

LEGAL PRINCIPLES GOVERNING DISTRIBUTION OF CLASS ACTION SETTLEMENTS

The Special Master is guided by United States law and, in particular, the precedents of this Court in devising a plan to distribute the \$1.25 billion settlement agreed to by the parties and approved by the Court in In re: Holocaust Victim Assets Litigation.¹ Courts in the United States have adopted a number of equitable principles to guide the distribution of class action settlements. The set of opinions which address the settlement in In re “Agent Orange” Product Liability Litigation, by both the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit, clearly illustrate these principles and provide leading authority on the equitable allocation of class action settlements in this jurisdiction. Moreover, Agent Orange has significant underlying similarities to the present litigation. This Annex, which analyzes the legal principles that guide the allocation of class action settlements, will therefore discuss in detail the Agent Orange decisions, as well as other related case law on the subject of class action settlement distributions.²

AGENT ORANGE LITIGATION

I. Background

The plaintiffs in the Agent Orange class action litigation brought personal injury claims against a number of American herbicide manufacturers on behalf of United States, New

¹ 96 Civ. 4849 (ERK) (MDG) (July 26, 2000, corrected August 2, 2000 E.D.N.Y.) (slip op.).

² Of the numerous opinions issued in connection with the Agent Orange litigation, this analysis will focus on the four which most fully address the principles which guided the settlement distribution: In re “Agent Orange” Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984) (granting preliminary approval of settlement); In re Agent Orange, 611 F. Supp. 1396 (E.D.N.Y. 1985) (detailing distribution plan) (the “Distribution Opinion”); In re Agent Orange, 818 F.2d 179 (2d Cir. 1987) (affirming Distribution Opinion in part, reversing in part, and remanding for further consideration); and In re Agent Orange, 689 F. Supp. 1250 (E.D.N.Y. 1988) (modifying distribution plan on remand to conform to Second Circuit’s decision).

Zealand and Australian servicemen and their families who claimed injuries as a result of the veterans' exposure to certain herbicides, including Agent Orange, during the Vietnam War. The veterans asserted that their exposure caused them to suffer various systemic diseases, their wives to have miscarriages, and their children to sustain birth defects. The plaintiffs' claims were based on a range of legal theories including strict liability, negligence, breach of warranty, intentional tort and nuisance.³

Then-Chief Judge Jack Weinstein of the United States District Court for the Eastern District of New York certified the plaintiff class as

those 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 The class also includes spouses, parents, and children of the veterans born before January 1, 1984 directly or derivatively injured as a result of the exposure.⁴

Although the Court did not create subclasses of plaintiffs, it did direct plaintiffs' counsel to "choose representative claimants for each type of injury alleged."⁵ The size of the class was relatively large: the number of individual claimants was approximately 245,000 at the time the litigation was resolved.⁶

³ In re Agent Orange, 506 F. Supp. 762, 769 (E.D.N.Y. 1980). For a detailed history of the proceedings in the Agent Orange litigation, see also In re Agent Orange, 818 F.2d 145 (2d Cir. 1987).

⁴ In re Agent Orange, 100 F.R.D. 718, 729 (E.D.N.Y. 1983).

⁵ *Id.* at 721-22.

⁶ Approximately 245,000 claims had been received by the time the district court approved the distribution plan. In re Agent Orange, 611 F. Supp. 1396, 1417 (E.D.N.Y. 1985).

II. Settlement Approval/General Principles Regarding Distribution

On the eve of trial, the parties agreed to settle all class claims for \$180 million.⁷ Judge Weinstein, after conducting a number of fairness hearings, conditionally approved the settlement amount to permit immediate work on a distribution plan.⁸ The district court concluded that the settlement was fair to the plaintiffs for several reasons, including the following: (1) the plaintiffs' claims were subject to a number of factual and legal obstacles (in particular, inadequate proof of causation and the impossibility of identifying the manufacturer of the herbicide to which each veteran was exposed) which made a full legal recovery doubtful; and (2) the settlement allowed the plaintiffs to avoid protracted litigation and receive a relatively prompt recovery.⁹

Concurrent with his preliminary approval, Judge Weinstein stated several "General Principles" to guide the parties as they developed a distribution plan. The district court focused on class harmony, low administrative costs, targeted use of scarce settlement funds, and prompt aid. Judge Weinstein urged that any organization established to distribute settlement funds should promote cooperation among the members of the plaintiff class. Otherwise, the district court warned, the settlement fund "may become a reason for divisiveness and disunity that may serve to weaken the just claims of the veterans and their ability to vindicate their rights."¹⁰ Judge Weinstein also advised the parties to keep to a minimum the transaction costs associated with distributing the funds by avoiding complex fact-finding and adjudication of individual claims.¹¹ In addition, recognizing that "[i]t is not possible for all class members to

⁷ In re Agent Orange, 818 F.2d 145, 155 (2d Cir. 1987).

