

Agent Orange Lawsuit

Written by Ilene

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Knocking Down Windmills

Gerson H. Smoger

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It was 1995, and I was having lunch with colleagues at an ATLA convention in San Francisco. We were talking about our plans for litigation. As I discussed my ideas, a colleague turned to me and smiled. "You're always chasing windmills," he said.

Three years earlier I had agreed to help retired navy admiral Elmo (Bud) Zumwalt gain compensation for Vietnam War veterans who had been exposed to Agent Orange. Most veterans hadn't received compensation from an earlier settlement because they were diagnosed with Agent Orange-related illnesses too late. It seemed contrary to our justice system that a settlement entered by other plaintiffs long before many veterans even knew they were injured could prevent them from obtaining justice.

Nearly 25 years ago, veterans first brought claims involving exposure to Agent Orange and other herbicides that had been sprayed over 6,000 square miles of rice paddies, riverbanks, roadsides, and jungles in South Vietnam during the 1960s and 1970s. The herbicides were used to destroy enemy cover, eliminate crops, and clear military base perimeters. It was later publicly revealed that the herbicides contained the chemical dioxin, one of the most toxic substances.

The cases were consolidated before the U.S. District Court for the Eastern District of New York, and a settlement was reached in 1984. (*In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).)

The certified class included military personnel who had served in the war from 1961 to 1972 and were exposed to the chemicals. Also among the class were family members including spouses and children born before January 1, 1984 who suffered Agent Orange-related injuries.

The settlement specified that the class included people who have not yet manifested injury, and it indemnified the defendants against future state court actions alleging the same claims as those already addressed. It required the defendants to pay into a fund from which parties to the settlement would receive payments for 10 years, beginning January 1, 1985, and ending December 31, 1994. Injuries manifested after 1994 were not eligible for payment.

The \$180 million settlement was separated into funds that were allocated for organizational grantees, Vietnam veterans, and their eligible children, with \$10 million placed into a reserve fund to indemnify the defendants against future state court actions alleging the same claims. Individual

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payments to about 50,000 veterans rarely exceeded \$5,000.

The settlement was subject to several appeals, but the Second Circuit consistently upheld it, and the U.S. Supreme Court refused to review it.

A mission to right wrongs

Admiral Elmo Bud Zumwalt Jr. contacted me several years after the 1984 settlement, shortly after I had represented the first plaintiff to win a jury verdict in a case involving exposure to Agent Orange. The Admiral, as we called him, had served as a commander of the U.S. forces in Vietnam and later as chief of naval operations and a member of the Joint Chiefs of Staff during the Vietnam War. His son, Elmo Zumwalt III, served as a lieutenant captain on a riverboat in Vietnam and was exposed to a significant amount of Agent Orange. When Elmo III was diagnosed with non-Hodgkin's lymphoma, a type of cancer associated with Agent Orange exposure, the Admiral made it his mission to gain compensation for victims of the herbicides that he had ordered to be sprayed. His son died of the illness in 1988.

As part of his effort, Admiral Zumwalt had organized the Agent Orange Coordinating Council, comprising various veterans service groups and providing a forum to coordinate their interests in representing the Vietnam veterans who had been affected by Agent Orange. The council advocated compensation from the Department of Veterans Affairs, the recognition of a connection between herbicide exposure and cancers and other health problems, and ways to hold the manufacturer of the chemicals accountable for the injuries beyond the nuisance-value settlement. The Admiral asked me to represent the council pro bono.

The 1984 settlement had already been challenged once unsuccessfully. In 1989 and 1990, two class actions were filed in Texas courts (later removed to federal court in New York and consolidated) *Ivy v. Diamond Shamrock Chemicals Co. and Hartman v. Diamond Shamrock Chemicals Co.* on behalf of veterans who were afflicted with cancer after the original settlement. The new actions alleged that the Agent Orange agreement impermissibly settled cases for plaintiffs who had suffered no cognizable injuries by the settlement date.

The federal district court and, on appeal, the Second Circuit concluded that the plaintiffs had been treated no differently from those plaintiffs who had suffered injuries before the settlement. According to the district court, Class action settlements simply will not occur if the parties cannot set definitive limits on defendants liability. The court said that making settlements too difficult will work harms upon plaintiffs, defendants, the courts, and the general public. In essence, the rights of potential future plaintiffs were trumped by the interests of presently injured plaintiffs, as well as defendants, in achieving a settlement. (*Ryan v. Dow Chem. Co.*, 781 F. Supp 902, 920 (E.D.N.Y. Oct. 4, 1991) (*Ivy/Hartman I*)).

