NINE QUESTIONS FOR DEFENDING ASBESTOS LITIGATION

Getting Uncle Sam on the Hook for World War II Asbestos Exposure

BY STUART ROTH, ERICH RAPP, AND DOUGLAS LITTLEJOHN

Asbestos liability is a problem facing many corporate counsel and their clients.[1]

Asbestos litigation is now the longest-running mass tort litigation in American history, with the cost of claims through 2002 estimated at $70 billion, and is expected to reach $265 billion in payments to as many as 3 million plaintiffs. Seventy-three of the 85 industrial sectors recognized by the Department of Commerce have faced asbestos litigation, while 70 individual companies have filed bankruptcy over asbestos claims.

Stuart N. Roth is vice president, regulatory audit, and deputy general counsel of Olin Corporation in Norwalk, CT. He formerly worked for the U.S. Environmental Protection Agency as an enforcement attorney. He is available at snroth@olin.com.

Erich P. Rapp is a partner at Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P., in Baton Rouge, La. He represents companies in toxic tort and environmental litigation and focuses on claims against the government and defenses available to government contractors. He is available at Erich.Rapp@Keanmiller.com.

Douglas A. Littlejohn is an associate at Kean, Miller, Hawthorne, D'Armond, McCowan & Jarman, L.L.P., in Baton Rouge, La. He represents a major national insurance company in asbestos litigation defense and also practices in environmental litigation, focusing on claims against the government, CERCLA, and toxic tort defense. He is available at Douglas.Littlejohn@Keanmiller.com.

If your company is faced with asbestos litigation, three valuable tools may be sitting unnoticed in your litigation tool box:

- removal to federal court,
- asserting and benefitting from federal sovereign immunity, and
- joining the federal government as party to the litigation.

While many asbestos defendants may be aware that the roots of workplace asbestos exposure trace back half a century or more, few litigants realize that the U.S. government's use of asbestos and its corresponding involvement with American industry during World War II was pervasive and widespread in wartime facilities and equipment that it owned or operated. The government may have been deeply involved with your company's business during World War II and this historic—and often temporary—involvement may reduce your company's asbestos liability and save it money.

Once you've established that the plaintiff's alleged injuries can be traced to asbestos used or manufactured by or for the government during the war, there are nine questions you should ask in every asbestos action in which you are a defendant. The answers to those nine questions could lead to successfully getting Uncle Sam on the hook for a substantial part of the liability in your case. But before you address those questions, you must understand the history of the government's relationship to industry (and perhaps your company) during the war.

GOVERNMENT AND INDUSTRY DURING WORLD WAR II

The government financed, planned, and ran the industrial machine in the United States during World War II in an unprecedented fashion. Before the war, the government's role in the development and administration of American industry was comparatively minor to what would follow during the 1940s. The most significant federal agency or actor to play a role in industry during the war had its roots in the New Deal. Congress created the Reconstruction Finance Corporation (RFC) in 1932 to provide assistance to financial institutions, such as banks and insurance companies, distressed because of the Great Depression. Through the 1930s, the RFC's role expanded, allowing it to provide assistance to other types of businesses. In May 1940, as war approached, President Roosevelt asked Congress to authorize the government to purchase 50,000 airplanes per year. Before Roosevelt's request, the United States had produced just over 3,000 combat aircraft and transports—and 2,300 of those had been ordered by foreign governments. Thus, the President's request required a dramatic increase in the productive capacity of the United States.

Shortly after the President's call to arms, Congress authorized the RFC and its subsidiary corporations to provide financial assistance for industrial mobilization. The financial assistance was provided through those subsidiaries, but the four most significant were the Defense Plant Corporation (DPC), the Rubber Reserve Company (RRC), the Metals Reserve Corporation (MRC), and the Defense Supplies Corporation (DSC).

Between August 1940 and June 1945, the DPC financed the construction of new industrial facilities

and the expansion of existing facilities at the request of other agencies, including the military, the War Production Board, the Maritime Commission, and even other RFC subsidiaries. In practice, the RFC and its subsidiaries paid for the construction of facilities and thereafter entered into operating or lease agreements with companies to operate the facilities under the supervision of the government. The RFC retained ownership of the new facilities throughout the war and in some instances, most notably the synthetic rubber plants, until the mid-1950s.

