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# With Liberty and Justice for All: An Essay on Agent Orange and Choice of Law

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# ESSAY

## WITH LIBERTY AND JUSTICE FOR ALL: AN ESSAY ON AGENT ORANGE AND CHOICE OF LAW

*Aaron D. Twerski\**

The *Agent Orange* choice of law decision<sup>1</sup> should never have been written. That it had to be written was the fault of the Second Circuit in ruling that jurisdiction based on federal common law was inappropriate under the facts of the case.<sup>2</sup> Judge Weinstein was faced with an impossible dilemma when the case was remanded to the district court. He came to realize that the Second Circuit had erred badly. The case demanded a federal rule of decision; there was no rational way to litigate the case without utilizing a federal standard. If federal common law would not provide the rule of decision, then a common-law "federal" solution had to be fashioned.

Although the *Agent Orange* decision will undoubtedly cause traditionalists considerable consternation, Judge Weinstein was not in fact seeking to break new ground with his choice of law decision in this case. He fashioned a "national consensus" standard as the appropriate governing law because his back was up against the wall. I believe that he was forced to take this ap-

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Several subsections of this Article were taken from a memorandum prepared by the author for the plaintiffs' Management Committee and incorporated in large part in the Fairness Brief filed by the plaintiffs in support of the settlement. The author served as a member of the Law Committee in the *Agent Orange* litigation. Many of the arguments contained herein were a product of the joint efforts of the author and Irving Like, of Reilly, Like & Schneider, Babylon, New York. Mr. Like served as chairman of the Law Committee throughout the litigation.

<sup>1</sup> *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690 (E.D.N.Y. 1984).

<sup>2</sup> *In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980).

proach for three reasons: (1) no choice of law method presently extant could provide a rational method for choosing law in this case; (2) the spectre of treating soldiers differently based solely on their differing domiciles was so grotesque that Judge Weinstein was unable to put aside the argument that unequal treatment of similarly situated plaintiffs was unjust; and (3) the logistics of trying the case without a single "federal standard" were mind-boggling. For all practical purposes, if the more traditional approaches were to be used, *Agent Orange* simply would not have been justiciable.

As we shall see, these arguments have an interlocking quality, with one bolstering the internal logic of the other. Each one, viewed individually, supports the rejection of traditional choice of law norms. When taken together it becomes evident why Judge Weinstein believed that he had no choice but to search for an innovative alternative.

It remains to be seen whether Judge Weinstein's decision to adopt a national consensus standard as the governing law of the case was correct. It should be noted, however, that by abandoning the existing choice of law methodologies he was sailing into uncharted waters. It will be unproductive to question whether his *Erie-Klaxon* guess<sup>3</sup> was accurate. Only an omniscient G-d (or the United States Supreme Court) could answer that question authoritatively.

## I. A PAGE OF HISTORY

Before embarking on a critical evaluation of Judge Weinstein's landmark choice of law decision, it will be useful to review the factual and procedural history of the case. For those who lived with the case day to day for over five years, it is often hard to imagine that not everyone in the universe has total familiarity with the *Agent Orange* story. However, a year's distance has effected some sobriety. I have come to realize that other matters of importance did transpire during that period of time and that the attention of some may have been diverted from all of the procedural wrangling that took place.

The *Agent Orange* litigation began in early 1979 when several individual veterans and their families commenced actions

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<sup>3</sup> See note 34 and accompanying text *infra*.

against the United States and the chemical companies that supplied the military with the herbicide "Agent Orange."<sup>4</sup> This herbicide was used by the military to defoliate the jungles in Vietnam so that the Viet Cong could not hide and ambush American and South Vietnamese troops. Barrels of the herbicide were marked by the chemical companies with an orange stripe — hence the name Agent Orange.

The complaint alleged that Agent Orange was contaminated with the highly toxic by-product 2,3,7,8 tetrachlorodibenzo-p-dioxin (TCDD or dioxin).<sup>5</sup> The plaintiffs alleged causes of action in negligence, strict liability, breach of warranty, intentional tort and nuisance. These causes of action were tied to each of the three product liability categories: production defect, design defect and failure to warn. According to the plaintiffs, the veterans' exposure to the TCDD contaminated herbicides in Vietnam resulted in a host of injuries, such as chloracne,<sup>6</sup> and various systemic diseases including soft tissue sarcoma and prophyria cutanea tarda.<sup>7</sup> The plaintiffs also claimed that exposure resulted in miscarriages to their wives and birth defects in their children.<sup>8</sup>

### A. *Federal Common Law*

In the early stages of the litigation, Judge Pratt ruled that plaintiffs were correct in their contention that federal question jurisdiction existed because the case implicated "federal common law."<sup>9</sup> In reviewing the leading cases, Judge Pratt determined that three factors had to be considered before a court could find that an adequate foundation for jurisdiction based on federal common law existed: "(1) the existence of a substantial federal interest in the outcome of a litigation; (2) the effect on this federal interest should state law be applied; and (3) the effect on state interests should state law be displaced by federal

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<sup>4</sup> The full procedural history is related in *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 750-58 (E.D.N.Y. 1984).

<sup>5</sup> *Id.* at 750.

<sup>6</sup> Chloracne is a skin disease that can leave large permanent scars. *Id.* at 817.

<sup>7</sup> Soft tissue sarcoma is a form of cancer and prophyria cutanea tarda is a liver ailment. *Id.*

<sup>8</sup> *Agent Orange*, 597 F. Supp. at 750.

<sup>9</sup> *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 737 (E.D.N.Y. 1979).

common law."<sup>10</sup> In determining the extent of the federal interest in *Agent Orange*, Judge Pratt relied on *United States v. Standard Oil Co.*,<sup>11</sup> in which the Supreme Court stated that: "no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces."<sup>12</sup> Thus, this relationship and any interference with it must be governed by federal authority.<sup>13</sup>

The federal interest in the *Agent Orange* litigation, however, was not founded solely on the relationship between the United States and its soldiers. It was tied to the relationship between the United States and its defense contractors as well. It was clear that the potential liability of war contractors to soldiers would affect future dealings between the government and the contractors. The district court found the dual federal interests in the litigation sufficient to satisfy the first factor of jurisdiction based on federal common law.

After ruling on the existence of substantial federal interest, Judge Pratt questioned whether those interests would be impaired if the appropriate state laws were applied to resolve the issue of liability. He concluded that the application of fifty different state laws would result in similarly situated plaintiffs being treated in a disparate fashion.<sup>14</sup> That soldiers who fought shoulder to shoulder in Vietnam should be treated according to the law of their individual domiciles would certainly burden the interests of the federal government in affording even-handed

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<sup>10</sup> *Id.* at 746.

<sup>11</sup> 332 U.S. 301 (1947).

<sup>12</sup> *Agent Orange*, 506 F. Supp. at 746 (quoting *United States v. Standard Oil Co.*, 332 U.S. 301 (1947)).