⁸ In re Agent Orange, 597 F.Supp. 740, 763-64 (E.D.N.Y. 1984).

⁹ *Id.* at 749.

¹⁰ *Id.* at 858.

¹¹ *Id.*

receive significant individual compensation,” the district court recommended that “simple criteria for eligibility should be established to assure acceptable targeting of limited settlement funds.”¹² Finally, Judge Weinstein advocated the expeditious development of a distribution plan: “It is better to make some immediate decisions concerning class benefits in order to get prompt aid to some members of the class. To wait for the development of the perfect plan is to lose much of the value of the settlement that makes money available immediately.”¹³

The district court also made some specific observations. In particular, Judge Weinstein emphasized the need for an uncomplicated, streamlined process to certify the plaintiffs’ claims. In that regard,

[i]f some form of proof of exposure to Agent Orange is required, the standard for certification should take into account of the fact that many veterans — and particularly their widows and children — may have difficulty in authenticating claims.¹⁴

The district court also recognized that it would be difficult to award substantial compensation to individual class members given the limited size of the settlement fund and the potential divisiveness of such awards.¹⁵ One remedy the district court suggested would be to set aside a portion of the settlement amount to pay certain specific categories of claims.¹⁶

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 859.

¹⁵ The district court stated: “Although it would be desirable in an ideal setting to compensate fully every veteran exposed to Agent Orange, there is considerable doubt that this can be accomplished. The limited size of the fund, the near impossibility of proving scientifically which adverse health effects are compensable and which are not, the persuasive evidence of need likely to accompany many individual applications, the danger that large compensation awards will further divide rather than unite the Vietnam veteran community — all of these considerations call into question the idea of providing substantial compensation for individual veterans.” *Id.*

¹⁶ The district court proposed that “[a] limited portion of the fund might be earmarked for all class members filing claims who demonstrate both exposure to Agent Orange and the existence of adverse health effects. An additional lump sum amount might be targeted to those veterans suffering from total physical disability or death from a disease such as cancer.” *Id.* at 860.

III. Distribution Plan Approval

The district court considered several distribution plans, including one proposed by the Plaintiffs' Management Committee ("PMC") on behalf of various plaintiffs' counsel, and another submitted by Kenneth R. Feinberg, Esq., the court-appointed Special Master who had assisted the parties in settlement negotiations. Ultimately, the district court adopted, in a modified form, Special Master Feinberg's proposed distribution plan, which Judge Weinstein described as

an elegant solution . . . [combining] insurance-type compensation to give as much help as possible to individuals who, in general, are most in need of assistance, together with a foundation run by veterans with the flexibility and discretion to take care of individuals and groups most in need of help.¹⁷

Under the Special Master's plan, approximately \$150 million would be directly distributed to individual class members who met certain criteria, while another \$45 million¹⁸ would be used to fund a self-governing "class assistance foundation" which would benefit the entire class by promoting the interests of all Vietnam veterans who had been exposed to Agent Orange as well as their affected spouses and children.¹⁹

A. Initial Observations

Before beginning its analysis, the district court acknowledged its obligation to approve a plan which distributed the settlement fund equitably:

The court's responsibility for ensuring that a satisfactory and equitable distribution plan is implemented derives from the requirement that settlement of a class action have court approval. . . . The [Federal Rule of Civil Procedure] 23(e) standard of

¹⁷ In re Agent Orange, 611 F. Supp. 1396, 1400 (E.D.N.Y. 1985).

¹⁸ The original \$180 million settlement fund had been accruing interest since the date of settlement and totaled over \$195 million by the time Judge Weinstein issued his opinion approving the settlement fund distribution plan. *Id.* at 1401.

¹⁹ *Id.* at 1400.

fairness, adequacy, and reasonableness [with respect to class action settlements] “applies with as much force to the review of the allocation [plan] as it does to the review of the overall settlement between plaintiffs and defendants.”²⁰

Judge Weinstein also, as a preliminary matter, repeated that time was of the essence: “Many class members have immediate needs, and much of the value of a settlement lies in the ability to make funds available promptly.”²¹ However, a distribution plan based on traditional tort principles could not, in the district court’s opinion, apply in this case. Judge Weinstein observed that such a plan, which would require a particularized showing of individual causation and injuries, would be impossible “because of a virtual absence of proof of causation, financially impracticable because of administrative costs, and not feasible for other compelling reasons.”²²

B. Rejection of the PMC’s Distribution Plan

The distribution plan submitted by the PMC would have compensated persons with any one of a list of diseases if exposure to Agent Orange could be proven.²³ The district court rejected this plan as “essentially a tort-based compensation scheme, based upon an assumption of a causal connection between Agent Orange exposure and a given disease . . . [which] requires claimants to submit substantial medical, diagnostic and other proof.”²⁴ Judge Weinstein repeated his earlier concern that no substantial evidence of individual or general causation which would link Agent Orange to particular diseases or to a specific plaintiff’s injuries had ever been offered in the litigation.²⁵ Attempting to establish the necessary causal

²⁰ *Id.* at 1402.

