSE: -- injury."

MR. HAGER: There were persons --

JUDGE KEARSE: You construe that to mean it includes just some of the persons who've not yet manifested injury?

MR. HAGER: I construe it to mean exactly what it says, which is that there were persons, but it doesn't include all persons. As a matter of fact, there were uninjured veterans who felt that they needed to file their claims to date -- Mr. Yanacone, their lawyer felt they needed to file their claims immediately in order to preserve their rights under New York -- rigorous New York statute of limitations at that time. They did so. They were part of the class. That provision made them expressly part of the class. They were part of the class action because they voluntarily intervened.

My clients do include any of those people. We're not here to suggest that those uninjured persons who were part of the first

class action should somehow now be able to come back and undo what they did. We're talking about only people who were absent and who were uninjured and who did not receive notice because no notice went out to persons who were absent and uninjured.

JUDGE VAN GRAAFEILAND: Counsel, let me suggest this to you.

MR. HAGER: Excuse me, your Honor. Yes, sir.

JUDGE VAN GRAAFEILAND: If you want to focus your argument on whether or not that settlement could under the law include uninjured people, that's one thing. But if you're arguing that it was not intended to include them, I don't think you're going to get very far with that argument if that is --

MR. HAGER: It was intended --

JUDGE VAN GRAAFEILAND: Wait a minute.

These chemical companies didn't pay $180 million unless they thought they were washing the whole thing out. Now, that's as plain as can be. Now, whether they had the authority, whether the judge had the authority is another

question. But if you're going to argue what the intent was, I don't think you're going to get very far.

MR. HAGER: Well, we -- the intent was to include uninjured persons. We're not saying not the absent uninjured persons who had no notice, who had no representative, who is exclusively bound to represent their claims.

JUDGE VAN GRAAFEILAND: Who would know the answer to that question the best besides Judge Weinstein?

MR. HAGER: Well, Judge Weinstein was not in the settlement agreement. It would be the --

JUDGE VAN GRAAFEILAND: Oh, come on. He kept those attorneys for the chemical companies in his chambers until 3:00 in the morning before they worked out that settlement. You're saying he was not a party to it?

MR. HAGER: Well, he did not sign the agreement. It would be the lawyers and the intention of the lawyers for the plaintiffs,

the intentions of the lawyers for the defendants certainly -- Certainly before we even get to that it has to be the text of the agreement, and the text of the agreement simply does not say that --

JUDGE VAN GRAAFEILAND: Counsel, in essence, this agreement, this settlement agreement was Judge Weinstein's baby. Nobody else's but his.

MR. HAGER: I would defer to you on that, your Honor, on that judgment.

What we have is a situation where no court in the land, or I would submit no court in Anglo-American jurisprudence, has ever held that a person can bring, maintain, settle a tort action in court without an injury.

JUDGE VAN GRAAFEILAND: Well, you see that's a different argument.

MR. HAGER: I'm not going back and saying that those persons back in '84 who had their appellate rights and so forth who were members -- I'm not representing them. I'm representing people who were absent at that time, who never had a chance to make the

argument that you can't settle our claims because we are here involuntarily and we're not even -- we have no notice because we don't believe we have any injury. These people in '84 had no idea about an agent orange litigation. Don Ivy didn't know about an agent orange litigation, didn't know about it until after his injury in '87. There are many veterans in that situation. Those are the people we're representing.

Now, the question is were they represented adequately. Now, I maintain that any lawyer who is told that they are representing, who are appointed to represent uninjured absent veterans in 1984 would have done nothing but opt them out of that settlement. That's the only ethical thing they could have done.

JUDGE VAN GRAAFEILAND: You maintain other things, Counsel, that bother me. At least five or ten times in your brief and your papers you allege that this was a collusive settlement. I put quotes around the letter collusive. Tell me who were the parties to

this collusive settlement that you say was put through.

MR. HAGER: Okay. Judge Weinstein has said that this case would not have settled --

JUDGE VAN GRAAFEILAND: Just answer my question, Counsel. Who were the parties to this collusive settlement that you've alleged a dozen times?