<sup>13</sup> In *Standard Oil*, the Supreme Court stated that:

To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority [citations omitted]. So also we think are interferences with that relationship such as the facts of this case involve. For, as the Federal Government has the exclusive power to establish and define the relationship by virtue of its military and other powers, [footnote omitted] equally clearly it has power in execution of the same functions to protect the relation once formed from harms inflicted by others. . .

332 U.S. at 305-6.

<sup>14</sup> *Agent Orange*, 506 F. Supp. at 748.

treatment to those who served their nation.<sup>15</sup> Applying state law would also burden the federal interest by creating uncertainty as to the rights and liabilities of the war contractors.

Judge Pratt also examined the possible effects on state interests should federal common law be applied. He concluded that state law had yet to examine the question of a war contractor's liability to soldiers who had served abroad and were injured by toxic chemicals manufactured and supplied by the contractors.<sup>16</sup> State law dealing with isolated cases of injury to soldiers caused by manufacturing defects in combat equipment was of marginal relevance. The issues in these idiosyncratic cases were far different from the question of liability to an entire army for toxic exposure to a herbicide. Moreover, Judge Pratt noted that the *Agent Orange* litigation, unlike the cases decided under state law, involved toxic chemicals, the use of which is subject to increased federal legislation and regulation.<sup>17</sup> Since state law had yet to speak to the issue, the application of federal common law could hardly impair any existing state interests.

The Second Circuit, in reversing Judge Pratt's decision to apply federal common law, focused primarily on the first of the three factors: whether there was a "substantial federal interest in the outcome of the litigation."<sup>18</sup> It found no "identifiable federal policy at stake" in the litigation sufficient to warrant the application of federal common law.<sup>19</sup> In reaching this conclusion, the court first addressed the question of whether there was a federal interest in uniformity for its own sake. It decided that no such federal interest existed when the suit was between private litigants and did not involve the federal government as a party.<sup>20</sup> The court found it "of no moment" that the application of different state laws would produce "a variety of results."<sup>21</sup> The court thus concluded that "[i]t is in the nature of a federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 748-49.

<sup>17</sup> *Id.* at 749.

<sup>18</sup> *Agent Orange*, 635 F.2d at 993.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 994.

their citizens."<sup>22</sup>

Those initiated into the conflicts of law fraternity will recognize the Second Circuit's familiar refrain. Whenever a serious challenge is made to shockingly unequal results brought about by the application of one of the myriad choice of law theories, a court will bristle with impatience and declare that unequal treatment of parties before the court is merely the price of federalism.<sup>23</sup> Usually that completes the equal protection analysis. Ultimately, the Second Circuit had to believe that traditional choice of law methodology could respond intelligently to the problem of the selection of a rule of law to govern this case. The plaintiffs, however, argued that no choice of law system could rationally do so. If a choice of law rule in a case imbued with such overwhelming federal presence cannot effectively further state interests, then the least we can ask is that it not foster gross inequality. Sadly, the Second Circuit did nothing more than parrot the "cost of federalism" theme. It did not inform the lower court how it was to utilize the existing choice of law system to select governing law. Moreover, while it recognized that disparate results would almost certainly attend the decision, it failed to explain how the lower court could arrive at the disparate results rationally.

In rejecting the application of federal common law, not only did the Second Circuit adopt the traditional cavalier approach of the courts to the problem of inequality, it also borrowed heavily from the most extreme statements of interest analysis to give content to its "dual interest" theory. The court distinguished *Agent Orange* from such leading cases as *Clearfield Trust Co. v. United States*,<sup>24</sup> which mandated the application of federal common law. It noted that federal common law had been applied when "the government's substantive interest in the litigation" was "monothetic."<sup>25</sup> In contrast, *Agent Orange* involved two government interests "in sharp contrast with one another."<sup>26</sup> In *Clearfield Trust* the government's single substantive interest was in preserving the federal fisc, whereas in *Agent Orange* the

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<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *Neumeier v. Kuehner*, 31 N.Y.2d 121, 126, 286 N.E.2d 454, 456, 335 N.Y.S.2d 64, 68 (1972).

<sup>24</sup> 318 U.S. 363 (1943).

<sup>25</sup> *Agent Orange*, 635 F.2d at 994.

<sup>26</sup> *Id.*

government had an interest in the welfare of its veterans and an opposing interest in protecting its suppliers of war material.

Judge Kearse's analysis appears to be too simplistic, unless one is to believe that federal courts fashion federal common law rules solely by taking into account the interest of the federal government in emerging victorious from the litigation. Whatever rule the court ultimately formulates must be sensitive not only to the interests of the federal government but to the interests of the opposing party as well. In *Clearfield Trust* the court permitted the United States to recover from a bank that had honored a forged endorsement because it found that the delay in bringing the forged endorsement to the attention of the bank had not prejudiced the bank.<sup>27</sup> To characterize the rule formulated by the court in *Clearfield Trust* as "monothetic" because it protected the federal fisc is downright silly. The rule selected by the court fairly balanced the interests of the federal government and the interests of the bank. One is hard pressed to think of a case in which that kind of balancing is not present. The Second Circuit should not have been troubled by the need to balance the government's interests in the welfare of its veterans and in the welfare of its defense contractors in fashioning a rule of decision in *Agent Orange*.<sup>28</sup>

It is not certain why Judge Kearse had such difficulty with this issue. I would venture a guess, however, that the Second Circuit suffered from the same malady affecting courts that attempt to utilize interest analysis<sup>29</sup> to resolve choice of law cases. As Professor Ely has demonstrated, a major premise of interest analysis is that states have a greater stake in advancing the interests of their own citizens or domiciliaries than they have in advancing the interests of outsiders.<sup>30</sup> If that premise were shorn

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<sup>27</sup> *Clearfield Trust*, 318 U.S. at 370.

<sup>28</sup> See Note, *Tort Remedies For Servicemen Injured by Military Equipment: A Case for Federal Common Law*, 55 N.Y.U. L.Rev. 601, 623 (1980).

<sup>29</sup> Courts employing an interest analysis approach examine the policies underlying the laws in conflict and identify the parties' contacts with the respective jurisdictions to determine which states have an interest in having their law applied in the particular case. See Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171.

<sup>30</sup> Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 Wm. & Mary L. Rev. 173 (1981). But see, Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the New Critics*, 34 MERCER L. REV. 593 (1983).



from interest analysis there would be no false conflict cases.<sup>31</sup> And without false conflict cases the most significant contribution of the modern school of conflicts scholars for resolving choice of law problems would be obviated. It is clear that when a court can find no interest in protecting its own, interest analysis provides little direction in helping to avoid resolve a conflict.<sup>32</sup>

There is, I believe, a common sense reason that explains courts' need to rely on a "domiciliary protecting" principle in choice of law. The same reason may explain why the Second Circuit believed that it could not resolve the federal common law question when two opposing federal interests were at war with each other. Cases that require courts to choose between two different sources of law in a federal system are excruciatingly difficult to decide. The problem is reminiscent of the quandary of the judge who would like to find for both sides. To approach a choice of law decision without a clear set of biases that embody a philosophical perspective is almost certain to doom the venture to failure. It is for this reason that the first *Restatement of Conflicts* had such a tenacious hold on American conflicts law for so many years. It was not neutral; it approached most cases with a clear territorial bias. The Currie brand of interest analysis sought to define state interests in a more fair and even-handed fashion. Therein lies the problem: the more sensitive and analytical the evaluation of competing state interests is, the more difficult it becomes to resolve the conflict. Ultimately, resolution depends on some bias or philosophical position that will help resolve the tension. The "domiciliary protection" thesis provides an answer.<sup>33</sup> A state, under this analysis has an obligation to utilize its law to win victories for its domiciliaries.

