

LAWYERS WEEKLY USA

THE NATIONAL NEWSPAPER FOR SMALL LAW FIRMS

REPRINTED FROM JANUARY 7, 2002

A BI-WEEKLY NEWSPAPER FROM LAWYERS WEEKLY PUBLICATIONS

Top #2 Ten

JURY VERDICTS OF 2001

Billion-Dollar Blockbuster Against Oil Industry

Retired Judge Claims Exxon Mobil Contaminated His Land With Radioactive Waste

By Diana Digges

A handful of environmental lawyers made history last May when a Louisiana jury ordered Exxon Mobil to pay \$1.06 billion to a retired judge for radioactive contamination of his land.

The verdict has fanned the flames of the environmental justice movement, triggering a class action by more than 2,000 area residents. It also sent a signal to businesses throughout Louisiana, which suffers from one of the highest rates of toxic pollution in the U.S., that environmental degradation comes at a very high cost.

The lawyers who won the case pioneered the nation's first suit of this type, *Street v. Chevron*, back in 1986. They estimate there are tens of thousands of potential property damage and personal injury claims involving radioactive contamination from oilfields.

"The verdict signals a trend that the oil industry is going to be held accountable for cleaning up the waste they left behind from years of profit-taking throughout the oil-producing states," said Michael Stag, a member of the plaintiff's legal



Photos by Evidence Management

Retired judge Joseph Grefer owned 33 acres of land outside New Orleans which Exxon contaminated by storing radioactive oil pipes. Grefer's attorneys said there are hundreds of similar sites across the nation that have been contaminated by oilfield radiation.



team. "This was wanton, reckless disregard of the public safety."

The central issues at trial were:

- The extent of the contamination.
- Who knew about it – the oil companies, the pipe-cleaning business and/or the landowning judge.

- When each party knew about it.
- What, if anything, they did about it.
- The value of the land and the cost of decontaminating it.

For several decades, Exxon and other oil companies (most of which settled with the plaintiff) sent pipes to the Louisiana site for cleaning and refurbish-

ing. While pumping oil, the pipes had become contaminated when oil, water and naturally occurring radium became concentrated into a layer of radioactive "scale" inside the pipes, restricting the flow of oil. The industry has grappled with the problem – known as "naturally occurring radioactive material" (NORM) or "technologically enhanced radioactive material" (TERM) – publicly since 1986, and privately since the 1950s.

Plaintiff's attorneys argued that retired Judge Joseph Grefer's claim was triggered when he discovered radioactive contamination on his land in October 1996. He filed suit 10 months later.

While conceding there was some contamination at the site, Exxon contended that the judge knew of the problems long before then, and that the statute of limitations had run out on the claim. The court, however, did not review that claim until after the verdict was rendered – a move that both sides characterized as highly unusual.

The plaintiff's attorneys attributed their victory to proving that Exxon knew about the contamination for decades and

Continued on page 2

Continued from page 1

did nothing about it. They also noted a number of missteps by the defense, including the decision to bus jurors to the site to show them how the plaintiff had let it deteriorate into a dump. But that dump turned out to be on a parcel not owned by Judge Grefer – and what the jurors saw was something that did far more damage to the defendant's case.

"The trip backfired. The jurors also saw that there were churches, schools and houses next to the property, that children were playing and riding their bikes there," said Stag.

Attorneys for the defense called the verdict "absurd," saying the plaintiffs convinced jurors that the case was a referendum on the evils of the oil industry rather than a straightforward evaluation of how contaminated the property was and how much it would cost to clean it up.

"The plaintiffs were successful in getting the jury to ignore the data and focus on what they thought Exxon knew or should have known instead of focusing on whether the property was contaminated and needs to be remediated," said lead defense counsel Gregory Weiss. "The only reason this verdict is newsworthy is because there was such a large award, not because of the contamination, which is minimal."

The large award, \$1 billion of which was for punitive damages, is especially remarkable in a state that has been actively courting business under Governor Mike Foster.

In a gesture intended to show its friendliness to business, the state took out an ad in the *Wall Street Journal* seven years ago depicting a man doing a backbend with the slogan 'Louisiana will bend over backwards for business.' The following year, the state legislature did away with punitive awards against businesses.

The ban on punitives didn't apply to Grefer's case because the contamination had occurred before the law went into effect.

But even without the threat of punitives, this verdict has struck fear into many of the state's businesses, said Elizabeth Teel, deputy director of the Tulane



The plaintiff's lawyers (from left to right) Roger Stetter, Stuart Smith, Michael Stag, Ronald Austin and Jack Harang.

Environmental Law Clinic.

"Just the finding of liability alone is a big thing here," she said. "We have a very dirty state, and the oil and gas and chemical industries are predominantly responsible for it. This might open the door to a flood of litigation on environmental contamination."

Who Knew What When?

