United States District Court

for the

EASTERN DISTRICT OF NEW YORK

IN RE

***AGENT ORANGE* Product Liability Litigation**

MDL 381

Victor John Yannacone, jr.
Yannacone & Yannacone, PC
W. Keith Kavenagh

FEE PETITION MEMORANDUM

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YANNACONE FEE PETITION MEMORANDUM

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1,965 days x 9 hrs = 17,685 available billable hours

THE AGENT ORANGE LITIGATION CHRONICLE

The Claim of Paul Reutershan

6 June 1978 to 9 October 1978
125 days; 17.86 weeks

At the request of Edward J. Gorman and Peter M.J. Reilly, Jr. attorneys for the railroad union of which Paul Reutershan was a member, Victor John Yannacone, jr. reviewed files he had established during the mid-70s when the United States Air Force proposed to incinerate the deteriorating Herbicide Orange stocks stored on Johnson Island in the South Pacific. Attorney Yannacone outlined his original plan for maintaining the Agent Orange Litigation as a class action seeking indeterminate damages and demanding equitable relief in the nature of a trust fund for the benefit of all the Viet Nam veterans who might be so unfortunate as to be afflicted with illness, suffering from disability, or who died as a result of exposure to dioxin contaminated phenoxy herbicides deployed as chemical defoliants during the war in Southeast Asia.

The Senate Hearings; The Alvin Young Reports

10 October 1978 to 13 December 1978
64 days; 9.14 weeks

On 10 October 1978, the United States Senate conducted a sparsely attended Committee hearing at which time Alvin Young presented a report he had prepared concerning the Dioxin contamination of phenoxy herbicides deployed as chemical defoliants during the war in Southeast Asia. Yannacone attended those hearings at the request of attorney Gorman. He obtained a copy of the Young report together with a number of other documents prepared by the Veterans Administration and circulated to the Committee.

After meticulously comparing the conclusions of the 1978 Young report with his copy of the Draft Environmental Impact Statement (DEIS) done in 1973–74, Yannacone concluded that there were substantial discrepancies in the two reports and much of the material on dioxin toxicity and adverse health effects contained in the 1973–74 DEIS had been either omitted, ignored, or treated as insignificant or inconclusive in the 1978 report.

Yannacone reviewed much of the original source material cited and contacted a number of his scientific colleagues who had participated in the DDT litigation with him from 1966 through 1969. During that period Yannacone had become familiar with all of the extant published literature on pesticides and their effects on non-target organisms and the environment. The collective recollection of Yannacone and his scientific colleagues was that at no time did they ever see any data, much less any papers published in the open, peer-reviewed, scientific literature indicating that

2,4,5–Trichlorophenoxyacetic acid (2,4,5–T) might have any toxic effects upon humans or other animals associated with its use until the work of Dr. Courtney was first circulated in late 1968.

Yannacone and his colleagues did recall vividly, however, the report in Science by K. Diane Courtney of Litton Bionetics, an NCI (National Cancer Institute) contractor which suggested that there might be teratogenic effects associated with 2,4,5–T. Those effects, however, might have been associated with a contaminant of the 2,4,5–T used for the tests—a contaminant identified by The Dow Chemical Company as 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin. Although Dr. Courtney's report caused a furor at the December 1969 meeting of the American Association for the Advancement of Science (AAAS), most of the discussion at that meeting was associated with the work of Orians and Pfeiffer documenting the ecological damage resulting from the wholesale use of powerful chemical defoliants on the mangrove swamps of Southeast Asia.

Yannacone advised Gorman that the Reutershan case was quite weak as a products liability claim in the absence of substantial evidence that other veterans were similarly afflicted. The evidentiary problems in presenting a single claim were overwhelming and Yannacone argued that the only rational way to establish any claim would be in the context of a class action that first established liability and then general causation, while deferring the determination of proximate cause.

Attorney Gorman was reluctant to file the Reutershan case as a class action because the conventional wisdom of the plaintiff's tort bar was that class actions with judicial control of attorney's fees were inconsistent with contingent fee practice and philosophy. Gorman subsequently filed the Reutershan case as a conventional products liability case against the Dow Chemical Company, Monsanto Company, and Northwest Industries, Inc. in the Supreme Court of the State of New York for Westchester County. Dow promptly removed the action to the United States District Court for the Southern District of New York.

The Amended Reutershan Class Action Complaint
14 December 1978 to 8 January 1979
25 days; 3.57 weeks

On 14 December 1978, Paul Reutershan died. His friend, Frank J. McCarthy, founder of AOVI[1] the first Viet Nam Veteran's Organization concerned with the "Agent Orange" problem came to Yannacone's office in Patchogue and asked him to take over the Reutershan case.

At first Yannacone refused. However, he did start to investigate the rumors within the military medical community of cancers among Viet Nam combat veterans inconsistent with their age and prior health status. Eventually, Yannacone uncovered work at the VA which, together with information from sources within the Department of Defense, indicated that Paul Reutershan's cancer was not an isolated circumstance.

As a result, on 22 December 1978, Yannacone agreed to take over the Reutershan case from Gorman and amend the complaint to refile it as a class action on behalf of all the Viet Nam veterans so unfortunate as to be similarly afflicted.

During this period, Yannacone discussed the case with a number of attorneys besides Gorman, including, among many others, Melvin Block. All of them felt that the action had merit but the possibility of recovery was so remote that it was nothing more than a pro bono public service effort with which they did not wish to become associated. Alone, Yannacone drafted and filed the amended Reutershan complaint as a class action in the United States District Court for the Southern District of New York on 8 January 1979.

When Yannacone agreed to refile the Reutershan action as a class action in December, 1978, no other law firm was willing to take it on. There was no pay day in the offing and the Viet Nam veterans and their families were not popular. The attorneys of record for Paul Reutershan were ready to abandon the case as soon as they could find an attorney willing to accept responsibility for the claim. Yannacone accepted that responsibility and took charge of that case.

On 8 January 1979, the conventional wisdom of the plaintiff's trial bar leaders—Melvin Belli, Philip Carboy, Melvin Block, the "Million Dollar Round Table," the "Masters of Disaster,"[2] the "air crash cartel," and most especially those attorneys representing both plaintiffs and defendant's who had created a national cottage industry for a small group of lawyers out of asbestos litigation was that class actions were not suitable for personal injury claims. At this time, Yannacone stood alone in his conviction that the Agent Orange Litigation and indeed, all mass toxic torts, should be maintained as class actions for determination of fault and generic causation.

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1. Agent Orange Victims International, now Vietnam Veterans .Agent Orange Victims International (VVAOVI).
2. A self-styled designation adopted by a group of personal injury lawyers including, among others, Stanley Chesley, one of the "Agent Orange" Plaintiffs' Management Committee members. The Masters of Disaster claim to be 'specialists' in mass disaster litigation and, like vultures circling a fresh kill can be found at the Courthouse immediately following any catastrophe involving significant numbers of personal injuries and loss of human life. See, Diane Wagner, "The New Elite Plaintiffs' Bar," *ABA Journal*, February 1, 1986, pp. 44-50.

Without Yannacone's foresight and determination to maintain the Agent Orange Litigation as a class action, the Veterans would have been forced to follow the interminable path of the asbestos litigation through all the Courts of the United States and the 50 states. But for Yannacone's effort to litigate the fundamental issues of the "Agent Orange" controversy—fault and dioxin toxicity—in a single class action, the Viet Nam veterans and their families would have been lost forever in the trackless miasma of state tort law and trapped in the killing fields between time billing defense counsel and the contingent fee "Masters of Disaster," eventually meeting the same fate as the hapless asbestos victims.

The amended *Reutershan* complaint contained a full exposition of the entire military herbicide program during the war in Southeast Asia; a summary of all the extant published scientific literature on the effects of dioxins (PCDDs) and related compounds such as the furans (PCDFs) and polychlorinated biphenyls (PCBs); together with sufficient information about each of the major corporate defendant war contractors to support Yannacone's theory that these corporations were of sufficient economic resources and technological sophistication as to stand in a fiduciary relationship with the Government and the veterans as to information about the products they manufactured, marketed, promoted and sold.

The amended *Reutershan* complaint stood for over a year as an uncontradicted "white paper" about herbicides in Viet Nam, dioxin, and corporate culpability.

The Early Veterans Claims; Marcie Smith and the Children

9 January 1979 to 22 February 1979
44 days; 6.29 weeks

During this period the full national and international scope of the "Agent Orange" problem became apparent. Hundreds of veterans called and their cases were screened by Carol and Victor Yannacone. Out of these initial screenings came the evidence that there were a number of different syndromes associated with service in Viet Nam and exposure to dioxin contaminated phenoxy herbicides.

During the first week of February, 1979, the case of Marcie Smith from Bethlehem, Pennsylvania was filed. Shortly after her claim was filed, information surfaced that there were at least five more children with the same bizarre pattern of polygenetic anomalies—a missing ear, a missing eye, cleft palate, and club foot—all of whose fathers were Viet Nam combat veterans, marines who served at the DMZ during 1968–69.

The Yannacones immediately recognized that this pattern of congenital anomalies was similar to that found among chicks hatched from eggs laid by hens suffering from "chick edema disease" a condition we now know was caused by ingestion of dioxin contaminated feed.

Carol Yannacone analyzed the Seveso birth defect data which had been furnished by counsel for Dow and verified that the "dioxin episode" had resulted in a statistically significant number of children born within a year after the Seveso explosion who had polygenetic birth defects not generally found in Italian industrial communities.

Associated Counsel Agreements; The CHAOS DBMS

23 February 1979 to 26 April 1979

62 days; 8.86 weeks

Arrangements were made with associated Counsel throughout the United States and the ultimate "Agent Orange" Associated Counsel Plan was developed and implemented after a meeting in Chicago on 21 February 1979 with Steven Schlegel and Steven Platt.

The success of Yannacone's early arrangements with associated counsel can be measured by the minimal amount of the settlement proceeds that Judge Weinstein distributed as attorney's fees. Measured by fees awarded and expenses reimbursed to plaintiff's counsel, the transaction costs associated with the Agent Orange Litigation are lower than any mass tort liability case in American legal history. The plan for associating counsel and the rules governing such association were developed by Yannacone over the vociferous objections of such "leaders" of the personal injury trial bar as Melvin Belli, Scott Baldwin, and Mel Block, among others.

The veterans claims were evaluated by the Yannacones in the context of existing epidemiological data and morbidity tables. Histories of possible confounding causes including alcohol consumption, familial disease, lifestyle, medications, and industrial or occupational exposures to toxic substances were considered. Family physicians, scientists, medical specialists and researchers were consulted. The CHAOS (Case Histories of Agent Orange Survivors) data base was designed, developed, and debugged by Robert W. Liquori to process the information provided by Carol A. Yannacone.

Without this rigorous evaluation of the initial "Agent Orange" claims by Carol and Victor Yannacone, particularly the death claims and the early infant claims of Marcie Smith and Kerry Ryan, the medical and scientific information which ultimately drove the corporate defendant war contractors to settle the Agent Orange Litigation would never have emerged.

Claim Consolidation; The MDL Application

21 March 1979 to 26 April 1979
36 days; 5.14 weeks

After the initial pretrial conference on 20 March 1979 before Judge Pratt, lengthy discussions were conducted with Leonard Rivkin, counsel for Dow, leading to a joint proposal to consolidate all the "Agent Orange" claims by means of a petition to the Judicial Panel on Complex and Multi District Litigation. The joint petition sought designation of the Agent Orange Litigation as an MDL action consolidated for the purposes of discovery at the very least. The petition was vigorously opposed by Benton Musselwhite and his Texas colleagues, Newton Schwartz and Scott Baldwin, and their local New York counsel Melvin Block. Rivkin and Yannacone successfully argued before the MDL panel for consolidation of all the "Agent Orange" claims in the United States District Court for the Eastern District of New York before Judge Pratt. Their joint petition for MDL Certification was granted from the Bench.

The MDL consolidation set the Agent Orange Litigation on a "fast track" toward trial or settlement. No other mass tort litigation in American jurisprudence has moved with such alacrity through the system to produce such a recovery in the face of such extensive and formidable defense by and on behalf of multinational and transnational corporations with unlimited resources and no incentive to settle.

The agreement Yannacone negotiated with counsel for Dow in late March 1979 to present the "Agent Orange" litigation to the Judicial Panel on Complex and Multi District Litigation at their April sitting in St. Louis made it possible for the case to proceed quickly towards a resolution on the merits rather than become bogged down in endless procedural wrangling among warring groups of plaintiff's lawyers and defense counsel.

Yannacone's efforts avoided the unseemly spectacle of defense firms in all the jurisdictions vying to join the feeding frenzy represented by countless opportunities to generate hourly billings on essentially identical lawsuits each of which could be billed independently to the partially self-insured chemical companies, as well as their primary, secondary, and excess liability insurance carriers. Yannacone's efforts similarly avoided the no less sorry spectacle of greedy, selfish plaintiffs' lawyers led by the "Masters of Disaster" fighting for a place at the trough of what they presumed would be substantial contingent fees.

By filing essentially identical law suits in a number of unrelated judicial districts in several Circuits reflecting different statutory and common law treatment of tort litigation, all prior to the application for MDL consideration, Yannacone was able to present the MDL Panel with the opportunity to send the thousands of Viet Nam veterans and their families to a single court in what could be treated essentially as a single common law suit.

Yannacone's efforts provided significant and substantial economies of scale to the Viet Nam veterans and their families in the management of their litigation, and resulted in enormous savings to the federal judicial system with most effective conservation of judicial resources.

Consolidation of the "Agent Orange" Cases.

27 April 1979 to 28 May 1979

31 days; 4.43 weeks

Following the order of the MDL Panel consolidating the Agent Orange Litigation for pretrial and discovery matters before Judge Pratt in Uniondale, all of the outstanding cases were transferred to the Eastern District of New York. Files were opened. Attorneys were brought into association in support of the Class action. Medical information on the cases of representative plaintiffs was assembled and analyzed.. The CHAOS DBMS (Data Base Management System) was implemented.

MDL Management Operations

Victor John Yannacone, jr. was the attorney designated to receive all MDL documents dealing with the Agent Orange litigation from April 26, 1979. From 26 April 1979 through 23 October 1984, every MDL document was handled in precisely the same way in the Agent Orange Litigation Center at 62 Rose Avenue in Patchogue.

Whenever an MDL transfer order or a document dealing with an MDL matter was received, Debra Wylie, the paralegal assisting Dr. Kavenagh on a full time basis would search the files to determine whether the attorney of record for the plaintiff in the transferred case was an associated counsel and whether or not a file was being maintained on the veteran plaintiff already.

If files existed they were pulled and presented to Dr. Kavenagh who compared the complaint in the transferred action with the master form complaint, noted any discrepancies and contacted the attorney of record for the plaintiff in the transferred case by telephone to discuss association with and participation in the class action.

In those cases where the attorney of record for the plaintiff in the transferred case was not one of the counsel already associated with Yannacone in the "Agent Orange' class action, a set of documents establishing association[3] was immediately sent to the attorney. Association was discussed, usually a few days later on the telephone in a conversation between the attorney and Dr. Kavenagh. When the association documents were returned, they were filed and docketed with the court under seal.

The associated counsel documents included an affidavit that the veteran's claim had not been solicited nor had any consideration been paid to anyone for bringing the

3. Exhibit 1., "Agent Orange" Association Documents.

action to the attorney of record.[4] The affidavit was adapted from a form that had been developed by the United States District Court for the Northern District of Illinois (Chicago). Yannacone refused association with any attorneys who felt they could not sign an "affidavit of no solicitation."

The claim file, the pleading file, and the MDL file were then presented to Yannacone for review, comment, and sometimes dictation of a letter to the attorney of record. The claim file was then referred to Carol A. Yannacone for further investigation of the medical aspects of the claim and to post the CHAOS data base.

Dr. Kavenagh would conduct further discussions with the attorney of record and make the introduction and referral to one of our regional counsel, such as Steven G. Schlegel/Sullivan Associates, for administrative and liaison purposes.