²¹ *Id.* at 1405.

²² *Id.* at 1402-03.

²³ *Id.* at 1407.

²⁴ *Id.*

²⁵ *Id.* at 1408.

connection would be time-consuming, psychologically difficult for the plaintiffs, and result in high transaction costs:

Necessarily, the contemplated inquiry would involve a great deal of work by attorneys, doctors and claims administrators. Claimants would have to assemble extensive evidence including sophisticated medical tests to prove specific diseases. Such a requirement would be burdensome, expensive and emotionally trying for the claimants. The transaction costs of such a distribution plan would be substantial.²⁶

Moreover, the plan was potentially divisive, where “a handful of veterans might get large recoveries, while the vast majority would get nothing, all on the basis of controversial and speculative causal distinctions.”²⁷

C. Adoption of the Special Master’s Plan

Before analyzing the distribution plan offered by the Special Master, Judge Weinstein emphasized that

[a] distribution plan for a settlement in a tort class action should as far as possible reflect the traditional tort law principle that individuals will receive monetary compensation for their injuries. . . . Accordingly, a major portion of the settlement fund should be distributed in the form of individual awards if at all possible.²⁸

At the same time, however, the district court reiterated its earlier philosophy that

[t]o be both practicable and fair, a program of individual benefits must minimize transaction costs, be relatively easy to administer and involve relatively simple, understandable and objective eligibility criteria, while maximizing protection of those said to have suffered as a result.²⁹

The formula proposed by the Special Master, the district court concluded, best met these criteria.

²⁶ *Id.*

²⁷ *Id.* at 1409.

²⁸ *Id.* at 1410.

²⁹ *Id.*

1. Structure of Distribution Plan

As adopted, the Special Master's distribution plan made direct individual cash payments to only two categories of claimants: (1) totally disabled veterans who were exposed to Agent Orange, and (2) the survivors of exposed veterans who had died.³⁰ No causal connection between Agent Orange and the compensated injuries was required under the adopted plan. In addition, the degree of exposure to Agent Orange would not be considered in making individual awards.³¹ Significantly, the distribution plan also did not provide for direct payments to veterans who were exposed to Agent Orange in Vietnam and who suffered diseases that were less than totally disabling, or to family members who suffered birth defects or miscarriages, even though such claims were to be released under the settlement. Instead, the Court concluded that a separate "class assistance foundation" which would "fund services to help meet the needs of the entire class" was the appropriate mechanism to compensate such class members.³²

2. Rationale for Limited Individual Payments

The district court justified "channeling individual compensation payments to class members in only certain categories" on a number of grounds.³³ First, "the settlement fund, though large in absolute terms, is not sufficient to satisfy the claimed losses of every class member."³⁴ Second, even in light of the tenuous causal connection between Agent Orange and

³⁰ *Id.* at 1411-12.

³¹ *Id.* at 1415.

³² *Id.* at 1411. According to the district court, "only totally disabled veterans and the surviving spouses or children of deceased veterans will receive individual cash awards. The class as a whole, however, will benefit significantly in other ways. . . . [A]bout one quarter of the settlement fund, or some \$45 million, will be turned over to a class assistance foundation. The foundation will fund services on behalf of the class as a whole, including aid to children of veterans and their families in coping with birth defects. The foundation's work will provide useful and meaningful benefits to those class members not eligible for direct individual awards." *Id.* at 1410.

³³ *Id.* at 1411.

³⁴ *Id.*

the plaintiffs' injuries, the relative strength of different categories of claims must be considered: "[I]f one set of claims had a greater likelihood of ultimate success than another set of claims, it is appropriate to weigh 'distribution of the settlement . . . in favor of plaintiffs whose claims comprise the set' that was more likely to succeed."³⁵ Third, the plan benefits the most needy by targeting for benefits those veterans who have suffered the most severe injuries. Finally, limiting the program to specific categories of claims (death or total disability) without requiring proof of a specific disease or causation would (1) simplify the claims procedure;³⁶ (2) minimize transaction costs "which would almost certainly be overwhelming if any of the other individual award proposals submitted to the court were implemented;"³⁷ (3) thereby increase the overall recovery to the class;³⁸ and (4) avert the factual and legal hurdles the plaintiffs otherwise faced.³⁹

³⁵ *Id.* at 1411 (quoting In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 220 (5th Cir. 1981), *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283 (1982), and citing In re Equity Funding Corp. of America Securities Litigation, 603 F.2d 1353, 1364-66 (9th Cir. 1979); In re Investors Funding Corp. of New York Securities Litigation, 9 B.R. 962, 964 (S.D.N.Y. 1981); Dunn v. H.K. Porter Co., Inc., 78 F.R.D. 50, 53-54 (E.D. Pa. 1978); *cf.* Holmes v. Continental Can Co., 706 F.2d 1144, 1148 (11th Cir. 1983) ("there is no rule that settlements benefit all class members equally" and "higher allocations to certain parties [may be] rationally based on legitimate considerations.")).