MR. HAGER: Whoever it was that settled my clients --

JUDGE VAN GRAAFEILAND: Don't give me whoever. Who were they?

MR. HAGER: It could only be the people who signed the agreement.

JUDGE VAN GRAAFEILAND: Who were they? Was Judge Weinstein one of them?

MR. HAGER: No, I'm not talking about Judge Weinstein, no. I mean, he's the judge. He's not a person who colluded with the other side to settle claims for my client.

JUDGE VAN GRAAFEILAND: In other words, you say these lawyers colluded and then they put one over on Judge Weinstein; is that what you're arguing?

MR. HAGER: Did he put it over on Judge -- I don't know. I wasn't there, if it was a matter of putting it over on Judge Weinstein, but this court --

JUDGE VAN GRAAFEILAND: By what right --

MR. HAGER: But this court has held that frequently the district --

JUDGE VAN GRAAFEILAND: By what right, Counsel --

MR. HAGER: Excuse me, your Honor.

JUDGE VAN GRAAFEILAND: -- do you come in and file papers in this Court alleging it was a collusive settlement. By what right do you do that? What do you base it on?

MR. HAGER: By what right? I think there's sufficient circumstantial evidence that my client is not represented. My client was not represented but is being told --

JUDGE VAN GRAAFEILAND: What is it? What is the collusive settlement, Counsel?

MR. HAGER: The collusion is that my client's case was settled without her consent, without her knowledge, without her having a prior cause of action, and the lawyers who

received $13 million --

JUDGE VAN GRAAFEILAND: Is that what you mean by the word -- Counsel, is that what you mean by the word collusive?

MR. HAGER: That's what I mean by collusive, is that people who --

JUDGE VAN GRAAFEILAND: Then don't use the word again, Counsel. Look it up in the dictionary and see what it means before you come in alleging.

MR. HAGER: Your Honor, lawyers walked away with $13 million for settling my client's claim against her interests, okay. She gets nothing. She's lost her right of her cause of action. She gets nothing. The lawyers walked away with $13 million. That's what I call collusion.

JUDGE VAN GRAAFEILAND: Counsel, while I'm on --

MR. HAGER: They did not represent her interest.

JUDGE VAN GRAAFEILAND: While I'm on the subject of English, you say that counsel who represented the class were guilty of

reprehensible conduct. That's your exact word. What do you mean by that?

MR. HAGER: That the lawyers who represented the class who did not opt out my -- who did represent Mrs. Ivy -- excuse me -- who purported to represent Mrs. Ivy but did not opt her out of the class, instead accepted fees in return for settling the claims of persons who were absent instead of representing their interests properly and opting them out, that would be reprehensible conduct.

JUDGE VAN GRAAFEILAND: And you'll also say they are --

MR. HAGER: Now, the other part of that is that this Court itself held that they had a conflict of interest. This Court held, except the Court said well since those parties couldn't have won anyway on the evidence that it didn't really matter. But now we have the evidence to win. So now it does matter that those lawyers had a conflict of interest.

JUDGE VAN GRAAFEILAND: Counsel, let me tell me something. I'm interested in this

because I sat on the original appeal, as you may know.

MR. HAGER: I'm aware of that, your Honor.

JUDGE VAN GRAAFEILAND: I didn't hear no word mentioned about collusive conduct, about malpractice or about reprehensible conduct. I don't recall whether you argued -- I think you did because you --

MR. HAGER: No, not at all, your Honor. I had no part of the first case. No part whatsoever.

JUDGE VAN GRAAFEILAND: Well, nobody who appeared before this Court at that time made a single allegation about collusion, of fraud, reprehensible conduct or malpractice. Nobody did.

MR. HAGER: There's nothing else you can call --

JUDGE VAN GRAAFEILAND: Now you come in here seven or eight years later with all these allegations.

MR. HAGER: Well, I have many more allegations than that, your Honor, I think it

would be good to get onto before I use up all my time. It's time to sum up. I'd like to reserve the rest of my time for rebuttal, your Honor. I think I've spent a good deal of time here. Thank you.