By 1945, the RFC and its subsidiaries had built facilities in 46 of the 48 existing states. The building program was extensive: over 200 plants in each of three Midwestern states (Michigan, Ohio, and Pennsylvania), more than 100 plants in each of eight additional states, and 10 new facilities in each of 33 other states (see "All Over the Map," on this page).[2] The benefit of the government's construction program was that it was well distributed across the country. Yet, the program's ubiquity has also produced the unexpected and unintended consequence of thousands of lawsuits due to the presence of asbestos in those wartime facilities.

By 1945, the RFC had invested $7 billion—in mid-1940s dollars—on new or expanded industrial facilities, increasing the gross national product by 10 percent. The RFC had even created an entirely new industry, the production of synthetic rubber.

FEDERAL LIABILITY—NINE CRUCIAL QUESTIONS

At the end of the war, the RFC started selling the industrial facilities that it had built. This disposal process continued through the mid-1950s, when most of the synthetic rubber plants were sold. In 1957, the RFC was abolished and other agencies, including the Department of Commerce, General Services Administration, and the Treasury Department, assumed the RFC's remaining functions and liabilities.

Many of the plants built under RFC's jurisdiction

All Over the Map

Defense Plant Corporation: Top 15 Investments by State

	State	Number of DPC projects	Amount Invested
1.	**Ohio**	250	$702,000,000
2.	**Michigan**	213	$665,000,000
3.	**Texas**	108	$650,000,000
4.	**Illinois**	136	$638,000,000
5.	**Pennsylvania**	202	$571,000,000
6.	**New York**	169	$526,000,000
7.	**Indiana**	97	$365,000,000
8.	**California**	129	$323,000,000
9.	**New Jersey**	135	$281,000,000
10.	**Utah**	19	$240,000,000
11.	**Louisiana**	31	$228,000,000
12.	**Missouri**	36	$159,000,000
13.	**Kentucky**	52	$152,000,000
14.	**Nevada**	5	$150,000,000
15.	**Conneticut**	70	$141,000,000

continued to operate after the war. Like private manufacturing facilities, these plants contained asbestos; asbestos-related claims began to arise from people who worked in these plants and suffered asbestos-related injuries. But since these plants were former government facilities, a number of litigation opportunities—known as federal liability strategies—are available to counsel working on these cases.

Corporate defendants employing the following strategies will broadly break into two groups. The benefits and burdens of these strategies will differ based on whether the defendant falls into one of the following two groups:

The federal contractor group is comprised of corporations that once designed, built, or operated industrial facilities for the federal government during World War II (aka "former government facilities");

The general defendant group is made up of traditional asbestos defendants or those companies that did not design, build, or operate industrial facilities for the federal government during World War II.

QUESTION 1: Did the plaintiff ever work at a former government facility during the government ownership period?

Whether or not your client is a federal contractor or a general defendant, you should determine if the plaintiff ever worked at a former government facility, and if so, whether the plaintiff worked at such a facility during the period of federal ownership. If your client is a general defendant and the answer to both these questions is yes, you will want to add the federal government and the related federal contractor as defendants either in the main demand or a third party demand. Adding these parties could put your case into a federal forum and gain contribution from the federal government for your client. (The reasons for removal are explained in Question 5.) If your client is the related federal contractor who gets added as a defendant, you may want to remove the case to federal court, assert the government agency (see Question 6) and government contractor defenses (see Question 7), and seek contribution from the federal government.

QUESTION 2: Did the plaintiff work at a former government facility, but NOT during the period of government ownership?

Alternatively, if the plaintiff worked at a former government facility but not during government ownership, you will need to determine whether the plaintiff has made the customary allegation that the owner of the premises failed to construct the facilities with materials that are safer than asbestos. Even where such allegations are not expressly made in the complaint, the plaintiff's experts will often make such claims in their testimony or the complaint could arise during discovery.

IF YOUR CLIENT IS A GENERAL DEFENDANT AND THE PLAINTIFF HAS MADE THE ALLEGATIONS REGARDING ASBESTOS SAFETY, BUT THE GOVERNMENT AND THE FEDERAL CONTRACTOR HAVE NOT BEEN INCLUDED IN THE CASE, YOU MAY WANT TO ADD THEM AS THIRD PARTY DEFENDANTS IN ORDER TO REACH A FEDERAL FORUM AND OBTAIN CONTRIBUTION FROM THE GOVERNMENT.

