



Vietnam Veterans of America, Inc.
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Action Alert

March 1992

MAR 30 1992

TO: Vietnam Era Veteran Leaders & Advocates
FROM: Tim Brown, Chairman, Government Affairs Committee

A
Action Alert

Dear Brothers & Sisters:

Consistent with the recommendations of VVA's standing committee on Agent Orange and our overall advocacy on this issue of great importance, I am asking you on behalf of our membership to take immediate action in mobilizing an effort with the Attorney General in your state to join the brief filed by the State of Alabama on the Ivy vs. Diamond Shamrock Chemicals Company, et al.

Enclosed with this alert is a copy of the brief filed by the State of Alabama, and my letter to the Texas State Attorney General, both of which will give you insight on this mission. Please feel free to have your members, supporters, etc. use this letter as a model in contacting your State Attorney General, and be sure that you provide him/her a copy of the enclosed brief with your letter or personal visit.

If you have any questions please do not hesitate to call me toll free in Dallas at 1-800-880-8830, or write directly to me at my Dallas office.

Your efforts are not only vital to our success, but are greatly appreciated as well.

Sincerely,

Tim Brown
Vietnam Veterans of America
10935 Estate Lane, Suite 350
Dallas, Texas 75238
Phone: (214) 553-9688
Fax: (214) 553-9689

CC: National President, VVA
Executive Director, VVA
Central File



Vietnam Veterans of America, Inc.
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March 24, 1992

The Honorable Dan Morales
Attorney General
State of Texas
P.O. Box 12545
Austin, TX 78711

RE: Ivy vs Diamond Shamrock
Chemicals Company, et al.

Dear Attorney General Morales:

I am writing to call your attention to and request your assistance in a case that may have far-reaching consequences for many of the 680,000 + Vietnam era veterans residing in Texas and for the administration of our system of justice.

The case is Shirley Ivy v. Diamond Shamrock Chemicals Company, et al., now pending in the U.S. District Court for the Eastern District of New York. The plaintiffs are Vietnam veterans who were exposed to the chemical Agent Orange and who became ill since the 1984 settlement of an earlier suit. These veterans seek to remand the Ivy case to Texas state court to obtain compensation for the cancers and other health effects caused by the defendants' breach of duty.

Originally filed as a class action suit in Texas state court, the case was removed to the federal court for the Eastern District of New York, where the presiding judge dismissed all claims as foreclosed by the 1984 settlement agreement. This is the same judge and the same court who presided over the 1984 settlement of the Agent Orange Class Action.

I am concerned that the ruling denies a day in court to victims who were not yet sick in 1984, and whose claims had therefore not come into existence when the earlier case was settled. How could they have agreed to a settlement when they were not yet sick? I am also concerned about the unwarranted federal intrusion into the state judicial system: the federal court denies the Texas court jurisdiction over personal injury, an area long considered within the province of state law. The high-handed method, not supported by any law, by which the case was removed from Texas court is an affront to all state courts.

Attorney General Morales
March 23, 1992
Page 2

The plaintiffs have asked that the federal court reconsider and will appeal if necessary. I ask you to (1) ask the court for permission to join the brief filed by the State of Alabama, and (2) write a letter to the Attorney General of Alabama saying you would like to join any brief the Attorney General of Alabama files in this case on appeal to the 2nd Circuit Court of Appeals or the U.S. Supreme Court.

I would very much appreciate an opportunity to meet with you to discuss my request. Meanwhile, I enclose for your review a copy of the brief submitted by the Honorable James H. Evans, Attorney General of Alabama. I believe that Mr. Evan's office may contact you separately with a similar request.

