

# Litigator of the Week: Merrill Davidoff of Berger & Montague

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After two decades of litigation over pollution near the Rocky Flats nuclear weapons plant, thousands of Colorado residents saw their hopes dashed in 2010 when a \$926 million judgment slipped away in an appeals court reversal. But lead plaintiffs lawyer Merrill Davidoff and his team at Berger & Montague weren't deterred, and laid the groundwork for a dramatic turnaround.

"We don't abandon cases, and we don't abandon clients," said Davidoff in an interview Thursday.

With a ruling on Tuesday, the U.S. Court of Appeals for the Tenth Circuit took the unusual step of directing a lower court to enter judgment on state nuisance claims against Dow Chemical Co. and Rockwell International Corp, instead of ordering a new trial. Judge Neil Gorsuch, who authored the majority opinion, seemed especially moved by the plaintiffs' long wait for a resolution. "We can imagine only injustice flowing from any effort to gin up the machinery of trial for a second pass over terrain it took 15 years for the first trial to mow through," he wrote.

Through these 25 years, Berger & Montague has carried nearly all the expense for this case, and still hasn't been paid, since it's working for a contingency fee. Davidoff says it's likely the most costly matter the firm has ever undertaken.

The two companies ran the Rocky Flats nuclear weapons production plant near Denver until 1989, when federal investigators determined that plant workers had



**Merrill Davidoff of Berger & Montague.**

mishandled radioactive waste for years. On behalf of roughly 12,000 Coloradans, Berger & Montague filed nuisance and trespass claims in 1990, alleging that their property values plummeted after the discovery of soil and water contamination. The plaintiffs also initially filed medical monitoring claims, but those unraveled after the district court in 1998 decertified a medical monitoring class.

Davidoff served as lead counsel at a trial that began in late 2005, arguing that the two companies were liable

for a loss of property values under the federal Price-Anderson Act, which applies to nuclear incidents. After a jury returned a \$337 million verdict for the plaintiffs in February 2006, the district court tacked on more than a half-billion in pre-judgment interest. But on appeal, the Tenth Circuit sided with the companies' lawyers at Kirkland & Ellis, finding that the jury instructions included too broad a definition of a nuclear incident.

Regrouping, Davidoff and his team abandoned the Price-Anderson claims, conceding that the 2010 appellate ruling prevented them from proving a nuclear incident had occurred. Showing plutonium contamination wasn't enough. The plaintiffs would have had to prove actual damage to their property, or that they were forced to evacuate and could no longer use it. But the lawyers pushed forward with claims under Colorado's state nuisance law, arguing that the appellate ruling found no flaws with the jury instructions on that claim. The Tenth Circuit this week approvingly described this switch in tactics as "a little judicial jujitsu."

"Our position was that we had a trial, the jury answered all these questions on nuisance ... and, therefore, there should be a judgment entered on the existing nuisance verdict," says Davidoff. "It also would have been very difficult to retry the case decades and, in some cases, generations after the events at issue."

The approach didn't pay off immediately—the district

court in January 2014 sided with Kirkland, finding that the plaintiffs' earlier pursuit of Price-Anderson claims barred the state claims. But Berger & Montague's arguments, which Davidoff presented at oral arguments last November, played better in front of the Tenth Circuit panel that ruled Tuesday.

The 25-year-old case isn't over yet—a Dow spokeswoman said Wednesday that the company is considering a petition for en banc and Supreme Court review. Barring a reversal on a further appeal, the plaintiffs are expected to ask the district court to award even more money than they originally received. Including years of pre-judgment interest, the total could top out around \$1.25 billion.

A Dow spokeswoman said the company is entitled to be indemnified by the U.S. Department of Energy because it operated Rocky Flats under a government contract.

Davidoff—who notes that his youngest son, now 25, wasn't yet born when the complaint was filed—says this case has been hard-fought all the way through: "For 25 years, it's been a scorched-earth defense." Tuesday's Tenth Circuit ruling, he added, was all the more gratifying because the remaining named plaintiffs haven't given up. (Some have died since the case began.)

"I feel especially good for them," says Davidoff. "The class representatives really deserve applause."

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