The review and disposition of each MDL transferred file consumed, on an average, 90 minutes of Yannacone's time, approximately 6 hours of Dr. Kavenagh's time, and approximately 8 hours of Carol Yannacone's time. Without this effort the Agent Orange Litigation could not have been presented to this Court as a single unified action with a single lead counsel responsible to the Court for all of the decisions in the litigation.

Practice & Procedure; Amended Class Action Complaint
29 May 1979 to 21 June 1979
23 days; 3.29 weeks

During this period Yannacone made a number of practice and procedure suggestions which were ultimately to shape the course of discovery in the Agent Orange Litigation. The most significant was the demand that all discovery materials be produced in microform. Microfilm made it possible for Yannacone to maintain the voluminous Agent Orange, document collection in the limited space available at 62 Rose Avenue.

The class action complaint was amended in response to suggestions from the Court.

Defendants First Wave of Motions to Dismiss.
22 June 1979 to 18 July 1979
26 days; 3.71 weeks

4. Exhibit 2., "Agent Orange Affidavit of No Solicitation."

All of the corporate defendant war contractors moved against the class action Complaint. Yannacone responded with cross-motions, offers of proof, and affidavits/memoranda in opposition which clearly established that the Viet Nam veterans and their families were ready to continue their class action, and if necessary proceed to an immediate trial on the merits.

EPA RPAR/FIFRA Proceedings
19 July 1979 to 15 August 1979
27 days; 3.86 weeks

Some time after the Reutershan complaint was amended and the numerous Class action filings throughout the country made "Agent Orange" and its dioxin contaminant a matter of national concern, the United States Environmental Protection Agency initiated proceedings under FIFRA/FEPCA to suspend registration and terminate widespread outdoor use of 2,4,5–T.

In an effort to protect its proprietary phenoxy herbicide, *silvex*, Dow objected to the proposed suspension order and demanded administrative hearings. Dow then requested suspension of discovery in the Agent Orange Litigation until completion of the US EPA RPAR Hearings. Based on past experience with similar EPA proceedings, Yannacone opposed any delay in the Agent Orange Litigation. There was a flurry of activity over the EPA proceedings.

Memos on Diversity Jurisdiction, Class Actions in general, and a supplemental memo on Class Certification were prepared during this period. Motions were made by a number of the corporate defendant war contractors to dismiss or strike portions of the Amended Class Action Complaint and Yannacone responded successfully to these motions.

Federal Question Jurisdiction; Federal Common Law
16 August 1979 to 3 October 1979
48 days; 6.86 weeks

During the period following the decision denying the defendants motions to dismiss the complaints or for summary judgment, Yannacone filed the Second Amended Verified Complaint.

Northwest Industries, Inc. attempted to obtain dismissal from the action on stipulation and proof of non-involvement in herbicide supply for the war in Southeast Asia. The other corporate defendant war contractors opposed the Northwest Industries application and moved to dismiss the veterans Second Amended Verified Complaint for lack of subject matter jurisdiction.

Yannacone drafted, edited and filed memos opposing the motions to dismiss the complaint, on Federal Common Law, and Class Certification.

In addition, Yannacone prepared the notices directed to each of the corporate defendant war contractors requesting production of specific documents and demanding admissions of specific facts.

Defendants Second Wave of Motions to Dismiss
4 October 1979 to 22 November 1979
49 days; 7.00 weeks

The corporate defendant war contractors filed their second wave of motions for Summary Judgment dismissing the complaint.

The corporate defendant war contractors continued to oppose class certification and were joined in their opposition by New York attorney Melvin Block who was serving of counsel to Texas attorneys Benton H. Musselwhite, Newton Schwartz, and Scott Baldwin.

Defendant North American Phillips formally moved for dismissal on the grounds that it did not manufacture or supply dioxin contaminated herbicides for use in Viet Nam.

Yannacone responded to all these motions and prepared memos on Class Certification and a Third Amended Verified Complaint which, after it was approved by Judge Pratt, became the model for all the "Agent Orange" complaints being filed throughout the country and ultimately consolidated by the MDL Panel before Judge Pratt in the Eastern District of New York.

The Long Island Consortium, Yannacone & Associates, did not come into existence until late September 1979, only after Judge Pratt had denied the corporate defendant war contractors omnibus motion to dismiss the complaint.[5]

During this period, the Long Island Consortium, Yannacone & Associates, conducted organization meetings, but did not provide any meaningful economic support until December. All of the original Long Island Consortium attorneys have been reimbursed for their contributions to Yannacone & Associates, but Yannacone himself has not yet been reimbursed the remaining $472,766,13 of his actual expenses in conducting the Agent Orange Litigation beyond the meager amounts contributed by the Consortium.

5. The decision by Judge Pratt denying the motion to dismiss and the motion by defendants for a gag order was denied on 15 August 1979- 23 years to the day after New York Supreme Court Judge D. Ormande Ritchie granted Carol A. Yannacone's application for a temporary injunction prohibiting the continued use of the broad spectrum persistent chemical biocide DDT- The day the Environment Movement was born.

Claims Examination and Case Consolidation
23 November 1979 to 4 January 1980
42 days; 6.00 weeks

After Judge Pratt denied the motions to dismiss the complaints and accepted jurisdiction of the Agent Orange Litigation as a "federal question", to be determined under "federal common law" principles, the corporate defendant war contractors moved for a stay of proceedings and certification of an immediate appeal to the Second Circuit.

Such an appeal would have only been possible with plaintiffs' consent. Yannacone opposed allowing the interim appeal and argued for continuing directly into the Government Contractor Immunity phase of the litigation.[6]

In return for a stipulation certifying the appeal, Yannacone was able to obtain an order from Judge Pratt on stipulation directing the corporate defendant war contractors to file their answers to the Plaintiffs complaint and make any cross-complaints, or third party complaints by 4 January 1980.

Following this decision, the existing claims files were consolidated and examined and the document management procedures established to eventually process more than 2,000,000 pages of government and chemical company documents.

Defendants Answers/Third Party Complaints
Plaintiffs' Statement of Issues
5 January 1980 to 21 January 1980
16 days; 2.29 weeks

Pursuant to the order of Judge Pratt, the corporate defendant war contractors finally filed answers to the veterans' complaint and filed third party complaints against the United States of America asserting what was to become known as the Government Contractor Immunity Defense, both as an affirmative defense against the Viet Nam veterans and their families and the basis for a claim of indemnification against the federal government.

6. Rather than make any more contributions to the litigation, the Long Island Consortium members, led by Irving Like, insisted on allowing the corporate defendant war contractors to take an interim appeal on consent. In addition, the Long Island Consortium refused to allow any .additional filings and consolidations and discontinued financial support for processing further claims from the veterans. As it turned out this was among the most penny wise and pound foolish decisions the Long Island Consortium ever made. The appeal to the Second Circuit cost the plaintiff veterans two years and created a jurisdictional miasma that continues to plague the Court.

In response, Yannacone prepared the first wave requests to the corporate defendant war contractors for production of documents and to take the depositions of certain employees of the corporate defendant war contractors on specific issues.
Yannacone and Dr. Kavenagh, with the assistance of the document data base management system developed by Liquori analyzed all of the Defendants' answers, cross-complaints, affirmative defenses, and third party complaints so as to produce for the Court a Composite Statement of Issues and Marked Plaintiffs' Third Party Amended Complaint. This document became something of a reference handbook and guide for the subsequent proceedings in the Agent Orange Litigation before Judge Pratt and Special Master Sol Schreiber.

In both form and substance, the Plaintiffs' Composite Statement of Issues and Marked Pleadings, represented a new and unique document in personal injury litigation before the federal courts.

Defendants Appeal to the Second Circuit;
Preliminary Discovery of United States Documents
22 January 1980 to 1 May 1980
100 days; 14.29 weeks

Immediately after filing the Plaintiffs Statement of Issues, Yannacone filed additional demands upon the corporate defendant war contractors for documents and to take depositions, as well as notices to admit particular facts relevant and material to meeting the issues raised by the Defendants' answers.

The Dow Chemical Company moved under Rule 34 for production of documents by the United States of America and a number of its executive agencies. Dow and the other corporate defendant war contractors moved against the United States on a variety of issues raised in their Third Party Complaints against the Government.

There was extensive discussion with the Court and among the parties concerning protective orders and the questions of privilege raised by the document demands of the parties.

The corporate defendant war contractors briefed their appeal to the Second Circuit and Dr. Kavenagh worked on the Plaintiffs response to the Defendants briefs. He continued to process new claims and assimilate associated counsel into the Agent Orange Plaintiffs team.

Over the objections of the Long Island Consortium, Yannacone continued to encourage the filing of new claims; their consolidation under MDL 381; association of their counsel with class counsel in the litigation; and active participation of the plaintiff veteran in the Class.

On 1 May 1980, Irving Lake unsuccessfully argued the appeal before the Second Circuit Panel, while Yannacone answered the Panel's questions concerning the

national scope of the litigation and the importance of its "federal' issues. At that time only 800 individual claims had been consolidated from 24 states, and a majority of the Panel, over the vigorous dissent of Chief Judge Feinberg felt that there was insufficient "national interest' to support "federal question' jurisdiction.

It is now obvious that even more cases should have been filed before the appeal was argued since Judge Kearse did not seem to grasp the magnitude of the "Agent Orange" controversy at the time she wrote the majority opinion.

Government Discovery; FTCA Claims

2 May 1980 to 29 December 1980

241 days; 34.43 weeks

Following the argument in the Second Circuit, and while further proceedings directly involving the Plaintiff veterans and the corporate defendant war contractors had been stayed, the involvement of the United States in the Agent Orange Litigation took center stage. The defendants vigorously pursued their efforts to discover government documents and take the depositions of government witnesses, while the United States raised issues of "Executive Privilege" and "State Secrets".

The Plaintiffs continued to serve notices to admit facts upon the defendants and the corporate defendant war contractors continued to raise issues of confidentiality at every opportunity.

From the filing of the Third Party Complaints against the United States and even to this day, the corporate defendant war contractors have conducted an all out effort to establish that the decision makers in the federal government during the War in Viet Nam had actual knowledge that the phenoxy herbicides procured for use as chemical defoliants were contaminated with dioxin and that dioxin was extraordinarily toxic.

Yannacone vigorously asserted and ultimately established that the United States of America in general, and the Department of Defense in particular, had relied on representations by the corporate defendant war contractors about the safety and efficacy of phenoxy herbicides as chemical defoliants and the assurance by the manufacturers that the phenoxy herbicides were "absolutely safe and non-toxic to humans and animals."

However, the plaintiffs began to feel the pressure of the Draconian time limitations imposed on claims that the corporate defendant war contractors insisted should be made under the Federal Tort Claims Act (FTCA).

Efforts were made to ameliorate the technical provisions of that Act on behalf of the entire class of Viet Nam veterans and their families while local counsel were advised to assist their clients in filing individual Notices of Claim against the United States under the FTCA.

At Yannacone's insistence, however, those individual claim forms which the veterans filed all stated that the claims against the government were based on allegations made by the corporate defendant war contractors. The veterans represented by Yannacone, the Class plaintiffs, all continued to maintain the basic theme of the Agent Orange Litigation—the corporate defendant war contractors and their dioxin contaminated phenoxy herbicides were responsible for the ills of the veterans, not the Government.

All the while the volume of documents produced on discovery continued to grow virtually without limit. Document management became a critical element of the Agent Orange Litigation and with their limited resources, the plaintiff Viet Nam veterans and their families became more dependent upon the data base management system devised by Liquori. Without that system, and its implementation by Dr. Kavenagh and Carol Yannacone, the veterans would not have been able to handle the volume of paper that was inundating the tiny Agent Orange Litigation Center at Rose Avenue.

Class certification issues continued to concern all the parties and the Court. The continued opposition to class treatment of the Agent Orange Litigation by a small group of attorneys with a limited number of clients further complicated the management task of Yannacone.

On 29 December 1980, Judge Pratt dismissed the Third Party Complaints of the corporate defendant war contractors against the United States.

Discovery Start-up; The Australian/New Zealand Claims

30 December 1980 to 30 January 1981

31 days; 4.43 weeks

During the month following dismissal of the defendants' Third Party Complaints against the United States, Yannacone and Kavenagh managed a number of complex issues and proceedings.

The corporate defendant war contractors moved to reargue dismissal of their Third Party Complaints against the United States. Amchem moved to dismiss the few complaints that had been filed against it by individual plaintiffs not associated with the "Agent Orange" class action.

The corporate defendant war contractors continued to pursue their Government Contractor Immunity Defense with increased vigor against the plaintiff veterans since their indemnification claims against the government had been dismissed. The plaintiffs responded with appropriate memoranda as did Ashcraft & Gerel from a different position.

Ashcraft & Gerel moved to establish a steering committee and appoint liaison counsel, a position that the majority of the Viet Nam veterans and their families who favored maintaining the Agent Orange Litigation as a class action opposed.

The Class Certification issues included the proposed form of notice; proposals for notice through the media; proposed representative class plaintiffs; defendants' opposition to class certification and to the proposed representative class plaintiffs; and responses by the plaintiffs to the defendants' motions.

Plaintiffs and Defendants exchanged first wave interrogatories.

The Plaintiffs responded to the Defendants' First Wave Interrogatories and the Defendants moved against the Plaintiffs' First Wave Interrogatories.

An application was made on behalf of the plaintiff veterans to discover the documents surrounding the intentional exposure of human beings—prisoners at a Pennsylvania State penitentiary—to dioxin applied by a dermatologist, Dr. Kligman in an experiment that may have been funded by one or more of the corporate defendant war contractors; and to take the testimony of Dr. Kligman. This application was vigorously opposed by the Defendants.

Australian and New Zealand claims continued to be filed and processed.

An action was brought against the Veterans Administration to try and obtain benefits, particularly improved medical care and treatment, for Viet Nam combat veterans claiming disease and disability associated with exposure to dioxin contaminated phenoxy herbicides during service in Southeast Asia.

Discovery Motions; Defendants Amend Answers

31 January 1981 to 20 May 1981

109 days; 15.57 weeks

Benton H. Musselwhite, one of the attorneys eventually appointed to the Plaintiffs' Management Committee, moved for an MDL Steering Committee with liaison counsel and he continued to oppose class certification of the Agent Orange Litigation. Ashcraft & Gerel moved on Class Notice seeking to encourage massive "opt outs" from the Plaintiff class.

The United States opposed the Defendants' Motion for reconsideration of the dismissal of the Third Party Complaints and the Defendants moved for leave to amend their Third Party Complaints against the United States.

Statute of Limitations issues concerning the Australian and New Zealand veterans were briefed by all the parties as were the more general Statutes of Limitations questions affecting the claims of veterans from a variety of states with different rules.

The United States moved to dismiss the complaints of veterans against the VA.

The corporate defendant war contractors responded to the plaintiffs request for documents with voluminous indices and demands for protective orders and confidentiality agreements. Defendants also responded to the veterans' first wave of interrogatories with information that had to be processed, managed, and made retrievable in the context of the demands of the litigation, particularly the elements of

the Government Contractor Immunity Defense. Again there were extraordinary demands placed on Liquori and the data base management system he developed; and again the plaintiffs were successful in managing the flood tide of paper loosed upon them by the corporate defendant war contractors.

Ansul moved for summary judgment to dismiss those claims that had been brought against it outside the context of the "Agent Orange" class action litigation. The other "Agent Orange" Defendants opposed the motion.

The United States agreed to produce the documents requested by the corporate defendant war contractors, and the issue of the form of that production became critical. Yannacone prevailed in his demand that all document production be on microfilm with the expense of microfilming imposed on the party producing the documents. Through the efforts of Yannacone the plaintiff veterans were able to obtain the documents on microfilm at the cost of reproducing the film alone. The veterans were not required to share in the cost of filming the original documents. This saved the veterans tens of thousands of dollars and made it possible for them to successfully pursue the action to a settlement. In addition, through the efforts of Dr. Kavenagh, the veterans were able to obtain the microfilm on credit from Matthias & Carr.