It is likely that courts have faced a similar dilemma in seeking to decide when federal common law is applicable and what its content should be. The tension between the competing claims

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<sup>31</sup> Ely, *supra* note 30, at 180. A false conflict exists when only one state actually has an interest in applying its own law. If advancing the interests of a state's own domiciliaries is no longer a criterion, then the state that emerged victorious under interest analysis because its law protected its own would be on a par with a state that was not protecting its own. *Id.* at 179-80.

<sup>32</sup> See, e.g., *Erwin v. Thomas*, 264 Or. 454, 506 P.2d 494 (1973). (Washington's defendant-protecting law immaterial to case involving only Oregon defendants; therefore, applying Oregon law does not offend Washington's interest).

<sup>33</sup> See Twerski, *To Where Does One Attach the Horses*, 61 Ky. L.J. 393, 399 (1973).

of the state and federal systems is substantial. When a court becomes convinced that a federal solution is absolutely necessary (for whatever reason), it can look to the federal character of the right to give content to the rule that is chosen. Admittedly, in deciding whether to protect the federal fisc in *Clearfield Trust*, the court had to deal fairly with banks. But in deciding the content of the federal rule that was to be chosen there was a clear philosophical bias. The rule chosen was the one that would best protect the federal fisc while not treating the banks unfairly. It remains unresolved, however, what will happen to those cases for which the federal focus provides no direction. Indeed, what happens when the federal perspective demonstrates an internal tension as great as the tension between the state and federal systems what guidelines is the court to utilize for decision making? These questions, I believe, forced the Second Circuit to deny jurisdiction based on federal common law. Agent Orange did not simply pit the state system against the federal system. The federal system was at war with itself. The federal bias could not, in and of itself, tip the scales. If the federal bias could not resolve the tension, there was no reason for not permitting the state-federal tension to rend the case at the seams.

I believe that the Second Circuit was wrong. Even giving it the benefit of the aforestated analysis, the fact remains that *Agent Orange* was remanded to be tried under *Erie-Klaxon*<sup>34</sup> when it should have been clear that no existing choice of law system could resolve the case. A grocery store may find itself temporarily out of sugar or some other staple; a clothing store may be out of shirts or scarves; but a court of law cannot be "out

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<sup>34</sup> Simply stated, the *Erie-Klaxon* doctrine mandates that a federal court sitting in diversity must apply substantive state law as the rule of decision in the case. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). To determine which state's law will apply, the federal court must apply the choice-of-law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). When a case has originated in many jurisdictions but is transferred to a federal court in one jurisdiction, the court must examine the conflicts-of-law rules of the states in which the transferor courts sit. *Van Dusen v. Barrack*, 376 U.S. 612 (1964). In *Agent Orange*, individual claims were filed in all parts of the country, but were transferred to the Eastern District of New York and certified as a class action. *Agent Orange*, 580 F. Supp. at 692. Therefore, once the Second Circuit refused to permit federal common law to govern the case, the district court was forced to examine the choice-of-law rules of each transferor state "to predict what law each state would apply." *Id.* at 693. Judge Weinstein concluded that "under the special circumstances of this litigation, all the transferor states would look to the same substantive law for the rule of decision on the critical substantive issues." *Id.*

of law". By sending the case back to the district court under *Erie-Klaxon* without any idea as to how the choice of law questions were to be resolved, the Second Circuit in effect invited the trial judge to create and innovate—and that was exactly what Judge Weinstein did.

## II. RATIONALITY, EQUALITY, AND JUSTICIABILITY

Judge Weinstein found that no choice of law system presently utilized by any of the states was capable of resolving the potential conflicts in *Agent Orange*. His decision speaks for itself and it is not my intent to parse it line by line. It is necessary, however, to set forth his recitation of the relationships of the parties and their contacts with various jurisdictions so that one can appreciate how wide-ranging and diversified they were. Judge Weinstein noted that in *Agent Orange*:

Injuries arguably occurred in the fifty states and other nations where plaintiffs now live or at one time lived. The original exposure to Agent Orange was at a variety of places in and near Vietnam—i.e., South Vietnam, Cambodia and Laos. The conduct causing the injury was the manufacture of Agent Orange by the defendants and the alleged failure by the defendants to warn the government of the dangers of Agent Orange. Agent Orange was manufactured in factories in New Jersey, Michigan, Arkansas, West Virginia, Missouri and Canada, and perhaps Germany and elsewhere. The basic decision to use it was made in and around Washington D.C. and in South Vietnam by our government officials and those of South Vietnam. The companies responsible for its manufacture are incorporated and have as their main place of business the states of Delaware, New Jersey, Ohio, Michigan, Missouri, Kansas and Connecticut; treated as a unit, their combined sales run into the billions of dollars and have a substantial impact in every state of the union and in many foreign countries. It is difficult to pinpoint any particular states as the location of the failure to warn since what is alleged is inaction, not action. However, the meetings and conferences which plaintiffs allege furthered what they refer to as the "conspiracy of silence" took place in the various states where defendants have their principal place of business. Other states with relevant contacts include Pennsylvania and Texas, where the Herbicide Management Team of the United States armed forces was located, Alabama and Mississippi, the states from where the Agent Orange was shipped, and South Vietnam, where it was stored and used. Adding to the factual complexity is that of mixture. The products manufactured were so mixed and so labeled that it is not possible to determine

which manufacturer's product was used at any time or place.<sup>35</sup>

Even with the multiplicity of contacts, the question arises — why could not each domiciliary state (either pre- or post transaction) claim an interest in applying its law to its domiciliaries? If the sole question were the rationality of applying its law to each individual claimant, it is likely that each state could make out a case for applying its law under interest analysis.<sup>36</sup> The problem arises when the entire galaxy of state interests is revealed. Once the competing claims of interested states are presented there is no rational method for choosing among them. The large number of states that would have a substantial claim to application of their laws would overwhelm the interest of any particular state in applying its own law. When one adds to this the fact that the soldiers and the defense contractors were acting in response to instructions from the federal government, the interests of the other states are implicated not only as individual states but also as members of a community of states. The interests of the individual state and the individual litigant are simply dwarfed.<sup>37</sup>

If the Second Circuit was correct, we cannot establish the content of a federal common law because of the absence of a mechanism for establishing a national interest. I am aware that Judge Weinstein argued that the Second Circuit only found against federal question jurisdiction and not against the creation

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<sup>35</sup> *Agent Orange*, 580 F. Supp. at 700-01.

