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STATEMENT OF INTEREST

Amici are service organizations, most of which have been chartered by Congress to represent the interests of veterans of the Armed Forces and their families. They join together in an unusual, if not unique, solidarity in appealing violations of American Vietnam war veterans' rights of due process; rights which in any other legal case are routinely accorded to every citizen of the United States injured by a defective product.

Admiral Elmo R. Zumwalt, Jr. (USN Ret.), Chairman of the Agent Orange Coordinating Council, served as Special Assistant to the Secretary of Veteran Affairs and was Chief of Naval Operations in Vietnam. Under Admiral Zumwalt's leadership, The Agent Orange Coordinating Council has provided a forum for many veterans' service organizations to coordinate their interests in representing Vietnam veterans affected by Agent Orange.

The American Legion, chartered by Pub. L. No. 66-47 (September 15, 1919), is the nation's largest veterans' organization and has a long history of working on behalf of Vietnam veterans who suffer from the effects of exposure to defoliants used during the Vietnam War. A large number of the American Legion's 3.1 million members are Vietnam veterans.

The Vietnam Veterans of American (VVA), chartered by Pub. L. No. 99-318 (May 23, 1986), which is the largest chartered veterans organization dedicated exclusively to the interests of the more than 2.5 million Vietnam veterans, has consistently supported the rights of all affected Vietnam veterans to a fair process for assessing their Agent Orange claims.

AMVETS, chartered by @ (June 23, 1947), has over 200,000 members, many of whose rights to due process have been violated by the *Agent Orange* settlement.

The Marine Corps League, chartered by the 75th Congress (January 5, 1937), has many Vietnam veterans among its 37,000 members, and has actively supported the rights of Vietnam veterans to fair compensation for their exposure to Agent Orange.

The American Ex-Prisoners of War, chartered by Pub. L. No. 97-234 (August 10, 1982), includes many Vietnam veterans among its 33,000 members.

The Jewish War Veterans of the U.S.A., chartered by Pub. L. 98-391 (August 21, 1984), has long been involved in efforts to obtain long-delayed justice for Vietnam veterans.

The Military Order of the Purple Heart of the U.S.A., Inc.,

chartered by Pub. L. No. 85-761, includes many Vietnam veterans among its 17,000 members.

The Blinded Veterans Association, chartered by Pub. L. No. 85-769 (August 17, 1958), includes many Vietnam veterans among its 27,000 members.

The Polish Legion of American Veterans, U.S.A., chartered by Pub. L. No. 98-372 (June 23, 1984), includes many Vietnam veterans among its 16,000 members.

The Women's Army Corps Veterans Association, chartered by Pub. L. No. 98-584 (October 30, 1984), is the only chartered organization exclusively representing women, and it includes among its 5,000 members many women who were assigned to duties in Vietnam where they were potentially exposed to Agent Orange.

The Catholic War Veterans, USA, Inc., chartered by Pub. L. No. 98-382 (August 17, 1984), counts among its membership many Vietnam veterans.

The Regular Veterans Association, chartered by Pub. L. No. 74-844 (June 29, 1936), was originally founded on August 10, 1880 and its more than 15,000 members have had a long history of interest in the exposure of Vietnam veterans to Agent Orange.

This brief is also joined by the following unchartered organizations: 1) The Fleet Reserve Association, which includes among its 170,000 members veterans who were exposed to high doses of Agent Orange in Vietnam; 2) The National Association of Military Widows, which includes many widows of Vietnam War veterans among its membership; 3) The Agent Orange Data Base, which is dedicated to understanding the multifarious nature of the health problems that exposure to Agent Orange has inflicted upon Vietnam war veterans; and 4) The Veterans of the Vietnam War, Inc., whose more than 10,000 members have suffered many maladies as a result of their exposure to Agent Orange.

Amici on behalf of the members of the above organizations, allege that herbicides, and particularly Agent Orange, were defectively manufactured by the respondents so as to cause contamination of their product by unwanted and highly toxic substances, including dioxin. Some of the *Amici*, especially the American Legion, have actively developed scientific information concerning the health effects on Vietnam veterans of their exposure to Agent Orange and dioxin. These organizations have both conducted their own scientific studies and petitioned Congress to

authorize studies to be performed by others. As the average 20 year latency period passes for injuries, such as cancer, these studies are now creating a body of evidence that leaves little doubt that Vietnam war veterans were injured by respondents' defective products in the process of serving our country during the course of our nation's longest war.