MR. MUSSLEWHITE: Your Honor, I was one of the lawyers that was on the committee, the Plaintiff's Management Committee.

I listened well, and I'm going to start at the point where you suggested a moment ago. And that is I think the point to start at is with Phillips Petroleum v. Stutts [phonetic], which I believe requires that we center upon the definition that was used in the class notice so that there's no mistake about it. I'm not going to argue about what the settlement said. It did say what you said it said of what was read. There's no question about that. Nobody can argue with that. But that was not the -- that was not the definition used in the class notice.

Now, I represent Mr. Hartland [phonetic] who's been diagnosed in 1988 as having non Hodgkin disease lymphoma. He's a very sick

man. He's going to die. And he probably has one of the best cases I've ever seen because he has a disease as you know the Congress has now presumed to have been caused by exposure to dioxin. He was heavily exposed in Vietnam. I would hope that the Court has time to read his affidavit as to why -- he did not receive that notice. He did not even know about the litigation. Don't ask me why, but that's what he says and I believe him. But even if he had -- in his affidavit he says if I had received the notice since I felt good in 1984, had no illness, had no fears, didn't know that agent orange was dangerous, I would -- if I tried to get a lawyer, were able to get a lawyer, no lawyer would take the case, if he filed suit he might be sanctioned under -- we have a rule in Texas, Summary Rule 11, he certainly wouldn't spend his time on a contingent fee contract, I have no injury. So I can't get the benefit of a lawyer. I wouldn't have thought this whole class action would have affected me. And the main thing is under Stutts which requires constitution for

there to be the right to opt out at the time that the opt out was given, see, if the summary notice went out no right to opt out was given, your Honor. Now, if the Court -- I asked Judge Weinstein, requested that a right to opt out be given at that time, and that was denied. But it was not given so the only time the right to opt out is Phillips Petroleum v. Stutts, says it's constitutionally required was at the time the class notice went out, and it did not mention future claims. It did not mention anything about -- it talked about injured, people injured in the past tense. So I say, your Honors, that the -- that was defective, therefore my people, Mr. Hartman and those who are similarly situated were not a member of that class.

Then I go to the question that you raised. Even if it was intended that they be a member of the class at the time the notice of class with opt out went out, which I say it was not, and the notice itself does not include them in the notice, I don't think they

constitutionally can be a part of the class. Under Article 3 I was handed two decisions today by counsel, Mr. Brock. He was kind enough to hand me copies of those decisions saying that he might mention them, and I just read them hurriedly, and I was very impressed to see in both decisions they talked about Article 3 standing, and I'm saying it's my respectful opinion and suggestion as counsel for the Hartmans, that a person who is not injured at the time that there was a proceeding going on cannot -- does not have the standing under Article 3, and that's what these cases say. One of them is a Second Circuit case, U.S. v. City of New York, 972 F.2d, just recently came out, and the other is a District Court decision in the Fifth Circuit. But there are other cases I've cited in my brief, and I do not believe they could constitutionally be either under Article 3 or under due process. In the Schwitzer [phonetic] case and other cases talk about due process, and we've cited those cases in the brief, a part of a class when they have no

injury.

I understand what you're saying, your Honor. How can these chemical companies, what can they do about it. But I want to call this to your attention. They knew that there was a possibility of future claims because in the settlement agreement there was created a $10 million fund for those claims. Now, I admit that was too low, but I think they were like a lot of us when I was there at 3:00 in the morning. I was one of the nine members of the Agent Orange Plaintiff's Management Committee. And the truth is I think, and I say like them, I think these men were sincerely representing the defendants. They thought, like we thought, there were only about 25,000 claims. It turned out after a claims process there was 250,000 claims. That's why I personally withdrew from the committee and as you may recall I argued against the settlement in the Second Circuit. I was overruled but at least I felt it was my conscious that I should do that. But the point is is that I think that you can see that the people who were injured,

non-injured, who had not manifested an injury, should not be a part of a class that was settled on the basis of assuming there were only approximately 25,000 claimants. They were not mentioned in the class notice. Nobody at the counsel table was representing them as Mr. Hager said. There was nobody there to say wait a minute, let's talk about that provision that was put in that tag a long settlement agreement that the unmanifested injuries would be covered, and the -- and one of the cases in this circuit, in Caine [phonetic] I believe it is, indicated that in order to have a settlement that is fair, and I disagree with Caine respectfully, I don't think constitutionally these people can be included. But if they can at the very least they should have appointed somebody, the court should have appointed somebody to represent their interest separate and apart from the Agent Orange Plaintiff's Management Committee so that they can protect their interests and their interests alone. That was not done.

