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WEEKLY

JUSTICE

Boulder attorneys' battles against polluter pay off for poor Denver neighborhood

by
Jefferson Dodge

*Boulder environmental attorneys
Randall Weiner, left, and Macon Cowles*

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BOULDER ATTORNEYS' BATTLES AGAINST POLLUTER PAY OFF FOR POOR DENVER NEIGHBORHOOD

by Jefferson Dodge

Had the lawsuit been filed 20 minutes later, about 300 people would be thousands of dollars poorer today — and might still be living on a bed of arsenic in what was called “the most polluted zip code in Colorado.”

Boulder environmental attorney Randall Weiner's 13-year-old class-action lawsuit against a Denver smelting plant is finally paying off for many residents of the former Denver suburb known as Globeville.

On April 27, a Denver judge authorized the final \$596,700 payout in Weiner's 1999 settlement with ASARCO, and the 117 Globeville residents awaiting the second half of their payments finally have some closure — and then some. They are being notified of the payments this week, and checks will be cut in early June.

And Weiner isn't the first Boulder lawyer to successfully sue ASARCO (formerly known as the American Smelting and Refining Company) for millions of dollars based on environmental complaints about its Globeville plant.

Global history

ASARCO's smelting plant in Globeville — a former company town that sits at the intersection of I-25 and I-70 — was originally known as the Globe Smelting and Refining Company when it began smelting gold, silver, copper and lead in 1886. ASARCO bought the plant in 1901 and turned it into a lead-only facility, but then began producing

arsenic trioxide for things like insecticides, medicines and glass in 1919. Seven years later, it began producing the cadmium used to coat iron and steel.

The plant, located just northeast of where those two interstate highways meet, spewed smoke into the sky and onto the surrounding neighborhoods for decades. It was targeted by the state as a Superfund site in 1983 but was still active on a limited basis until a few years ago.

By 1997, when Weiner heard about an organizer concerned that the plant had polluted soil in south

According to the date on the letter, it had been written two years and two days earlier.

Unfortunately, the statute of limitations on filing a class-action lawsuit against the company was two years.

So Weiner asked Riley if she still had the envelope the letter came in.

She did.

It was postmarked one day shy of the two-year deadline. It was a Saturday, so Weiner had until the following Monday at 5 p.m. to file a suit.

He did.

On Monday at 4:40 p.m.

The decision

In a similar last-minute decision, about two years later, just a couple of days before his case was supposed to go to a six-week trial, Weiner reached a settlement with ASARCO for \$12.3 million. He recalls that the judge who approved the settlement observed in a footnote that “this case would have disappeared but for 20 minutes,” a reference to barely beating the clock on that Monday two years earlier.

At the beginning, Weiner says, he knew that his case would be harder to win than Cowles' case was, because the neighborhood he targeted was farther from the plant, so ASARCO would have stronger

claims that high levels of arsenic in the soil could have come from another source, such as weed killer.

But Weiner says a turning point came when John Drexler, an associate professor of geology at the University of Colorado at Boulder, used special equipment to “fingerprint” the exact type of arsenic found in the soil, allowing scientists to rule out certain sources. According to Weiner and a July 11, 1998, story in the Rocky Mountain News, the ensuing study found that the arsenic in the Globeville soil was not from an herbicide, as ASARCO had claimed, but from a unique trioxide used to make rat poison and manufactured at the smelter from 1911 to 1927.

“That was perhaps the main reason we settled the case,” Weiner says.

Drexler, who has been at CU for 29 years, told Boulder Weekly that while he could not discuss th

Courtesy of the Colorado Historical Society (William Henry Jackson Collection)



Globeville. ASARCO had already been targeted by another Boulder attorney — Boulder City Council member Macon Cowles — and in 1993 had been forced to pay \$28 million related to environmental damage in north Globeville.

That case, the state's largest environmental verdict at the time, revolved around 570 homeowners and about 2,000 renters who lived in the immediate vicinity of the smelting plant, Cowles told Boulder Weekly.

Four years after that verdict, Weiner heard about Toni Riley, a concerned resident who lived in south Globeville, a neighborhood farther away from the ASARCO plant. Weiner says he met with Riley and discussed her concerns about pollution in the soil. She showed him a letter sent by ASARCO to residents, notifying them about test results from samples taken in the area.

specifics of any particular case, his specialty is "metal speciation," in which he tracks the source of pollutants. He says he has worked for the Environmental Protection Agency and the state health department on not just the Globeville plant, but many other ASARCO smelters and mining/milling properties.

Weiner says he insisted that the removal and replacement of soil in the homeowners' lawns and gardens be included in the settlement with ASARCO, "because we didn't want children in the future ingesting arsenic-contaminated soil."

He says he was especially concerned about toddlers and kids stricken with pica, who eat nonfood items like dirt and rocks. Arsenic was banned as a pesticide in 1971, and it has been linked to various maladies, including cancer.

The standards of the remediation were more stringent than state authorities would have required, according to Weiner. ASARCO was required to remove at least the top 12 inches of soil from each property, replace it with uncontaminated soil, and put new sod in.

"The type of grass they put in isn't too hot," says 91-year-old Lalo C. deBaca, the last surviving "class representative," or lead plaintiff, in the case.

In addition to the cleanup, the settlement called for \$6,000 for each homeowner, and up to that amount for each renter, depending on how long they had lived in south Globeville.

The settlement may not sound like much money per person, but it was a significant amount for the residents in that area, which has a high poverty rate. According to 2000 data from The Piron Foundation, more than 23 percent of its residents were at or below the federal poverty level, and in 2007 the crime rate was 288 incidents per 1,000 people.