Unfortunately, as a result of the judicially supervised settlement, known as *In re Agent Orange*, many Vietnam veterans have been systematically denied rights normally accorded to others by our nation's legal system. In particular, those veterans who had manifested no injuries as of the date of the settlement have been denied fundamental constitutionally derived rights to notice, legal representation, and trial by their peers. In the course of this denial, one single federal court has also managed to usurp jurisdiction from each and every state of our federal system. The decisions by the Federal District Court for the Eastern District of New York and the Second Circuit Court of Appeals have prompted this unprecedented coalescence of organizations in this *Amici Curiae* brief on behalf of their members and the veterans of Vietnam generally — war veterans and their families who should be those most entitled to enjoy the fruits of our democratic liberties.

Amici believe that this Court should grant review in this case, based particularly upon the significance of the deprivation of these due process rights when viewed from the perspective of the losses suffered by individual veterans and their families, such as Captain and Mrs. Ivy. The Second Circuit has acknowledged that it has authorized the abridgement of various due process rights accorded by the Seventh and Fourteenth Amendments, but has stated that the individual rights of individual veterans, including Captain and Mrs. Ivy, were outweighed by "society's interest in the efficient and fair resolution of large-scale litigation."[1] A17. While "efficient claims administration" may never be sufficient justification for the abridgement of constitutionally derived rights, the abridgment of those rights here is not made in the typical context of class action

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[1] This Court has stated that the right to jury trial applies to personal injury actions. See *Woodell v. Int'l Brotherhood of Elec. Workers, Local 71*, 112 S.Ct. 494, 498 (1991). ("[A] personal injury action is of course a prototypical example of an action at law, to which the Seventh Amendment applies.")

claims, such as the collection of relatively small sums of royalties, as in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), or disputes over fees charged by title insurers, as in *Ticor Title Insurance Co. v. Brown*, No. 92-1988 (pending), but rather regarding claims which literally implicate matters of life and death.

SUMMARY OF ARGUMENT

The petition for *certiorari* should be granted. The judgment below illustrates the grave dangers in any settlement that permits attorneys for already injured plaintiffs to obtain a settlement while trading off the rights of absent, currently uninjured future claimants. In this case, two core due process requirements — adequate notice and representation — were abandoned; an abandonment which was justified by the courts below in the interests of "finality." A17, A35.

I. There was no notice to future claimants. Although the scope of the class was expanded upon settlement, and after certification, to include claimants, like Captain Ivy, who had not yet manifested injury, no additional notice was given. While the meaningfulness of notice to uninjured plaintiffs may be questionable, A17, since they would be forced to speculate upon the possibility of becoming ill in the future, that problem should lead neither to a justification for the failure to deliver any notice whatsoever nor to a presumption of the waiver of constitutionally protected liberty and property interests. Waivers of constitutionally protected rights, such as the liberty and property interest in pursuing a cause of action, should not be valid unless they are knowingly and intelligently made.

II. Future claimants were unrepresented at the *Agent Orange* settlement. No sub-classes were created, nor was a guardian appointed to safeguard their interests. The courts below justified this utter lack of representation for absent future plaintiffs by citing the "unique circumstances" of the case. A21. However, this explanation does not remedy the divergent interests of present and future claimants, including different concerns about statutes of limitations and repose, disparate interests in obtaining immediate financial recovery, and different abilities to await further scientific and medical developments which could clarify issues of causation.

III. The reiteration of notice and adequate representation requirements by this Court in the class action setting — and

particularly in the mass tort setting — would give important guidance to lower courts throughout the country as they struggle with the problem of balancing the perceived need to encourage class action settlements against the individual rights that the judiciary is obligated to protect. *Amici* submit that the courts below did not hold true the balance between these competing interests. Instead, the courts approved an unwarranted invasion of the rights of American veterans — as well as plaintiffs in a wide range of circumstances — and sanctioned an extraordinarily broad use of federal judicial power. There are accepted mechanisms by which federal courts can preserve the rights to due process and trial by jury without imposing an unreasonable burden on the settlement of mass tort cases. The route taken by the courts below is not among these mechanisms.

ARGUMENT

Amici are well situated to advise this Court on the costs, both in legal and in human terms, posed by the Second Circuit's extraordinary disregard of due process rights. The judgment below creates a threat to settled law, constitutional values of due process, and to the welfare of thousands of severely ill veterans and their families. In this light, the question that must be answered is to what extent and under what circumstances may present claimants and their attorneys extinguish or compromise the rights of "future" claimants, *i.e.* those whose injuries have not yet become manifest, in the class action setting.