And a second point I make is even if

they were part of the class then you're faced with a collateral attack rule. There's no question that in a class action the people who are absent members and all the people that Mr. Hager and I represent were absent members, they have the right to collaterally attack that judgment in another court at a later time.

I see it says I have to sum up and I would like to save some time so all I want to --

JUDGE VAN GRAAFEILAND: That's a yellow light, not a red light.

MR. MUSSLEWHITE: All I want to say is that since they were not a member of the class at the time the notice went out with opt out and never were given a chance to opt out, so constitutionally they could not be a member of the class. Under Article 3 they cannot be a member of the class.

Since they have the right even if they were to collaterally attack that judgment in a state court later or some court later, I say that all the reasons that Judge Weinstein gave

for removing the case, for sustaining the removal and the refusal to remand go out the window. And whether it's Sarkisian doctrine, whether it's a Yonkers's doctrine, whether it's a retention of jurisdiction concept, whatever it is, since they were not a member of the class, could not constitutionally be a member of the class, and since even if they were they could collaterally attack that in another court at a later time, they could not be refused remand. They had the right to remand because there was no diversity, there was no subject matter jurisdiction, and as the case of U.S. v. City of New York stated the first thing that should be decided is whether or not the remand motion should have been granted. I respectfully say it should have. Had it been granted then we wouldn't be here and none of the other issues would have to be considered.

Thank you very much.

MR. SABETTA: Your Honor, if this may please the Court. John Sabetta for the defendant appellee chemical companies.

Defendants have divided presentation of the argument this morning into three parts of roughly equal length. I will address the proposition that the Ivy and Hartman appellants were members of the agent orange class. Mr. Brock will address defendant's contention that the District Court had and properly exercised subject matter jurisdiction over the merits of the appellant's claims, and finally Mr. Gordon will address the proposition that the District Court correctly decided defendant's motion to dismiss those claims on res judicata grounds as predicated on the judgment of dismissal and settlement agreement in the class action.

Judge Weinstein found that there was no doubt whatsoever that these appellants were members of the agent orange class. In our view, that conclusion was inescapable given the earlier decisions of the District Court and this Court during the course of the agent orange class action litigation.

Recall, please, that the plaintiffs in the agent orange class action from the outset

in that litigation beginning in 1979 urged on the court the proposition that all two-and-a-half million men who served in Vietnam had been exposed to agent orange and thereby dioxin, and had therefore been injured in fact. In some cases those injures were manifested and diagnosable at the time of litigation. In other instances, and this was primarily articulated by Mr. Yanacone and other members of class counsel appointed by the court, those injuries had not yet manifested themselves but they were no less real. Mr. Yanacone on behalf of the class he was seeking to have certified alleged that all two-and-a-half million men were at increased risk of developing cancer, genetic damage and suffering an earlier death, and that the creation of a trust fund was required out of defendant's earnings in order to create a reserve against which future claimants, those without manifest injury at that time, could be assured that they would have a remedy when their injuries became manifest. But he also sought a creation of a fund so that the

members of the class could have available medical monitoring, genetic testing, genetic counseling, recompense for any emotional and mental disorders that they were then suffering as a result of their concerns about exposure to agent orange. The contention included the proposition that many veterans were hesitant to father additional children for fear they might be born with birth defects, and that monies were needed in order to conduct counseling and testing of those veterans as well. So the proposition that injuries were being alleged of a physical character only which would then manifest is not correct. It's not in keeping with the nature of the claim of injury that was being articulated by Mr. Yanacone on behalf of the class.

JUDGE VAN GRAAFEILAND: Didn't Judge Weinstein make a finding that nobody had a causally related injury?