³⁶ *Id.* The district court outlined a simple, two-part test to determine whether claimants qualified for individual settlement distributions as totally disabled veterans who were exposed to Agent Orange or survivors of exposed veterans who had died. First, total disability was determined using the Social Security Act's definition of "long term total disability." Survivors would need to "establish the deceased's status as a class member veteran and confirm the existence of at least one eligible survivor," a process the district court characterized as straightforward, most often involving documentary evidence such as death and birth certificates. *Id.* at 1413-14. Second, claimants would need to demonstrate exposure to Agent Orange during military service in Vietnam by filing out a questionnaire which would then be evaluated by objective criteria. *Id.* at 1416.

³⁷ *Id.* at 1411.

³⁸ In the end, the district court noted that "[c]reation of a costly new claims-processing bureaucracy, which would devour money that should go to class members, thus is avoided. 'The proposed method of distribution will maximize the value of the recovery actually received by the class.'" *Id.* (quoting Ohio Public Interest Campaign v. Fisher Foods, Inc., 546 F. Supp. 1, 11 (N.D. Ohio 1982)). Based on the statistical information available at the time, the actual payments to individual death or total disability claimants were projected to be relatively modest. The district court estimated that the maximum award for total disability would be about \$12,800 per individual claimant paid over a ten-year period. *Id.* at 1418. The maximum death benefit was estimated at \$3,400 per claimant, payable in a lump sum. *Id.* at 1420.

³⁹ As the district court noted, "this plan 'obviate[s] the necessity for particularized proof' and is 'a fair
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In conclusion, Judge Weinstein highlighted the need to strike a balance between compassion and pragmatism in developing a plan for individual payments:

In distributing the settlement fund, every possible effort should be undertaken to alleviate the suffering of men, women and children in the class. But compassion, though heartfelt, must be tempered with a down-to-earth sense of what can and what cannot be done. The needs of the class must be weighed against the realities of what can be accomplished given the amount of money available, the danger that administrative, medical and legal costs will bankrupt the fund, and the premise that if anyone was injured by Agent Orange it was the veterans who were directly exposed.⁴⁰

3. Cy Pres Remedy

Although the plan adopted by the district court ensured direct distribution of settlement funds to some individuals (exposed veterans who were totally disabled and the survivors of exposed veterans who had died), Judge Weinstein understood that the majority of plaintiffs, many of whom had health problems or other needs but who were not totally disabled, would not receive individual cash compensation.⁴¹ At the same time, the district court recognized that “[d]istribution of thousands of small individual payments would trivialize the beneficial impact of the settlement fund on the needs of the class.”⁴² To resolve this problem, the

response to the particular difficulties that this class would have in gathering and presenting evidence of damages.” *Id.* (quoting In re Chicken Antitrust Litigation American Poultry, 669 F.2d 228, 240 and n.20 (5th Cir. 1982)) (citations omitted).

⁴⁰ *Id.* at 1412.

⁴¹ *Id.* at 1431.

⁴² *Id.* In a later opinion, Judge Weinstein developed this observation, noting that “[t]he class includes all Vietnam veterans who may have been exposed to ‘Agent Orange’ and related phenoxy herbicides in Vietnam, and the family members of such veterans. The class is therefore significantly larger than the group of people who have filed claims as part of the [Individual] Payment Program. The Payment Program and the Foundation were designed in tandem to maximize the benefit to the class of a multimillion dollar fund that might otherwise degenerate into some quarter of a million small awards incapable of providing any real aid to any class member (amounting to only about \$80 each). Through the funding of services, the Foundation would have offered ‘some benefit from the settlement’ to the majority of claimants who will not meet the eligibility requirements for cash

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district court employed a *cy pres* remedy – a class-wide benefit program in lieu of individual compensation – concluding that “[t]he most practicable and equitable method of distributing benefits to this segment of the class is through funding of services,” by means of “a class assistance foundation.”⁴³

Referring back to his earlier opinion approving the settlement, Judge Weinstein recalled that a class assistance program would “provide Vietnam veterans and their families with

compensation under the Payment Program.” In re Agent Orange, 689 F. Supp. 1250, 1259 (E.D.N.Y. 1988).