<sup>36</sup> It is unlikely that such a finding would violate the guidelines of *Allstate Ins. Co. v. Hauge*, 449 U.S. 302 (1981). In *Allstate*, the Supreme Court held that a state may constitutionally apply its own law to a case as long as that state has "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 313. For a many facted exploration of *Allstate* see *Choice of Law Theory After Allstate Insurance Co. v. Hauge*, 10 *HOFSTRA L. REV.* 1 (1981).

<sup>37</sup> In recent years there has been an attempt to formulate special choice of law rules to deal with product liability conflicts. They are set forth in Symposium on Interest Analysis in Conflict of Laws: An Inquiry Into Fundamentals With a Side Glance at Products Liability, 46 *OHIO ST. L. J.* 590-93 (1985). An in depth evaluation of various proposals is beyond the scope of this article. Suffice it to say that none of the proposals comes to grips with the serious inequality problem raised by Agent Orange and other mass torts. Furthermore, many of the proposals admit to a substantive plaintiff bias. See e.g. Weintraub, A Defense of Interest Analysis in the Conflict of Laws and the Use of that Analysis in Product Liability Cases, 46 *OHIO ST. L. J.* 493, 504 (1985). Given the very substantial legislative response to the product liability crisis there is a very real question whether a plaintiff-bias reflects shared multijurisdictional attitudes toward compensation.

of a national common law by states utilizing state choice of law rules.<sup>38</sup> Nonetheless, if the court refused to exercise jurisdiction because it could not determine the content of federal common law, then there is good reason to question the authority of the district court to do so by a more circuitous method. In terms of alternatives, Judge Weinstein played with the idea of using forum law. Certainly under the *Currie* analysis forum law should not be displaced unless the law of another forum has a superior claim to application. Judge Weinstein argued that the national interest had a stronger claim to application than that of any particular forum. I believe that the argument begs the question. If the Second Circuit was not prepared to identify such an interest, how could the district court do so? I am convinced that the necessity of seeking out such a national solution rather than applying the forum law stems from the gross inequality that would have resulted had forum law been applied. If, in fact, forum law was used as a fallback to decide individual cases before the court it would not resolve the inequality problem.<sup>39</sup> Only the most compelling state interests should permit a court to become the tool for fostering grossly unequal results. Forum law may be a tool for deciding a case for which no other resolution is possible, but it does not justify the application of different rules of law to large numbers of litigants. It is at this juncture that minimum rationality loses out to gross inequality. It was for this reason that Judge Weinstein was forced to create a national standard.

Finally, Judge Weinstein had to concern himself with the very real problem of whether *Agent Orange* could be tried under a multiplicity of rules of law. The Second Circuit in *In re Diamond Shamrock Chemical Company*, expressed "considerable skepticism" as to the existence of a national consensus rule and suggested that variations in state law could be handled by subclassing.<sup>40</sup> I believe that the Second Circuit was indulging in

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<sup>38</sup> *Agent Orange*, 580 F. Supp. at 697. Judge Weinstein explained that although federal common law does not control the case by its own force, states often adopt federal statutes and common law when fashioning their own laws. *Id.* at 695. The Second Circuit's decision forbade the use of federal common law as a basis for jurisdiction but did not preclude the application of federal law or a national consensus approach if state courts chose to look to these as the rules of decision in their cases. *Id.* at 698.

<sup>39</sup> In *Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965(1985), the Court held that forum law could not be applied in a class action when it was clear that the forum had no "interest in claims correlated to that state." *Id.* at 2980.

<sup>40</sup> *In re Diamond Shamrock Chem. Co.*, 725 F.2d 858, 861 (2d Cir.); (subclasses of

wishful thinking. The number of potential conflicts in *Agent Orange* would have turned it into a procedural nightmare. At some point a court must ask whether fidelity to the nuances of state law should overwhelm the practical problems attending the litigation of a lawsuit. When one considers the justiciability question in the context of the flimsy claim of any single state to the application of its law over the law of any other state, the decision in favor of a single national standard becomes even more compelling.

I conclude that the choice of a national consensus rule of law to govern *Agent Orange* was correct. As Judge Weinstein indicated in his opinion, the adoption of a multistate substantive conflicts rule had been widely discussed in the literature.<sup>41</sup> The most significant obstacle to its implementation has been the high administrative cost that would attend the formulation of such rules in individual cases. In the context of a class action in which tens of thousands of claims are implicated, this concern is of no moment. To test whether such a standard could be formulated, I have chosen to examine how it would operate in the context of the defendant identification issue.

### III. FORGING A NATIONAL CONSENSUS STANDARD - AGENT ORANGE AND DEFENDANT IDENTIFICATION

The *Agent Orange* litigation raised the dual problem of the indeterminate plaintiff and the indeterminate defendant. Plaintiffs had to attempt to prove that a particular plaintiff had suffered harm from exposure to Agent Orange. Even assuming that plaintiffs could establish that the entire soldier population faced a higher statistical likelihood of contracting the various diseases that Agent Orange was alleged to have caused, there was a very real problem of identifying any *particular* plaintiff as having contracted a disease as a result of the Agent Orange exposure and not from some other source.<sup>42</sup> In addition, it was clear that

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plaintiffs according to variation of state law acceptable solution under unique factors of this case), *cert. denied* 465 U.S.1067,(1984).

<sup>41</sup> *Agent Orange*, 580 F. Supp. at 693 (citing Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 971 (1983); Trautman, *The Relation Between American Choice of Law and Federal Common Law*, 41 LAW AND CONTEMP.PROB. 105, 120 (1977)).

<sup>42</sup> Even those who are sharply critical of applying a "substantive super law" have recognized that in a case like Agent Orange with relevant contacts so dispersed that no single law can be plausibly chosen that the creation of a multi-state substantive law may

plaintiffs would have difficulty in identifying which of the seven *Agent Orange* defendants caused the harm to any particular plaintiff. The herbicide was shipped to depots in Alabama and Mississippi by the seven defendants with no identification other than an orange stripe on the outside of the barrel. Barrels were then forwarded to Vietnam with no additional markings. The dioxin content of the batches varied from defendant to defendant, and the contents of the barrels were often mixed with other defendants' barrels and sprayed in mixed form from the same airplane. Furthermore, as a result of repeated sprayings, the environment contained the combined product of any number of defendants' *Agent Orange*. The military treated all *Agent Orange* as fungible and never sought to identify zones in which the products of any one defendant were to be used exclusively. Thus, one-on-one causation between a particular defendant's product and a particular veteran's injury could not be established.