MR. SABETTA: I'm sorry, which judge, your Honor?

JUDGE VAN GRAAFEILAND: Didn't Judge Weinstein make a finding that nobody had a

causally related injury?

MR. SABETTA: He found in approving the settlement and in dismissing the opt out claims that --

JUDGE VAN GRAAFEILAND: He spent a great deal of time with epidemiological studies, that there were no causal relations.

MR. SABETTA: Right. He said the --

JUDGE VAN GRAAFEILAND: He made that finding, that is basis on which this settlement was entered into. Was it not?

MR. SABETTA: That was one of the bases on which the judge concluded the settlement was fair. It was also a basis on which he dismissed the opt out claims. The evidence was not sufficient to meet the plaintiff's burden of proof of causation in the tort context.

JUDGE VAN GRAAFEILAND: My question about knowledge becomes sort of academic if there's no causal relationship. It doesn't make much difference whether they had knowledge or not.

MR. SABETTA: I think there's something

to that, your Honor.

JUDGE VAN GRAAFEILAND: At least that's the basis on which this settlement was entered into.

MR. SABETTA: I think that's -- I think there's something to that contention, your Honor. And we -- you may recall because your Honor I think was on the panel, that in 1980 we asked this Court as we had asked the District Court, to dismiss all of the claims as legally and sufficient that were being asserted on people who were then without manifest injury. This Court chose not to decide that question. Judge Pratt, who has been the District Judge, declined to decide that question. We persistently asked him to dismiss those claims as legally insufficient. He declined to do so. Instead, he certified a class using language proposed by the plaintiffs that was consistent with their theory of damage which included all of the men exposed regardless of whether they then had manifest injury or not. And he asked the parties to make recommendations on how notice

could be given to these over two million persons and their family members. There's little question that both Judge Pratt and Judge Weinstein intended to include within their definition of the class, each of which said they wanted the most broad definition possible of the agent orange class, all persons who had been exposed and thereby injured, in fact whether the injuries were then manifest or not.

Judge Pratt said that he had several reasons for defining the class as broadly, and they included judicial management, they included concerns that some veterans might lose their claims to statute of limitations which impose stringent tests such as the then the New York statute and about a dozen other states which had a last exposure rule for the accrual of your cause of action as distinct from the manifestation of injury. Those decisions clearly meant to encompass plaintiff's theory of injury in this case over the defendant's strenuous objection. After the class was certified and settled, the same

objections and alleged errors that plaintiffs here rely upon, were urged on both Judge Weinstein and later this Court.

In July of 1984 after the tentative settlement in May of '84, objectors to the settlement argued to Judge Weinstein that the settlement agreement improperly expanded the definition of the class to include after manifested claimants, that those claimants had irreconcilable conflicts with those who then had current injury, that the after manifested claimants were not properly represented and could not be. Judge Weinstein denied those arguments.

The same arguments were then reprised before this Court in 1986 on the direct appeals from the maintenance and settlement of the class action. This Court heard from Mr. Musslewhite and other counsel at that time that the inclusion then of after manifested claimant's in the class was unconstitutional, violated Rule 23, violated the due process rights of the absent claimants without manifest injury, diluted the settlement fund

improperly, thus depriving people with then injury from their potential recoveries. All of those arguments were made to this court which rejected them implicitly in approving the settlement and moreover in approving the plan of distribution.

With one exception not relevant here, this Court both approved the maintenance and settlement of the class action as well as the plan of distribution. The plan of distribution fashioned by Judge Weinstein specifically called for a set aside of a quantity of money to be paid to persons with after manifested injuries, and since all appeals to the settlement became final, namely in late -- mid -- I guess 1988, June of 1988 when the Supreme Court denied the final two certiari petitions that were pending.