⁴³ In re Agent Orange, 611 F. Supp. 1396, 1431-32 (E.D.N.Y. 1985). The equitable doctrine of *cy pres*, or “next best use,” has its origins in the law of charitable trusts, where it was developed to deal with circumstances in which “compliance with the literal terms of a charitable trust became impossible.” State of California v. Levi Strauss & Co., 715 P.2d 564 (Cal. 1986). In such an instance, “the funds would be put to the ‘next best use,’ in accord with the dominant charitable purposes of the donor.” *Id.* at 570 (citing Estate of Tarrant, 237 P.2d 505 (Cal. 1951)). *Cy pres* remedies (also called “fluid recovery” in class action settlements) have been adopted in the class action context pursuant to the equitable powers of the court and are the basis for programs which serve to distribute settlement funds to benefit the class as a whole – the “next best use”. See generally, 2 Herbert B. Newberg and Alba Conte, Newberg on Class Actions § 11.20 (3d ed. 1992). It is well settled not only in the Second Circuit but in other courts that *cy pres* relief is appropriate where it is difficult or impractical to compensate directly individual class members. See, e.g., In re Agent Orange, 818 F.2d 179, 185 (2d Cir. 1987) (affirming plan to fund program to provide class-wide services where district court found it would be difficult and uneconomical to make direct individual payments to all class members); In re Matzo Food Products Litigation, 156 F.R.D. 600, 605 (D.N.J. 1994) (“Typically, the court employs *cy pres* where class members cannot be located or where individual recoveries would be so small as to make distribution economically impossible”); Democratic Central Committee v. Washington Metro. Area Transit Commission, 84 F.3d 451, 455 (D.C. Cir. 1996) (upholding a *cy pres* remedy where the cost of notifying and distributing twenty-five-year-old fund to overcharged passengers was prohibitive); New York ex rel. Koppell v. Keds Corp., No. 93 CIV. 6708, 1994 WL 97201, at *3 (S.D.N.Y. Mar. 21, 1994) (ordering plaintiff states to select charities to receive their share of settlement proceeds where it would be difficult if not impossible to trace 5 million unidentified class members and cost of locating and notifying class members would wipe out any economic benefit of settlement). *Cy pres* distributions are also made when there is a close correlation between the proposed use of the funds and the class benefited. See, e.g., In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D. Md. 1979) (issuing more than \$1.4 million in negotiable certificates for future use of class members who were sold homes through defendant real estate brokers). The use of a *cy pres* remedy also has been found appropriate where it promotes and furthers the goals of the class action litigation. See, e.g., In re Three Mile Island Litigation, 557 F. Supp. 96, 97 (M.D. Pa. 1982) (setting aside \$5 million of \$25 million settlement for a public health fund to finance studies of the long-term health effects of Three Mile Island nuclear accident and to further future evacuation planning).

‘a visible, central source of legal and political power.’⁴⁴ The district court summarized the goals of the Class Assistance Foundation as follows:

Maintaining a large part of the fund for a class assistance foundation will serve many purposes. The foundation can serve as a national focus for Vietnam veterans who are class members to mobilize themselves and others to deal with their medical and related problems. Because the foundation will direct the spending of a large pool of money to fund services, it will have a greater impact on the problems of the class than if thousands of small, individual payments were made. In addition, the foundation will provide class members with leverage in seeking to make public and private institutions more responsive to the medical problems of the class.⁴⁵

The district court emphasized that that the services offered by the foundation should be narrowly tailored to benefit only the class of persons covered by the settlement, although the court recognized that some worthwhile programs may incidentally benefit individuals who are not members of the class:

Projects funded by the foundation should be designed to benefit the class of persons whose claims are covered by this settlement. Funding should be directed to projects that focus on this class rather than on society as a whole or on the general veteran population, even though indirect benefits may flow to this broader group of veterans and family members from the foundation’s activities. Some worthwhile projects may not be able to deliver services exclusively to members of the class, but efforts should be made to inform and encourage class members to participate in foundation-funded projects. In addition, the claimants – those class members who have filed or will file a claim to participate in the settlement – should be the initial focus of projects that provide intensive services to individuals.⁴⁶

⁴⁴ In re Agent Orange, 611 F. Supp. 1396, 1431 (E.D.N.Y. 1985) (quoting In re Agent Orange, 597 F. Supp. 740, 859 (E.D.N.Y. 1984)).

⁴⁵ *Id.* at 1432.

⁴⁶ *Id.* at 1433 (internal citations omitted).