Authority throughout the country is sharply split as to the correct method for resolving the problems of the indeterminate defendant. Plaintiffs therefore presented a broad range of theories, some of them novel, to meet the demands of the law with regard to establishing causation and defendant identification. The defendants vigorously contested the application of the causation theories to the unique facts of *Agent Orange*. It is clear that the adoption of some of them would have created serious choice of law problems. Whether some of the more novel defendant identification theories presented by plaintiffs and adopted by the court would raise conflict of law problems is hard to determine. After setting forth the various alternatives, I shall examine whether there is any hope that these diverse strains point to a credible national consensus standard.

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be necessary. See, e.g. Kozyris, *Interest Analysis Facing Its Critics — And Incidentally What Should Be Done About Choice of Law For Products Liability?*, 46 OHIO ST. L. J. 569, 572 (1985). Recent literature has focused on this problem. See, e.g., Delgado, *Beyond Sindell: Relaxation of Cause-in-Fact Rules For Indeterminate Plaintiffs*, 70 CALIF. L. REV. 881 (1982); Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982); Rosenberg, *The Causal Connection in Mass Exposure Cases: A Public Law Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). See also *Allen v. United States*, 588 F. Supp. 247, 428 (D. Utah 1984) (although plaintiffs' injuries may have been caused by other sources, statistical evidence may prove that defendant's conduct was a substantial factor in plaintiffs' injuries).

### A. *Alternative Liability.*

In the seminal case of *Summers v. Tice*,<sup>43</sup> two hunters negligently fired their guns in the direction of the plaintiff at the same time. It was impossible to ascertain which of the defendants fired the shot that injured the plaintiff. The California court held that under these circumstances the defendants were jointly and severally liable unless they could absolve themselves of liability individually. Justice Traynor characterized the *Summers* burden-shifting rule as being

based on the policy that it is preferable to hold liable a negligent defendant who did not in fact cause the injury than to deny an innocent plaintiff any remedy when it cannot be determined which of the defendants is responsible for the harm but it appears that one of them was.<sup>44</sup>

It was the contention of plaintiffs that the *Agent Orange* facts made out an a fortiori case for the application of the *Summers* burden-shifting principle. In *Summers*, one defendant whose bullet missed was nevertheless held liable because he was unable to meet the burden of proving that his bullet did not hit the plaintiff and that he was thus totally free from causal relation to the plaintiff's injuries. In contrast, each of the defendants in *Agent Orange* is alleged to have been causally responsible for some indeterminate amount of harm to the plaintiff class. This brings the case much closer to section 433(b)(2) of the Second Restatement of Torts, which provides:

Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.<sup>45</sup>

Admittedly, it cannot be established that any single plaintiff suffered as a result of the combined fault of all of the defendants. Nonetheless, defendants whose fault was causally related to the injuries suffered by the class would walk away unscathed even though both *fault and cause* had been established. The es-

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<sup>43</sup> 33 Cal. 2d 80, 199 P.2d 1 (1948).

<sup>44</sup> *Vasquez v. Alameda*, 49 Cal. 2d 674, 682-83 n.2, 321 P.2d 1, 7 n.2 (Traynor, J., dissenting).

<sup>45</sup> RESTATEMENT (SECOND) OF TORTS § 433(b)(2) (1965).



cape hatch would be the inability to establish the causal relation between any single defendant's product and the harm suffered by any given plaintiff. This was the very evil that the Restatement sought to avoid. In addition, unlike the defendants in *Summers*, the defendants in *Agent Orange* were not strangers to each other. Each of them knew that their products would be commingled when sprayed. This brought *Agent Orange* closer in concept to the pollution cases in which the independent tortious conduct of several defendants produces a single indivisible injury.<sup>46</sup>

The defendants took sharp issue with the application of alternative liability to the *Agent Orange* fact pattern. They contended that in deciding whether alternative liability is appropriate in a product liability case, courts have focused on a number of factors: (1) whether the cause of the harm complained of was undisputed; (2) whether all of the possible tortfeasors were before the court; and (3) whether the defendants were in a superior position to offer evidence of identification, or were responsible for plaintiff's inability to identify the manufacturer.<sup>47</sup> Defendants argued that at best the causal relationship between dioxin and the injuries complained of was tenuous. Therefore, utilizing the extreme measure of shifting the burden of proof to defendants when the injuries were based on such a thin causal thread entailed a considerable extension of the *Summers* doctrine, in which only defendant identification and not causation itself was in question. Defendants further argued that the applicability of *Summers* was even more questionable because not all of the causal agents that could be responsible for plaintiffs' injuries were before the court as defendants. Defendants suggested that many Agent Orange symptoms could have resulted from munitions, antimalarial drugs, chlorinated insecticides, organophosphorous insecticides, illicit drugs, microorganism diseases endemic to Southeast Asia, and psychological problems arising from exposure to the war theatre.<sup>48</sup> Finally, defendants argued

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<sup>46</sup> *Michie v. Great Lakes Steel Div.*, 495 F.2d 213 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974); *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952).

<sup>47</sup> *Agent Orange*, 597 F. Supp. at 827. *See, e.g., Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1016-17 (D.S.C. 1981).

<sup>48</sup> *Agent Orange*, 597 F. Supp. at 827; *cf. Starling v. Seaboard Coastline R.R. Co.*, 533 F. Supp. 183, 191 (S.D. Ga. 1982) (injuries caused by asbestos exposure not limited

that they were in no better position than plaintiffs to identify the true causal agents, since they were excluded from the military's decisions of where, when and how to spray Agent Orange.

More telling than these arguments is the fact that most courts that have examined alternative liability in the context of a complex product liability case have rejected its use as a burden-shifting device. Thus, most courts that have ruled on the DES and asbestos cases, for example, have generally refused to apply alternative liability.<sup>49</sup>

One must conclude that, although the alternative liability theory had much to commend it, there was good reason to doubt whether the trial court would have adopted it. Even if it had been adopted, there was a real question whether the Second Circuit would have approved its application to *Agent Orange*.<sup>50</sup>

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to asbestos products; other products may have caused injuries).

<sup>49</sup> See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982); *Starling v. Seaboard Coastline R.R. Co.*, 533 F. Supp. 183 (S.D. Ga. 1982); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981). Only the Michigan Supreme Court in *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 343 N.W.2d 164, cert. denied, 105 S. Ct. 123 (1984), has applied the alternative liability theory to a DES case. See also *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1 (burden of proof shifted to defendants in case where tip of forceps broke off during surgery and was left in plaintiff's spine), cert. denied, 423 U.S. 929 (1975); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980) (lower court adopting alternative liability theory in DES case). In *Hall v. E.I. DuPont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), the court recognized alternative liability as a burden-shifting device but quite clearly limited its application to breaches of duty that are "substantially concurrent in time and of a similar nature." *Id.* at 380. Since the various failure to warn duties in *Agent Orange* spanned a significant period of time and reflected different states of knowledge among the various defendants whose products contained differing amounts of dioxin, there is considerable doubt as to the applicability of this limited alternative liability approach to *Agent Orange*.