During this period there was considerable discussion and argument over the location of depositions, particularly the depositions of non-party witnesses. Dr. Kavenagh conducted these negotiations on behalf of the plaintiffs and eventually agreement was reached among all the parties and the United States Attorney General which made it possible to complete all the necessary depositions within a year-an extraordinary feat in modern litigation of this magnitude.

There was litigation pending at this time against the Monsanto Company both in Nitro, West Virginia, arising out of a dioxin accident in 1948, and a more recent tank car accident in southern Illinois. Applications were made by the attorneys for the plaintiffs in those actions for leave to intervene in the :Agent Orange Litigation for the purpose of obtaining access to the document discovery of the plaintiffs without in any way contributing to the cause of the Viet Nam veterans and their families.

This effort by major figures of the plaintiffs' tort bar typifies the differences between Yannacone and the rest of the "leaders" of the personal injury trial bar at that time. Yannacone argued that mass tort actions, particularly mass toxic tort litigation, should be conducted as class actions seeking equitable relief for all the victims as a class and transfer of the burden of caring for those victims from the taxpayers to those responsible for the damages. The conventional wisdom of the tort bar, however, both plaintiffs attorneys seeking contingent fees and hourly billing defense firms, was that tort claims were unsuitable for class action treatment. To those attorneys whose vision was fixed on the "bottom line"— legal fees—tort claims, even those arising out of a common disaster, were to be prosecuted only for individual plaintiffs, producing

windfalls for a few and wipeouts for most, while maximizing the costs to society, the expenses of litigation, the demands on judicial resources, and most of all, attorneys' fees.

The Government Contractor Immunity Defense
21 May 1981 to 15 September 1981
117 days; 16.71 weeks

The corporate defendant war contractors moved for leave to amend their Third Party Complaints against the United States of America.

Hooker Chemical and its parent, Occidental Petroleum, moved for summary judgment and defendant Hoffman Taff answered the plaintiffs' first wave of interrogatories.

The Australian and New Zealand veterans' claims were filed and added to the CHAOS data base.

While the defendants and certain plaintiffs' attorneys opposing class certification made motions concerning the need for, and conduct of, *in extremis* depositions, Yannacone conducted negotiations with representatives of the defendants on the most appropriate methods of conducting videotape depositions of seriously iii veterans such as Charles Hartz. The rules and procedures for conducting such video depositions developed during those negotiations over the Hartz videodeposition were eventually endorsed by Judge Pratt.[7]

To post the record with the full extent of the diligent preparation for trial completed by counsel for the plaintiff veterans, Yannacone filed a motion for summary judgment to dismiss the Government Contractor Immunity Defense.

Dow sought to discover (and discredit) certain unpublished data from a series of dioxin feeding studies conducted by scientists at the University of Wisconsin. Dow caused a subpoena for the raw, unpublished data to be issued by the Hearing Officer in the EPA RPAR proceedings. Yannacone intervened before the United States District Court in Madison, Wisconsin, on behalf of the plaintiff Viet Nam veterans and their families in the Agent Orange Litigation, and Dow similarly intervened through its Washington counsel, Kirkland & Ellis.

Although the US EPA and the University of Wisconsin were the nominal parties to the proceedings to enforce the subpoena for the monkey feeding study data, the District Court agreed to recognize the Viet Nam veterans and their families in the Agent Orange Litigation, with Victor Yannacone as their representative, and The Dow Chemical Company, one of the corporate defendant war contractors in the Agent Orange Litigation with Kirkland & Ellis as its attorneys, as the real parties in interest.

7. Pretrial Order 29.

There, in the District Court, Yannacone succeeded in quashing the subpoena and Dow appealed to the United States Court of Appeals for the Seventh Circuit. Yannacone successfully argued that appeal and established the privileged nature of scientific data from work in progress prior to publication in the open peer-reviewed literature.

The eventual publication of this data provided substantial and convincing animal evidence of dioxin toxicity and supported Yannacone's representations to the Court concerning the biochemical mechanisms of physiological injury associated with dioxin exposure.

Document Discovery Matters; Claims Management
16 September 1981 to 16 December 1981
44 days; 6.29 weeks

Pretrial Order 29 formalized Yannacone's suggested procedures for conduct of *in extremis* depositions.

Consideration was given to methods of providing notice to the class and whether broadcast notice through the electronic and print media would be adequate. There was also consideration of certifying general "non opt-out" classes under Rules 23(b)(1) and 23(b)(2) as to common issues of law and fact such as the Government Contractor Immunity Defense.

The Dow Chemical Company moved to dispose of many of its corporate documents.

Throughout this period the filing of claims throughout the country continued to meet the Second Circuit concerns on what was sure to be eventual reconsideration of federal question jurisdiction. There was further consolidation of individual independent actions under the MDL rules.

Document Motions; Class Decertification Attempts
17 December 1981 to 24 February 1982
69 days; 9.86 weeks

The corporate defendant war contractors filed a series of motions against the United States to discover documents and to prevent contact between representatives of the Department of Justice and former Government employees who might be called to testify by the defendants.

The plaintiff veterans attempted to depose officials of the Veterans' Administration concerning the extent of VA knowledge of disease among the Viet Nam combat veterans in numbers greater than to be expected for the age and general physical condition of those veterans. The veterans wanted access to cancer registry information maintained by the VA.

The United States raised issues of privilege concerning many of the documents requested by the corporate defendant war contractors. The plaintiff veterans moved

against the United States on the FTCA claims in an effort to establish an efficient, streamlined claims procedure. This effort was vigorously opposed by the Attorney General.

Dow made application to destroy many of its documents on the ground that they were now "too old" and therefore too expensive to maintain.

Ansul, the manufacturer of certain defoliants not at issue in the Agent Orange Litigation, and not a defendant in the class action cases, moved for summary judgment as did the defendant Hooker Chemical and its parent corporation, Occidental Petroleum.

The corporate defendant war contractors continued to pursue their third party complaints against the United States. Judge Pratt dismissed those claims[8] and then certified an appeal to the Second Circuit.

The corporate defendant war contractors and certain Plaintiffs' firms who did not wish to proceed with the Agent Orange Litigation as a class action because it might lead to abrogation of individual contingent fee contracts, made efforts to decertify the putative class.

Yannacone successfully opposed all the attempts to decertify the class, and without his successful efforts to maintain the Agent Orange Litigation as a class action, the eventual settlement would not have been possible.

Yannacone prepared a further statement of issues that ultimately guided the course of the Agent Orange Litigation to its successful conclusion.

The plaintiff veterans cross moved against many of the motions made by the corporate defendant war contractors and the United States.

Issues concerning the Australian and New Zealand veterans claims were considered.

Yannacone and Kavenagh prepared the Petitioners' Surreply to the Brief of the United States Solicitor General that had been requested by the United States Supreme Court on the veterans Petition for Certiorari from the decision of the Court of Appeals for the Second Circuit.

Defendants Non-Jury Request;
Definition of "Agent Orange"
25 February 1982 to 18 March 1982
21 days; 3.00 weeks

The corporate defendant war contractors made the suggestion that the Agent Orange Litigation be tried on the single issue of Government Contractor Immunity Defense, before Judge Pratt without a jury as soon as possible.

8. Pretrial Order 33.

In response to this suggestion which both the Special Master and Court seemed disposed to accept, Yannacone and Kavenagh developed a "web" model of information flow within the federal bureaucracy based on an analysis of documents produced by the United States in response to the Defendants demands.

Yannacone conducted all the arguments before the Special Master and Judge Pratt on the Defendants' motion for a non-jury trial of the Government Contractor Immunity Defense.

Judge Pratt and the Special Master insisted on a formal definition of "Agent Orange" which would effectively limit the claims of the Viet Nam veterans and their families by defining the toxic substances they claimed were actually responsible for their illness, disability, and death.

During this period the motion to reargue the decision of the United States Court of Appeal for the Second Circuit was prepared as well.

Preparation for Depositions
19 March 1982 to 30 April 1982
42 days; 6.00 weeks

Yannacone was personally familiar with many of the documents produced by the United States of America and professionally acquainted with many of the individuals who were called as witnesses by the corporate defendant war contractors. In several cases, such as Dr. Whalen Hays, a toxicologist relied upon by the chemical companies during the DDT litigation and Dr. Harry W. Hayes, the former Director of Pesticide Registration for the United States Department of Agriculture, Yannacone had actually cross-examined these witnesses extensively during the DDT hearings in Madison, Wisconsin in 1969.

Ashcraft & Gerel, still opposing class certification, insisted upon including in the definition of "Agent Orange" all the herbicides used by the Department of Defense during the War in Viet Nam, including Agent Blue, an organic arsenical, Agent White, a Dow proprietary product, *Tordon* 101, as well as the 2,4–D component of "Agent Orange".

Yannacone insisted that the Government Contractor Immunity Defense could only be overcome in the case of the 2,4,5–T contaminated with dioxin. He defined the "Agent Orange" which was the subject matter of the Agent Orange Litigation as limited to only the dioxin contaminated materials. Subsequent events have shown the wisdom of this decision which would not have been possible but for the extent of Yannacone's specialized knowledge and information about pesticides and his personal mastery of the intricate details of the Agent Orange Litigation.

After a thorough review of the tens of thousands of documents provided by the Government, and after consultation with a number of experts and colleagues from the DDT litigation of the mid 1960s, Yannacone prepared a definition of "Agent Orange" which was found to be adequate to hold all the corporate defendant war contractors in the case. At the same time he developed a formula for apportionment of liability responsibility which did in fact, lead to the ultimate settlement of the Agent Orange Litigation.

The Government Contractor Immunity Defense
Depositions; in general
1 May 1982 to 23 October 1983
540 days; 77.14 weeks

During the 77 weeks from the appointment of Sol Schreiber as Special Master to manage discovery and other pretrial matters through the motions for summary judgment by the corporate defendant war contractors on their Government Contractor Immunity Defense, Victor John Yannacone, jr. spent 16 or more hours of every day actively involved in mission critical substantive Agent Orange Litigation matters for the benefit of the entire class of Viet Nam veterans and their families.

During those 77 weeks, Yannacone read and annotated documents and transcripts; briefed attorneys, argued before the Special Master and prepared the case for trial. All the while, the Agent Orange Litigation Center at 62 Rose Avenue continued to process all of the paperwork necessary to serve as liaison counsel with over a thousand attorneys throughout the United States representing more than 18,000 Viet Nam combat veterans and their families. Yannacone also monitored and participated in the regular proceedings of the MDL panel throughout the Country.

During those 77 weeks, Yannacone was personally responsible for reading and annotating every document produced by the corporate defendant war contractors for presentation to a witness at depositions. In many cases the documents were delivered the day before the deposition and at best they were delivered two or three days before a deposition.

Yannacone was responsible for presenting the attorney covering a deposition with annotated documents and a briefing on the substantive matters and issues to be covered. Yannacone was expected to anticipate just what evidence the corporate defendant war contractors would seek to elicit from the witness at each deposition and what facts the witness could actually testify to and what might be speculation.

Yannacone was on telephone standby during every deposition he did not personally conduct himself. On those depositions he did conduct personally, he was often interrupted with questions on issues raised at other depositions.

Yannacone argued most, if not all, of the teleconference objections raised during depositions and often argued before the Special Master by teleconference from other depositions.

During the 77 weeks of government depositions and government document discovery two attorneys, Victor John Yannacone, jr. and Dr. W. Keith Kavenagh until his untimely death, together with Carol A. Yannacone, supported by a small dedicated staff of clerks and paraprofessionals together with volunteers from the veteran class, beat back the concerted attack of some of the largest law firms in the world each with comparatively unlimited economic and technical resources of the agrichemical industry at their command.

Yannacone and his small force at 62 Rose Avenue with their antiquated but cost-effective PDP-11/34 minicomputer and their IBM Copier III/60 was able to meet the challenge of the corporate defendant war contractors.

Early Discovery:
Government Contractor Immunity Issues

1 May 1982 to 27 December 1982
240 days; 34.29 weeks

After the appointment of Sol Schreiber as Special Master, the corporate defendant war contractors began discovery of the United States on the issues of whether the United States had actual knowledge both that the phenoxy herbicides deployed as chemical defoliants during the war in Southeast Asia were actually contaminated with 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin and that the phenoxy herbicides so contaminated were toxic to human beings or other animals. These were the critical elements of the "Government Contractor Immunity" Defense.

Hearings were conducted on a weekly and occasionally daily basis before the Special Master to resolve issues of document production and deposition management. Witness depositions were conducted continuously as the corporate defendant war contractors examined present and former government employees and officials in a fruitless effort to establish actual knowledge on the part of some responsible government official that 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin contaminated the phenoxy herbicides deployed as chemical defoliants during the war in Southeast Asia and that some responsible government official with decision-making authority knew that the dioxin contaminant was toxic to human beings.

"Scope of Discovery" was a matter of constant argument between the plaintiff veterans and the corporate defendant war contractors as well as among the corporate defendant war contractors themselves.

Hooker Chemical and its parent Occidental Petroleum moved for Summary Judgment. Hooker was responsible for making a critical intermediary product

(tetrachlorobenzene) necessary for the manufacture of 2,4,5–Trichlorophenoxy acetic acid (2,4,5–T) by all the corporate defendant war contractors except Dow and Hercules. Some of the corporate defendant war contractors claimed that the tetrachlorobenzene supplied by Hooker might have been the source of some of the dioxin contamination of the phenoxy herbicides sold to the Department of Defense for deployment in Southeast Asia.

Class certification issues included the perennial question of class notice and whether media notice would be appropriate as well as the more fundamental question of class definition, criteria for class membership, and actual identification of class members.

The *in extremis* depositions of critically ill veterans were generally opposed by the defendants and the decisions of the Special Master permitting such depositions to go forward were often appealed to the Court. The rules for *in extremis* depositions Yannacone first proposed, and which had been approved by Judge Pratt for the Hartz deposition, were the subject of constant *ad hoc* applications for modification by the defendants.

The *Hoffman Trip Report*, and the problems associated with the "paper clip Nazis" recruited for the American and British CBW programs at the time of the Nazi surrender and who were relocated to suburban Maryland raised fundamental questions of "State Secrets" and "Executive Privilege."

Authentication of critical documents created decades ago raised novel issues that had to be argued on a regular basis before the Special Master and on occasion, Judge Pratt. Throughout this period, CBS pursued its First Amendment claims to broadcast information developed during discovery.

Of particular concern during this period were documents presented under statutory assurance of confidentiality by the corporate defendant war contractors to the United States Environmental Protection Agency or its predecessor in pesticide registration, the United States Department of Agriculture. Much of this information contained proprietary data on chemical processes that could have destroyed the American Agricultural Chemical Industry had it become available to foreign or even domestic competitors. Yet, it was argued, the data might contain information relevant to the Agent Orange Litigation and so should be considered discoverable under the Federal Rules.

Because Carol and Victor Yannacone had begun the legal attack on broad spectrum, persistent, chemical biocides in 1966, and Victor Yannacone had managed all the pesticide litigation throughout the nation until 1970, he had sufficient personal knowledge and professional experience to permit the American Agricultural Chemical Industry to protect its important trade secrets without jeopardizing the claims of the plaintiff veterans and their families in the Agent Orange Litigation.

The role of the United States Department of Agriculture in the promotion of phenoxy herbicides through experiments in Puerto Rico and Hawaii became an issue during this period.

Yannacone's success in advancing the claims of the Viet Nam veterans and their families to this point caused the Court and the parties to consider the question of insurance coverage and policy limits available to the corporate defendant war contractors should the Viet Nam veterans and their families obtain a judgment after trial.

Claims Evaluation; Initial Settlement Discussions
28 December 1982 to 22 February 1983
56 days; 8.00 weeks

Depositions concentrated on the recollections of members of PSAC (The President's Science Advisory Committee) and documents with which they were supposed to be familiar including some widely circulated "Reports" reflecting White House concern with the issues raised by Rachel Carson in Silent Spring.