Funds also should be distributed by the foundation in such a manner as to “minimize administrative costs so that the settlement fund is conserved and the benefit to the class is maximized.”⁴⁷ The court noted that “[t]here should be no elaborate bureaucracy. Quality volunteer assistance should be sought in all aspects of administration. Settlement funds should not be used to duplicate existing services.”⁴⁸ At the same time, the foundation would have the broadest discretion in distributing funds to address the needs of the class.⁴⁹

Indeed, the Class Assistance Foundation was designed to function independently from the court as a self-governing and self-perpetuating body.⁵⁰ The foundation’s board would have broad powers, determining “such matters as investment and budget decisions, specific funding priorities, a detailed grant application process, the actual grant awards, evaluation mechanisms, and fundraising strategies.”⁵¹ The district court expected that it would oversee the foundation primarily by receiving financial reports from the board and by generally retaining the authority to “exercise control as necessary to protect the interests of the class.”⁵² However, Judge Weinstein contemplated that the district court would have a “comparatively modest supervisory role in the operation of the class assistance foundation” which would allow “the

⁴⁷ *Id.* at 1432-33.

⁴⁸ *Id.* at 1433. In fact, the district court urged the use of existing service organizations, when possible: “Numerous existing organizations, some with general mandates and others dedicated to veterans only, are currently helping to meet the medical and related service needs of the class. Many provide high quality services but lack the resources to meet class demands. The foundation cannot afford to duplicate already existing services nor should it create a new bureaucracy to fill service gaps. Rather than provide services itself, the foundation should fund the expansion of existing projects and encourage the creation of new projects to help meet class needs. The foundation thus will take advantage of groups that have already developed expertise and will explore new ways to benefit the class.” *Id.*

⁴⁹ “The foundation may fund projects that directly benefit individual claimants as well as projects that help the class in general. Foundation funds need not be limited to existing organizations.” *Id.*

⁵⁰ *Id.* at 1435.

⁵¹ *Id.*

⁵² *Id.* at 1436.

board of directors to make all procedural and substantive decisions necessary to run the foundation, including investment in the endowment, establishment of funding priorities and the actual awarding of grants.”⁵³

IV. Review by the U.S. Court of Appeals for the Second Circuit

On appeal by plaintiffs,⁵⁴ the Second Circuit reviewed the district court’s plan for distributing the Agent Orange settlement. The appeals court affirmed the plan to the extent it provided for payments to individual class members. And, although the Second Circuit reversed and remanded the decision with respect to the Class Assistance Foundation on the basis that it had too much independence and its mandate was overly broad, the appeals court generally confirmed the propriety of *cy pres* remedies in the distribution of class action settlements.

A. Initial Observations

The appeals court began its analysis by observing that “[d]istrict courts enjoy ‘broad supervisory powers over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably’”⁵⁵ and that the district court’s distribution plan would be overturned only upon a showing of abuse of discretion.⁵⁶ The Second Circuit also remarked on the size and diversity of the claimant pool, noting that plaintiffs “are as

⁵³ *Id.*

⁵⁴ Plaintiffs contended, among other grounds for appeal, that the district court abused its discretion by allowing compensation without requiring a particularized showing of individual causation and injuries and that the use of a *cy pres* remedy was contrary to precedent. In re Agent Orange, 818 F.2d 179 at 183-84.

⁵⁵ *Id.* at 181 (quoting Beecher v. Able, 575 F.2d 1010, 1016 (2d Cir. 1978)). Other United States courts also affirm the judicial obligation to ensure an equitable division of settlement proceeds. *See, e.g., In re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091, 1105 (N.D. Ill. 1983) (“The Seventh Circuit . . . adverted to the pivotal role of equitable principles in apportioning class action settlement funds”); In re Equity Funding Corp. of America Securities Litigation, 603 F.2d 1353, 1365 (9th Cir. 1979) (emphasizing the district court’s “duty to insure the equitable distribution of settlement proceeds”).

⁵⁶ *Id.*

sharply divided over the distribution of the settlement fund as they are over its adequacy.”⁵⁷

However, the appeals court observed that “the allocation of an inadequate fund among competing complainants is a traditional equitable function, using ‘equity’ to denote not a particular type of remedy, procedure, or jurisdiction but a mode of judgment based on broad ethical principles rather than narrow rules.”⁵⁸

B. Affirmation of Individual Payment Plan

The Second Circuit affirmed the district court’s system of individual payments for death or total disability claimants. Specifically, the appeals court confirmed Judge Weinstein’s simplification of the claims process, consideration of the relative strength or weakness of the various asserted claims, and effort to minimize administrative costs:

[The district court] could also consider the substantial difficulty of proving that any particular plaintiff was injured by Agent Orange in making an equitable allocation of the limited settlement fund. *See Curtiss Wright Corp.*, 697 F.2d at 174-75 (equitable allocation of a class action settlement fund may be accomplished over party’s objection without ‘resolv[ing] trial-type issues of liability’ based on district court’s independent ‘weigh[ing of] the relative deservedness’ of claimants). Moreover, he was correct in seeking a distribution scheme governed by criteria that are relatively easy and inexpensive to apply.⁵⁹

⁵⁷ *Id.* at 182.