<sup>50</sup> 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980). The *Sindell* opinion has received a mixed reception from courts and scholars. Several courts have directly adopted *Sindell* or some variation thereof. See, e.g., *Collins v. Eli Lilly & Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 105 S. Ct. 107 (1984) (court applied risk contribution theory in which market share was one of a number of factors used to assign percentage of fault among defendants); *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, rev'd, 681 F.2d 344 (5th Cir. 1982). See also Note, *Market Share Liability: A New Method of Recovery for DES Litigants*, 30 CAT. U.L. REV. 551 (1981). Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981).

A substantial number of courts however, have, rejected the market share approach even in the DES cases. See, e.g., *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981) (market share approach held to be against public policy of South Carolina); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589 (D.S.C. 1981); *Morton v. Abbott Laboratories*, 538 F. Supp.

## B. Market Share Liability

Another approach to the problem of defendant identification is that offered by the California Supreme Court in *Sindell v. Abbott Laboratories*.<sup>51</sup> The *Sindell* court was faced with DES plaintiffs who could not identify the specific manufacturer of the DES pills taken by their mothers that caused the vaginal cancers from which plaintiffs suffered. The court held that if the companies comprising a substantial share of the DES market were joined as defendants, then each defendant would be liable to pay its own market share unless it could establish that its pills were not the cause of the particular plaintiff's injuries. In light of the fact that almost all (if not all) of the companies in the Agent Orange market were named as defendants, the *Agent Orange* plaintiffs proposed the application of "market share" liability as a way to resolve the defendant identification problem. Presumably no defendant would be able to establish that its product was *not* the cause of a particular plaintiff's injuries and would thus be unable to exculpate itself from liability on a case-by-case basis.

The appropriateness of the market share theory to *Agent Orange*, however, is complicated by two factors. First, there is a sharp split in authority as to whether "market share" is an acceptable method for the resolution of the defendant identification problem. Second, there are special problems in applying market share to *Agent Orange*.

Although the market share theory has been found accept-

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593 (M.D. Fla. 1982); *Tidler v. Eli Lilly & Co.*, 95 F.R.D. 332 (D.D.C. 1982); *Payton v. Abbott Laboratories*, 386 Mass. 540, 437 N.E.2d 171 (1982). It has similarly been rejected by the majority of courts that have considered it in asbestos cases on both policy and factual grounds. *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983), cert. denied, 465 U.S. 1102 (1984); *Hannon v. Waterman S.S. Corp.*, 567 F. Supp. 90 (E.D. La. 1983); *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183 (S.D. Ga. 1982); *In re Related Asbestos Cases*, 543 F. Supp. 1152 (N.D. Cal. 1982); *Prelick v. Johns-Manville Sales Corp.*, No. 79-2206, (D. Md. Dec. 11, 1981); *Garcia v. Johns-Manville Sales Corp.*, 1981 Asb. Lit. Rep. 3931 (M.D. Fla. Aug. 28, 1981); *Aguilar v. Johns-Manville Sales Corp.*, 1981 Asb. Lit. Rep. 4141 (N.D. Ohio July 6, 1981). It should be noted that in several of the asbestos cases market share was held to be unnecessary since the plaintiffs were able to identify specific defendants. See, e.g., *In re Related Asbestos Cases*, 543 F. Supp. 1152 (N.D. Cal. 1982). Scholarly writings have been sharply critical as well. See, e.g. Fischer, *Products Liability - An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Note, *Beyond Enterprise Liability in D.E.S. Cases - Sindell*, 14 IND. L. REV. 695 (1981).

<sup>51</sup> 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

able in the DES cases, there is a general hostility towards its use in the asbestos cases based on the fact that asbestos products, unlike DES, are not generic products. As one court noted "asbestos fibers are of several varieties, each used in varying quantities by defendants in their products, and each differing in its harmful effects."<sup>52</sup> *Agent Orange* approximates the asbestos cases since there is general agreement that the dioxin content of the Agent Orange differed from manufacturer to manufacturer.

It might have been possible to fashion a formula based on gallons sold and dioxin content so that a form of dioxin share of the market could be derived.<sup>53</sup> In light of the doubt expressed with regard to the accuracy of *Sindell's* market share apportionment approach, it is questionable whether courts would be willing to add a new complicating factor that would move significantly beyond *Sindell*.

### C. Concerted Action

A significant aspect of plaintiffs' attempt to overcome the problem of defendant identification was their argument that the defendants conspired together to keep the government ignorant of the dangers of dioxin. Where a true conspiracy exists, either through express agreement or through tacit understanding, there is no need to establish a separate causal connection between each of the co-conspirators and the plaintiff's injuries; the acts of one are the acts of all.<sup>54</sup>

Plaintiffs built their conspiracy argument on a series of documents arising from meetings arranged by Dow Chemical Company to deal with the "dioxin" problem. For example, on March 19, 1965, Dow wrote letters to the Hooker, Diamond and Hercules Chemical Companies, inviting them to come to Midland to discuss the toxicological problems caused by the toxic impurities in dioxin. In a subsequent memorandum dated July 9, 1965, the chief toxicologist at Hercules wrote concerning his telephone conversation with a Dow executive:

He then stated that Dow was extremely frightened that this situation

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<sup>52</sup> *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982).

<sup>53</sup> There was speculation that the defendants apportioned damages among themselves on this basis.

<sup>54</sup> W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 46 (5th ed. 1984); *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968); *Nelson v. Nason*, 343 Mass. 220, 177 N.E.2d 887 (1961).

might explode. They are aware their competitors are marketing 2,4,5-T [dioxin] which contains alarming amounts of acnegen and if the government learns of this, the whole industry will suffer. They are particularly fearful of a Congressional investigation and excessive restrictive legislation on manufacture of pesticides which might result.<sup>55</sup>

It was the plaintiffs' position that Dow feared that disclosure to the Government that the herbicides it purchased were contaminated by dioxin would cause retaliatory action that would hurt Dow's plans to capitalize on its dominant and profitable position in the military and domestic herbicide market. Plaintiffs further argued that evidence collected from 1965-1970 supported the theory that a tacit agreement existed on the part of all manufacturers of Agent Orange to withhold information from the government concerning the production, testing and health hazards associated with the use of Agent Orange.

Defendants vigorously disputed the existence of any conspiracy. As evidence of separate rather than conspiratorial behavior they pointed to the fact that each defendant had its own process for manufacturing Agent Orange resulting in differing levels of dioxin contamination. They noted that the meetings which lay at the center of plaintiff's conspiracy argument were nothing more than an invitation to all American producers of the herbicide trichlorophenol to discuss toxicological problems caused by the possible presence of highly toxic impurities in trichlorophenol.

There is a plausible argument that even if the defendants did not have a tacit understanding to withhold dioxin information from the government, they followed parallel lines of behavior that kept the government ignorant of important information. Significantly, such parallel behavior was not held sufficient to support a civil conspiracy in the DES cases.<sup>56</sup>

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<sup>55</sup> Plaintiffs' Concerted Action Memorandum, Exhibit 8.

