

Vol. 13 No. 3

March 25, 2005

## AGENT ORANGE RULING HOLDS HIDDEN HAZARDS FOR DEFENSE CONTRACTORS

by  
David Price

The recent decision of the U.S. District Court for the Eastern District of New York in *In re "Agent Orange" Product Liability Litigation* presents significant issues for U.S. defense contractors. Although the court ruled for the contractors in that case, the opinion sets out avenues for plaintiffs to establish contractors' liability even where the contractors have met the requirements of the government contractor defense.

The case arises from the aerial spraying of various herbicides (the best known of which is Agent Orange) by U.S. forces during the Vietnam War. The plaintiffs in the case, the Vietnamese Association for Victims of Agent Orange and a group of Vietnamese nationals, filed suit against numerous U.S. defense contractors that supplied chemicals for use in the program.

The plaintiffs claimed that the spraying program was illegal under various multilateral treaties regarding the laws of armed conflict and under customary international law. They contended that the contractors' role in the program rendered them liable under the Alien Tort Statute, Torture Victim Protection Act, War Crimes Act, and the tort laws of the United States, New York, and Vietnam. The plaintiffs sought damages for the deaths and injuries caused by the herbicides, clean-up of the contaminated areas of Vietnam, and disgorgement of profits.

In a March 10, 2005, ruling, Federal District Court Judge Jack B. Weinstein granted the defendants' motion to dismiss. The court ruled that the contractors were exempt from liability for all claims under United States law, including state law claims, based on the government contractor defense. The court also sided with the defendants in determining that the spraying did not violate any norms of international law that existed at the time.

Yet in the course of reaching those holdings, the court mapped out far-reaching paths of defense contractor liability. The court rejected the existence of a federal statute of limitations period for claims based on international law. The court further indicated that international law overrides the government contractor defense — rejecting the view of the United States that the defense is valid against international law claims. The court based that view on its analysis of the Nuremberg Tribunals and other post-World War II proceedings. Although arguably *dicta*, these statements will be troubling to defense suppliers who may face suit in the Eastern District or elsewhere.

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**David Price** is Senior Vice President for Legal Affairs of the Washington Legal Foundation.

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