⁵⁸ *Id.* (quoting *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7th Cir. 1982)) (citation omitted).

⁵⁹ *Id.* at 183. These principles are widely affirmed. *See, e.g., Women in City Government United v. City of New York*, No. 75 Civ. 2868, 1989 WL 153059 at *4 (S.D.N.Y. Dec. 13, 1989) (“[A] formula for allocating the settlement fund in proportion to the precise harm suffered by each plaintiff would entail substantial costs as well as delays in the ultimate distribution of the settlement award. Both the expense and the ease with which settlement distribution schemes operate are relevant factors in the settlement’s approval”).

The Second Circuit concluded its analysis of the district court's individual payment plan by emphasizing that "the district court is free to alter the distribution plan in the future to simplify it even more or to clarify standards as concrete issues arise."⁶⁰

C. Reversal and Remand of Specific Cy Pres Remedy

The appeals court also generally affirmed the use of *cy pres* or "fluid recovery" remedies in the context of class action settlements. Referring to two of its earlier decisions, the Second Circuit noted that "we have previously recognized that some 'fluidity' is permissible in the distribution of settlement proceeds."⁶¹ The appeals court concluded that "a district court may, in order to maximize 'the beneficial impact of the settlement fund on the needs of the class' . . . set aside a portion of the settlement proceeds for programs designed to assist the class."⁶²

However, the Second Circuit rejected the particular means by which the district court had employed a *cy pres* remedy – the Class Assistance Foundation – on the grounds that the district court had delegated to the Class Assistance Foundation too much independence and had provided it with too vague a mandate. Where a *cy pres* remedy is used, the appeals court held, "the district court must in such circumstances designate and supervise, perhaps through a

⁶⁰ In re Agent Orange, 818 F.2d 179, 184 (2d Cir. 1987).

⁶¹ *Id.* at 185 (citing Beecher v. Able, 575 F.2d 1010, 1016 n.3 (2d Cir. 1978) and West Virginia v. Chas. Pfizer & Co., Inc., 314 F. Supp. 710, 728 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871, 92 S. Ct. 81 (1971)). The appeals court also distinguished two cases cited by the plaintiffs which had rejected fluid recoveries: Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 156, 94 S. Ct. 2140 (1974) (rejecting a *cy pres* remedy that would have primarily benefited future investors rather than past investors who had suffered loss), and Van Gemert v. Boeing Co., 553 F.2d 812 (2d Cir. 1977) (rejecting a fluid recovery proposal that would have permitted class members who had already been made whole to receive the unclaimed portion of the settlement fund). Instead, the appeals court found that the class that will benefit from the Class Assistance Foundation in Agent Orange is, unlike those in Eisen or Van Gemert, "essentially equivalent" to the class that claimed injury. *Id.* In addition, the Agent Orange settlement, unlike those in Eisen and Van Gemert, occurred before trial, allowing the district court to provide broader relief than could be awarded after a trial. *Id.*

⁶² *Id.* (citations omitted).

special master, the specific programs that will consume the settlement proceeds.”⁶³ Otherwise, the Second Circuit found, there is the potential for inequity and discord, with “less vocal and less activist members of the class” left unprotected by the district court and the danger that funds are spent “in ways that generate more controversy than benefits.”⁶⁴ In fact, the appeals court perceived “no assurance that the ‘self-governing and self-perpetuating’ board of directors of the class assistance foundation, or any other such body that might be devised by the court, will possess the independent, disinterested judgment required to allocate limited funds to benefit the class as a whole.”⁶⁵ The Second Circuit concluded that “only direct judicial supervision can assure that the settlement fund is expended for appropriate purposes.”⁶⁶

Furthermore, the Second Circuit criticized the Class Assistance Foundation’s broad and ill-defined mandate and specifically disapproved of the use of settlement funds for political purposes:

[W]e are concerned that the broad mandate given the class assistance foundation, which must remain an arm of the court however loosely connected, would permit settlement proceeds to be expended on activities inconsistent with the judicial function. For example, “activities to ‘help class member veterans better obtain and utilize VA services’ and to ‘increase public awareness of the problems of the class,’” . . . might include political advocacy. We do not believe that the proceeds of a court-administered settlement ought to be used for such a purpose.⁶⁷

However, as noted above, the Second Circuit did not reject the essential concept of a *cy pres* remedy. Rather, it concluded that a properly-supervised fluid recovery program would be an

⁶³ *Id.*

⁶⁴ *Id.* at 185-86.

⁶⁵ *Id.* at 185.

⁶⁶ *Id.* at 186.