If such allegations have been made and your client is a federal contractor defendant, you may still be able to remove the case to federal court, assert immunity, and seek contribution from the government—even though the plaintiff never worked at the facility during federal ownership. You may also have a separate contractual indemnity claim (see Question 9) against the government in the Court of Federal Claims.

If your client is a general defendant and the plaintiff has made the allegations regarding asbestos safety, but the government and the federal contractor have not been included in the case, you may want to add them as third party defendants in order to reach a federal forum and obtain contribution from the government. Even though the plaintiff never worked at the former government facility during federal ownership, it is possible to win on such a claim, but it requires some ability to show that the plaintiff could have been exposed to asbestos originally installed by the government and its related federal contractor.

QUESTION 3: How should a defendant respond to a plaintiff's assertions regarding asbestos?

While many defendants are reluctant to respond to allegations concerning alternatives to the use of asbestos, a prudent approach may be to deny such allegations and assert that if some defendants are found liable on such a basis, all other similarly situated defendants should also be found liable on the same basis.

THE FEDERAL GOVERNMENT THROUGH THE RFC AND ITS SUBSIDIARIES ENGAGED IN THE MINING OF ASBESTOS AND THE MANUFACTURING OF ASBESTOS PRODUCTS.

QUESTION 4: What is the scope of the government's liability in asbestos cases?

The federal government through the RFC and its subsidiaries engaged in the mining of asbestos and the manufacturing of asbestos products. Although the extent of the government's involvement in these activities is not well established in published sources, a casual examination of the list of facilities that the RFC and its subsidiaries constructed during World War II suggest that the government was engaged in the mining of asbestos and the manufacturing of asbestos-containing products on a widespread basis. For example, the following companies, among others involved in the asbestos industry, operated facilities for the RFC and its subsidiaries:

- Raybestos-Manhattan, Inc.,
- Asbestos Manufacturing Company,
- Philadelphia Asbestos Company,
- Fibre & Metal Products, Inc., and
- Southern Asbestos, Inc.

As a result, the federal government may be a proper defendant in many asbestos cases.

The government may also be liable for contribution to general and federal contractor defendants. A contribution claim against the federal government is available to the federal contractor group and the general defendant group whenever a plaintiff worked at a former government facility. If a plaintiff worked at the former government facility during federal ownership, the claim is available simply by making the government a defendant based upon the same allegations made against any other premises owner. If the plaintiff worked at the former government facility after the government sold the facility, the government may still be made a defendant to the extent that the plaintiff can make plausible allegations that the government had alternatives to asbestos that could have been used when the facility was built, but the government failed to use these alternatives, causing plaintiff's exposure to asbestos and consequent injuries.

QUESTION 5: Can this case be removed to federal court?

The government and the federal contractor group may be able to remove any case in which they are made a defendant in the main demand or a third party defendant, based on the language of the Federal Officer and Agency Removal Statute, 28 U.S.C. § 1442(a), which provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer *(or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any*

FOR USE IN WAR ONLY

Some asbestos products were made for specific use during World War II only. For example, *Defendex* was an asbestos-containing thermal insulation made during the war as a substitute for magnesia pipe insulation due to the shortage of magnesia. Manufactured in Lockland, Ohio, *Defendex* was composed of corrugated sheets of asbestos paper and principally used in power houses. As the war ended and magnesia became available once more, *Defendex* was eliminated.

Source: "A History of Philip Carey Asbestos Products", by Jim Walter Corporation, Tampa, Florida. January 18, 1978.

> *act under the color of such office* or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or in the collection of the revenue.

(emphasis added)

In *Willingham v. Morgan,*[3] the U.S. Supreme Court said that "[t]he federal officer removal statute [28 U.S.C. §1442] is not 'narrow' or 'limited.'" The statute, combined with the *Willingham* decision, suggests that persons—including juridical persons such as companies acting under the direction of a federal officer—will, broadly speaking, be allowed the right to remove cases against them to federal court, and that a federal officer or a person acting under that officer may remove a suit against such person to the extent that the federal officer was acting under the color of such office. The Department of Commerce, General Services Administration, and the Treasury Department, as the successors to the RFC and its subsidiaries, are clearly federal agencies within the meaning of 28 U.S.C. § 1442. The federal contractor group is arguably a juridical person acting under a federal officer.