Indeed, even at present there is a conflict in the lower courts over whether present claimants may ever extinguish in any manner the rights of future claimants. In *Shults v. Champion Int'l Corp.*, 821 F.Supp. 517, 520 (E.D. Tenn. 1992), the court held: "[N]o settlement that precludes future, unknown causes of action can be considered fair, reasonable, or in the best interests of the class as a whole. " 821 F.Supp. at 524 The court explained that it would only "approve release language that barred . . . any class member's personal injury claim arising prior to the date the class was closed." 821 F.Supp. at 524. The court thus refused, without limitation, to approve a settlement that barred class members' personal injury

claims arising *after* the class was closed.[2]

Nevertheless, the Second Circuit has, in the interest of judicial efficiency, fashioned a broad and far-reaching doctrine, which enabled Captain Ivy to be bound despite a lack of notice or an opportunity to opt out, A17, and despite the absence of separate representation. A21. This solution has been fashioned as if Congress had delegated to the Second Circuit a broad power to create public policy concerning the compensation for all Vietnam veterans to the exclusion of every other state and federal court in the country.[3] The result has been to settle the claims of Captain and Mrs. Ivy for a pre-ordained "nuisance" value of approximately $3,200.00; a value which was established three years before Captain Ivy was ever diagnosed with cancer and four years before he died. Such a monstrous result cannot be proper under governing law. Indeed, the flaws in the judgement below indicate that any settlement purporting to extinguish the rights of future claimants should be gravely suspect and carefully reviewed.

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[2] See, for example, *Yandel v. PPG Indus. Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974) (court denied certification of class under 23(b)(3) by employees of an asbestos plant, expressing concern that "because of the nature of the injuries claimed, there may be persons that might neglect to 'opt out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer, or other pulmonary disease. These persons would be bound by decision rendered in this litigation.") *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 626-27 (E.D. Ark. 1981) (Present employees cannot represent future employees in discrimination suit. "To rule otherwise,. . . the court fears that the due process considerations which permeate the decision of whether or not to certify a class would be ignored."); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1975) (class action could not include future plaintiffs because "overbroad framing of the class may be so unfair to absent members as to approach, if not amount to, deprivation of due process." (citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1125 at 1127 (5th Cir. 1969))).

[3] The district court applauded the Federal government for making compensation available to veterans through the Department of Veterans Affairs pursuant to the Agent Orange Act of 1991, Public L. No. 102-4, 105 Stat. 11 (1991). A58-59. While *Amici* also applaud this legislation, *Amici* point out that the American taxpayer is now paying for all of the expenses for the injuries caused by Agent Orange rather than respondents who had greater responsibility for those injuries, but who have through this class action settlement so far managed to cap their losses.

I. FUTURE CLAIMANTS HAD NO NOTICE THAT THEIR CLAIMS WERE BEING EXTINGUISHED

This Court has held that in class actions seeking money damages notice to absent claimants is not only required by Rule 23(b)(3), but also by due process. *Shutts, supra.* Yet, in the *In re "Agent Orange"* cases, notice was never given to "future" claimants in violation of their rights of due process. The extent of this deprivation is elucidated when related to the particular circumstances of Captain and Mrs. Ivy.

Captain Ivy served in Vietnam in the Marine Corps and was exposed to Agent Orange during his tour of duty there. For much of his later adult life, however, this experience was at best a distant memory. Thus, when in 1978 other Vietnam war veterans and their families first began to bring state law tort actions against the present respondents seeking monetary relief for injuries they believed were due to their Agent Orange exposure, A3, Captain Ivy, uninjured at that point, paid no attention to the claims made by these other veterans. He was then of course unaware that these multiple state-law tort actions were consolidated into a single action known as *In re "Agent Orange" Product Liability Litigation.* A3, A68.

Because Captain Ivy had filed no lawsuit, had consulted with no attorneys, and had never contacted the Veterans Administration regarding his exposure to Agent Orange in Vietnam, he had no way of knowing that on December 16, 1983, the district court would certify a Rule 23(b)(3) class with opt-out rights. A3-A4. Nor was Captain Ivy himself subsequently notified of the existence of the class, which was defined to include:

> "[T]hose persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange or other phenoxy herbicides .... "

A34-A35. 100 F.R.D. 718, 729 (E.D.N.Y. 1983) Captain Ivy, of course, did not have a belief in 1983 that he had been "injured" by Agent Orange, nor should he reasonably have had such a belief, as he had no injuries in 1983.

Thus, Captain Ivy did not know nor should he have known that the deadline for opting out of this Rule 23(b)(3) class was May 1, 1984, and he was completely unaware that six days later, on May 7, 1984, the named plaintiffs and their attorneys would settle these cases for what the Second Circuit has itself characterized as essentially "nuisance value," 818 F.2d at 171. He was most certainly not aware that the settling parties would, after class certification, unilaterally change the definition of the class and substantially extend its breadth by agreement: "The Class specifically includes persons [including, apparently, Captain Ivy] who have not yet manifested injury." 597 F.Supp. 740, 862 at 865 (E.D.N.Y. 1984) (settlement agreement), aff'd, 818 F.2d 145 (2d Cir. 1987), *cert.* denied, 484 U.S. 1004 (1988). Nor was he aware that despite this modification, which substantially broadened the scope of the class, the district court would fail to direct that a second notice be distributed to veterans who were covered by this broadened class definition, i.e. those, like Captain Ivy, who did not believe that they had manifested an Agent Orange related injury.