With the hope that our membership can count on you to act in their best interest, I remain,

Sincerely,



Tim Brown, Chairman
Government Affairs Committee
Vietnam Veterans of America
10935 Estate Lane, Suite 350
Dallas, TX 75238

TB/ms

Enclosure

cc: Jim Brazee, National President
Don Waak, State Council President
R. J. Huckaby, State Council Agent Orange Committee

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SHIRLEY IVY, Individually and	[]	
as Representative of the Estate	[]	
of DONALD IVY, et al.	[]	
	[]	
Plaintiffs,	[]	
	[]	
	[]	CV-89-03361 (E.D.N.Y.) (JBW)
vs.	[]	
	[]	
	[]	[B-89-00559-CA (E.D.TEX.)]
DIAMOND SHAMROCK CHEMICALS	[]	
COMPANY, et al.	[]	
	[]	
Defendants.	[]	

AMICUS CURIAE BRIEF OF STATE OF ALABAMA REQUESTING
ABSTENTION BY FEDERAL DISTRICT COURT FROM INTERFERENCE
WITH PENDING TEXAS STATE COURT PROCEEDING

The State of Alabama by and through its Attorney General submits this brief to support plaintiffs' motion to remand the Ivy case to Texas state Court.

BACKGROUND

Mrs. Shirley Ivy, a Texas citizen, has brought a class action in Texas state court, exclusively under state law, against a Texas corporation and other private corporations for injuries allegedly suffered by her husband, and herself, due to his exposure to Agent Orange in Vietnam while serving with the United States Armed Forces as a Marine Captain. This suit has been brought as a potential nationwide class action on behalf of thousands of other similarly situated persons, who are citizens of Alabama and other states, and thereby includes

claims by Alabama citizens that cancers and other health effects, which are alleged to have been caused by Agent Orange, occurred after the settlement of a New York class action in 1984 of claims for similar injuries to other veterans and their families. Mrs. Ivy, and other similarly situated persons, including Alabama citizens involved in this lawsuit as class members, allege that they did not participate, or even know about the settled federal action, which was dismissed before their state law claims arose.

Thousands of Alabamians who served in Vietnam, and were allegedly exposed to dioxin contaminants in defendants' products there could be affected by Mrs. Ivy's lawsuit.

On June 19, 1989, the defendant chemical companies, who manufactured Agent Orange, removed Ivy from state court under 28 U.S.C. § 1441, without any apparent basis for doing so. Defendant chemical companies have also sought in this Court an injunction of, or removal of the case from, the state court under the All Writs Act, 28 U.S.C. § 1651(a), in apparent violation of the Anti-Injunction Act, general principles of equity and the federal abstention doctrine. See Defendants' Memorandum of Law in Response to Plaintiffs' Motion to Remand, December 14, 1990, at 15-16; Memorandum of Law in Support of Defendants' Motion for a Permanent Injunction, December 18, 1990, at 1.

ARGUMENT

The U.S. Supreme Court has recognized that significant

state interests may be harmed by unwarranted federal intrusions into the state judicial system. See Pennzoil v. Texaco, 481 U.S. 1, 10 (1986).

It is clear that,

[s]ince the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.

Younger v. Harris, 401 U.S. 37, 43 (1971). Ivy does not involve any of the few known exceptions to that foundation of our American federalism. It involves a res judicata defense in a state civil suit brought exclusively under state law. The U.S. Supreme Court has long prohibited interference with such a suit even where important U.S. constitutional rights were at stake. Id. "In recent years the Court has broadly applied the principles articulated in Younger to require abstention by federal courts in order to protect the integrity of state adjudication of civil matters." County of Suffolk v. Long Island Lighting Co., 710 F Supp. 1387, 1399 (E.D.N.Y. 1989) (Weinstein, J.). Where, as here, nothing more important than a routine determination of the res judicata effect of a federal court settlement of state law claims is involved, the abstention doctrine permits no possible justification for interference with a state court proceeding.

The implication of defendant's removal and injunction requests in this case is that the state court will not fairly adjudicate Defendants' arguably federal defenses, particularly

their res judicata defense. But this suggestion offends the dignity of the "state courts, which are presumed competent to resolve federal issues." Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 150 (1988) (citations omitted). As stated by the United States Supreme Court in Pennzoil v. Texaco, 481 U.S. 1, 14 (1986) "proper respect for the ability of state courts to resolve federal questions presented in state-court litigation mandates that the federal court stay its hand" from issuing an injunction of state court proceedings.