The removing party must also show that it was engaged in an "action under the color of office." This showing requires a causal connection between the conduct at issue and asserted official authority. Congress authorized the RFC and its subsidiaries through various amendments to the Reconstruction Finance Corporation Act to own, design, construct, and operate industrial facilities for the construction of war materials. Thus, the RFC, its subsidiaries, and their agents had official authority to own, design, construct, and operate the industrial facilities in question.

Finally, the Supreme Court in *Mesa v. California* held that the acting under color of office requirement also requires the removing defendant to raise a colorable federal defense.[4] In asbestos litigation, the federal defenses may include sovereign immunity, government agency immunity, and the government contractor defense (described below).

QUESTION 6: Is the government agency defense available?

While the government may be liable for exposing workers to asbestos, your federal contractor client may be immune for the same actions. If a plaintiff alleges asbestos exposure as the result of your client's designing, constructing, or operating a wartime facility, your client may be able to assert the government agency defense and the government contractor defense. The general defendant will, of course, have no claim for government agency or contractor immunity.

The government agency defense was first described in 1940 by the Supreme Court in *Yearsley v. W.A. Ross Const. Co.*[5] It may be available to the companies that designed, constructed, and operated industrial facilities for the government during World War II.

The govt. financed, planned, and ran the industrial machine in the United States during WWII in an unprecedented fashion.

In *Yearsley,* a private contractor was performing work on a dike in the Missouri River pursuant to a contract with the Army Corps of Engineers. A landowner adjoining the river claimed that the construction caused part of his property to wash away. The Supreme Court held that as long as the authority to construct the project was validly conferred by Congress, the contractor could not be liable for mistakes made when carrying out the will of Congress.

In the opinion, the Supreme Court did not decide if the government owed the plaintiff compensation for the loss of his land or was immune from such a claim. The Court also declined to decide whether the plaintiff had a claim against the federal government in the Court of Federal Claims under the Takings Clause. Instead, the Court held that "the action of the agent is the act of the government" and

the agent was not liable for the damages incurred.

The *Yearsley* decision requires that the party asserting the government agency defense establish that its authority to act was properly conferred upon it and that it acted within that authority. Additionally, *Yearsley* requires that a principal and agent relationship exist between the government and the contractor. Under traditional common law, the establishment of a principal-agent relationship will depend on the terms of the contract between the parties, particularly with regard to the right to control the details of the agent's work.[6]

Prior to the creation of the government contractor defense, a few cases did discuss shared or derivative sovereign immunity, which seems to have some relationship to *Yearsley.* For example, a 1973 district court case, *Green v. ICI America, Inc.,* does not mention the agency requirement suggested in *Yearsley,* and only references *Yearsley* in brief passages; but the case did hold that a government contractor "shared" sovereign immunity with the federal government.[7] In this case, the contractor defendant was an operator of a TNT plant built during World War II, owned by the government, and operated in by the contractor defendant during the Vietnam War.

The Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.* discussed the *Yearsley* defense, but declined to reach any holding with regard to the defense.[8] The Eleventh Circuit stated: "The defense is rarely invoked and its elements are nowhere clearly stated." In *dicta*, the court laid out what it called the three elements of the *Yearsley* defense,[9] and thus seemed to impose more elements on the government agency defense than the decision in *Yearsley.*

With the later advent of the government contractor defense in the Supreme Court's decision in *Boyle v. United Technologies Corp.*, a portion of the reasoning in Shaw was rejected by the Supreme Court.[10] The decision in *Boyle*, however, did not address the *Shaw* interpretation of *Yearsley*.

With the establishment of the government contractor defense, the future of the *Yearsley* defense seems uncertain. Nevertheless, *Yearsley* was not overruled or expressly supplanted by *Boyle*. Subsequent cases by lower courts further require that the government have sovereign immunity from which the agent would derive its immunity. This requirement is not, however, necessarily mandated by *Yearsley*.

From this point on . . .
Explore information related to this topic.

ONLINE:

- Mark R. Siwik, Lori L. Siwik, and Robert C. Mitchel, "Environmental and Toxic Tort Claims: Are You Covered?" *ACCA Docket*, vol. 18, no. 3 (June/July 2000), available on ACCA Online℠ at *http://www.acca.com/protected/pubs/docket/jj00/toxictort.html.*

- Jo Lynn White, Vernon Thomas Meador III, and Deanne L. Miller, "Managing Mass Toxic Tort Litigation Risks: Effective Pretrial Tactics," *ACCA Docket,* vol. 20, no. 4 (April 2002), available on ACCA Online℠ at *http://www.acca.com/protected/pubs/docket/am02/toxic1.php.*

- ACC Environmental Law Committee home page, *http://www.acca.com/networks/envir.php.*

ON PAPER:

- Hans A. Klagbrunn, "Some Aspects of War Plant Financing," *American Economic Review* 33, supplement (March 1943).