Of course, this was not an issue which was of much concern to Captain Ivy in 1984. It only became a concern to him in 1987 when, in his forties, he was diagnosed with cancer. It was at this time, while investigating the cause of his own cancer, that he realized its connection to Agent Orange, as well as the existence of the earlier *Agent Orange* class action litigation. A69. It was only then that Captain Ivy was informed that the case he had not yet brought had already been settled for "nuisance value" without anyone's ever contacting him and without his ever contacting an attorney or having one appointed to represent his interests.[4] A69.

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[4] Curiously, the prospect of state court actions had been provided for by the settlement. A42 The settlement agreement expressly contemplated "state-court actions alleging harm caused by exposure to Agent Orange," and provided for indemnification to respondents of up to $10 million from the settlement funds "for all final compensatory judgments" obtained in such suits. 597 F. Supp at 864-5. The district court explained that "Vietnam veterans exposed to Agent Orange" could thus be compensated if "future evidence" would sustain a claim for "specific ailments" in such state cases. 689 F.Supp. at 1259. The Second Circuit then reinterpreted this provision by stating that the provision was really meant to cover only opt outs from the class as certified. A22 However, those plaintiffs who specifically opted out of the class as certified had by definition already had their cases coordinated before the

Shockingly, at A17 the Second Circuit could only offer a rather ominous basis for this abrogation of the due process rights of Captain and Mrs. Ivy :

> "[S]ociety's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. ... [P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good."

In contrast to the Second Circuit's cavalier approach to due process rights, this Court has been more concerned with the constitutional rights of individuals. This Court has previously held that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). Rights to opt out cannot be abridged in a class action for money damages: "[W]e hold that due process requires **at a minimum** that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts, supra*, at 813-814.[5]

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district court. The reinterpretation of the settlement agreement by the Second Circuit therefore makes little sense and is contrary to the district court's own understanding of the provision. A42

[5] Indeed, few activities are subject to more extensive record keeping than military service; if the rights of future claimants can be abolished in this context without individualized notice, then the implications of the Second Circuit's decision are unlimited. By contrast, in an early decision regarding Rule 23 requirements, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), this Court demonstrated the full extent to which the rights of individual class members must be safeguarded under Rule 23. *Eisen* raised the issue of adequate notice in a Rule 23(b)(3) antitrust and securities class action with millions of members and a class representative with only a $70 stake. Despite the size of the individual claims, this Court held that the class could proceed only with individual notice to all two million class members whose names and

Finally, what is most astonishing is the Second Circuit's willingness to countenance an abridgement of due process rights on the basis that "[p]roviding individual notice and opt-out rights to persons who are unaware of an injury would do little good."[6] Ironically, the Second Circuit may well have been correct: individuals with no present injuries are not in a position to make intelligent decisions regarding the waiver of their rights.[7] However, inexplicably, the Second Circuit's response to this problem was to authorize a judicial presumption of the waiver of constitutional rights instead of, more appropriately, increasing the vigilance with which those rights are protected. A judicially countenanced presumption of waiver is directly contrary to numerous decisions of this Court. See *Brady v. United States*, 397 U.S. 742, 748 (1970)

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addresses could be identified with reasonable effort. *Id.* at 176, holding that "[i]ndividual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23." *Id.* at 175-76. Significantly, the Court in *Eisen* stated that such notice was required so that each individual class member "may request exclusion from the action and thereby preserve his opportunity to press his claim separately. . . ." *Id.* at 176. See also *Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351 (1983) ("*Eisen's* notice requirement was intended to inform the class member that he could 'preserve his opportunity to press his claim **separately**' by opting out of the class." (empbasis in original)).

[6] Other Circuits have not been as willing as the Second Circuit to abridge the notice and opt out rights of absent future claimants. See, *e.g.*, *Dante v. Dow Corning Corp.*, 143 F.R.D. 136, 137 (S.D. Ohio 1992) (requiring individual notice by first-class mail to all potential future breast implant claimants); *Payton v. Abbott Labs*, 83 F.R.D. 382, 393 (D. Mass. 1979) (refusing to bind women whose mothers had ingested the drug DES unless personal notice was sent to each member) (order vacated on other grounds, *Payton v. Abbott Labs, 100 FRD 336 (D.Mass. 1983))*; *In re UNR Indus.*, 29 B.R. 741, 747 (N.D. Ill. 1983) ("[I]t is inconceivable that any notice short of personal notice to every person whom the debtors would seek to bind — and this could include theoretically, every person in this country — would be acceptable under the principles of due process.")