⁶⁷ *Id.*

appropriate means to distribute the Agent Orange settlement, and invited the district court to adopt such a program with the modifications required by the Second Circuit.⁶⁸

V. Decision by District Court on Remand

On remand, Judge Weinstein made a number of refinements to the distribution plan. For example, the district court simplified the individual claims procedure by permitting a wider range of information to substantiate exposure to Agent Orange, recognizing that there were few sources of evidentiary information to identify “exposed individuals some twenty years after the fact.”⁶⁹ Judge Weinstein also retained outside claims administrators, Aetna Technical Services, Inc., and Aetna Life Insurance Company, to “administer the entire claims procedure, recording claims on a computerized database, sending out questionnaires, receiving completed claims applications, answering questions about applications, reviewing applications and awarding payments.”⁷⁰

Furthermore, the district court replaced the Class Assistance Foundation with a new mechanism, the “Class Assistance Program,” to fund projects and services which would benefit the entire class.⁷¹ Unlike the earlier foundation, the Class Assistance Program would operate under strict court supervision: judicial oversight now extended to the disbursement of

⁶⁸ “We explicitly note, however, that the district court may in the exercise of its discretion and after consultation with veterans’ groups undertake to use portions of the fund for class assistance programs that are consistent with the nature of the underlying action and with the judicial function. Accordingly, the district court on remand may designate in detail such programs and provide for their supervision.” *Id.*

⁶⁹ In re Agent Orange, 689 F. Supp. 1250, 1264 (E.D.N.Y. 1988); *see also id.* at 1265-66.

⁷⁰ *Id.* at 1267.

⁷¹ *Id.* at 1259.

funds, as well as the type of activities supported by the Program.⁷² The district court was also careful to note that the new fluid recovery plan would not engage in political advocacy.⁷³

Within those parameters, however, the district court considered a broad range of projects as suitable for funding by the Class Assistance Program. The court noted that

[n]umerous strategies for assisting the class have been suggested and investigated. Among them are an information-referral network; aid to the children of exposed veterans, particularly to those children suffering from birth defects; aid to homeless veterans; genetic counseling; employment assistance; substance abuse treatment; post-traumatic stress disorder (PTSD) treatment; and diverse local community assistance grants.⁷⁴

As before, Judge Weinstein emphasized the importance of “maximiz[ing] the resources available for service expenditures by operating projects through existing provider organizations rather than by creating a new organization.”⁷⁵

⁷² “[T]he court will retain direct accountability authority over every project funded by the Class Assistance Program. Grants will be made only on court order.” *Id.* at 1270.

⁷³ “A program could be developed to assist class members in their attempts to secure benefits or services from agencies such as the Veterans Administration. . . . This assistance would be limited to advice and representation . . . and would not be available for lobbying activities, in order to avoid what the court of Appeals has termed ‘activities inconsistent with the judicial function [such as] political advocacy.’” *Id.* at 1273-74 (citation omitted).

⁷⁴ *Id.* at 1270-71. For example, the court noted that “[o]ne alternative is financing an information and referral service or ‘hotline’ for class members to obtain information about the Agent Orange litigation and settlement and about benefits to which they are entitled, medical and legal assistance, placements in appropriate public and private programs, and counseling.” *Id.* at 1271. In addition, the court observed that “[t]he large number of homeless Vietnam veterans, many of whom suffer emotional traumas or mental illness, warrants serious consideration of assistance in obtaining benefits that are already available, but unused. . . . Many members of the class have expressed interest in assistance for veterans with addictive, mental or emotional disorders, especially post traumatic stress disorder and substance abuse.” *Id.* at 1273.

⁷⁵ *Id.* at 1274. The district court made a similar observation when it discussed the range of projects that could be considered for funding by the Class Assistance Program: “Care must, of course, be taken to ensure that there is no duplication of available private and public services and that Agent Orange funds are not used for activities which are or should be otherwise funded.” *Id.* at 1271. The court also noted that “making grants to existing service providers can help strengthen worthy projects already in place, and can prime the pump for programs that will persist and prove useful after the Agent Orange Settlement Fund is exhausted.” *Id.* at 1274.

SUMMARY OF GUIDING PRINCIPLES

A number of guiding principles emanate from the opinions which shaped the final settlement of the Agent Orange litigation, as well as from the decisions of other courts which have addressed the distribution of class action settlements. These principles include the following:

- Settlement distribution plans must be equitable;
- The benefits provided by the plan must be meaningful, particularly where the settlement fund is limited;
- Courts may consider the relative strengths and weaknesses of various categories of claims in crafting the plan;
- Administrative costs must be minimized and a lengthy and cumbersome process of determining individual eligibility must be avoided;
- Distributions under the plan should benefit the most needy class members; and
- A *cy pres* remedy – one that provides benefits other than individual payments – is appropriate in certain circumstances to address the needs of class members.

It is these principles which have directed the Special Master's efforts in developing the present plan to distribute the \$1.25 billion settlement reached by the parties and approved by the Court in the current litigation.