- David Novick, Melvin Anshen, and W.C. Truppner, Wartime Production Controls (Columbia University Press 1949).

- Bruce Catton, The Warlords of Washington—The Inside Story of Big Business versus the People in World War II (Harcourt, Brace and Company 1948).

- Gerald T. White, Billions for Defense, Government Financing by the Defense Plant Corporation during World War II (University of Alabama Press 1980).

If you like the resources listed here, visit ACC's Virtual Library℠ on ACCA Online℠ at www.acca.com/resources/vl.php. Our library is stocked with information provided by ACC members and others. If you have questions or need assistance in accessing this information, please contact Senior Attorney and Legal Resources Manager Karen Palmer at 202.293.4103, ext. 342, or palmer@acca.com. If you have resources, including redacted documents, that you are willing to share, email electronic documents to Managing Attorney Jim Merklinger at merklinger@acca.com.

In many instances, companies that designed, built, and operated industrial facilities for the federal government during World War II, such as the federal contractor group of defendants, had an agency relationship with the government through their contracts with RFC and its subsidiaries. The federal government exerted unprecedented control over the design, construction, and operation of the World War II era industrial facilities. The government routinely controlled the products manufactured, the facilities' hours of operation, the source and quantities of raw materials available, how the raw materials were delivered to the facility, what price would be paid for the raw materials, how and where the products manufactured were to be delivered, and what price would be provided for the manufactured products. Further, the federal government often had its own representatives stationed at the facilities to determine that its directives were followed.

Shortly after President Roosevelt's call to arms, Congress authorized federal agencies to provide financial assistance for industrial mobilization.

INITIALLY, THE GOVERNMENT CONTRACTOR DEFENSE WAS EMPLOYED ALMOST EXCLUSIVELY IN THE CONTEXT OF COMPANIES MANUFACTURING PRODUCTS FOR THE MILITARY. IN THE YEARS SINCE *BOYLE*, HOWEVER, THE APPLICATION HAS BROADENED BEYOND MILITARY EQUIPMENT MANUFACTURERS.

This type of operational control by the government over private facilities was enough to establish federal environmental liability under the Superfund statute in *FMC Corporation v. U.S. Department of Commerce*.[12] In that case, the court held that the government was liable as an operator under CERCLA due to its activities in a Virginia facility involved in the strengthening of aircraft tires. The court stated that those activities included: "[t]o implement the required plant conversion and expansion, the government through the Defense Plant Corporation…leased government-owned equipment and machinery for use at the facility…But the government did not allow American Viscose to install the leased equipment. Instead the government contracted…to design and install the DPC-owned equipment at the facility. Under its contract…the government had substantial control over and participation in the work related to the DPC equipment. For example all plans, specifications and drawings were submitted to DPC for approval; DPC could promulgate rules governing all operations at the work site and require the removal of any…employee; and DPC was represented by a government representative…"[13] For all of these reasons, the *Yearsley* defense may be available to the Federal Contractor Defendant group. In fact, perhaps if future court decisions are favorable to industry, the *Yearsley* defense would be available to the federal contractor group while the government itself would be liable for the same activities because of the ruling in *Keifer & Keifer*.

QUESTION 7: Is the government contractor defense available?

Companies that manufacture things for the government in accordance with specifications provided by the government are sometimes able to benefit from the government's sovereign immunity by asserting the government contractor defense. The Supreme Court's requirements for asserting the

government contractor defense are found in *Boyle v. United Technologies Corp.* The requirements are:

- The government reasonably approved precise specifications;
- The manufactured products conformed to those specifications; and
- The supplier warned the United States about the dangers in the use of the product that were known to the supplier, but not known to the government.