[7] As stated by a leading scholar in the field of class actions: "For class members who cannot currently identify themselves for purposes of protecting their interests with respect to a class action purportedly commenced on their behalf, an opt-out right within a court-designated period of time ... is of no beneficial use." 1 Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, § 1.23 (3rd. Ed. 1992).

(the waiver of constitutional rights "must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences."); *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.")

II. THE LACK OF ANY REPRESENTATION FOR FUTURE CLAIMANTS DURING THE SETTLEMENT PROCESS

Settlement classes, in any setting, present serious potential for abuse. See, *e.g.*, Manual for Complex Litigation, Second, *supra*, § 30.41, at 236 ("As a practical matter, the dynamics of class action settlement may lead the negotiating parties — even those with the best of intentions — to regard the interests of the class members too lightly."). Indeed, all participants in class action settlement negotiations have extraordinary incentive to settle. From the perspective of defendants, settlement is an opportunity to cap risk. From the perspective of the courts, settlement may be an opportunity to clear court calendars of tens of thousands of cases. And, not least of all, from the perspective of class counsel, the economic rewards of settlement can be extraordinarily enticing.

For these reasons, adequate representation of absent claimants has become one of the cornerstones of due process guarantees in class actions, requiring, among other things, that class representatives and their counsel have the same interest as absent class members. As this Court stated in *Hansberry v. Lee*, 311 U.S. 32 at 42-43, 45 (1940):

> "[S]election of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires."

In the within instance, however, the class as originally certified was not defined to include those veterans who had not yet manifested injury, and, as such, by definition the counsel for the class as originally certified did not represent claimants whose interests were

"the same" as those of Captain and Mrs. Ivy.[8]

Both the district court and the Second Circuit herein acknowledged the dangers that could be posed in the absence of separate representation for potential future claimants like Captain Ivy. A58. As the Second Circuit noted, "'[m]any genuine conflicts of interest' [can exist] in a situation such as this" when there is no represented sub-class to decide whether to extinguish the unaccrued future claims of absent plaintiffs who had not yet suffered injury. A17 (quoting the district court). Nevertheless, no class representative was ever designated for Captain or Mrs. Ivy or for any other absent "future" claimant, nor were the future claimants represented by a separate attorney, trustee, or guardian. 996 F.2d at 1437, A18, A21.

Recognizing that future claimants received no separate representation, both the district court and the Second Circuit excused this admitted failure to accord Captain Ivy his rights to counsel, holding that constitutional rights of due process may be extinguished when a court makes a *post hoc* determination that no harm was caused by the abrogation of the right. Thus, both courts dismissed the requirement of separate counsel with the assertion that harm from any conflict had "never materialized," because all veterans would become eligible for identical "nuisance value" payments from the Fund. (Neither the district court nor the Second Circuit mentions the fact that pursuant to the terms of the settlement the vast majority of veterans, i.e. those with injuries causing less than total disability or death, would not be entitled to receive any recovery at all.) A18. However, the applicable test of a conflict of interest is not to judge it on a *post hoc* basis, but rather to examine whether at the time of settlement there was a potential for conflict between the present injury and the "future" injury classes.[9] Clearly, such potential for

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[8] See generally *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); Note, "Abuse in Plaintiff Class Action Settlements: The Need for A Guardian During Pretrial Settlement Negotiations," 84 *Mich. L. Rev.* 308 (1985).

[9] The Comment to the American Bar Association's Model Rule 1.7(b) on Ethics and Professional Responsibility states that "[a]n impermissible conflict may exist by reason of . . . the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Cited by *ABA Committee on Ethics and Professional Responsibility*, Formal

conflict did exist. Nevertheless, the Second Circuit concluded from its own factual review that "[t]he unique circumstances" of this case rendered separate class counsel "unnecessary."[10] A21.

Notwithstanding the inherent deficiencies in the Second Circuit's willingness to abandon constitutionally required due process rights subject to its own *post hoc* determination, both the Second Circuit and the district court were in error when they stated that a conflict had "never materialized" because future claimants and current claimants were treated identically. First, they were not treated identically. Those claimants who had present injuries which they subjectively believed were related to their exposure to Agent Orange had the ability to judge the merits of their claim and reasonably decide whether to opt out of the class. On the other hand, Captain Ivy, who had not yet manifested any injuries, received no notice of the class and, in any case, could not intelligently evaluate the prospects of litigating the case for his injuries, because his injuries had not yet manifested.[11]

Op. 93-371, at 6.