Settlement negotiations were conducted with representatives of The Dow Chemical Company initially and later with Hercules Incorporated. These negotiations were supposed to remain secret, and would still be unrevealed but for their disclosure by Albert J. Fiorella and David J. Dean (albeit inaccurately) to Peter Schuck for publication in a book about the Agent Orange Litigation.

By February 1983 Yannacone had established that 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin was immunotoxic and responsible for damage to the human immune system. This became the basis for a credible theory accounting for the broad range of symptoms clinically manifest among the Viet Nam combat veterans. Without such a plausible theory of physiological action, there would have been no incentive for a settlement by the corporate defendant war contractors.

By this time, Carol Yannacone was able to state with some confidence based on the detailed examination of more than 3,295 veteran files and medical records, that the empirical evidence indicated there would be approximately 20,000 serious illnesses that could reasonably be associated with exposure to dioxin contaminated herbicides in Viet Nam, and that approximately 5,000 veterans had already died of dioxin associated disease. At that time, the Yannacones were also reasonably certain that approximately 5,000 of the catastrophic polygenetic defects among the children of veterans could be associated with damage to the sperm forming cells of the veterans as a result of their exposure to dioxin contaminated herbicides in Viet Nam.

One of the keys to settlement with any single defendant was a determination of the extent of liability to be born by each of the corporate defendant war contractors. Yannacone was able to calculate the proper apportionment among the defendants by

determining the actual amount of dioxin contributed by each of the herbicide manufacturers. Although the actual apportionment of the eventual settlement is not a matter of public record, it appears from media accounts that the corporate defendant war contractors accepted Yannacone's method and may very well have actually reached precisely the same conclusion as to apportionment.

The amount eventually discussed as a settlement figure for Dow and Hercules (manufacturers of the least contaminated herbicide used in Southeast Asia) was $150 million with a number of structured alternatives to a direct payout that were acceptable to the veterans.

Over the Washington's Birthday weekend in February, settlement negotiations had reached the point where a number of veteran leaders had been notified to be prepared to come to New York on short notice and participate in a major event with certain of the corporate defendant war contractors.

Eventually, settlement negotiations were terminated when the defendants decided to make one last effort to defeat the claims on a motion for summary judgment based on cumulative testimony from government employees which might constitute circumstantial evidence of actual knowledge sufficient to establish the government contractor immunity defense.

Litton Bionetics; PSAC;
Edgewood Arsenal/Camp Detrick
23 February 1983 to 20 April 1983
56 days; 8.00 weeks

The Litton Bionetics report and the work of Dr. K. Diane Courtney was an essential element of the motion for summary judgment by the corporate defendant war contractors based on their Government Contractor Immunity Defense. It was Yannacone's personal familiarity with all the circumstances surrounding the Bionetics report and the work of Dr. Courtney as well as the publication of the information about the dioxin contamination of the phenoxy herbicides in 1969 that enabled the plaintiff Viet Nam veterans and their families to defeat the motions for summary judgment and permit the case to be settled.

Yannacone personally conducted the depositions of the Science Advisors to each of the three presidents who authorized deployment of phenoxy herbicides as chemical defoliants during the war in Southeast Asia—Dr. Jerome Wiesner, President Emeritus of MIT, Science Advisor to President Kennedy; Dr. Hornig, Distinguished Professor of Chemistry at Harvard University, Science Advisor to President Johnson; and Dr. Lee E. DuBridge, President Emeritus of CalTech and Science Advisor to President Nixon.

Dr. DuBridge was Chairman of the President's Science Advisory Committee (PSAC) at the time Dr. Courtney's paper was published in Science; the AAAS annual meeting denounced the use of chemical defoliants in Viet Nam; and Congress began to worry about the dioxin contaminant of "Agent Orange."

The Defendants Motions for Summary Judgment

21 April 1983 to 12 May 1983
21 days; 3.00 weeks

The defendants motions for summary judgment on the Government Contractor Immunity Defense were triggered by the initial deposition of PSAC (president Science Advisory Committee) member Dr. Gordon E.F. MacDonald.[9] Dr. MacDonald had been led by a series of grossly improper questions to make an inference that was patently inaccurate, but yet became the basis for the claim by the corporate defendant war contractors that the highest levels of Presidential advisors had actual knowledge of the dioxin contamination of the phenoxy herbicides and that dioxin was toxic to human beings and other animals.

Upon receiving the telephone call from the Ashcraft & Gerel representative covering the deposition that Dr. MacDonald had admitted actual knowledge of a "dioxin" problem in the mid-1960s rather than 1969 as was actually the case, Yannacone immediately moved before the Special Master to conduct a further deposition of Dr. MacDonald on an emergency basis.

Yannacone personally conducted that deposition before the Special Master and reestablished the basic element of the plaintiff's case necessary to defeat the Government Contractor Immunity Defense—that no member of the Executive Branch of the United States government with decision making authority in the area of herbicide deployment in Viet Nam had any actual knowledge of the dioxin contamination of the herbicides, much less that dioxin Was toxic to humans and other animals.

On the late afternoon of 21 April 1983, each of the corporate defendant war contractors, except Monsanto and Diamond Shamrock (the two companies which manufactured the 2,4,5–T most heavily contaminated with dioxin) filed and served

9. In a memo to the Long Island Consortium at the beginning of the Defendants depositions of government witnesses, Yannacone predicted that at some point the corporate defendant war contractors would attempt a "go for broke" motion for summary judgment and seek to overwhelm the limited resources of the plaintiffs, much as the Germans attempted to break out at what became known as the Battle of the Bulge in World War II. Yannacone insisted that all PSAC depositions be actively managed to prevent improper efforts by defense counsel to lead the witnesses or "refresh" their recollections with less than accurate or incomplete statements of historical fact. However, the Long Island Consortium refused to authorize travel expenses to Washington DC for the first MacDonald deposition and permitted the deposition of this critical witness to be covered by an inexperienced member of the firm of Ashcraft & Gerel.

motions for summary judgment based on the Government Contractor Immunity Defense without addressing the fundamental issue of corporate culpability.

The motions were filed independently by each of the defendants and they appeared on a Friday afternoon in a variety of forms with no common reference system and enormous numbers of duplicate documents and fragmentary references to extensive documents. The total weight of all the motions and supporting documents served on Yannacone at the Agent Orange Litigation Center was over 70 pounds.

Defendants multiple motions for summary judgment based on the Government Contractor Immunity Defense represent one of the most dramatic examples of the extraordinary service Yannacone performed for the class of Viet Nam veterans and their families during the course of the Agent Orange Litigation.

By dawn on Monday morning, Yannacone had analyzed all of the motions, and together with Liquori, sorted, cross referenced, and tracked all of the documents cited, and placed them in their proper context.

Yannacone had also organized the efforts of a number of attorneys, word processing operators, clerks and veteran volunteers into an efficient, effective force at 62 Rose Avenue. He was ready to meet the challenge of the corporate defendant war contractors without the need to petition the Court for additional time to reply. Yannacone would not let the Agent Orange Litigation timetable be delayed.

In three weeks of around-the-clock effort, Yannacone marshaled enough substantial credible evidence from the enormous document data base and from his successful handling of significant depositions to defeat the Dow motion for summary judgment.

Dow, Monsanto and Diamond Shamrock were still in the dock scheduled to face a jury in a trial during which national attention, perhaps even live television coverage, would be focused on their corporate culpability for selling the government a contaminated herbicide and maintaining a 30 year cover-up of dioxin toxicity.

The only resources available to the plaintiff Viet Nam veterans and their families during this critical final battle over Government Contractor Immunity were: Victor John Yannacone, jr. with his encyclopedic knowledge of the Agent Orange Litigation and his personal familiarity with all the documents produced on discovery, as well as the practices and policies of the pesticide industry after the publication of Silent Spring and during the War in Viet Nam;

The dedicated clerical staff and veteran volunteers who performed countless hours of clerical service;

Carol A. Yannacone with her knowledge of the veterans claims and her analysis of the chemical company laboratory data concerning tests claiming to assure the United States Government of the safety of 2,4,5–T;

Liquori with his knowledge and experience in data base management; his administrative assistant, and their small talented staff of data processors;

Robert A. Taylor of Ashcraft & Gerel, Washington D.C. who was familiar with many of the Dow documents; read German; and had attended many of the government witness depositions;

Dorothy Thompson of Greenwald & Greenwald, Los Angeles, CA who had been coordinating Agent Orange Litigation matters on the West Coast since February 1979; was knowledgeable in the ways of bureaucracy and a talented writer and a skilled editor who, like Edward F. Hayes, III, had been following Dr. Kavenagh's search for information paths through the federal bureaucracy;

Edward F. Hayes, III, who had worked closely with Dr. Kavenagh since the beginning of the Agent Orange Litigation and who was familiar with much of Dr. Kavenagh's preparation for this motion, particularly the "web" model of government agencies which Yannacone and Kavenagh had prepared from the government documents.

The web model which clearly tracked the passage of information throughout the maze of federal executive bureaucracy and the failure of any meaningful information of dioxin contamination or dioxin toxicity to reach any decision maker with responsibility for the deployment of phenoxy herbicides as chemical defoliants in Viet Nam.

Over the period 22 April to 23 April 1983, Liquori and Janet Vandervoort prepared a composite compilation of all the documents and transcript references contained in the Defendants papers with complete and accurate cross-references. This compilation was presented to the Court before the return of the motion and appears to have been of considerable assistance to Judge Pratt in reaching a prompt decision on the motions.

From 22 April 1983 through 27 April 1983, Yannacone, Liquori, Taylor, Thompson, and Hayes sat at video display terminals drafting and editing memoranda and affidavits. They ate at their terminals, napped in their chairs, and left their work stations only to visit the bathroom or take a shower. Through it all, Yannacone led, directed, and managed the entire process which produced the response that saved the case for the veterans and ultimately led to the Agent Orange Litigation settlement.

During this frenetic period, other individuals also contributed some time and effort. Aaron Twerski drafted responses; Steven J. Schlegel and V. Don Russo checked document references while Albert J. Fiorella supplied Italian pastries.

By Memorial Day, 1983 there was no effective Government Contractor Immunity Defense. Yannacone had thwarted the efforts of the corporate defendant war contractors to establish parity of knowledge about dioxin between the government decision makers and the chemical companies. He had discredited the Bionetics argument and taken the depositions of the three highest ranking scientists in government during the War in Southeast Asia—President Kennedy's science advisor, Dr. Wiesner of MIT; President Johnson's advisor, Dr. Hornig of Harvard; and Dr. DuBridge who advised President Nixon. As Yannacone had told the Court in 1979,

none of these world renowned scientists and academics had ever even heard of dioxin prior to the publication of the Dow footnote to Diane Courtney's article in Science in November 1968.

At this point, Thomas W. Henderson of Basin & Sears who had declined all prior invitations to participate in the Agent Orange Litigation,[10] suddenly appeared and expressed a willingness to "take charge."[11] With eventual settlement all but certain, lawyer greed was about to devour the Viet Nam veterans and their cause.

Discovery of the Defendants; Government Witnesses
13 May 1983 to 23 October 1983
163 days; 23.29 weeks

During this period, while Yannacone was conducting depositions, supervising discovery, and preparing for trial, members of the Long Island Consortium were preparing their putsch to remove Yannacone as lead counsel so they could sell the cause of the Viet Nam veterans and their families to the high rollers of the tort bar. As Judge Weinstein noted, "it was clear when the [Plaintiffs' Management Committee] was organized that money was a more sought after commodity than talent."[12] Judge Weinstein also felt that the investor reward provisions of the Plaintiffs' Management Committee fee sharing agreement,"was unlikely to withstand close scrutiny."[13]

Because federal law has not developed comprehensive standards to govern the conduct of attorneys, and in light of the value of uniformity in regulating the bar, federal courts in this instance would look to the ABA Code of Professional Responsibility, which has been enacted by nearly every state, and to the newly promulgated ABA Model Rules of Professional Conduct." citing Code DO 2-107(A) (division of fees between lawyers not members of a firm); Model Rule 1.5(d) (same);

10. In April 1980, after spending a weekend reviewing the case with Yannacone, Henderson, one of the leading figures in the asbestos litigation industry declined to participate in the Agent Orange Litigation because there was no promise of a pay day or return on the investment commensurate with what he was making with his asbestos cases.

11. Henderson was responsible for proving proximate cause for a group of inappropriately selected plaintiffs who were supposed to be representative of the class of all "Agent Orange" victims. He failed. However, instead of suffering any penalty for his mistakes, he and his firms were handsomely rewarded for their ineptitude, while Yannacone has been left uncompensated for his success.

12. Weinstein, slip opinion, 7 January 1985, at page 60, "Private Arrangements for Sharing Fees."

13. Weinstein, slip opinion, 7 January 1985, at page 60.

Code DO 5-103(A) (prohibition against acquisition of an interest in litigation); Model Rule 18(j) (same).[14]

Judge Weinstein noted in his decision on attorneys fees

> Throughout the "Agent Orange" litigation, even after the [Plaintiffs' Management Committee] took over as lead counsel, organization of the management committee and financing of the litigation appear to have been constant topics of discussion and, not infrequently, sources of friction. Especially in the spring and summer of 1983 many management committee meetings were devoted to problems having more to do with the committee than with the litigation. These internal difficulties—disputes about who was running the litigation and mounting pressures in the face of financial constrictions—did not further the class action; the acrimony in fact probably hindered prosecution of the case. * * *nonsubstantive meetings at which committee members aired their disputes with one another and haggled over finances were especially numerous from the spring through the fall of 1983. * * * Many telephone conferences during the spring, summer and fall of 1983 concerned the management committee's internal problems.…[15]

Yannacone chose to ignore the internecine warfare and negotiations with the lawyers who ultimately became the "Agent Orange" Plaintiffs' Management Committee during this period. Rather, he continued to move the case along towards a trial on the issues of corporate defendant war contractors fault, the toxicity of 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin the parity of knowledge element of the Government Contractor Immunity Defense.

Epilog

Judge Weinstein worried that Class actions "doubtless present many instances of duplicative work including the overstaffing of conferences and court appearances;" and opined that "Duplication of attorney work may be inevitable in any large class action run by committee." He noted that "The potential for duplication and overstaffing is especially great when,... the case involves an enormous plaintiff class that is national, even international in scope, and a number of turnovers in management committee membership have taken place."[16] These are certainly statements of obvious fact of which Judge Weinstein or any other Court may take judicial notice.

Judge Weinstein's conclusion, however, that "To some extent these factors caused a lack of effective central organization in the Agent Orange Litigation that gave rise to not infrequent repetition and duplication of effort." applies only to the state of affairs which existed after 23 October 1983 when Judge Weinstein removed Yannacone as lead counsel and appointed his Plaintiffs' Management Committee with Steven

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14. The Agent Orange Plaintiffs' Management Committee members had entered into an internal management agreement that set out the procedure for allocation of any fees awarded from a class recovery. Its provisions called for (1) a 300% return on funds advanced by certain class members before any other distribution and (2) division of the remainder of the award as follows: 50% in equal shares among all committee members, 30% in proportion to hours worked, and 20% based on factors paralleling those considered by courts in granting fee award multipliers. The result would be that those who advanced money would be advantaged to an extraordinary degree over those who gave their time and skill to the enterprise. * * * Weinstein, slip opinion, 7 January 1985, at page 63.

15. Weinstein, J, slip opinion, 7 January 1985, *op cit.*

16. Weinstein, J, slip opinion, 7 January 1985, *op cit*.

Schlegel its chief executive and David Dean as spokesman and trial counsel for the class.[17]

On 23 October 1983, by the stroke of a pen, Judge Weinstein dismantled the trim, efficient, effective, proven operations unit Yannacone had built and which was capable of responding to the demands of both Court and Defendants on demand and without delay. Yannacone had led the Viet Nam veterans and their families to the eve of trial and settlement was a foregone conclusion. The only real question was, "how much."