One of the crucial issues in the case was when the plaintiff learned of the contamination. Judge Grefer and his family had leased the property for nearly

30 years to John Hooper, president of Intracoastal Tubular Corporation (ITCO), a pipe-cleaning, storage and transportation company that did work for Exxon Mobil and other oil companies.

In June 1992, Hooper came to Grefer, wanting to terminate his lease since he was going out of business. Grefer took the property back, and agreed to release ITCO from the remainder of the rental agreement.

The plaintiff's team maintained steadfastly that Grefer did not discover the contamination

problem until 1996. That was the year Michael Stag asked Grefer's permission to test the site because of a claim brought by his client, a pipeworker, who believed he contracted leukemia from handling radioactive material at ITCO. Those tests showed that the property was, indeed, contaminated by radioactive material and Grefer was informed of the contamination in October 1996. He filed suit the following August.

Defense attorney Gregory Weiss, however, said that Grefer knew back in 1992 that there were problems with the site – and this was key to the defense argument that the statute of limitations had run out.

The plaintiffs presented testimony that when Grefer terminated the lease with ITCO, the company's president assured him there was no problem with contamination at the property. Both Grefer and ITCO President John Hooper testified in depositions that this discussion did, indeed, occur.

But ITCO attorney Daniel Lund claimed that he told Grefer in June 1992 that unacceptable levels of radiation existed and that the area had been cleaned up. He also testified that Grefer himself not only witnessed the cleanup but asked that the release agreement be modified to reserve lessors' rights against third parties.

"So he knew in '92 that there may be some radiation on his property," said Weiss. "He never surveyed it. Why did he wait to file his claim?"

Stuart Smith, lead plaintiff's attorney, scoffed at the notion that Lund's testimony was reliable.

"What Lund had was some notes from 10 years ago," he said. "Judge Jefferson reviewed all the documents and concluded that the statute of limitations under Louisiana law did not begin to run until [Grefer] received test results showing contamination on the property. The bottom line is that there was no evidence, direct or otherwise, that Grefer knew anything about the contamination [in 1992]."

Judge Jefferson ruled against Exxon in a post-verdict hearing on the statute of limitations issue. She stated that both Grefer and Hooper were credible witnesses, while Lund, the ITCO at-

AT-A-GLANCE

Verdict: \$1.06 billion
\$1 billion in punitives

State: Louisiana

Type of case: Environmental contamination.

Trial: 5 ½ weeks

Deliberations: 3 days

Status: On appeal.

Case name: *Grefer et al v. Alpha Technical, et al*

Date of verdict: May 22, 2001

Plaintiff's attorneys:

- Stuart Smith, Jack Harang, Michael Stag of Sacks & Smith in New Orleans
- Ron Austin and Roger Stetter, sole practitioners, New Orleans

Defense attorneys:

- Gregory Weiss of Weiss & Eason in New Orleans.
- Tom Gottsegen and Patricia Weeks of The Weeks Firm in New Orleans.

Evidence Management

torney, was not. She concluded that it "defied belief" that Lund, an ITCO attorney, would make statements against his client's interests, or that Grefer would have terminated ITCO's lease if he had known of a problem with contamination.

Cost of Restoration

A major question the jury had to answer was how contaminated the property was and how much it would cost to restore it.

The defense argued that, according to a massive \$350,000 subsurface survey of Grefer's property in March 2001 done by American Radiation Services, there was limited contamination in five areas. It could be cleaned up for as little as \$45,000, they said.

"This was the most comprehensive survey done by any company on a piece of property in the state of Louisiana at that time. And we found 99.2 percent of the property [had radioactivity] within acceptable levels," said Weiss.

The plaintiff's attorneys contended that the entire property was contaminated, to a depth of two feet, and that it would cost \$83 million to clean it up. Their experts testified that based upon the site history and the surveys done on both sides, the contamination was interspersed throughout the 33-acre tract, and that it would be cost-prohibitive to try to find and clean each "hot spot."

"They concluded that the best way to clean this place up was to remove the top two feet off the property," said Stag.

The jury sided with the plaintiffs on this issue. It awarded \$56 million to the Grefers for restoration costs and \$125,000 for the lost value of the property.

If the jury had stopped there, the verdict probably wouldn't have garnered much attention. But the plaintiff's attorneys were able to focus the jury's attention on the behavior of the oil company nationwide and thus set the stage for a stunning punitive damages award.

A Pattern of Hiding Data

There were three issues that explain the size of the verdict, according to Smith:

- Exxon intentionally spread radioactive materials into an open environment without any controls.
- The company did so in violation of existing laws.
- The company had never – anywhere – been brought to justice for this course of behavior.

"They knew the radioactivity was there, they took no steps to clean it up, and in fact turned their backs and tried to walk away," said Smith. "This is one of the most deadly substances known to man. Radium 226 has a half-life of 1,600 years, so wherever it was deposited in the environment, it's still there."

Plaintiff's attorneys presented documents at trial showing that Exxon officials were aware of the possibility of radioactivity at the pipeyard, but hid the information from the public and from their contractors for decades.