[10] Unlike here, in bankruptcy, as well as in limited fund class actions under Rule 23(b)(1), it is at times necessary to account for future claims in order to preserve a portion of insufficient assets to cover future liabilities that have not matured. Yet, even in the few cases in this setting that have recognized future claimants, in light of the inescapable conflicts that may arise, the courts have typically segregated future claimants from present claimants into separate sub-classes with separate counsel. *See In re Amatex Corp.*, 755 F.2d 1034, 1042-43 (3d Cir. 1985)("[N]one of the parties currently involved in the reorganization proceedings have interests similar to those of future claimants, and therefore future claimants require their own spokesperson."); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 134 F.R.D. 32 (E.D.N.Y. 1990) (requirement of appointment of counsel for future claimants in limited fund action). *In re Forty-Eight Insulations, Inc.*, 58 B.R. 476, 478 (Bankr. N.D. Ill. 1986); *In re Johns-Manville Corp.*, 36 B.R. 743, 749 (Bankr. S.D.N.Y. 1984), aff'd, 52 B.R. 940 (D.C. 1985); *In re UNR Industries, Inc.*, 46 B.R. 671, 677 (Bankr. N.D. Ill. 1985).

[11] In 1984, Captain Ivy's claim was not even justiciable. This Court has in *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, at 2139 (1992) established an "irreducible constitutional minimum of standing" which requires that "the plaintiff must have suffered an 'injury in fact' - an invasion of a legally-protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" 112 S.Ct. at 2136 In the absence of unbounded clairvoyance, the risk of Captain Ivy's developing

In addition, there were benefits conveyed to present claimants that were not equally conveyed to Captain Ivy. First, many present claimants were benefitted by the fact that class actions toll statutes of limitations or repose, and in the absence of the class filing they would have seen their claims evaporate. Others, who had suffered their injuries much earlier, were able to take advantage of participation in the settlement and avert the possible defense by respondents on the basis of the lapse of applicable statutes of limitations or repose. Captain Ivy had no incentive to compromise his claim for any such benefits, because his Texas statute of limitations did not begin to run until the time of the diagnosis of his injury, and Mrs. Ivy's statute did not begin to run until her husband's untimely death.

Secondly, presently injured claimants had the rational incentive to seek an immediate, albeit less adequate settlement, because their illnesses caused financial pressures, including the present costs of treatment, and these costs were clearly defined. By contrast, Captain Ivy did not experience the same financial pressure nor did he have any knowledge of the potential costs of his treatment and disabilities in 1984.

Third, while presently injured claimants were obligated by statutes of limitations and repose to file their claims in a timely fashion, often these claims had to be filed at a time when medical causation was insufficiently developed. In claims related to a toxin's ability to cause cancer, epidemiological evidence to support causation often requires sufficient latency in time from exposure to demonstrate a significant increase in cancers of interest. When the *Agent Orange* cases were initially filed in 1978, at maximum claimants were only sixteen years post-exposure and at minimum six years. Often mean cancer latency for environmental toxins is in excess of twenty years. Dr. Jenkins Affidavit, Appendix Second Cir., No. 92-7575, at 133-134. Indeed, the district court recognized that "[i]t is, of course, possible that in a few years a sudden increase in diseases associated with Agent Orange will be

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an Agent Orange related cancer at some indefinite time in the future was, by definition, a speculative or conjectural injury rather than a current or imminent "injury in fact" as necessitated by *Lujan*. For a claim to be ripe for adjudication, a plaintiff must show that "he has sustained or is immediately in danger of sustaining a direct injury." *Laird v. Tatum*, 408 U.S. 1, 13 (1972).

revealed."[12] 597 F. Supp. at 795. In this sense, if independent counsel had been appointed for Captain Ivy, that counsel could have been able to assert that it was unreasonable for Captain Ivy to accept a "nuisance value" settlement when, in all likelihood, his ability to substantiate medical causation at trial would improve with time, obviating the need to accept "nuisance value" for his claims.

In fact, despite the Second Circuit's protestations to the contrary, which are based upon material *dehors* the record,[13] scientific knowledge, obtained since the date of the settlement, has, as expected, strengthened claims that respondents' product was responsible for the occurrence of cancer in American war veterans. See, *e.g.*, Dr. Jenkins Affidavit, Appendix, 2d Cir., No. 92-7575, at 129. Indeed, in 1991 Congress directed the Secretary of Veterans Affairs under Public Law 102-4 to "conduct a comprehensive review and evaluation of the available scientific and medical

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[12] The District Court went on to find that for the purpose of the opt-out claims before it, "[i]t appears unlikely that such proof will develop in time to affect th[at] litigation." 597 F. Supp. at 795. The Court then dismissed the claims of those persons who had exercised their opt-out rights. 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd* 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988). The grounds for dismissal were that the then-available scientific evidence was insufficient to demonstrate a causal link between Agent Orange exposure and plaintiffs' illnesses, and that the "government contractor defense" preempted state tort law. Only the latter ground was upheld on appeal, as the Second Circuit found that the district court's ruling was inconsistent with the law applied in the Second Circuit on the admissibility of expert testimony under the Federal Rules of Evidence, Rule 703. 818 F.2d at 189. This would remain true today under this Court's ruling in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993).