Instead of the efficient and effective leadership that Yannacone had provided, the Plaintiffs' Management Committee Judge Weinstein appointed demonstrated a singular inability to do the job. From that moment on, the Agent Orange Litigation, like a ship without a captain, foundered.

Major litigation like major surgery depends on the leadership skills of single individual. One does not conduct brain surgery by committee.

No Court should allow Piper Cub lawyers at the controls of 747 litigation.[18]

Judge Weinstein pointed out that there were many difficulties resulting from the Committee operations of the Plaintiffs' Management Committee and the resulting diffusion of responsibility and the lack of focused leadership. Nevertheless, he handsomely rewarded those who failed in their leadership responsibility by allowing them $13 million in fees and expenses for nine months work. To this day, there is only one attorney who has full and complete understanding of the entire Agent Orange Litigation. That attorney, Victor John Yannacone, jr., has yet to be fully and fairly compensated for the services he rendered to the class he created.

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17. See, Exhibit 10, Memo dated 16 November 1983, from Benton H. Musselwhite to the Plaintiffs' Management Committee. Musselwhite militantly opposed the class action until he became a member of the Plaintiffs' Management Committee appointed by Judge Weinstein. He claimed to have been actively involved in the litigation since it began on behalf of his individual clients, however, he was not even aware that extensive Interrogatories had been exchanged and that the information he was seeking was already available. Obviously, he hadn't read the existing available discovery materials.

18. Warren Berger, as Chief Justice of the United States Supreme Court, remarks at Fordham University School of Law, *op cit*.

INTRODUCTION

Judge Weinstein has apparently established a double standard for compensating attorneys representing the Viet Nam veterans and their families in the Agent Orange Litigation. There seems to be a relatively loose and unquestioning standard for the Plaintiffs' Management Committee appointed by Judge Weinstein for the work they did after October 21, 1983, and for the Special Masters managing the Settlement Fund.[19] However, a strict and skeptical standard exists for all the work that Victor John Yannacone, jr. and his associate attorney W. Keith Kavenagh did prior to that time- the work that brought the Agent Orange Litigation to this Court as a class action in the first instance, maintained it here as a class action, litigated it aggressively, and managed it efficiently to the point where it could be settled relatively easily.

The Agent Orange Litigation did not begin in late October of 1983 when Judge Weinstein took over the case and appointed his Plaintiffs' Management Committee. On the contrary, the case was well-established and had been successful prior to that point. The architect of that success and the manager of the winning effort up to that point was Victor John Yannacone, jr.

On 23 May 1983 Yannacone turned back the last major counterattack by the corporate defendant war contractors before they would have to enter the dock as defendants and face a jury. Yannacone's grand strategy had been completely vindicated. He had achieved the impossible. A trial was now scheduled on the fundamental issues of liability, fault, and general causation, all issues upon which the Viet Nam veterans and their families could prevail; but without the need to face the thorny issue of proximate cause in the case of each individual veteran. Yannacone had held the class together and created a united group of more than twenty thousand (20,000) individual representative plaintiffs.

The clinical condition of the veterans themselves, together with the anecdotal evidence from industrial accidents and the results of laboratory toxicity investigations clearly established that 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin could have been responsible for the illness, disease, disability, "and death among the Viet Nam combat veterans and the catastrophic polygenetic birth defects visited upon their children."

The case was ready for trial and the Viet Nam veterans and their families had a substantial and reasonable chance of winning.

Without Yannacone's vigorous attack on the Government Contractor Immunity Defense and his ability to find support for the veterans' claims in the literally hundreds of thousands of pages of documents, there would have been no settlement

19. See, Exhibit 3, MDL 381 Docket Document 12,924, Morrison & Foerster bill for services of Special Master Peter Woodin; Exhibit 4, MDL 381 Docket Document 12,944, W. Bernard Richland, Special Master, Appeals, for services in June, 1991.

of the Agent Orange Litigation because the case would never have reached Judge Weinstein.

Now this Court must find a way to provide just compensation to Victor John Yannacone, jr. and W. Keith Kavenagh, and, directly or indirectly, Carol A. Yannacone, for the services they rendered to the entire class of Viet Nam veterans and their families. Without those services there would not have been a class action in the first place and there certainly would not be a common fund from which millions of dollars could be distributed.

The essence of the common fund doctrine can be found in the law of equity. Equity suffers no wrong to be without a remedy. The duty of this Court is to fashion a remedy that will provide just compensation to Victor and Carol Yannacone and Dr. Kavenagh for their services to the class.

Fee Awards from Common Equitable Funds

The common fund doctrine is "part of the historic equity jurisdiction of the federal courts,"[20] and contemplates "fair and just allowances for expenses and counsel fees."[21] This equitable doctrine covers claims "filed not only by a party to the litigation, but also by an attorney whose actions conferred a benefit upon a given group or class of litigants."[22]

The equitable supervisory authority that Rule 23 of the Federal Rules of Civil Procedure grants federal courts in class actions extends to attorney fee questions and itself provides a quasi-substantive predicate for fee allowances.[23]

The existence of a benefit to the class is central to the common fund theory.

> "The award of fees under the equitable fund doctrine is analogous to an action in *quantum meruit*: the individual seeking compensation has, by his actions, benefitted another and seeks payment for the value of the service performed."[24]

As long ago as 1881, the Supreme Court admonished that "fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous

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20. *Sprague* v. *Taconic National Bank*, 307 U.S. 161, 164 (1939).

21. *Trustees* v. *Greenough*, 105 U.S. 527, 536 (1881).

22. *City of Detroit* v. *Grinnell Corp.* (*Grinnell I*), 495 F.2d 448, 469 (2d Cir. 1974).

23. See, *e.g.*, *Vincent* v. *Hughes Air West Inc.*, 557 F.2d 759, 768 (9th Cir. 1977); 7AC. Wright & A. Miller, *Federal Practice and Procedure: Civil* §1803 (1972 & Supp. 1984).

24. *Lindy Bros. Builders* v. *American Radiator & Standard Sanitary Corp.* [(*Lindy I*)], 487 F.2d 161, 165 (3d Cir. 1973).

regard to the rights of those who are interested in the fund.'"[25] The "touchstone" for the fee award is "the actual effort made by the attorney to benefit the class."[26] The district court must "act 'as a fiduciary who must serve as a guardian of the rights of absent class members.'"[27]

Care must be exercised to ensure that counsel is compensated only for the benefit received by the class; to protect members of the class a philosophy of adequacy rather than generosity must be followed[28] so that even the appearance of a windfall to the attorney receiving a fee award must be avoided.[29]

The "lodestar" approach was developed by appellate courts in the 1970's to limit the almost unreviewable judgment previously exercised by district courts, supplant the percentage-of-recovery method of awarding fees, and increase the small hourly rate fees then being awarded under fee-shifting statutes.[30]

The current "lodestar" approach to attorney fee awards followed in this and other circuits emphasizes the need to examine the award's fairness to both the attorney and the common fund beneficiaries.

Conventional lodestar analysis is divided into two steps, the first theoretically objective, the second more subjective.[31] First, "attorney's fees are calculated by multiplying the number of billable hours that the prevailing party's attorneys spend on the case by 'the hourly rate normally charged for similar work by attorneys of like skill in the area.'"[32] Second, once the base fee is calculated the district court, within fairly broad parameters of discretion, may adjust the time-rate figure upward or downward on the basis of other factors reflecting considerations such as risk of litigation and quality of representation.

The lodestar method, however, has significant disadvantages. Because the first step in the process calls for a calculation based on hours worked, counsel has an incentive to expend time and expand effort in order to increase the lodestar figure.

The current lodestar approach thus tends to encourage excess discovery, delays and late settlements, while it discourages rapid, efficient and cheaper resolution of

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25. *Grinnell I*, 495 F.2d at 469 (quoting Greenough, 105 U.S. at 536).

26. *City of Detroit* v. *Grinnell Corp.* (*Grinnell II*), 560 F.2d 1093, 1099 (2d Cir. 1977).

27. *Id.* (quoting *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975)).

28. See *Grinnell II*, 560 F.2d at 1098.

29. *Grinnell I*, 495 F.2d at 469.

30. See, *e.g.*, the debate between the majority and dissenter in *Laffey* v. *Northwest Airlines, Inc.*, 746 F.2d 4 (D.C. Cir. 1984); see also 2 M. Definer & A. Wolf, *Court Awarded Attorneys Fees*, §15.01 [1] (1983).

31. See generally 2 M. Definer & A. Wolf, *Court Awarded Attorneys Fees*, ch. 16 (1983).

32. *New York State Ass'n for Retarded Children, Inc.* v. *Carey,* 711 F.2d 1136, 1140 (2d Cir. 1983) (quoting *Grinnell II*, 560 F.2d at 1098).

litigation. The current lodestar approach was developed to meet the needs of securities litigation, civil antitrust actions, and consumer credit claims, all actions generally brought by a well established, time billing group of specialists within the bar. The hourly basis for lodestar analysis tends to increase almost without limit the cost of the litigation and impose enormous demands on judicial resources often incommensurate with the value of the litigation to society.

The district court must review the activities for which time is claimed to ascertain whether they resulted in some compensable benefit to the class. As part of its assessment of the billable hours claimed, the district court has a duty to analyze the tasks performed, to assure the class that the various tasks are being performed by individuals with the appropriate skills.[33]

The particular task undertaken, hours expended, and number and training of the legal personnel involved are all appropriate subjects of a court's scrutiny in determining the base time-rate figure under the lodestar approach. "In assessing the extent of staffing and background research appropriate for a given case, a district court must be accorded ample discretion."[34]

However, according to Judge Weinstein, the entire process of fee fixing is so imprecise and has so many arbitrary and subjective aspects that pretensions of exactitude about any element leads to illusory accuracy. Ultimately the good sense and experience of the trial bench and bar must be relied upon for a reasonably acceptable result.[35]

Like the Statute of Frauds, the Second Circuit guidelines were adopted to prevent fraud and imposition on the class for whose benefit the common fund was created. This is particularly true in cases where the work done by counsel for the class is little more than administrative busy work and "there is very little of substantive import to be accomplished by counsel other than cutting up the pie that might be represented by the legal fees."

The Magistrate Judges have made a great deal of the various bookkeeping rules established by the United States Court of the Appeals for the Second Circuit in several cases. Those rules, however, take effect after 1 June 1983 and do not really apply retroactively to the Yannacone claims. In addition, according to the opinions of Judge Weinstein, those rules do not apply in their most strict interpretation to the period prior to his appointment of the "Agent Orange" Plaintiffs' Management Committee, 23 October 1983.

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33. *in re Equity Funding Corp. of America Securities Litigation*, 438 F. Supp. 1303, 1330 (C.D. Cal. 1977)..

34. *New York State Ass'n for Retarded Children*, 711 F.2d at 1146.

35. Weinstein, slip opinion, 7 January 1985, *op cit*.

Of perhaps greater relevance to the "Agent Orange" fee petitions is that the Second Circuit guidelines and the Manual comments from which they are derived assume that class actions will only be undertaken by time billing law firms organized and existing primarily to convert time generated into dollars earned without regard to the economic value or social merit of the services rendered to the plaintiff class. No such law firms were willing to participate in the Agent Orange Litigation.

The only time billing lawyers associated with the Agent Orange Litigation were Irving Like and Steven Schlegel, neither of whom did any significant work for the benefit of the class prior to 23 October 1983.

Although Yannacone did not maintain a time billing practice, the nature of his computer system produced contemporaneous time records,[36] while his personal work habit of documenting the time when, and often the place where, he handled a particular document or piece of paper in international time notation made most of the "Agent Orange" documents themselves contemporaneous time records.[37]

Such considerations are essentially immaterial, however, because the best record of the time Yannacone devoted to the Agent Orange Litigation are the actual documents filed with the Court on behalf of the Viet Nam veterans and their families. They are original efforts created by Yannacone himself, not copied from some form book or adapted from documents in the ATLA Product Liability Exchange. They were finely drafted, artfully crafted, literate statements of complex legal positions, and enlightening the Court on even more complex factual patterns. They were filed in a timely fashion and stand as the best evidence of the extensive and valuable services Yannacone performed on behalf of the Plaintiff class of Viet Nam veterans and their families.

This Court must not forget that by Memorial Day, 1983, the Agent Orange Litigation was on the way to trial. Yannacone was ready for trial. He needed only $300,000 from the Long Island Consortium to get to trial. The Consortium was unwilling to invest their money, and the investors they eventually sold the case to wanted no part of the Agent Orange Litigation as Yannacone had structured it for the benefit of the Viet Nam veterans and their families.

Fee Award Adjustments

After the time-rate figure has been calculated, the district court in its discretion may adjust it upward or downward on the basis of frankly subjective factors. Such

36. See, Exhibit 6. Computer Access Timestamps.

37. See, Exhibit 5. Annotated Documents.

considerations include "the risk of litigation, the complexity of the issues, and the skill of the attorneys."[38]

Precedent indicates that in general, the greater the contingent nature of success- that is, the risk of failure- the more weight that a district court may place upon this factor in increasing the lodestar figure.[39]

In general, the court is sympathetic to the use of a risk multiplier. However, in the "Agent Orange" litigation, Judge Weinstein chose not to grant a risk multiplier. Instead, he allowed a multiplier for demonstrated skill.

The "quality of representation' factor is intended to permit a district court either to reward "particularly resourceful' legal work that "secures a substantial benefit ... with a minimum of time invested,' or to decrease "the objectively determined fee where the benefit produced does not warrant awarding the full value of the time expended."[40] "Any increase or decrease in fees to adjust for the quality of work is designed to take account of an unusual degree of skill, be it unusually poor or unusually good."[41]

In considering whether to adjust the lodestar figure, a court may look to, among other things, (1) the result obtained, evaluated in terms of, (a) the extent of possible recovery compared with the amount of actual verdict or settlement, and (b) the benefit conferred on the class, as well as (2) the efficiency of "the professional methods utilized in processing the case."[42]

Although not generally considered an aspect of proficiency, related criteria also may be taken into account such as tenacity, demonstrated ability to bear strains attendant upon preparation of a difficult case for trial under the pressure of short time schedules, and skill shown in coordinating the work of many attorneys. These qualities of character and administrative skill often make the difference between success and failure in a lawsuit. They are properly considered a lawyer's skills.

According to Judge Weinstein, as a preliminary matter, application of the general rule depends on how "success" is defined.[43] By any kind of definition, Yannacone's work on behalf of the class has been successful and is entitled to be compensated fairly.

Still, the Magistrate Judges have ignored the value of Yannacone's monumental effort on behalf of the class and his major contribution to the American legal system by successfully prosecuting the Agent Orange Litigation as a class action. The Magistrate

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38. *New York State Ass'n for Retarded Children*, 711 F.2d at 1140 (citing *Grinnell II*, 560 F. 2d at 1098).

39. See, *Grinnell I*, 495 F.2d at 471.

40. *Merola* v. *Atlantic Richfield Co.*, 515 F.2d 165, 168–69 (3d Cir. 1975), quoted in *Lindy II*, 540 F.2d at 112.

41. *Lindy I*, 487 F.2d at 168. See also *Grinnell*, 560 F.2d at 1100.

42. *Lindy II*, 540 F.2d at 118.

43. Weinstein, slip opinion, 7 January 1985, *op cit.*

Judges have only seen fit to reward the busy work of the unimaginative scriveners who followed the path Yannacone blazed.

Throughout Yannacone's entire career as an attorney he has charted the course for others to follow. For more than three decades he has led the way in the public interest. First in the early 1960s he applied the trust doctrine to the protection of natural resources as social property. In the late 1960s he challenged the continued wide spread use of broad spectrum persistent chemical biocides such as DDT and the DEATH group[44] by declaring that the sovereign people of the United States have an absolute right to a salubrious or healthy environment. He brought environmental issues to the federal courts in class actions for declaratory judgment and equitable relief. Finally, on 8 January 1979, he placed the plight of the Viet Nam Veterans and their families before the conscience of the Country and on 7 May 1984 the class of Viet Nam veterans and their families he had created became the beneficiaries of a $180 million Trust Fund.