<sup>56</sup> See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); *Morton v. Abbott Laboratories*, 538 F. Supp. 593 (M.D. Fla. 1982).

The only DES case to find liability on the basis of "conscious parallel conduct" was *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982). However, *Bichler* is slim authority to support the proposition that a conspiracy may be established by conscious parallel behavior. In *Bichler*, the New York Court of Appeals noted that the defendants failed to object to a jury instruction that based liability for conspiracy on "conscious parallel conduct." *Id.* at 583, 436 N.E.2d at 187, 450 N.Y.S.2d at 781. It thus limited its role on appeal to deciding whether the evidence supported a jury instruction on conscious parallelism. It specifically left open the question of whether

#### D. *Enterprise Liability*

The fountainhead for the concept of enterprise liability is *Hall v. DuPont de Nemours & Co.*<sup>57</sup> In that case, thirteen children sued six blasting cap manufacturers, alleging that they had been injured by the explosion of the caps in twelve unrelated accidents between 1955 and 1959.<sup>58</sup> Although the six defendants were not the only possible sources of blasting caps, they did comprise virtually the entire blasting cap industry in the United States. Plaintiffs claimed that the practices of the industry were deficient because they failed to take reasonable safety precautions and failed to provide adequate warnings. They alleged that members of the industry had adhered to industry-wide safety standards and had delegated substantial safety investigation and design functions to their trade association.<sup>59</sup> The court found that plaintiffs who were unable to establish defendant identification could shift the burden to defendants to disprove their causal connection, provided that plaintiffs "demonstrate defendants . . . joint awareness of the risks at issue in this case and their joint capacity to reduce or affect those risks."<sup>60</sup>

In some ways the *Agent Orange* defendants may be likened to the defendants in *Hall*. The seven *Agent Orange* defendants made up the entirety of the phenoxy herbicide manufacturers in the United States. Plaintiffs argued that defendants met and found common ground to help control what was feared as potentially intrusive government regulation of their industry. They banded together to form the Industry Task Force on Phenoxy Herbicides under the auspices of the National Agricultural Chemicals Association for the purpose of determining toxic tolerances of phenoxy herbicides. Plaintiffs further alleged that the defendants utilized their very substantial control of information and research to keep numerous government agencies in the dark as to the reality of the dioxin contamination of the phenoxy herbicides.

Though there are similarities to *Hall*, the differences are significant. No industry-wide standard for acceptable dioxin

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as a matter of law parallel conduct would suffice to establish a civil conspiracy. *Id.*

<sup>57</sup> 345 F. Supp. 353 (E.D.N.Y. 1972).

<sup>58</sup> *Id.* at 359.

<sup>59</sup> *Id.* at 378.

<sup>60</sup> *Id.*

contamination of the phenoxy herbicides was ever developed. This fact supports the position that this was not an industry seeking joint control of risks. Defendants' meetings may have led to less information flowing to the government, but they did not lead to a uniform industry standard. Defendants argued with considerable justification that the flow of information to the government was substantial and came from various sources within the industry. They pointed to a large body of published literature that contained significant data concerning dioxin.<sup>61</sup> In short, defendants argued that theirs was a competitive industry acting in diverse ways rather than an industry exercising centralized control of its risks. The enterprise theory would therefore have been a difficult one to sustain.

E. *Failure to Warn About the Dangers Attendant to Commingling Its Product with Those of Other Chemical Company Defendants.*

As was noted earlier, defendants contended that the government indiscriminately mixed and used the various Agent Orange formulae manufactured by the respective defendants. The problem of defendant identification was thus laid at the doorstep of the military. Plaintiffs argued that the very opposite was true: each defendant failed to warn the government about the dangers attached to improper use of its own product. In plaintiffs' view, the onus of identification was on the defendant chemical companies and not on the government.

The facts of this case brought together very closely related failure to warn duties. The first was that each defendant failed to warn about the dioxin content in its own product. This arose from a duty to warn that a product contaminated with any level of dioxin was unsafe. Since the military had no knowledge of the danger level of any of the products, it had no reason not to mix and use the defendants' product or to be concerned about the effects of commingling. The duty to warn also arose from the risk of bio-accumulation of the defendants' dioxin both in the environment and in the body tissues of each plaintiff. Plaintiffs

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<sup>61</sup> A summary review of the information that came to the government's attention can be found in Judge Pratt's decision on the defendant's motion for summary judgment based on the government contract defense. *In re "Agent Orange" Prod. Liab. Litig.*, 565 F. Supp. 1263, 1266-74 (E.D.N.Y. 1983).

argued that the continued presence of dioxin in the environment and in body tissues served as a constant exposure not unlike a constant source of radiation implanted in the body.

In order to place this argument in perspective, consider the position of the defendants who contended that their products were relatively "clean." It was the plaintiffs' contention that a manufacturer who knew that its product was to be used and mixed with products of greater contamination had a duty to warn against such contamination. Thus, any defendant who knew that its product was to be mixed with products of other defendants that contained significantly higher dioxin levels and knew that such mixing would contaminate its product had a duty to warn of the dangers attendant to such mixing. This duty to warn is especially significant in view of plaintiffs' allegation that the defendants knew of the contamination of the Agent Orange shipped to Vietnam by the various manufacturers, and further knew that the government did not know of such contamination. The mixing of products then became a foreseeable use. Thus, there is no problem of defendant identification; each defendant could be considered the cause of more dangerous and greater volumes of contaminated Agent Orange being sprayed by virtue of each defendant's failure to warn.<sup>62</sup>

The manufacturers of the heavily contaminated Agent Orange had a similar duty to warn of mixing their products with Agent Orange that was less contaminated. Mixing the more and less contaminated batches of the herbicide necessarily results in a larger volume of Agent Orange with more gross dioxin in the mix. Since all defendants had some dioxin in their Agent Orange, the manufacturers of the more highly contaminated herbicide had a duty to warn that using their highly contaminated product with other lesser contaminated products would make the others more dangerous.