[13] A20. While not mentioning Petitioners' substantial record evidence, the Second Circuit went outside the record and cited both Han K. Kang, *et al.*, *Dioxins and Dibenzofurans in Adipose Tissue of U.S. Vietnam Veterans and Controls* (1990) and 13B Arthur L. Frank, *Courtroom Medicine: Cancer*, Sections 25A.00, at 25A-4 (1992), quoting from Frank as follows: "'[F]urthermore, no deaths attributable solely to exposure to Agent Orange and its dioxin contaminant have been reported.' A20. However, the danger of such an *ex parte* evidentiary process is that a court risks the possibility of basing its decision on inaccurate information. Petitioners cited below, Brief for Shirley Ivy (2d Cir.) at 47, a case tried by counsel for *Amici* wherein the family of a worker exposed to dioxin received a $1.5 million verdict for his death due to soft tissue sarcoma. *Overmann v. Syntex (USA), Inc.*, No. 852-02-681 (Div. 5), Circuit Court, City of St. Louis (Mo. July 10, 1991).

information regarding the health effects of exposure to Agent Orange." Pursuant to that charge, the National Academy of Sciences' Institute of Medicine Committee to Review the Health Effects in Vietnam Veterans of Exposure to Herbicides reported in August 1993 that there was sufficient evidence to conclude that there is a positive association between herbicide exposure in Vietnam and three classes of cancer (soft tissue sarcoma, Non-Hodgkin's lymphoma, and Hodgkin's disease) and that there was suggestive evidence of an association with three other classes of cancers (respiratory cancers, prostate cancer, and multiple myeloma.) *National Academy of Sciences Institute of Medicine, Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (1993).[14] See attachment to July 28, 1993 letter of Robert Hager to Clerk of the United States Court of Appeals for the Second Circuit.

Lastly, the district court itself recognized that "[f]uture claimants might . . . disagree with prior litigation strategy or find new evidence in support of their claims." A57. As it has turned out, one of the most difficult impediments to recovery for Vietnam war veterans in 1984 was the district court's perception of the expansive nature of the immunity given to defense contractors. Recently, the Second Circuit, by Chief Judge Oakes, has held that the district court's rulings regarding this defense did not survive this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), which established a far narrower contractor defense than that applied by the district court. See *Joint Eastern and Southern District of New York Asbestos Litigation*, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990).[15]

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[14] To date, the Veterans Administration has announced regulations to compensate veterans for each of the above cancers, with the exception of prostate cancer.

[15] *Boyle, supra*, as applied to the facts here, would require that a jury, and not a judge, decide the issue of whether the government ordered its herbicide to be contaminated with deadly dioxin, which the government clearly did not do (see *Joint Eastern and Southern District Asbestos Litigation, supra*, at 635 n.8) and whether the other elements of the defense were satisfied. 487 U.S. at 512, 514.

III. EFFICIENCY DOES NOT JUSTIFY THE WHOLESALE DENIAL OF DUE PROCESS RIGHTS TO FUTURE PLAINTIFFS, ESPECIALLY WHEN THERE ARE ALTERNATIVE MEANS OF ENCOURAGING SETTLEMENTS

In addition to trenching the rights of future claimants, the decision below approved a remarkable expansion of federal judicial power. The district court's justification for upholding the parties' belated contractual agreement to extinguish the rights of Captain Ivy was that the parties at the table were "[c]oncerned with the potential for new actions and recogniz[ed] the need for finality." A35. Concerned "that class action settlements simply will not occur" if they are made "too difficult" by according future claimants due process rights, the district court held that Captain Ivy's potential future claims in 1984 were outweighed by the "interests of presently injured plaintiffs as well as defendants in achieving a settlement." A58. The Second Circuit concurred that the abridgement of the constitutional rights of Captain Ivy was justified by "society's interest in the efficient and fair resolution of large-scale litigation." A17.