The American legal system is a better system for the work Yannacone has done.

Expenses of Class Counsel

Plaintiff attorneys are entitled to reimbursement of those reasonable and necessary out-of-pocket expenses incurred in the course of activities that benefitted the class.[45] Expenses must be both reasonable in amount and reasonably related to the interests of the class.

The Yannacone Submissions

In accordance with the directions of the Court to support the claim for just compensation and for reimbursement of expenses incurred by Yannacone & Yannacone, PC and Victor John Yannacone, jr., as attorneys for the Plaintiff class of Viet Nam veterans and their families in the Agent Orange Litigation, a number of submissions have been made to this Court and referred to Magistrates for preliminary report.

On 1 June 1990, a reasonably detailed summary log of time spent by Victor John Yannacone, jr., as lead counsel responsible for conducting the Agent Orange Litigation on behalf of the Viet Nam veterans and their families who were the plaintiffs in MDL 381 and who maintained the Agent Orange Litigation as a class action since the refiling of the *Reutershan* complaint on 8 January 1979.

More than 10,000 record items were data processed by Robert W. Liquori and presented to the Court in essentially the same format and from the same electronic

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44. The chlorinated hydrocarbon pesticides dieldrin, endrin, aldrin, toxaphene, heptachlor.

45. See, *e.g.*, *in re THC Financial Corp. Litigation*, 86 F.R.D. 721, 740 (D. Hawaii 1980); *in re Armored Car Antitrust Litigation*, 472 F. Supp. 1357, 1388–89 (N.D. Ga. 1979), modified and remanded on other grounds, 645 F.2d 488 (5th Cir. 1981).

data processing system accepted by the Court in the award of fees to David J. Dean and other members of the Plaintiff's Management Committee.

Of great relevance should be the fact that most of the Long Island Consortium members justified their requests for fees during the period prior to 23 October 1983 in the context of work they performed for the class at Yannacone's direction as well as meetings, conferences and discussions with Yannacone.[46]

The time statements submitted were samplings of actual time and expense records maintained by Yannacone & Yannacone, PC, and Victor John Yannacone, jr., in the regular course of their professional practice as attorneys during the period 6 June 1978 through 23 October 1983. These records were maintained contemporaneously with the services provided to the entire class of Viet Nam veterans and their families during that period. They included a variety of documents.[47]

The Claims

Victor John Yannacone, jr. claims compensation for 14,123.2 hours of billable time. The 14,123.2 hours represents an allowance of only approximately 50 hours for each of the 280 weeks that Victor John Yannacone, jr. devoted to active personal management of the Agent Orange Litigation. This number is substantially less than the actual time spent on "Agent Orange" matters for the benefit of the plaintiff class. It is less than the 9 hour day that Judge Weinstein ruled was a reasonable allowance of time for actively involved plaintiffs' attorneys with some responsibility[48]

A claim is made for awarding 7,432 hours of billable time to the late W. Keith Kavenagh. The 7,432 hours represents an allowance of 8.0 hours in each of five days for the 185.8 weeks that Dr. Kavenagh devoted to the Agent Orange Litigation. This number is substantially less than the actual "time spent on "Agent Orange" matters for the benefit of the plaintiff class.

A claim is made for crediting to Yannacone & Yannacone, PC, 9,367.5 hours of billable paraprofessional time for the services of Carol A. Yannacone. The 9,367.5 hours represents an allowance of 7.5 hours in each of five days for the 249.6 weeks that Carol Yannacone devoted to the Agent Orange Litigation. The 9,367.5 hours requested is substantially less than the actual time spent on "Agent Orange" matters for the benefit of the plaintiff class.

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46. Judge Weinstein noted that in his analysis of individual fee petitions, "An individual attorney's entry indicating attendance at a management committee meeting was compared with other committee members' entries for that day to arrive at a fair assessment of allowable time." Liquori utilized a similar technique in sampling and verifying the time claims for Yannacone.

47. Exhibit 5. (annotated documents). Exhibit 6. (computer access timestamps). Exhibit 7. (daily diary log pages). Exhibit 8. (MDL 381 Docket). Exhibit 9. (Transcripts of Hearings and Depositions).

48. Weinstein, slip opinion, 7 January 1985, *op cit.*

The Attorneys

Only two lawyers were actively involved in the daily operations of the Agent Orange Litigation Center at 62 Rose Avenue in Patchogue: Victor John Yannacone, jr. from 6 June 1978 through 21 October 1983 and the late Dr. W. Keith Kavenagh from 7 September 1979 to 31 March 1983 the last day he was in the office before his untimely death from the accumulated effects of three years of overwork on an overburdened heart.

Victor John Yannacone, jr.

From 22 December 1978 when Gorman turned over the Reutershan case to Yannacone with authority to amend the complaint and refile the action as a class action, until 21 October 1983 when this Court established a Plaintiff's Management Committee to replace him—a total of 252 weeks—Yannacone devoted the better part of every single day to the Agent Orange Litigation. On many occasions Yannacone spent twenty hours of each day directly involved in Agent Orange Litigation matters. On certain occasions, such as the defendants' motions for summary judgment, Yannacone worked around the clock for two or three days.

The uncontradicted evidence clearly establishes that Victor John Yannacone, jr. was directly and personally responsible for maintaining the Agent Orange Litigation as a class action from 9 January 1979 to 23 October 1983 and devoted his entire professional time and effort during that period to representing the Viet Nam combat veterans and their families as a class in the Agent Orange Litigation.

Even after the "Agent Orange" Plaintiff's Management Committee was appointed, Yannacone continued to conduct depositions, review documents, and advise the individual attorneys who had been selected as members of the plaintiff's management committee or who had been designated by that committee to perform particular services.[49]

The Court can take judicial notice by personal observation that Victor John Yannacone, jr. has continued to perform services on behalf of the entire class of Viet Nam combat veterans and their families to this present day, and is still performing such services in the public interest and in the interest of the unfortunate victims of the war in Southeast Asia.

49. Exhibit 10. (notation on Musselwhite Memo).

W. Keith Kavenagh

W. Keith Kavenagh, AB, MA, PhD, JD, was the only attorney other than Victor John Yannacone, jr. whose full time was devoted to conducting the Agent Orange Litigation on behalf of the Viet Nam veterans and their families who were the plaintiffs in MDL 381 and who maintained the Agent Orange Litigation as a class action.

From 7 September 1979 through 31 March 1983 185.8 weeks, Dr. Kavenagh worked six full days out of every week on the Agent Orange Litigation. Except for conferences outside the office, attendance at hearings before the Court and Special Master, depositions, and library research, Dr. Kavenagh spent all of his working hours at 62 Rose Avenue totally involved and immersed in the Agent Orange Litigation. Dr. Kavenagh was at the office at 62 Rose Avenue in the incorporated village of Patchogue before 7:00 every morning and until after 7:00 every evening working continuously on the Agent Orange Litigation. He did not go out for lunch but ate at his desk or in the communal kitchen maintained at the office. Without the efforts of Dr. Kavenagh in managing the efforts of more than 1,200 associated counsel throughout the United States, Canada, Australia and New Zealand the Agent Orange Litigation could never have been maintained as a Class Action and there would have been no "Agent Orange" settlement.

The time allowance requested for Dr. Kavenagh represents a fair and reasonable estimate based on the sampling conducted by Liquori. The hours of professional services for which a fee award is requested for the widow of the late Dr. Kavenagh are fair and reasonable and should be paid forthwith.

Carol A. Yannacone

The actual contemporaneous time records of Carol Yannacone's work are to be found in the 3,295 individual veteran files maintained at the 62 Rose Avenue Agent Orange Litigation Center. From these files on the night before the final settlement conference Liquori and Yannacone were able to provide the Plaintiffs Management Committee with meaningful estimates of the full extent of the "Agent Orange" tragedy.

From 8 January 1979 through 21 October 1983, 249.6 weeks, Carol A. Yannacone worked from before 9:00 in the morning until after 6:00 in the evening no less than five full days out of every week on the Agent Orange Litigation. She was the only scientifically and medically trained paraprofessional actively involved in the Agent Orange Litigation on behalf of the Viet Nam veterans and their families throughout that period.

Carol A. Yannacone opened, maintained, and managed 3,295 veteran claim files during that period. She was responsible for processing all the incoming veteran medical information and conducting intake interviews with all of the veterans who wanted to become members of the class and participants in the class action. She

conducted intake interviews on more than 3,295 individual veterans and their wives, girlfriends, parents, and children, and in the case of the nurses and other female combat veterans, their husbands and boyfriends. Carol Yannacone consulted with doctors and expert witnesses throughout the country and maintained the CHAOS (Case Histories of Agent Orange Survivors) data base from which the information used to negotiate the settlement was ultimately derived.

Carol A. Yannacone is still the single individual most knowledgeable about the general health of the Viet Nam combat veterans and their families as a class in the world today. She is a national treasure that has been overlooked by the Veterans Administration, insulted by the Plaintiffs Management Committee, and ignored by this Court. Without the information that Carol Yannacone developed about the health of the Viet Nam veterans and their families there would have been no "Agent Orange" settlement.

Only now, as more and more scientific research is reported, can the real value of the work Carol Yannacone did begin to be fully appreciated. The empirical observations she made permitted Victor Yannacone to make the tactical and strategic decisions as lead counsel for the plaintiff Viet Nam veterans which eventually led to the settlement of the Agent Orange Litigation.

In addition to the work she performed on the claims of the Viet Nam veterans and their families who were named representative plaintiff participants in the class action Carol Yannacone reviewed the epidemiological and animal study data from the documents produced by the corporate defendant war contractors such as The Dow Chemical Company. She also handled many of the MDL procedures both before Dr. Kavenagh joined the Agent Orange Litigation and after his untimely death.

This Court is certainly aware of the continued concern demonstrated by Carol A. Yannacone since the settlement of the Agent Orange Litigation, yet no claim is being made for any fees for those services. These services are truly *pro bono publico* and will continue to be performed so long as there are Viet Nam veterans and their families who need them.

The time allowance requested for Carol A. Yannacone is eminently fair and reasonable and should be approved.

Hours and Rates

The testimony of Judge Pratt, Special Master Sol Schreiber, and the affidavits and offers of testimony by Leonard Rivkin, counsel for Dow and *de facto* lead counsel for the corporate defendant war contractors during the Agent Orange Litigation and Frank J. McCarthy, the veteran whose persistence and dedicated concern to all the Viet Nam combat veterans led to filing and maintaining the Reutershan case as a class action before this Court, all clearly establish that the time claimed for the services rendered by Victor John Yannacone, jr., his associate W. Keith Kavenagh, and his firm,

Yannacone & Yannacone, PC were for the benefit of the entire class of Viet Nam combat veterans for whom the Agent Orange Litigation was maintained as a class action.

The hours of professional services for which a fee award is requested and the expenses for which reimbursement is sought are fair and reasonable and should be paid forthwith from the interest income already earned by the Agent Orange Trust Fund created by settlement of the Agent Orange Litigation. Payment of this just obligation will not reduce the principal of the Trust Fund at all.

The hourly rates Yannacone has associated with the various services he and Dr. Kavenagh performed as a function of their degree of difficulty are not inconsistent with the fees for such services charged by the attorney's who represented the corporate defendant war contractors. It is the fees those firms charged their clients which are the proper standard against which to determine the value of Yannacone's services to the class.

Yannacone's efforts on behalf of the Viet Nam veterans and their families who were the Plaintiff class in the Agent Orange Litigation were more successful than their services on behalf of the corporate defendant war contractors. In addition, Yannacone's services certainly furthered the public interest.

The claims that Hercules Incorporated and Wm. T. Thompson Co. are now making against the United States contain statements that these two minor defendants spent more than $9 million in legal fees to "monitor" the Agent Orange Litigation. How much more should the services of Yannacone, the man who not only "monitored" the litigation, but conceived it, organized it, managed it, and successfully prosecuted it for more than five years be worth.

Yannacone Expenses

Each and every expense represented by a line item in the expense statement submitted was in fact incurred wholly and solely for the prosecution of the Agent Orange Litigation as a class action in the United State District Court for the Eastern District of New York before Judge Pratt. That statement is uncontradicted and supported by the fair preponderance of the substantial and credible evidence- the actual successful management of the Agent Orange Litigation by one attorney, Victor John Yannacone, jr. for more than 64 months at a cost far less than the Plaintiffs' Management Committee appointed by Judge Weinstein spent in less than seven months.

Application is made at this time for immediate reimbursement of the remaining actual out-of-pocket expenses incurred by Yannacone & Yannacone, PC on the Agent Orange Litigation that are still unreimbursed in the amount of $472,766.13.

No Other Law Firms

When Yannacone agreed to refile the Reutershan action as a class action in December, 1978, no other law firm was willing to take it on. There was no pay day in the offing and the Viet Nam veterans and their families were not popular. The attorneys of record for Paul Reutershan were ready to abandon the case as soon as they could find an attorney willing to accept responsibility for the claim. Yannacone accepted that responsibility and took charge of the case.

On 8 January 1979, the conventional wisdom of the plaintiff's trial bar from Melvin Belli, Philip Carboy, Melvin Block, the "Million Dollar Round Table," the "Masters of Disaster," the "air crash cartel," but most especially the plaintiff's and defendant's attorneys who had created a national cottage industry for a small group of lawyers out of asbestos litigation, all unanimously agreed that it was impossible to bring a class action that involved personal injury claims.

Yannacone stood alone in his conviction that the Agent Orange Litigation and indeed, all mass toxic torts, should be maintained in their initial phases as class actions. Judge Weinstein raised the question of whether Yannacone was providing services to the entire class of Viet Nam veterans and their families rather than just individual veterans. Two Magistrate Judges have reluctantly concluded that Yannacone did in fact serve the entire class of Viet Nam veterans and their families and not individual veterans. However, these Magistrate Judges concluded that Yannacone's services to the class for over five years are not worthy of compensation.

This Court must recognize the absurd inconsistency in recognizing that Yannacone is responsible for bringing the Agent Orange Litigation to this Court as a class action but that he is not entitled to compensation for his services to the class for over five years, while the Plaintiffs' Management Committee appointed by Judge Weinstein is entitled to more than $13 million for less than nine months work.

It was only after Yannacone brought the case to the eve of trial by defeating Dow's motion for summary judgment in May 1983, and ultimate settlement was a foregone conclusion that these stalwarts of the trial bar joined the Agent Orange Litigation.

Prior to the day Judge Weinstein appointed his Plaintiffs' Management Committee, only Yannacone stood between the class of "Agent Orange" victims and the corporate defendant war contractors who would drive them from the Courthouse.

The Court might well ask, where, during those years, were Tom Henderson, Stan Chesley, Gene Locks, Nels Peterson, John O'Quinn, Benton Musselwhite, Newton Schwartz, and yes, where were Steven Schlegel and David Dean?

During the years Yannacone was struggling to maintain the Agent Orange Litigation on behalf of the entire class of Viet Nam veterans and their families, Henderson, Locks, and Peterson were driving Johns Manville into bankruptcy and getting rich, together with defense counsel, on the broken lives, widows and orphans of the men and women exposed to asbestos at work. Chesley was becoming a "Master of Disaster." O'Quinn was trying strict liability cases in Texas, while Musselwhite and Schwartz were vigorously opposing the "Agent Orange" class action at every opportunity throughout the country. Schlegel was holding fast in Chicago steadfastly refusing to become part of the Consortium and make and substantial contributions to the liability phase of the Agent Orange Litigation, while Dean was conducting a large and lucrative full time personal injury practice on Long Island.

Yannacone's Contribution in the Context of the Settlement Plan

The key element of Judge Weinstein's decision on attorney's fees is the need to determine, what, in retrospect, in the context of the Agent Orange Settlement Plan, was the value of the efforts of any attorney seeking compensation?