"The oil industry was aware

tubing contains radiation."

However, plaintiffs insist there was direct evidence that Exxon knew it was sending pipe contaminated with radioactive scale to ITCO for years before they notified the pipeyard.

An internal memo revealed Exxon's decision to shut down ITCO to avoid liability for personal injury claims of the workers.

"In that memo, [Exxon] referenced the *Street v. Chevron* case, saying that they didn't want this to turn into *Street* litigation," Stag pointed out.

Another document showed that the company's medical department wanted to do a study on the health effects of the workers' exposure to the radioactive scale, but the proposal was killed by the company's production department.

Former workers at the site testified to how widespread the radioactive material was at the pipeyard, how it was carried in

testing results.

"Those pictures were distorted; these were samples that weren't even used," said Weiss.

In fact, Grefer had shown this same videotape to state inspectors who, after visiting the site, concluded it did not show any-one landfarming.

According to senior inspector Michael Henry, the tape showed bulldozers clearing brush and pushing brush, dirt and other trash into large piles. But when his inspectors tested those piles, they found nothing unusual.

"We surveyed each of the piles on two different occasions, and they all were background (within acceptable levels of radiation)," he said.

"I was very surprised [by the verdict]," he said. "We simply didn't find all that much [contamination] on the site. We've certainly found sites with a lot more [contamination] than this."

Punitive Argument

The plaintiffs' attorneys hired a shadow jury, which gave them valuable feedback at trial that led to a shift in strategy early on. As a result, they focused all their efforts on making this into a punitive case against the oil industry.

"We knew we were killing [the defendant] on liability; the shadow jury told us we needed to focus on damages, that damages would be the real issue," said Stag.

Exxon was arguing that punitives were unwarranted. The company had become aware of the contamination only in 1986, Weiss argued; the following year, Exxon stopped sending pipes to be cleaned at ITCO.

The plaintiffs had already established that Exxon was aware of the problem much earlier and had refused to do anything about it – not only at the site in question, but anywhere it had uncovered radium 226. Based on this corporate disregard for public health, the plaintiffs asked for \$3 billion in punitives. The jury awarded \$1 billion.

"The industry has saved hundreds of billions of dollars in not cleaning these sites up," said Stag. "They admitted at trial that there were potential radioactive sites all over the country – wells, production facilities

'They knew the radioactivity was there, they took no steps to clean it up, and in fact turned their backs and tried to walk away. This is one of the most deadly substances known to man. Radium 226 has a half-life of 1,600 years, so wherever it was deposited in the environment, it's still there,' said attorney Stuart Smith.

since the 1940s that this radioactive material was being produced and basically covered it up. In the late '80s, it became an issue and that's when Exxon tested the ITCO yard," said Smith. "Exxon's own data proved beyond a shadow of a doubt [the extent of the] contamination at the site. We had hundreds of exhibits."

Exxon co-counsel Patricia Weeks maintained that the plaintiff's team used documents about the contamination issue in general to "prove" there was pollution at this particular site. But she is adamant that there is "no memo or study or document of any kind that shows Exxon knows that this scale that forms on the side of

buckets, dumped into potholes and covered over with truckloads of gravel and shells.

"There were two workers who testified at trial, and numerous depositions taken before. Exxon took a position that was indefensible, and they simply lost credibility," said Smith. "There was too much testimony damning them."

Especially damning to the defendant's credibility was a videotape introduced at trial showing Exxon's experts "landfarming" on the property in the course of preparing the site for a survey. Landfarming refers to the practice of mixing contaminated and non-contaminated soil to distort

Continued from page 3

and pipeyards similar to ITCO's that they contracted with. And they couldn't point to one cleanup that they had done."

Defense counsel attributed the huge punitives award to the plaintiff's strategy of hammering away at the size and wealth of the defendant.

"This was a verdict against Big Oil. It's difficult for a company the size of Exxon Mobil to be perceived as faultless in our current society," said Weeks. "The plain-

tiff's counsel were able to say over and over that this was the biggest corporation in the world. You can only hear that so many times before it affects you. There was a socialist aspect to this."

The jury was made up primarily of middle class African-Americans from the greater New Orleans community. Eight jurors were women, more than half owned their own homes and worked as professionals.

"I will spend the rest of my professional life wondering


about what we could or should have done differently. We clearly failed to counter whatever presumptions the jurors had against big corporations," said Weeks.

"I never thought it would be so bad," agreed Weiss. "The juror folk didn't understand what was involved."

But Smith contends that the jury understood exactly what was involved.

"The company is arrogant; they thought they could pull a fast one," said Smith. "But they

grossly misread the jury."

Smith and his team are certainly not lacking for more cases. "This is superfund waste, and in general, it is on other people's property, not the oil companies," said Smith. "I have numerous clients who want it off their property, in Arkansas, Mississippi, Louisiana and Alabama. We have plenty of work." 

Questions or comments can be directed to the writer at:
ddigges@lawyersweekly.com