Initially, the government contractor defense was employed almost exclusively in the context of companies manufacturing products for the military. In the years since *Boyle*, however, the application has broadened beyond military equipment manufacturers. The government contractor defense was also initially applied to product liability claims based upon design defects. More recent cases, however, have suggested that the defense is not limited to design defect cases but is also available in cases involving manufacturing defects.[13]

Often a single federal contractor designed, built, and operated a former government facility, although in some cases the design, construction, and operation tasks were performed by more than one contractor. At a minimum, the federal contractor that designed and built a former government facility might assert the government contractor defense.

Since the government's involvement in the design and construction process was extensive for the industrial facilities built during World War II, the federal contractor defendant would not have a problem demonstrating that the government approved reasonably precise specifications for the industrial facilities built. The government's own files in the National Archives are likely to have design plans, drawings, and various records of correspondence approving and accepting the construction of the facilities.

The most significant issue of fact will likely be the

relative knowledge of the federal contractor and the government as to the alleged dangers of installing asbestos and asbestos-containing products in any given industrial facility. While this matter can be established on a case-by-case basis, it's important to remember that in the 1940s the government's knowledge and access to information on the dangers of asbestos exposure probably exceeded most companies. Ultimately, a determination of whether a federal contractor defendant owed any warning to the government is a matter for the trial court.

QUESTION 8: Does sovereign immunity bar the lawsuit?

The principal reason that more suits have not been filed against the federal government for asbestos-related injuries is sovereign immunity, the legal doctrine that holds that the federal government is immune from suit for tort (or any other) claims unless Congress or the Constitution gives specific consent for the government to be sued.[14]

The authority for suing the government in tort is the Federal Tort Claims Act (FTCA).[15] Using the FTCA in asbestos exposure claims presents two major obstacles. First, the FTCA is effective only as to claims accruing after January 1, 1945. The government has not waived its sovereign immunity for claims accruing prior to this date. Claims before this date were handled by the Congress through the House Committee on Claims. In effect, each claim required Congressional authorization to be paid. The process became unduly burdensome and the FTCA was created.[16] In any case, while many of the acts of the government related to construction of industrial facilities with asbestos during World War II occurred prior to January 1, 1945, most of the asbestos torts probably accrued after January 1, 1945, because the injuries did not manifest themselves until later. The

effective date may be a problem, but in many cases, not one that is insurmountable.

The second problem in using the FTCA to bring asbestos exposure cases against the government is the "discretionary function exception," which generally means that the government will remain immune from suit if the alleged damages originated from actions or conduct associated with the government's decision-making process.[17] Asbestos claims against the government fall into two categories:

- Claims related to the government's ownership of, or decision to design, built and operate, facilities containing asbestos; or
- The government's decision to mine asbestos and manufacture asbestos products.

In either of these situations, the decision by the government to use asbestos in the 1940s under the pressures of wartime production will likely be subject to the discretionary function, and no claim under the FTCA would be allowed.[18]

Sovereign immunity doesn't absolutely defeat a claimant's allegations against the government. In 1939, the U.S. Supreme Court decided the case of *Keifer & Keifer v. Reconstruction Finance Corporation*.[19] In this decision, Justice Felix Frankfurter wrote that the RFC and its subsidiaries were not entitled to sovereign immunity. During the 1930s, one RFC activity was providing financial assistance to farmers. For this purpose, the RFC created subsidiaries called Regional Agricultural Credit Corporations. The Regional Agricultural Credit Corporation of Sioux City, Iowa, (Regional Corp.) was the defendant in *Keifer & Keifer*. Regional Corp. entered into a "cattle feeding contract" with the plaintiffs under which Regional Corp. agreed to provide feed and water for the plaintiffs' livestock. The plaintiffs claimed the RFC and Regional Corp. negligently performed their feed and water obligation to plaintiffs' livestock. In response, the RFC and Regional Corp claimed sovereign immunity. The Supreme Court rejected the defense and allowed the state tort claims.

Of course, the RFC and its subsidiaries cannot be sued directly and by name today, primarily because they no longer exist.[20] However, the agencies that assumed the RFC's liabilities can be sued. In broad terms, the responsibility for unwinding the wartime functions of the RFC were ultimately assumed by the General Services Administration, the Department of Commerce, and the Treasury Department. In 1957, Congressional legislation abolished the RFC, and any residual functions, assets, liabilities, or other responsibilities of the RFC not otherwise assumed by another federal agency were assumed by the Treasury Department.