After hearing the veterans during the settlement hearings, it became obvious that Yannacone's original Trust Fund proposals were the way to fairly and adequately administer the "Agent Orange" Settlement Fund. The present "Agent Orange" Class Assistance Foundation is the very goal that Yannacone sought to obtain by refiling the Reutershan case as a class action. No greater proof of success can be envisioned.

Yannacone was well aware, at the very outset of the litigation that in the context of the conventional accepted Anglo-American law of torts it would be difficult to establish proximate cause on behalf of any individual veteran until fault and cause-in-fact (generic causation) first had been established in the context of a class action. Recovery by and on behalf of the class of all the afflicted Viet Nam veterans was the goal and the objective of the complaints Yannacone filed. Individual claims could be made later against the trust fund or in subsequent damage assessment actions in local courts where proximate cause would be the principle issue.

Judge Weinstein's settlement of the Agent Orange Litigation is the most graphic demonstration of the success of Yannacone's efforts and the value of those efforts to the entire class of Viet Nam veterans and their families. All of the individual cases have been dismissed as Yannacone predicted they would be in the absence of a class action judgment establishing fault and generic causation.

To the extent that the "chump change" distributions from the settlement fund can be considered a benefit, the neediest members of the class have benefitted from Yannacone's efforts. Without Yannacone's efforts to direct the Agent Orange Litigation toward a trust fund recovery, these veterans would have received nothing.

The class of Viet Nam veterans and their families benefitting from the "Agent Orange" Class Assistance Foundation have recovered even more from the corporate defendant war contractors than they would have without the efforts of Yannacone. The Plaintiffs' Management Committee appointed by Judge Weinstein militantly opposed any Class Assistance Foundation.

The entire class of Viet Nam veterans and their families are the beneficiaries of both Yannacone's original equitable trust fund concept of recovery in the Agent Orange Litigation and his vigorous conduct of the litigation as a class action over the objections of not just the corporate defendant war contractors, but most of the organized plaintiffs' personal injury bar, including many of the individuals who later bought their way onto the "Agent Orange" Plaintiffs' Management Committee.

The attention of' the Court is called to the original title of the common or generic complaint for all the "Agent Orange" cases:

In the matter of the claims for damages attributable to the phenoxy aliphatic herbicides contaminated with toxic synthetic organic chemicals such as 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin (TCDD or "dioxin") manufactured, formulated, advertised, marketed, promoted and sold by the corporate defendants

Certain named veterans, individually and on behalf of a number of veterans all those so unfortunate as to have been and now to be similarly affected and situated at risk from the toxic effects of phenoxy herbicides manufactured, formulated, advertised, marketed, promoted and sold, individually and collectively, by the corporate defendants although known by them to be contaminated with toxic synthetic organic chemicals; (Classes designated 1, and 2); and

Certain named wives of veterans, individually and on behalf of all those wives of veterans so unfortunate as to have been similarly affected and situated at risk as a result of the toxic effects of phenoxy herbicides manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively, by the corporate defendants although known by them to be contaminated with toxic synthetic organic chemicals (Classes designated 6, 7, and 12); .and

Certain named veterans now deceased, by their several legal representatives, individually and on behalf of all those so unfortunate as to have been similarly affected by the toxic effects of phenoxy herbicides manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively, by the corporate defendants although known by them to be contaminated with toxic synthetic organic chemicals (Class designated 5); and

Certain named widows of veterans now deceased, individually and on behalf of all those so unfortunate as to have been similarly widowed as a result of the toxic effects of phenoxy herbicides manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively, by the corporate defendants although known by them to be contaminated with toxic synthetic organic chemicals (Classes designated 6, 7, and 8); and

Certain pained parents of veterans now deceased, individually and on behalf of all those so unfortunate as to have similarly lost their sons as a result of the toxic effects of phenoxy herbicides manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively, by the corporate defendants although known by them to be contaminated with toxic synthetic organic chemicals (Class designated 9); and

Certain named children individually and on behalf of all those children so unfortunate as to have been similarly affected and now at risk as a result of the toxic effects of phenoxy herbicides manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively, by the corporate defendants although known by them to be contaminated with toxic synthetic organic chemicals (Classes designated 13, 14, and 15); ;and

Certain named parents of children affected and now at risk as a result of the toxic effects of phenoxy herbicides manufactured, formulated, advertised, promoted, marketed and sold, individually and collectively, by the corporate defendants although known by them to be contaminated with toxic synthetic organic chemicals, each individually and on behalf of all those other parents and their children so unfortunate as to have been and now to be similarly situated at risk, not only during this generation but during those generations yet to come, from the toxic effects of such phenoxy herbicides manufactured, formulated, advertised, promoted, marketed and sold by said corporate defendants (Classes designated 10, 11, 12),

Plaintiffs,

-against-

THE DOW CHEMICAL COMPANY, MONSANTO COMPANY, HERCULES INCORPORATED, THOMSON-HAYWARD CHEMICAL COMPANY, DIAMOND SHAMROCK CORPORATION, UNIROYAL, INC, THOMPSON CHEMICALS, and HOFFMAN-TAFT, a subsidiary of SYNTEX CORP., together with HOOKER CHEMICAL COMPANY, a subsidiary of OCCIDENTAL PETROLEUM COMPANY,

Defendants[50]

In addition to the complex caption and heading for the Agent Orange Litigation, in the refiled Reutershan class action complaint, this Court was presented with a unique prayer for relief by the veterans.

The equitable remedy of declaratory judgment.

Further equitable relief imposing a constructive or resulting. trust upon the corporate defendants and holding them to their fiduciary obligations as trustees of the public health safety and welfare.[51]

The equitable remedy of injunction restraining the corporate defendants from continuing the advertising, promotion, marketing, and sale of phenoxy herbicides such as the 2,4,5–trichlorophenoxy aliphatics contaminated with toxic synthetic organic chemicals such as 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin (TCDD or "Dioxin").[52]

The equitable remedy of restitution and the equitable procedure of appointing a conservator or trustee to the extent necessary to accumulate, manage, and administer a trust fund against which claims can eventually be paid from current earnings rather than the capital assets of the corporate defendants.[53]

The "Veterans' Goals & Objectives in the Agent Orange Litigation" were explicitly stated to the Court in MDL 381 Docket Document No. 0033 filed on 19 July 1979. The statements in Document 0033 were dictated by the veterans, their wives, and even some of their children. It was only slightly modified to comport with the style of a legal document.

- The plaintiff veterans seek medical care and treatment of their own afflictions, but most cry out for medical care and treatment of the afflictions visited upon those of their children who have suffered developmental defects.
- The plaintiff veterans do not want to be recipients of public assistance.
- The plaintiff veterans, as tax payers, do not believe that they and all the other tax payers in the United States should bear the burden of the cost of the medical care and treatment they require as a result of the toxic effects of contaminated phenoxy herbicides manufactured, formulated, advertised, marketed, promoted, and sold by the corporate defendants.
- The plaintiff veterans and their families seek to compel the corporate defendants to make restitution to the American people by reimbursing those federal and state agencies that have provided benefits, medical care and treatment to the plaintiff veterans and their families for conditions attributable to the toxic effects of contaminated phenoxy herbicides manufactured, formulated, advertised, marketed, promoted, and sold by the corporate defendants.
- The plaintiff veterans and their families seek a resolution of the scientific controversy over the toxic effects of phenoxy herbicides contaminated with toxic synthetic organic chemicals such as the polychlorinated dibenzo-p-dioxins (PCDDs) and the polychlorinated dibenzo furans (PCDFs) fomented by the promotional efforts of the corporate defendants which manufactured, formulated, advertised, marketed, promoted, and sold such contaminated phenoxy herbicides.

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50. (79-06-20 Amended Verified Complaint (AVC) pp. 163-165).

51. (79-06-20 AVC pp. 165-166).

52. (79-06-20 AVC p. 166)

53. (79-06-20 AVC pp. 166-170).

- The plaintiff veterans and their families seek to challenge the continuing claims of those corporate defendants still actively involved in the advertising, promotion, marketing, .and sale of phenoxy herbicides known to be contaminated with toxic synthetic organic chemicals such as the polychlorinated dibenzo-p-dioxins (PCDDs) and the polychlorinated dibenzo furans (PCDFs) that such contaminated phenoxy herbicides are "safe."
- The plaintiff veterans and their families seek to test those safety claims of the corporate defendants in the crucible of cross-examination before this Court of Equity not in administrative proceedings which have been dragging on for almost a decade since the Department of Defense recognized the danger inherent in contaminated phenoxy herbicides and discontinued their use as defoliants in Southeast Asia.
- The plaintiff veterans who served our Country in Southeast Asia assert that the corporate defendants owed them a non-delegable fiduciary duty of care.
- The plaintiff veterans seek punitive damages against the corporate defendants responsible for the advertising, promotion, marketing, and sale of phenoxy herbicides contaminated with toxic synthetic organic chemicals such as the polychlorinated dibenzo-*p*-dioxins (PCDDs) and the polychlorinated dibenzo furans (PCDFs) in an amount sufficient to convince corporate management they serve as trustees of the public health, safety and welfare to an extent commensurate with the economic power and technological resources of the corporations they manage.
- 2,400,000 veterans are not a statistically insignificant sample of the American population, considering that all of them were cert. denied to be in good health when they left this country for service in Southeast Asia and the fact that those who came home without direct traumatic injury from that service are now suffering many clinical and subclinical effects attributable to chemical toxicants cries out for equitable relief.
- The plaintiff. veterans are aware of their unique position at risk as a result of their already significant exposure to phenoxy herbicides contaminated with polychlorinated dibenzo-p-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) and the bioaccumulative nature of the toxic effects associated with such exposure.
- The plaintiff veterans and their families are now becoming aware that other widely used products such as the phenoxy herbicides pentachlorophenol (PCP) and its salts are also contaminated with polychlorinated dibenzo-*p*-dioxins (PCDDs) and polychlorinated dibenzo furans (PCDFs) and may represent significant additional risk to the plaintiff veterans and their families.
- The plaintiff veterans and their families are appalled at the lack of concern by federal regulatory agencies for their unique position as a population already exposed to contaminated phenoxy herbicides and manifesting clinically ascertainable symptoms of such exposure.

As a result of the settlement of the Agent Orange Litigation, a substantial number of the goals and objectives of the Viet Nam veterans and their families have been attained because the settlement plan was consistent with Yannacone's original vision of the litigation.

Yannacone was the sole and exclusive architect of both the theory of liability and the trust fund concept of recovery. He was the master builder who accomplished what no other lawyer had ever succeeded in doing before. In fact, he did what no other lawyers considered possible. The settlement plan he envisioned and pleaded in the *ad damnum* clause and prayer for relief of the amended Reutershan complaint was the basic blueprint for the settlement plan that Judge Weinstein eventually adopted. Yannacone saw what had to be done for the Viet Nam veterans and their families and found the only possible way to do it.

It is now time to reward Yannacone for his efforts, not just with a vague pat on the head and thanks for a job well done, but with just compensation for his efforts. It is time to acknowledge the sacrifices that Yannacone and his family have made on behalf of the entire class of Viet Nam veterans and their families. It is time to restore

the economic health of the Yannacone family to at least the state it was at the start of the Agent Orange Litigation. It is no secret that the Yannacone family had exhausted all their economic resources in bringing the Agent Orange Litigation to the eve of trial following defeat of the Dow motion for summary judgment.

It is time for this Court to make amends for the trashing of Yannacone's career that has resulted from the loose-lipped remarks of attorneys seeking to justify substantial fees for insubstantial efforts.[54]

Public Information and Education in the "Agent Orange" Litigation

The Agent Orange Litigation became an object of national attention shortly after the Reutershan case was refiled as a class action on 8 January 1979. By March, 1979, it was necessary to represent the interests of the Viet Nam combat veterans to the Congress of the United States, the several state legislatures, and the American people because of the massive public relations campaign of disinformation that was being conducted by the war contractors who were the corporate defendants in the Agent Orange Litigation.

It is hypocritical for this Court to discount the value to the class of having its lead counsel and courtroom advocate competent to inform the public about the plight of the Viet Nam veterans and their families, the dangers of dioxin, and the threat of diseases such as melioidosis, while all the while keeping the class apprised of the progress of the litigation. It is evidence of the kind of double standard that has pervaded the entire process of awarding attorney's fees and reimbursing expenses after the Agent Orange Litigation was settled.

The opportunity for demagoguery was present during every day Yannacone actively managed the Agent Orange Litigation. This Court should recognize, respect, and reward Yannacone's steadfast refusal to assume the role of demagogue or politicize the litigation. Yannacone's restraint and constant consideration for the dignity of his clients, the integrity of the Judicial System, the economic vulnerability of the corporate defendant war contractors, and his profound respect for the facts of the case stand in stark contrast with the way in which less scrupulous lawyers have comported themselves with the media in litigation which has become an object of public interest.

Whatever time Yannacone was required to spend in dealing with the media and speaking to veterans groups was the time necessary to overcome the public relations efforts of the corporate defendant war contractors, their insurance carriers, and the executive branch of the federal government each of which mounted determined

54. Susan Milstein, "Crusader Who Lost His Way," *American Lawyer*, April, 1984; Peter H. Schuck, *Agent Orange on Trial* (Cambridge: Harvard University Press, 1986).

opposition to the claims of the Viet Nam veterans and their families, and each of which had essentially unlimited resources to bring to bear on their task.

No less an informed observed than Judge Pratt who was the trial judge during the period that the media was most concerned with the Agent Orange Litigation testified that he found nothing in more than five years of public statements by Yannacone about the Agent Orange Litigation that in any way offended the Court or interfered with the administration of justice .[55]

It is considered perfectly proper for a large, time billing law firm to include as part of its general and administrative overhead expenses the costs associated with public relations, advertising and promotion conducted under the euphemism "firm marketing". According to the Court of Appeals for this Circuit, such general and administrative overhead expenses are properly reflected in the hourly rate charged for the attorneys who are employed by or partners in such firms.

Nevertheless, this Court has disparaged the essential public information and education work by Yannacone as lead counsel for the Class, claiming that his efforts were of no value to the Class. The facts demonstrate that such efforts were an integral aspect of the "Agent Orange" class action litigation. It prevented the Agent Orange Litigation from becoming another asbestos debacle. It promoted significant economy of judicial resources and led to an early and timely settlement in favor of the veterans.

The case could never have been settled without the unanimity of support within the Veteran community that was demonstrated years later at the fairness hearings. That unanimity of support is solely the result of the work of Victor and Carol Yannacone. Their efforts directly benefitted the class and were not part of any "firm marketing effort".

It cannot be said that Victor John Yannacone, jr. was seeking to develop a national reputation through the Agent Orange Litigation. He was already internationally renowned for the work he had done in launching what has come to be known as the Environment Movement.[56] He had already demonstrated his prowess as a litigator in the actions against broad spectrum persistent chemical biocides such as DDT and the

55. Testimony of United States Circuit Judge George C. Pratt before USMJ Chrein, *op cit*. (1 November 1988).

56. See, АΔВОКАТ ПР РОΔНО СРЕΔЫ Fє ЗКж Амекарае, p. 20; V. J. Yannacone, jr., "*Miljön, establissemanget och lagstifningen,*" (The environment, the establishment and the law) in *Delat Ansvar en antologi om människan och miljön,* eds. Lars Gustafsson and Eva Waller, (Sweden: Rabén & Sjögren Bokforlag) 165-188 (1971).

other chlorinated hydrocarbons of the DEATH group[57] during the 60's.[58] He was already an established author of a respected two volume treatise on Environmental law,[59] the field he established as an independent legal discipline with the DDT litigation in 1966. His reputation as an expert in the area of occupational disease and the toxic effects of hazardous materials was established by 1960.[60]

Whatever time Yannacone spent with the media or with veterans groups was time well spent solely for the benefit of the entire class of Viet Nam veterans and their families who were the plaintiffs in the Agent Orange Litigation. It was time necessary to counter the enormous public relations and disinformation machine driven by the corporate defendant war contractors that has continued to run roughshod over the rights of the best and bravest of our fellow Americans, the Viet Nam veterans.