The District Court, beginning in February of 1989, began making payments to class members who qualified under the payment program. And since that time, as of October of 1992, $147 million has been paid out to claimants, 56 percent of whom are veterans

whose disability first occurred after May 7, 1984 and the rest are payments to -- that 56 percent are payments to survivors of veterans who died after May 7, 1984. They, together, those after manifested claimants have received a total of over $52 million as of October of 1992. The assertions here that the class did not include after manifested claimants is both contrary to the plain intent of plaintiff's class counsel, the two district judges who fashioned the class definitions, and this Court which approved the distribution plan which has resulted in payments of, as I say, over $50 million to people in that category. The notion that somehow the settlement agreement was limited to after manifested claimants who had by that date already intervened in the action is simply contrary to the plain facts that are before this Court, undisputed facts.

The plaintiffs in this action are members of a class that is not nearly of a great historical interest but rather are members of a class action that are still

pending in the District Court. Since the date of the settlement the District Court has entered 5,000 additional docket entries in the class action docket of this case, has decided plaintiff's attorneys fee applications, has taken judicial notice of ongoing reports of medical and scientific studies, has handled over 10,000 appeals from awards and denials of payments under the payment program, and the plaintiffs here by these suits, as the District Court said, and I think it is plain when held up against the language of the settlement agreement, these suits represent a direct challenge to the settlement agreement and the integrity of the distribution of the settlement funds. The District Court said, and we think it's plain from the language of the settlement agreement, that these suits contravene the District Court's order of injunction contained in the settlement agreement which provided that class members shall be barred from instituting or maintaining any action against the defendants that relates to or rises out of or in the

future relates to or arises out of the subject matter of any of the class action complaints including those complaints that alleged the so-called at risk claims filed by class counsel at the outset of the litigation.

Now, your Honors, Mr. Brock will provide a further explication of defendant's contention that the District Court had and properly exercised subject matter jurisdiction in these cases.

MR. BROCK: Good morning, Steve Brock for the defendant chemical companies.

We have a number of jurisdictional points in the brief and I want to, in addition to responding to any questions that you have, just focus on a couple of specific issues with respect to those theories.

First of all, I think the all writs act in the Yonkers case are particularly important here because they apply even if there is no removal jurisdiction under the traditional removal statutes, and Judge Weinstein found that as one basis for federal jurisdiction here. I have a recent decision which I

circulated to plaintiff's counsel this morning and which I'd like to hand up to the Court at this point. It's a decision of this Court in United States v. City of New York a few months ago, in which Yonkers was reaffirmed. This was the case that involved ocean dumping of sewage sludge by New York. The New York City Councilwoman Maloney had brought a state suit purely state law grounds alleging that some of the contracts that were being let in that process hadn't been put out for competitive bidding. Judge Mischler, who had handled that consent decree, ordered it removed to federal court even though it was purely state law, on the grounds of the all writs act and in light of Yonkers, and this Court affirmed. And the factors there were set forth. The two things that the District Court has to find to do this is the District Court has to find that it was necessary to protect the integrity of the consent decree and he has to find that the issues in the state court suit can't be separated from the relief that's being granted in the consent decree.

Now, Judge Weinstein made precisely those findings in this case.

JUDGE VAN GRAAFEILAND: That case is quite a bit different from the standpoint of who were parties to the action and what was involved, Counsel. That involved in a consent federal decree, did it not --

MR. BROCK: Yes.

JUDGE VAN GRAAFEILAND: And the parties who were removed to federal court, were all bound by that decree, were they not?

MR. BROCK: Yes, I think we have a --

JUDGE VAN GRAAFEILAND: That's not the situation here.

MR. BROCK: Well, Councilwoman Maloney was not a partner -- a party to the process. She was a New York City taxpayer. She wasn't a member of a prior class that was bound by the consent decree but the suit that she brought would have affected the consent decree. So I think this case is really an easier case because the people that are being removed here were, indeed, parties and were, indeed, bound by the consent decree which

Judge Weinstein entered as an order of the Court.

JUDGE VAN GRAAFEILAND: Well, you got to get over that first hurdle, Counsel. Where they parties to that decree, that's a hurdle you got to get over.

MR. BROCK: Well, that and again, as I say, Mr. Sabetta and again Mr. Gordon are going to talk more to the issue of whether these particular plaintiffs in Ivy and Hartman are members of the class, and our position is that they are, and granting that they were parties and they were bound by the consent decree.