In such cases as this the Supreme Court has required federal courts to refrain not just from removal, but from any interference with the state court. The U.S. Supreme Court has repeatedly "recognized that our concern for comity and federalism" required federal courts in such circumstances to abstain from enjoining or otherwise interfering with "pending state proceedings in which important state interests are involved." E.g. Ohio Civil Rights Commission v. Dayton Schools. 477 U.S. 619, 626-627 (1986) (emphasis added).

The purpose of this brief is to communicate to the federal court that has been asked to decide defendants' request to remove or enjoin Mrs. Ivy's claims under the All Writs Act, that "important state interests" are implicated by efforts to deny Mrs. Ivy, and other persons similarly situated, their right of access to state courts. Alabama is opposed to removal of this case from the court of a sister state, where no grounds have been properly stated for doing so under existing federal

law, and is also opposed to any interference with the state courts' hearing of Mrs. Ivy's claims for Agent Orange injuries under the general equity powers of the federal courts.

There are several reasons why the state's traditional interest in protecting the rights of the state and its citizens from federal encroachment is of acute importance in this case. In the previous Agent Orange litigation in Brooklyn, New York, the federal courts made novel legal rulings not subsequently approved by the federal appellate courts. See Joint Eastern and Southern District New York Asbestos Litigation, 897 F.2d 626, 634-635 (2d Cir. 1990) (use of government contractor defense to dismiss Agent Orange claims repudiated); and Agent Orange Product Liability Litigation, 818 F.2d 187, 189 (2d Cir. 1987). These rulings effectively barred Vietnam veterans from the federal courts for a trial of their Agent Orange claims. Many veterans opposed the settlement imposed upon them which had the effect of denying them a trial in exchange for a small payment of the "nuisance value" of their claims. Agent Orange Product Liability Litigation, 818 F.2d 145, 151 (2d Cir. 1987).

In the Ivy case the federal courts appear to be repeating this pattern of creating special law for Agent Orange claims. A removal has been made from a state court without justification under the governing statute, 28 U.S.C. § 1441. Unless the federal courts could have taken original jurisdiction of Mrs. Ivy's state law claims as raising a federal question, which it appears they cannot, then the

federal courts should not interfere in the functioning of the state courts, in a case between private citizens of this state, involving no federal officials or agents, and brought exclusively under state law.

The State of Alabama, therefore, seeks through this brief to protect the authority of the state judicial systems. Alabama has an interest in the preservation of the powers of its own state courts free of unauthorized federal court interference. These powers will be seriously eroded if the interference contemplated by this case is permitted.

This state could have no more important interest in the functioning of its judicial system than to assure that courts of the states remain open to all, but especially to those who have sacrificed to preserve in this land a government of laws, and not of men.

Donald Ivy himself said during the last days of his life:

I have cancer of the pancreas and liver; I believe I am a victim of Agent Orange. Without a doubt, the effects of Vietnam will shorten the length of time I have with my wife and children. I just hope that my family will be strong without me and understand what I did and for the love of my country.

...
My stay in Vietnam was not a happy one, but in my heart I stood by my belief in my country and my eternal loyalty to it. From my viewpoint as a 23 year old, going to Vietnam was a form of patriotism. Even though I contracted cancer from the effects of Agent Orange, a chemical for killing foliage, my stay in Vietnam seems but a

small price to pay for America's freedom.


Vietnam: By Word of Mouth (Virginia Havard, ed.) (Lufkin, Tex. 1988) 24-25.

Donald Ivy's willing sacrifice to preserve America's freedoms should not be mocked by begrudging this family one of the most fundamental aspects of the freedom for which he fought. The federal courts should abstain from any further interference with Mrs. Ivy's pursuit in state court of her "day in court" to seek any remedy she may have under the laws of the state for Agent Orange injuries suffered by her husband and family.

CONCLUSION

For the reasons stated above, this case should be remanded to the District Court of Jefferson County, Texas, where it was filed.

Respectfully submitted,



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