Based upon *Keifer & Keifer*, this residual liability would include state tort liability including, presumably, asbestos exposure liability. If the government has state tort liability for the acts of the RFC, its subsidiaries and their agents and employees, the government is the equivalent of any premises owner regarding the ownership, design, construction, and operations of industrial facilities built during World War II. Further, to the extent that the government mined asbestos and manufactured asbestos containing products, its liability is no different than any other asbestos mining or manufacturing concern.

No case law exists on the applicability of *Keifer & Keifer* to modern asbestos exposure cases. One must assume that the federal government will, nevertheless, claim sovereign immunity and contend that *Keifer & Keifer* is no longer good law, or that sovereign immunity somehow attached to any potential state tort liability when the RFC was abolished and its functions transferred to other government agencies. In fact, the D.C. Circuit in *Galvan v. Federal*

Searching for Federal Involvement

A short checklist for wartime federal involvement in asbestos:

- Search for government ownership of the facility, equipment, or product at issue.
- Determine the degree and extent of the involvement of the Defense Plant Corporation. *Hint*: Look for the term "PLANCOR" in any records dealing with your facility or product.
- Determine whether the federal government assigned employees to the facility at issue and the scope of their activities there.
- Find and read the government's wartime contracts with your facility. *Hint*: Look for any document that pertains or is pursuant to the Contract Settlement Act of 1944.

Prison Industries, Inc. did question whether *Keifer & Keifer* was good law in relation to other federal corporations.[21] This court contended that the Supreme Court has moved away from the reasoning in *Keifer & Keifer,* citing *FDIC v. Myers*.[22] Nevertheless, *Keifer & Keifer* has never been overturned; whether or not the Supreme Court would ever apply *Keifer & Keifer* to another federal corporation created at a later date pursuant to another Act, a reasonably good argument can be made that the *Keifer & Keifer* decision applies to the actions of the RFC in the years immediately after *Keifer & Keifer* was decided.

QUESTION 9: Are there other opportunities for asbestos-related claims against the federal government?

For a number of years, companies that designed, built, and operated industrial facilities for the federal government or contracted with the federal government for the production of goods during World War II have sought to enforce contractual indemnity agreement against the federal government.

On April 28, this situation changed. DuPont achieved a major victory in *E.I. Du Pont De Nemours and Company, Inc. v. United States*, before the Federal Circuit. This decision was an appeal by DuPont of an unfavorable decision before the Court of Federal Claims.[23]

The *DuPont* case addressed what has been, until now, the greatest obstacle a federal contractor has had to overcome to obtain contractual indemnity from the government: the Anti-Deficiency Act, which prohibits federal officers from entering into indemnity agreements that would exceed current Congressional appropriations unless Congress has authorized the creation of the indemnity agreement. The appeals court in the *DuPont* case concluded

that the Contract Settlements Act of 1944 authorized the creation of contractual indemnity rights against the federal government as part of the settlement and termination of contracts that the government entered into during World War II.

The future ramifications of this decision are substantial. The *DuPont* case concerned indemnity for environmental cleanup costs under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), but the application of the case may extend beyond the CERCLA arena.[24] If the federal government is liable for contractual indemnity for CERCLA costs arising out of World War II activities, it may also be liable for indemnity of other costs, such as claims for exposure to asbestos occurring as a result of a federal contractor designing, building, or operating an industrial facility for the government. The final outcome of any individual case will, of course, depend upon the contractual terms in question, but other agreements under the Contract Settlement Act of 1944 presumably contained similar indemnity provisions to those found in the *DuPont* contract.

ASSERTING THREE VALUABLE LITIGATION TOOLS—REMOVAL TO FEDERAL COURT, UTILIZING THE GOVERNMENT'S SOVEREIGN IMMUNITY FOR YOUR BENEFIT, AND MAKING THE FEDERAL GOVERNMENT A PARTY—ARE THE FIRST STEPS IN THIS PROCESS.

A LITTLE IMAGINATION CAN GO A LONG WAY

In every asbestos action involving allegations of exposure from facilities or equipment that date back to the World War II era, an evaluation of the government's potential liability should be performed. The extent of the government's wartime involvement with the facilities, equipment, and/or products may not be that difficult for you to uncover.

Additionally, as the expense of asbestos litigation will likely continue to cost companies millions over several years, more companies will seek ever more imaginative ways of establishing the liability of the federal government. Asserting three valuable litigation tools—removal to federal court, utilizing the government's sovereign immunity for your benefit, and making the federal government a party—are the first steps in this process. Whether your company has extensive experience in asbestos litigation or you find yourself litigating as a freshman asbestos defendant, your company can benefit from the government's involvement with asbestos and wartime industry as you determine the answers to the nine questions within the context of the facts and issues involved in your own company's history, as well as the case at issue.