There was yet another dimension to this argument based on classic failure to warn decisions. Not only was the commingling of the Agent Orange in question in this case, but the cumulative

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<sup>62</sup> That a defendant is required to warn of dangers attendant to a foreseeable use or even a foreseeable misuse of its product is supported by a plethora of cases in literally every jurisdiction. *See, e.g., Reid v. Spadone Mach. Co.*, 119 N.H. 457, 404 A.2d 1034 (N.H. 1979); *Tingey v. E.F. Houghton & Co.*, 30 Cal. 2d 97, 179 P.2d 807 (1947); RESTATEMENT (SECOND) OF TORTS § 388-389 (1979).



effect of the various dose levels of the Agent Orange that were sprayed in Vietnam were at issue as well. If the defendants knew that their dose levels differed drastically, they had a duty to warn about the inappropriateness of use in an environment where such varying dose levels existed.<sup>63</sup>

For all the ingenuity of this argument, the reality is that it is predicated on a duty to reveal to the government information concerning the Agent Orange manufactured by other defendants. Defendants argued with some justification that there exists no common-law duty to inform a purchaser about the properties of a competitor's product; this is similar to the case of the good samaritan or the rescuer for which the law has not recognized a duty to come to the aid of another.<sup>64</sup>

F. *Defendants Who Were Aware of Industry-Wide Problems with the Contamination of Agent Orange Had an Independent Duty to Inform the Government of the Contamination*

The preceding section outlined a duty to warn the military of the substantial dioxin contamination problem facing the industry as a result of the various processes used to manufacture the herbicides. In addition, the plaintiffs took the position that once the defendants became aware of the problems that existed with regard to the manufacture of dioxin-contaminated Agent Orange, they had a duty to warn the government not only about their own product, but also about the problems that arose throughout the industry. According to the plaintiffs this would be necessary even if a defendant could establish that its own product was dioxin free. Plaintiffs argued that *Agent Orange* was not the classic case of a stranger who refuses to come forward and rescue another. In this case, long standing relationships in which the parties have come to trust each other's judgment may have been a predicate for the imposition of an affirmative duty to act.<sup>65</sup>

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<sup>63</sup> See, e.g., *Tucson Indus., Inc. v. Schwartz*, 15 Ariz. App. 166, 487 P.2d 12 (1971); *Burch v. Amsterdam Corp.*, 366 A.2d 1079 (D.C. Cir. 1976).

<sup>64</sup> See W. PROSSER & W. KEETON, *THE LAW OF TORTS* §56 (5th ed. 1984); *Carrier v. Riddell Inc.*, 721 F.2d 867 (1st Cir. 1983); *Osterland v. Hill*, 263 Mass. 73, 160 N.E. 301 (1928).

<sup>65</sup> See, e.g., W. Prosser, J. Wade & V. Schwartz, *CASES AND MATERIALS ON THE LAW*

The plaintiffs argued that the following facts suggested that the government had a right to expect the defendants to come forward with information concerning the products of other companies that defendants knew to be seriously contaminated with dioxin:

1) The special expertise of several defendants with regard to testing for dioxin. This technique was available to the defendants and not to the government. 2) The knowledge to substantial certainty that the products of the others would be intermingled and sprayed as if they were fungible. The defendants knew that the products were different in that they contained varying amounts of dioxin. The government did not know and treated all the Agent Orange as fungible. 3) The unprecedented exposure of hundreds of thousands of soldiers to the dioxin hazard. This was the largest spraying of herbicides in the history of mankind. 4) The "take charge" attitude of Dow and other defendants with regard to the information that was to be disseminated and the attempt to jealously guard it from public view.<sup>65</sup>

The implication for the causation issue is obvious. By hypothesis, the breach of the duty to inform the government was specifically directed to the highly toxic product of all co-defendants. The very product that caused the harm was allowed to be deployed because the defendants failed to warn not only of the dangers indigenous to their own products but also of dangers inherent in the products the entire industry was selling.

The defendants' response to this argument followed their responses as discussed earlier. They contended that no independent duty to warn of industry-wide problems has ever been recognized short of conspiracy or enterprise liability.

Each of these defendant identification theories poses its own choice-of-law problems. Plaintiff's various home states subscribed to different theories. A federal court would have to decide for each plaintiff whether his or her home state would apply its law or defer to the law of another interested state under its choice-of-law rules. The prospect of deciphering these conflicts for the hundreds of parties in *Agent Orange* was overwhelming.

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OF TORTS, 422-46 (6th ed. 1982). Relationships having far less moment than that between the government and the chemical companies have been held to trigger a duty to act affirmatively. See *Connelly v. Kaufmann & Bear Co.*, 349 Pa. 261, 37 A.2d 125 (1944)(store owner and customer); *Hutchinson v. Dickie*, 162 F.2d 103 (6th Cir. 1947)(boat owner and social guest); *Parvi v. City of Kingston*, 41 N.Y.2d 553, 362 N.E.2d 553, 394 N.Y.S.2d 161 (1977)(police officer and drunken citizen).

<sup>65</sup> *Agent Orange*, 580 F. Supp. at 709-10.

G. *What is a National Consensus and Where Can One Find It?*

Having briefly outlined the arguments that the plaintiffs utilized to overcome their inability to identify the particular defendant causing harm to a particular claimant, it is evident why I am somewhat skeptical about the ability to forge a national consensus standard. It is relatively clear that what Judge Weinstein meant by "national consensus" is a multistate substantive rule that accommodates the interests of the conflicting states.<sup>67</sup> This is generally accomplished by forging a rule that reflects values that are common to all the states, but compromising among the various rules that are in conflict. That is how I believe Professor von Mehren defines a multistate substantive rule.<sup>68</sup> In my own writings I have presented a similar definition.<sup>69</sup>

If that is what Judge Weinstein had in mind, I believe he would find that the defendant identification issue would not lend itself to the creation of a multistate substantive rule of law. On this issue there is a fundamental difference of opinion as to whether tort law should impose collective liability. It is fair to say that the courts have been literally screaming at one another. I do not believe that there is an artifice available to bridge the gap. Even if one could argue that in the generic product case there is likely to be ultimate agreement in the courts for some form of burden shifting, one simply cannot predict with any confidence that in a case involving a product that differs from defendant to defendant (as in *Agent Orange*), courts would agree that burden shifting should be undertaken.<sup>70</sup>

The only way out was to create a national rule, not based on consensus or compromise, but rather on what the court believed to be the preferable national solution to the problem of defendant identification. In short, the only way to resolve the conflict problems in this case was to create a federal common law. This

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<sup>67</sup> *Agent Orange*, 580 F. Supp. 690, 709, 710 (E.D.N.Y. 1984).

<sup>68</sup> von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974); von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW AND CONTEMP. PROBS. 27 (1977).

<sup>69</sup> Twerski & Mayer, *Toward a Pragmatic Solution of Choice-of-Law Problems - At the Interface of Substance and Procedure*, 74 NW. U. L. REV. 781 (1979).

<sup>70</sup> In *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985), the court rejected the market share burden-shifting approach for non-generic products.

the Second Circuit refused to do. Judge Weinstein sought to dance around the problem by suggesting that a national consensus could emerge. I believe that he too was wrong.

Judge Weinstein brilliantly demonstrated that classic choice of law theory would not work in *Agent Orange*. But a multistate substantive rule was equally unattainable. The only solution was a national solution. There is evidence that courts are seriously troubled over unequal treatment of litigants in mass tort litigation.<sup>71</sup> The *Agent Orange* choice of law decision represents a glimmer of hope that the courts may be coming to grips with the pledge of allegiance; we may yet find ourselves to be "one nation indivisible."

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<sup>71</sup> In *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314 (5th Cir. 1985), for example, the Fifth Circuit split sharply as to whether federal common law should be applied to resolve difficult issues in the asbestos cases.

