

PUBLIC JUSTICE 2009 TRIAL LAWYER OF THE YEAR AWARD FINALIST

Case: *Cook v. Rockwell International Corp.*

Counsel: **Merrill G. Davidoff, Peter Nordberg, David F. Sorensen, Ellen Noteware, Jenna MacNaughton Wong, Louise Roselle, Jean Geoppinger, Gary Blum, Steve Kelly and Bruce DeBoskey**

EXPOSING THE TRUTH ABOUT RECKLESS NUCLEAR WEAPONS MAKERS

From 1952 to 1989, when an FBI raid shut it down, the Rocky Flats Nuclear Weapons Plant near Denver made nuclear bomb parts, transmitting cancer-causing chemicals and radioactive material to nearby residents. Meanwhile, the plant's operators – first Dow Chemical Co. and later Rockwell International Corp. – and its owner, the United States Department of Energy (DOE), hid behind the cloak of national security to protect their wrongdoing from public disclosure.

Thanks to **Merrill G. Davidoff, Peter Nordberg, David F. Sorensen, Ellen Noteware,** and **Jenna MacNaughton Wong** of Berger & Montague, P.C. in Philadelphia; **Louise Roselle** and **Jean Geoppinger** of Waite, Schneider, Bayless & Chesley Co., LPA in Cincinnati; and **Gary Blum, Steve Kelly** and **Bruce DeBoskey** of Silver & DeBoskey, P.C. in Denver, a class of 13,000 property owners near Rocky Flats was awarded \$926 million in compensatory damages, punitive damages, and prejudgment interest for the diminution of their property values in *Cook v. Rockwell International Corp.* The jury verdict achieved in this case marks the first time punitive damages have been imposed on a DOE nuclear weapons contractor.

In 1990, following the unprecedented FBI raid of Rocky Flats, Davidoff's team filed the class action in federal district court in Denver. The suit included claims for medical monitoring, so that those exposed to contamination could get preventative care, and for property damage, so that those whose homes were damaged and stigmatized by Rocky Flats could be made whole.

The team had its setbacks. The medical monitoring class was initially certified, but was later decertified on technical grounds. A separate suit on behalf of Rocky Flats workers was held to be barred by workers' compensation.

But Davidoff's team succeeded in winning certification of a class of property owners and defending against repeated motions to decertify. Indeed, this case marks the only occasion in which class claims have been certified and tried for diminution of property values attributable to the prospect of continuing tortious invasions.

One of the most difficult obstacles facing Davidoff's team was that the DOE had indemnified Dow and Rockwell against damages and legal fees, providing little incentive to settle. Defense counsel acknowledged having billed more than \$60 million, and it is likely they billed more than that figure. Davidoff's law firm, Berger & Montague, persevered for 16 years, even as a number of plaintiffs' counsel grew weary and withdrew.

The defendants and the DOE fought discovery tooth and nail, to the point where the DOE was held in contempt of court, a virtually unprecedented event. The DOE then admitted there were more than one million documents discussing unaccounted for nuclear weapons materials. Though the DOE began producing these documents, they were almost completely whited-out based on unsupported claims of national security.

Davidoff's team pressed ahead, locating and reviewing millions of classified documents scattered around the country and conducting scores of depositions. The trial lawyers took and defended more than 40 expert depositions alone. All the while, the intrepid lawyers fought off numerous and often inventive motions involving limitations issues, an easement defense, and aggressive challenges to strike more than a dozen of the homeowners' experts. The trial team prevailed, but that did not stop Dow and Rockwell from re-filing the same motions again.

About two years before trial, Davidoff's team scored a precedent-setting victory against federal preemption of state tort claims when they persuaded the court to reject decisions from other circuits and hold that the homeowners could sustain claims for nuisance and trespass without proving that the defendants had violated numerical federal standards for the release of plutonium and other hazardous substances. This victory required an exhaustive legislative history of the Price-Anderson Act, which governs liability for non-military nuclear facilities.

As trial got underway in October 2005, the DOE announced that Rocky Flats had been cleaned up and was now a "wildlife refuge." Davidoff's team raced to conduct discovery during the trial and showed that the wildlife refuge was a farce. Plant buildings had been torn down, but huge amounts of plutonium were left underground. The trial lawyers scrambled to present evidence and expert testimony that plants, insects and animals could dig up the contaminated soil, bring it to the surface, and high winds could spread toxic substances for years to come.

The four-month jury trial was bitterly contested. After years of silence, Davidoff and his colleagues made sure that the story of Rocky Flats was finally told. The trial team presented the jury with vivid and shocking details, such as the fact that Rockwell left thousands of leaky blocks of radioactive waste outside for years in cardboard boxes. All the while, the trial team fought off defendants' excessive motion practice, which placed not less than 600 entries on the docket between jury selection and the announcement of the verdict. The judge called it the most difficult and complex matter he had ever encountered in all his years on the bench.

After 16 years of tireless efforts by the tenacious trial lawyers, in February 2006, the jury awarded the 13,000 homeowners \$176.8 million in compensatory damages for nuisance and trespass against Dow and Rockwell. In addition, the jury awarded \$110.8 million in punitive damages against Dow and \$89.4 million in punitive damages against Rockwell. The court entered final judgment in June 2008, adding prejudgment interest to the jury verdict.

The trial lawyers' efforts in this case were nothing short of Herculean. The numbers tell the story of the obstacles they faced and overcame. Sixteen years of litigation. To date, 14 published district court opinions. Three different district court judges and 2,314 docket entries. Millions of dollars in expenses fronted by Berger & Montague, with uncertain prospects for success. And the biggest number of all – a total award of more than \$926 million.

The jury verdict in *Cook v. Rockwell International Corp.* sends a strong signal to the DOE and its contractors that they can no longer disregard their environmental responsibilities with impunity. ■