Yannacone's Effect on the Settlement Process

Settlement of the Agent Orange Litigation became a foregone conclusion when Judge Pratt denied The Dow Chemical Company motion for summary judgment on the Government Contractor Immunity Defense and granted the motion by Hercules Incorporated for summary judgment on the grounds that its phenoxy herbicides were essentially uncontaminated with 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin.

Yannacone's grand strategy had succeeded. He had scattered the hitherto consolidated forces of the corporate defendant war contractors. First he had separated them according to the extent that their phenoxy herbicides were contaminated with dioxin. Hercules Incorporated was out because it made "clean" "Agent Orange." Diamond Shamrock Corporation and Monsanto Company were still in the dock because they made incredibly "dirty" "Agent Orange" for the government. Then he separated them according to their parity of knowledge with the government about the dioxin contaminant and dioxin toxicity.

It was here that he held The Dow Chemical Company in the case. Yes they made relatively uncontaminated "Agent Orange," but they deliberately and intentionally withheld information from the government because they were afraid of stronger pesticide regulation. They had made a business decision to cover-up a hazard to our American troops and they would now stand in the dock and explain that decision to a jury in Brooklyn.

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57. Dieldrin, endrin, aldrin toxaphene and heptachlor.

58. See, *Carol A. Yannacone, &c*. v. *H. Lee Dennison, et al.*, 55 Misc2d 468 (1967); Henkin, Harmon, Martin Merta, James Staples, *The Environment, The Establishment, and the Law*, (Houghton Mifflin Company, Boston 1971).

59. Yannacone, Victor John, jr., B.S. Cohen, S.G. Davison, *Environmental Rights & Remedies*, (Lawyers Coop. Publ. Co., Rochester 1972).

60. Kalish, Jon, "Comp Family Dynasty Spans Three Generations", *The National Law Journal*, Monday, April 15, 1991, p. 8.

Yannacone's greatest success, however, was in creating a conflict among the corporate defendant war contractors that would prevent them from ever presenting a consolidated front to the Court and the public.

The Dow Chemical Company whose present day corporate ethos makes it a model corporate citizen and provides some reasonable assurance that the excesses of the 60s will not be repeated, would be forced to distance itself from Monsanto and Diamond in the public eye, and certainly before the jury. Yannacone had guaranteed that the Dow scientists who held the key to the dioxin secret would be willing, albeit reluctant, witnesses for the veterans on some of the most important issues of the litigation.

Is it any wonder that settlement of the veterans' claims began to look like an attractive alternative to Dow, Monsanto, and Diamond Shamrock.

The real reason the corporate defendant war contractors were so eager to settle the veterans claims was that the trial of the claims against Dow, Monsanto, and Diamond Shamrock would focus national attention not just on their corporate culpability for past sins, but the even larger issues associated with liability for clean up under federal toxic and hazardous waste legislation.

Diamond Shamrock alone faced potentially billions of dollars for clean up of its dioxin contaminated area in the Ironbound section of Newark, New Jersey. Monsanto faced similarly catastrophic liability for clean up of the Missouri River bed near St. Louis; while Dow faced problems at Midland, Michigan.

Yannacone had continually demonstrated to the chemical industry since 1966 that he was capable of escalating public interest litigation into a multi front assault on negligent, careless and reckless chemical process technology.

Product liability litigation is settled by corporate defendants the size of Dow, Monsanto, and Diamond, and the settlements are paid for by insurance companies like Travelers and Aetna, only when the plaintiff's represent such a credible threat to both the companies and their insurance carriers that there is a reasonable probability of a verdict or judgement in favor of the plaintiffs which could seriously damage [he defendants as business institutions and undermine the economic strength of their insurance carriers.

From the day Yannacone became publicly associated with the Agent Orange Litigation, and even to this day, he has maintained that level of credible threat. Without Yannacone's grand strategic plan, his unconventional tactics, and his formidable Courtroom presence, the Agent Orange Litigation would have been terminated by the first motion to dismiss.

It is obvious from the initial arguments and the earliest motions that the corporate defendant war contractors and their insurance carriers did not take the litigation seriously when it was filed by Reutershan's railroad union lawyers as just another

products liability action. Certainly not 180 millions of dollars worth of serious consideration.

In assessing Yannacone's contribution to the settlement and his value to the plaintiff class of Viet Nam veterans and their families, this Court should note that the Long Island Consortium, Yannacone & Associates, did not come into existence until late September 1979, only after Judge Pratt had denied the corporate defendant war contractors first major motion to dismiss the complaint.[61]

The credible threat that drove the settlement process was Yannacones continued involvement with the Viet Nam veterans and their families. There was always the possibility that he might still appear to raise the stakes on the eve of trial.

Argument

Without Yannacone's early success and the formidable edifice of scientific evidence he built to support the veterans' claims, Judge Weinstein would not have had a jawbone with which to bludgeon a settlement from the corporate defendant war contractors.

Unfortunately, however, the case Judge Weinstein settled was not the case brought to this Court by the Viet Nam veterans and their families. It was but a faint reflection of the vigorous cause that Yannacone brought to this Court in good faith and with honorable intentions on behalf of the best and bravest of the young Americans from the decade of the 1960s.

The case Judge Weinstein settled had been fashioned by a group of attorneys who had no real understanding of the veterans' claims much less their cause. The case Judge Weinstein settled was a case created by a group of attorneys who were only interested, as they said so often, in the bottom line- the legal fees.

Take a long hard look at the efforts of the 'Agent Orange' Plaintiffs' Management Committee Judge Weinstein appointed. Their efforts were directed to obtaining individual cases and taking substantial contingent fees approaching one-third of the recovery from individual veterans as well as a similarly substantial percentage of the settlement fund as their fee for serving as "class" counsel.

To further their scheme, the attorneys Judge Weinstein appointed as class counsel had to abandon the original equitable trust fund concept that was the heart of the Agent Orange Litigation as filed by Yannacone, and convert the case into nothing more than another asbestos action.

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61. The decision by Judge Pratt denying the motion to dismiss and the motion by defendants for a gag order was denied on 15 August 1979—23 years to the day after New York Supreme Court Judge D. Ormande Ritchie granted Carol A. Yannacone's application for a temporary injunction prohibiting the continued use of the broad spectrum persistent chemical biocide DDT—the day the Environment Movement was born.

The Evidence

There is clear, convincing, and uncontrovertible evidence that Yannacone was personally responsible for successfully managing the Agent Orange Litigation from its original refiling as a class action, through defeat of the corporate defendant war contractors' motions for summary judgment five years later.

The evidence of Yannacone's extensive and exemplary efforts on behalf of the Viet Nam veterans and their families as the Plaintiff class in the Agent Orange litigation is uncontradicted. The evidence comes from witnesses of well-established credibility such as Circuit Judge George C. Pratt, former Special Master Sol Schreiber, and Attorney Leonard Rivkin, counsel for Dow, as well as any number of veterans who were active plaintiffs and class representatives during the Agent Orange Litigation.

The actual legal documents Yannacone personally authored and filed with the Court on behalf of the Viet Nam combat veterans and their families as a class and the awesome number of documents that he personally handled, studied, responded to, and acted upon, are the best evidence that the time for which he claims compensation is eminently reasonable in light of the services performed for the Viet Nam combat veterans as a class.

Together with his associate attorney, Dr. Kavenagh, Carol Yannacone and the small staff identified in the application for reimbursement of expenses, Yannacone managed the entire Agent Orange litigation on behalf of the Plaintiff class of Viet Nam veterans and their families for 1,965 days. He did the work that established the rights of the Viet Nam combat veterans to a recovery from the corporate defendant war contractors.

Even his most determined detractors do not challenge the fact that he spent most of his waking hours actively managing the Agent Orange litigation and tirelessly representing the cause of the Viet Nam veterans and their families as a class.

It appears, however, that this Court has taken the position that the rewards of Yannacone's pioneering efforts on behalf of the class of Viet Nam veterans and their families- men and women who on 8 January 1979 had been forgotten by their Country, ignored by the Veterans Administration, and all but abandoned by our legal profession, should go to that cabal of attorneys who, after they saw a quick settlement was possible, prevailed upon Judge Weinstein to establish a Plaintiff's Management Committee made up of attorneys whose legal philosophy is exemplified in the following less than noble sentiments,

"Real lawyers only bill time and get their expenses 'up front!'"

"Class action litigation belongs to the lawyers. It exists to generate a fund from which fees can be paid."

"Lawyers who attempt to attain the socially beneficial goals of their class action clients are idealistic fools unworthy of compensation by the Courts."

"Real lawyers aren't concerned about clinical medicine, much less its underlying science. Cases are won by hiring experts and paying them enough so that they stick to their opinions."

"Real personal injury lawyers can't waste time listening to the health concerns of their clients."

"Real lawyers don't waste time reading medical literature and then distributing selected papers to their clients."[62]

Correspondence from Sullivan & Associates a Chicago firm associated with Stephen Schlegel as Co-Midwest Regional Coordinating Counsel from 22 February 1979 to Robert Ryan, a disabled and impoverished veteran[63] provide the Court with the opportunity to clearly see the difference between Yannacone's relationship with the Plaintiff class and those of the attorneys who later became the Plaintiffs' Management Committee.

Who Really Served the Veteran Class?

This Court must not forget, and it should seriously consider, that in order to justify their original outrageous fee requests, the Agent Orange Plaintiffs' Management Committee took the position that there was no merit to the veterans claims. They publicly stated on a number of occasions that they did little more than coerce a settlement out of the corporate defendant war contractors.

They boasted that the means of their extortion was the threat of further public indignation and more extensive damage to the corporate images of the war contractors. Such a threat was credible as the direct result of Yannacone's success in sensitizing the American people to the plight of the Viet Nam veterans and their families and arousing public concern over efforts by the corporate defendant war contractors to mislead government regulators concerning the dioxin menace.

The attorneys who were appointed by Judge Weinstein to represent the entire class of Viet Nam veterans suffering illness, disease, disability, and death as a result of exposure to dioxin contaminated phenoxy herbicides deployed as chemical defoliants during the war in Southeast Asia, argued against the claims of the members of the class they had been appointed by Judge Weinstein to represent.

By taking such a fundamentally unprofessional and dishonorable position, those attorneys appointed by Judge Weinstein as the Plaintiffs' Management Committee and charged with representing the entire class of Viet Nam veterans and their families

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62. David J. Dean, Albert J. Fiorella, Irving Like, Thomas W. Henderson, Benton H. Musselwhite, Steven G. Schlegel, personal comments. Actual statements made by individual members of the Agent Orange Plaintiffs' Management Committee and their associated counsel at various times during their reign

63. Exhibit attached to letters of 3 January 1991 to USDJ Weinstein and USMJ Chrein, submitted on this appeal as Exhibit 11.

caused irreparable damage to the members of the class seeking benefits from the VA under Title 38.

But for Yannacone's continued *pro bono* efforts on behalf of the Viet Nam veterans and their families since the settlement, these high-handed, pusillanimous attacks on the cause of the "Agent Orange" victims since the settlement would have irrevocably prejudiced the claims of all the veterans seeking benefits under Title 38 as a result of illness, disability, or death of non-traumatic origin associated with service in Southeast Asia.

The legacy of the Plaintiffs' Management Committee to the Viet Nam veterans has been to add an additional and even more inequitable burden to that which the veterans already have had to shoulder in proceeding under Title 38.

The Court has added insult to injury by imposing on the Viet Nam veterans and their families the ultimate indignity of having the attorneys who refused to support their claims richly rewarded. Further dishonor has been heaped upon the Viet Nam veterans and their families who brought the Agent Orange Litigation to this Court as a class action and have kept it here as a class action because the attorney who brought the veterans from the Streets to the Courthouse and then kept them there long enough to force the corporate defendant war contractors to admit that the phenoxy herbicides they sold to the government was contaminated with a deadly poison has been ignored and still remains unrecognized and uncompensated.

Conclusion

The Agent Orange litigation was the first mass toxic tort case ever filed, maintained, managed, and concluded as a class action under Rule 23. The veterans succeeded because Yannacone was able to maintain the Agent Orange litigation as a class action over the objections of many of the self-proclaimed leaders of the personal injury trial bar including some of the individuals who later came to profit from the Agent Orange litigation as members of the Plaintiff's Management Committee.

It is now time to formally recognize the extent of Yannacone's contribution to the American legal system and judicially acknowledge that his management of the Agent Orange litigation should serve as a model for the conduct of mass toxic tort litigation in the future.

Recognition must come in the form acceptable to the organized bar and the public—a fair and equitable fee—just compensation for the services Yannacone rendered to the Plaintiff Class of Viet Nam veterans and their families. That fee should be substantial enough to send a message to attorneys everywhere that public interest litigation, honorably conceived, well managed, and skillfully conducted can be fairly compensated at a rate no less than the fees approved by the Courts for services of less intrinsic merit and social value.

The asbestos nightmare which is already exhausting the public patience while squandering the limited judicial resources of this and other federal judicial districts stands as dramatic evidence of the way the Agent Orange Litigation would have gone had Benton Musselwhite, Newton Schwartz, John O'Quinn, Thomas Henderson, Gene Locks, Nels Peterson, Stanley Chesley, and other members of the Plaintiff's Management Committee been permitted to manage the case from the beginning. That the Agent Orange Litigation did not become another asbestos debacle is solely due to Yannacone's resourceful efforts on behalf of the Viet Nam veterans and their families.

Not only did Yannacone kept the Agent Orange Litigation from becoming another asbestos nightmare in which only the lawyers, not the victims profit. In addition, Yannacone made sure that none of the corporate defendant war contractors would be able to escape liability through Bankruptcy.

The Real Message This Court Should Send

It is time to let the American people know that there was indeed merit to the claims of the Viet Nam combat veterans that Yannacone presented to the Court in good faith on 8 January 1979 and that the class action he persevered in pursuing so diligently against the conventional wisdom of the organized personal injury tort bar should be the model for mass toxic tort litigation in the future.

Yannacone supported the Class Action settlement worked out by the Court not by denigrating the cause of the Viet Nam veterans and their families or prejudicing their rights to benefits from the Veterans Administration under Title 38, but by recognizing that the settlement represented vindication of the veterans claims.

On behalf of the class Yannacone argued in support of the settlement at each of the "Fairness" hearings. He supported the settlement not by forsaking the veterans claims but by restating the original goals of the Viet Nam veterans and their families who brought the Agent Orange Litigation to this Court as a class action.

The Viet Nam veterans and their families joined the "Agent Orange" litigation in order to obtain Information, Compensation, and Vindication.

- Information about the health effects and risks associated with exposure to "Agent Orange", 2,3,7,8-tetrachloro-dibenzo-*p*-dioxin and other toxicants, as well as the iatrogenic effects of medication and tropical diseases to which they were exposed during military service in Southeast Asia.
- Compensation for disability and death from disease attributable to service in Southeast Asia.
- Vindication of their rights as veterans entitled to at least the same benefits and honor as American veterans of any other declared or undeclared war involving the United States.

However, instead of vindication and ultimate victory against the real enemy, the insensitive bureaucracy of the Veterans Administration, the Plaintiffs' Management Committee denigrated the effort of the veterans, disparaged their claims; and vitiated their sacrifice in an obscene rush to grab large fees following the settlement.

It is time to provide just compensation to the attorney who stayed the course and permit him to continue his efforts on behalf of the Viet Nam veterans and their families secure in the knowledge that this Court has demonstrated its support for the merits and good faith of the veterans cause and those that faithfully represented their interests.

> Q How would you characterize Mr. Yannacone's representation of the Viet Nam combat veterans as a class as opposed to any individual veteran?
>
> A ... In my judgment, the case would never have survived without Victor Yannacone.[64]

Submitted on behalf of the Petitioners this 14th day of October 1991 by

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64.Testimony of Special Master Sol Schreiber before USMJ Chrein, pp 104-105 (1 November 1988).