Judge Weinstein's findings were that -- and I'm going to quote them here because I think they fit right into the same findings that were in Yonkers and in the City of New York case. He said that the new suits are a direct threat to the continuing viability of the judgment settling the class action. He said that the suits will consume the $10 million set aside to indemnify the settling defendants and reduce the recovery of the

remaining class members. Now, these are exactly the factors that they set up. It would protect the integrity of the consent decree. This suit is an attack on the integrity of Judge Weinstein's consent decree. He has been denying claims to the after manifested claimants telling them that that is their only federal remedy, that this is what they have to do. And this he found as a fact and I think his findings are entitled to difference, that this was -- would affect and undermine the viability of his administration of the consent decree. It's intertwined because it would reduce the class members' recovery if indemnity payments had to be made for cases of this sort, and I think it would also throw into a lot of question exactly how he should go about continuing to pay out claims in the future if it were indeed the after manifested claimants are found not bound.

So the important thing here also is Judge Weinstein has made the findings required by Yonkers in the City of New York and this

Court has held in several cases in our brief at Page 60 we collect a number of them, that once he makes these required findings they're reviewed on the basis of an abuse of discretion, and I think he clearly didn't abuse his discretion here. He considered a lot of alternatives. He considered can I enforce this by a further injunction, by contempt, by ordering these cases removed directly from state court, by enjoining state court rulings later if they're inconsistent and interfere with his administration of the consent decree; considered all of this, and he decided that as in Yonkers that taking jurisdiction of the cases now after they were voluntarily removed was the least drastic way to proceed, it was the best way to achieve consistency results, it afforded greater comity to the state courts then some of the other courses that he had available to him to implement the consent decree.

JUDGE VAN GRAAFEILAND: Well, it's your position that the consent decree covered every soldier who served in Vietnam, period?

MR. BROCK: The consent decree covered every member of the class.

JUDGE VAN GRAAFEILAND: (Laughter) That's not answering my question. I want to know who the members of the class were. Is it your position that every soldier who served in Vietnam was a member of this class?

MR. BROCK: I think every exposed soldier, every soldier that was exposed to agent orange and anyone that ever claims to have manifested injury at any point up until now or in the future. He ordered that there be no more suits.

JUDGE VAN GRAAFEILAND: If you start with the proposition, Judge Weinstein found that nobody was injured, that there was no causal relation between agent orange and injuries then how do you figure out who was in the class and who's out of the class?

MR. BROCK: He found that the class covered people who had claimed that they were injured and he bound everyone that claimed that they were injured either then or in the future. He enjoined people from suing

claiming that they were injured, and here's another important that we can get to as another basis for the decision. His injunction against suits claiming this sort of injury.

JUDGE VAN GRAAFEILAND: Then what you're saying is what we started out with, every soldier who served in Vietnam was a member of the class.

MR. BROCK: No, not necessarily. The soldiers that don't claim they were injured are not members of the class.

JUDGE VAN GRAAFEILAND: See, you go back to the claiming and not claiming. I'm trying to find out who were the members. You say only ones who made claims and then you say no, it doesn't include them. What I'm trying -- did it include every soldier in Vietnam who had any exposure to agent orange whether they knew it or not?

MR. BROCK: Yes. I'd say yes. Yes.

I think that goes on to the end. I think this lights very much to our next theory.

JUDGE VAN GRAAFEILAND: How would any of these soldiers know whether to opt out of this supposed class if it's that broad?

MR. BROCK: They would have known whether or not they were exposed based upon their --

JUDGE VAN GRAAFEILAND: How would they know that?

MR. BROCK: They also were put on notice that this was being litigated. They got class notice and -- there's always some imperfections in that. There are going to be problems with people not getting the notice. The best notice practical was given.

JUDGE VAN GRAAFEILAND: Well, Counsel, some plane might have flew over their camp while they were sleeping, dropped some of that agent orange defoliant. They wouldn't know anything about that. Were they members of the class?

MR. BROCK: Well, the people that will claim injury --

JUDGE VAN GRAAFEILAND: No wait a minute. You keep throwing things in that I