Fundamental constitutional principles cannot, however, be disregarded, even for the sake of supposed efficiency. As this Court has stated:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Fuentes v. Shevin, 407 U.S. 67, 90 n. 22 (1972) (quoting *Stanley v. Illinois*, 405 U.S. 645, 656 (1972)).[16]

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[16] See also *In re: General Motors Corp. Engine Interchange Litigation*, 594 F. 2d 1106, (7th Cir. 1979) *cert. denied*, 444 U.S. 870 (1979), wherein the Seventh Circuit disagrees with the Second Circuit, stating that

The Second Circuit's decision defies the history and very purpose of the Seventh and Fourteenth Amendments. The right to jury trial, as an essential civil right, was intended to safeguard against the type of supervisory dominion of the judiciary that the Second Circuit now advocates.[17] As the Chief Justice has stated:

> "The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence. ... The founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary."

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 338, 343 (1979) (Rehnquist, J., dissenting).

Additionally, the Second Circuit has ignored the very significant state interest in preserving the right of persons, like Captain and Mrs. Ivy, to bring suit subsequent to the manifestation of injury or the occurrence of death. Pursuant to the "discovery rule," virtually every jurisdiction in the United States has authorized a tolling of the statute of limitations until an injured person knows or should know of his or her injury.[18] As stated in the dissent of Judge Frank:

> Except in a topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent

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"[c]onvenience and expediency cannot justify disregard of the individual rights of even a fraction of the class."

[17] See, for example, Morris S. Arnold, "A Historical Inquiry Into the Right to Trial By Jury in Complex Civil Litigation," 128 *U. Pa. L.* Rev. 829, 832-35 (1980).

[18] *Urie v. Thompson*, 337 U.S. 163 (1949). See also *Barnes v. A.H. Robbins Co., Inc.* 476 N.E. 2d 84 (Ind. 1985) (collecting decisions) and 3 Louis R. Frumer and Melvin I. Friedman, *Products Liability*, §26.04 (1992) (collecting decisions applying discovery rule).

> railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of logical "axiom," that a statute of limitations does not begin to run against a cause of action before that cause of action exists, i.e., before a judicial remedy is available to a plaintiff.

Dincher v. Marlin Fire Arms Co., 198 F.2d 821, 823 (2d Cir. 1952). Yet, while virtually every jurisdiction has by now heeded these words, the Second Circuit would seem to add the paradoxical exception that an individual's claim can be settled by others before his or her cause of action exists.

It is clear then that the district court's interest in "finality," A35, cannot possibly justify the denial of the right to notice and adequate representation for future claimants. Even the presumption of the courts below that "class action settlements will simply not occur," A58, unless the rights of absent future claimants are violated is wrong. For instance, in the case of *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992), *appeal pending*, No. 92-3973 (6th Cir.), that court, faced with the same desire of the respective parties to extinguish future rights, approved a settlement that compromised the rights of unknown future claimants in a class action involving convex/concave heart valves only on the condition that any class member who ultimately did suffer a fractured heart valve would be permitted *at that time* to opt out of the class, to arbitrate, or to accept payment under the terms of the settlement. There is no reason that a similar settlement could not have been approved by the courts herein.[19]

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[19] Indeed, respondents are seeking a result by way of settlement which they could not have achieved through trial. Due process does not permit a class trial judgment to bind absent class members with respect to particularized damage issues. Personalized damage and causation issues require individual trials. See *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990) (reversing trial court's decision to adjudicate individual damages claims through statistical extrapolation from representative plaintiffs). *See, e.g., 3* Newberg, *supra*, § 17.39 ("Anytime a mass tort gives rise to injuries that occur over a period of time . . . inevitably there will be claims that arise in the future after an action for this mass tort has been permitted to be maintained and adjudicated as a class action. Those unaccrued future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples.")

In the *In re Agent Orange* cases, the thrust of the settlement could still be preserved by ruling that notice was effective to those who manifested Agent Orange-related injuries at the time of the settlement. On the other hand, those, like Captain and Mrs. Ivy, who subsequently manifested their injuries should be given an opportunity to be informed of their right to pursue their cause of action in a civil jury trial and afforded a reasonable period of time in which to exercise that right. Those who do not opt out within that period would then be bound by the terms of the settlement agreement.

Settlements, even for "future" claimants with future opt out rights, when predicated upon realistic evaluations of the prospective success of claims, will likely be favored by claimants in that they avoid significant transaction costs for both sides. However, when such settlements are unreasonable, it is then more likely that "future" claimants will opt out and return to the civil justice system. In the *Agent Orange* cases, if future claimants truly face the dim prospect of success that is envisioned by the Second Circuit, A21, then the risk that many veterans will opt for a return to the civil justice system will be minimal. Nevertheless, fundamental constitutional rights are no less precious to veterans of our Armed Forces than they are to every other American, and veterans should be given at least the opportunity for a jury trial that is generally accorded to all other victims by our system of laws.

CONCLUSION

[DEPENDS ON AVAILABLE SPACE]

Respectfully submitted,

[NAMES AND ADDRESSES HERE]