NOTES

1. Carroll Stephen of the Rand Institute for Civil Justice in his handout materials entitled, *The Dimensions of Asbestos Litigation* for the Spring 2003 meeting of the Casualty Actuarial Society. For more information about the impact and extent of asbestos litigation, see also *Asbestos Litigation Costs and Compensation: An Interim Report* 2002 also published by the Rand Institute for Civil Justice and available on-line at Rand's web site.
2. Gerald T. White, *Billions for Defense, Government Financing by the Defense Plant Corporation during World War II*. University of Alabama Press 1980, pp. 81-82.
3. Willingham v. Morgan, 395 U.S. 402 (1969).
4. Mesa v. California, 489 U.S. 121 (1989).
5. Yearsley v. W.A. Ross Const. Co., 309 U.S. 18 (1940).
6. See the Restatement (Third) of Agency) §1.01. In a departure from *Yearsley*, the cases which followed added the idea that the government as a "principal" has sovereign immunity for the actions in question. The *Yearsley* decision suggests that even though the plaintiff may not have had a state law tort claim against the federal government like the one claimed against the contractor, the plaintiff may have had a constitutional claim in the Court of Federal Claims for compensation based upon the Takings Clause of the Fifth Amendment. Further, the Yearsley court holds that this possible Takings claim was the plaintiffs' exclusive remedy and no claim of any type existed against the contractor.
7. Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973).
8. Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985).
9. First, the parties must determine whether the government could be sued in the circumstances. Second, if the government could not be sued because of its own sovereign immunity, one must then determine whether the contractor acted as an agent of the government. Finally, if an agency relationship exists, the court would then determine whether the agent acted within the course and scope of its duties. *Id.*
10. Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

11. *See* FMC Corporation v. U.S. Department of Commerce, 29 F.3d 833 (3d Cir. 1994). *See also* 42 U.S.C. § 9601 et seq., the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). In *FMC*, the federal government was found liable both as an "owner" (the government stipulated to the ownership of certain equipment) and as an "operator" under the liability scheme outlined under CERCLA. *See* 42 U.S.C. § 9607.
12. *See* FMC Corp., 29 F.3d at 837 (3d Cir. 1994). The facility in question in *FMC* was owned by the American Viscose Corporation during World War II. The facility produced high-tenacity rayon which was used to strengthen and lengthen the life of heavy duty truck and aircraft tires.
13. For example, in Baily v. McDonnell Douglas Corp., 989 F.2d 794 (5th Cir. 1993), the court applied the defense in a manufacturing defect case.
14. For examples of Supreme Court cases acknowledging sovereign immunity, see Principality of Monaco v. Mississippi, 292 U.S. 313 (1934); *Langford v. United States*, 101 U.S. 341 (1879); or Kawananakoa v. Polyblank, 205 U.S. 349 (1907).
15. The FTCA is comprised of 28 U.S.C. §2671 et seq., along with portions of 28 U.S.C. §1346 and 28 U.S.C. § 2401.
16. Claims subject to sovereign immunity can still be presented to Congress through the Congressional Reference Claims Act. See 28 U.S.C. §§1492 & 2509.
17. The "discretionary function exception" to the Federal Tort Claims Act is found in 28 U.S.C. §2680(a).
18. For further discussion regarding the "discretionary function exception" to the Federal Tort Claims Act, please see United States v. Gaubert, 499 U.S. 315 (1991); Berkovitz v. United States, 486 U.S. 531 (1988); United States v. S.A. Empresa de Viacoa Areea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984); and Indian Towing v. United States, 350 U.S. 61 (1955).
19. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381 (1939).
20. The Reconstruction Finance Corporation was abolished by 5 U.S.C. App. 1 REORG. PLAN 1 1957.
21. Galvan v. Federal Prison Industries, Inc., 199 F. 3d 461 (D.C. Cir. 1999).
22. FDIC v. Myers, 510 U.S. 471 (1994).
23. E.I. Du Pont de Nemours and Company, Inc. v. United States, 54 Fed. Cl. 361 (2002).
24. *See* 42 U.S.C. §9601 et seq.