The Second Circuit concurred, stating that the deprivation of an individual's constitutional rights was justified by society's interest in the efficient and fair

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resolution of large-scale litigation. ♦ (In re ♦Agent Orange♦ Prod. Liab. Litig., 996 F.2d 1425, 1435.)</p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal">When the Ivy/Hartman plaintiffs, as they came to be known, petitioned for certiorari, Admiral Zumwalt enlisted me to prepare an amicus brief on behalf of the Agent Orange Coordinating Council, asking the U.S. Supreme Court to find that the Agent Orange settlement violated Vietnam veterans♦ due process rights. In what was probably an unprecedented display of unity, of service organizations joined the brief, which included: the American Legion; Vietnam Veterans of America; the Veterans of Foreign Wars of the U.S.; Disabled American Veterans; Amvets; Jewish War Veterans of the USA; Retired Enlisted Assoc.; Marine Corps League; Catholic War Veterans, USA, INC.; American Ex-Prisoners of War; Blinded Veterans Assoc.; Military Order of the Purple Heart of the USA, Inc.; Army and Navy Union, USA; Polish Legion of American Veterans, USA; Paralyzed Veterans of America; Regular Veterans Assoc. of the U.S.; Italian American War Veterans of the USA; Women♦s Army Corps Veterans Assoc.; American War Mothers; Legion of Valor of the USA, Inc.; Congressional Medal of Honor Society; The Retired Officers Assoc.; National Vietnam Veterans Coalition; Fleet Reserve Assoc.; The Veterans of the Vietnam War, Inc.; National Assoc. of Military Widows; New Jersey Agent Orange Commission; Oklahoma Agent Orange Foundation; Agent Orange Data Base; and the Agent Orange Victims and Widows Support Network.</p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal"></p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal">Attorneys general for all 50 states, plus the District of Columbia and Puerto Rico, signed on to another amicus brief asking the Supreme Court to hear the case. The Court, however, denied the petition, and the matter appeared to be closed.</p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal"></p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal">Opportunity seized</p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal">I continued to work with the Admiral on securing government compensation for veterans and promoting more studies to assess ailments they were suffering. I promised him that when an appropriate case came along, I would do all I could to show the courts that binding veterans to the Agent Orange settlement was morally and legally unpalatable, particularly given the knowledge we now had about the herbicides♦ health risks.</p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal">In 1998, I received a call from a high school vice principal who had served at an airfield in Vietnam from which planes took off to spray Agent Orange. He called me at the suggestion of the Vietnam Veterans of America to see if I would file a lawsuit on his behalf. He had been exposed to Agent Orange and was suffering from non-Hodgkins lymphoma. I decided that his case was the one I had been waiting for.</p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal">In 1998, my co-counsel, Mark Cuker, and I filed suit against the manufacturers of Agent Orange, including: The Dow Chemical Co., Monsanto Co., Hercules, Inc.; Thompson Hayward Chemical Co.; T-H Agriculture & Nutrition Co.; and Ultramar Diamond Shamrock Corporation.</p><p style="color: #000000; font-family: 'Times New Roman'; font-size: medium; line-height: normal;" class="MsoNormal">Since all the Agent Orange settlement funds had been depleted by the end of 1994, no new

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claimants could get any compensation from the fund. Nevertheless, the defendants convinced the trial court to dismiss the claim, arguing that they had paid what they had agreed to in the settlement. The chemical companies contended that *their* due process rights would be violated unless they were released from every single veteran's future claims.

On appeal, I argued to the 2nd Circuit Court of Appeals in New York that the settlement had created two separate subclasses of future claimants: those eligible for compensation if their injuries occurred before December 31, 1994, and those who first manifested injuries after 1994, a no compensation group.

Reversing the lower court, the unanimous Second Circuit panel which included a judge who had previously ruled in favor of the settlement held that because co-plaintiffs Daniel Stephenson and Joe Isaacson had learned of their illnesses only after the settlement fund had expired and they were no longer eligible for compensation, they had not been adequately represented when the case settled. Therefore, they could not be bound by the settlement or barred from bringing suit. The Second Circuit concluded that its ruling did not expose the defendants to double liability because the inadequately represented plaintiffs could not have been parties to the original suit. (*Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. Nov. 30, 2001).)

A glimmer of hope

But the battle was not over: The defendants successfully petitioned the Supreme Court for certiorari, arguing that not only this case but every other class action could be reopened. On February 26, I argued the case against a former U.S. solicitor general, who was hired for the argument. While everyone believed the Court took the case to reverse our success, the justices split 4-4, thus affirming the Second Circuit. (Justice Stevens had previously announced that he could not participate in the vote.) (*Dow Chemical Co. v. Stephenson*, No. 02-271, 2003 WL 21310274 (U.S. June 9, 2003).)

Eighteen years after the Agent Orange class action was settled, Vietnam veterans finally have hope that they may receive compensation for their devastating injuries. As for me, I'll never forget a voice-mail message I received the day the Second Circuit issued its opinion: I suppose if you go after enough windmills, you can finally knock one down.

Gerson H. Smoger is a partner with the Smoger Law Firm in Oakland, California, and Dallas.