Dressed in coat and tie, Weiner and a paralegal went door-to-door at the judge's insistence to get each and every class member's signature approving the terms of the settlement.

"There were times I wondered if I was taking my life in my hands," he says with a laugh.

And it used to be worse, to hear Cowles tell it.

Cowles' case

Cowles says the original 1991 case against ASARCO developed after residents of the area received notices on their doors from the Colorado Department of Public Health and Environment advising them to mix their homegrown vegetables with store-bought produce so that they wouldn't consume dangerous levels of lead, cadmium and arsenic.

Cowles says he initially got involved because he, like Weiner, was involved in environmental activism with the Land and Water Fund of the Rockies, and was just trying to help the residents find a law firm to represent them in a suit against ASARCO. He offered to help them with litigation after the best offer they got from six major firms would have cost them \$250,000.

He, too, was coming up against a statute of limitations on 1989 soil tests when he filed suit in 1991. Two years later, after a six-week jury trial, he and his legal team had not only secured the clean-up of the properties, but homeowners received about half of the market value of their homes, while renters got about \$1,500 each.

Those payouts were actually higher than originally expected because after the jury verdict, Cowles

and his team forged a settlement with ASARCO in which the company agreed to do the cleanup for significantly less money than it would have cost to hire another firm to transport the soil. As a result of ASARCO simply burying the contaminated soil on its own property and capping it, Cowles says, the residents got about \$14 million of the judgment instead of only \$8 million.

And considering the socioeconomic class of the people there, that money went a long way.

"These are people on one of the lower rungs of the economic ladder," he says.

Cowles became close to members of his class-action suit — he still stays in touch with some of them, in fact — and saw a transformation in the community after the jury verdict. He says it wasn't just simple things, like people using the money to "paint their houses and do things they hadn't been able to do before."

The case also prompted the city of Denver to take notice — and better care — of a neighborhood that had been neglected, Cowles says. "The city didn't do shit for that area for a long time," he explains, adding that after the verdict, the city provided and repaired sidewalks, public light fixtures and a community swimming pool.

The result, he says, is that "it became a place that everyone knew had a future." Members of the class-action suit had taken some grief from neighbors because some thought the case would just further stigmatize the impoverished area.

"The verdict healed a lot of rifts in that neighborhood," Cowles says. "It was like a victim being stigmatized because not everybody was sure a crime happened."

"People began to take pride in where they lived again."

Even ASARCO got into the act, according to Cowles, by giving local residents jobs working on the cleanup and holding annual community picnics that were eventually attended by special guests like Colorado Rockies players.

Investment and earnings

Cowles, like Weiner, gives as much credit to his fellow attorneys as he does to himself for the successful outcome. Cowles lists Kevin Hannon, Bill Rossbach, Kieron Quinn, Mary Kane and Terri Harrington among his team members.

Weiner credits the two legal firms Gersh & Helfrich and Burns, Figa & Will, as well as claims administrator Matt Pohl.

Initially, Weiner financed his lawsuit by taking out credit cards so that he could chip in the \$120,000 that each of the other two firms was shell-ing out.

"Every time a credit card offer came in, I signed up," he says with a laugh.

He acknowledges that it paid off, earning the attorneys their hourly rate plus 50 percent, but he says their fees made up only about 14 percent of the total settlement, which is low.

"We agreed to take less than normal because we wanted the properties cleaned up," he says.

Another distinctive element about Weiner's suit is that the settlement required ASARCO to restore the properties to their condition before they were polluted, which is a much higher bar than the government's approach of requiring polluters to clean up property to a level deemed safe and economically reasonable.

And on top of the clean-up, the residents received payment, whereas in some cases, it's either/or.

"That's unfortunately one of the dirty little secrets of environmental law, or any property law, for that matter," Weiner says. "Our court system works on compensating injured people monetarily, and that allows people to receive money for contamination and never clean up the contamination with those funds. So the pollution remains on the property long after the person who received the money has sold it and moved on."

Weiner explains that cases like his and Cowles' — lawsuits brought by private parties — are playing an increasingly important role in policing industry for environmental pollution, considering that Superfund money dried up to "a shadow of its former self" during the administration of George W. Bush. The lack of funding for public enforcement by the state or federal government means that more and more, individuals will have to take matters into their own hands if they want to regulate polluters. That also means attorneys often have to take on a lot of risk and expense in representing citizens in such cases.

In addition to the ASARCO case, during his career Weiner has shepherded three other environmental lawsuits in what has been documented as the most polluted zip code in Colorado.

The final chapter — 11

By 2003, all of Weiner's clients had received the first half of their payments from ASARCO — and some had even received the final installment — when the company declared bankruptcy.

The remediation of the contaminated soil was 90 percent complete.

ASARCO didn't finish the clean-up until last summer.

Luckily, Weiner and his legal team had built language into the original settlement requiring ASARCO to pay \$500 a day if the remediation took longer than its 2003 deadline. Because the company filed for Chapter 11 and missed that deadline, Weiner and ASARCO negotiated an agreement in bankruptcy court that effectively doubled the amount of the final payment to residents who were still owed money.

So a homeowner who still hadn't received \$3,000 will get about twice that amount next month. Once renters are incorporated into the equation, the 117 remaining residents awaiting their last check will receive \$5,100 on average, Weiner says.

They are receiving notice of the payment this week, and once their addresses are verified, their final payments are expected to be mailed in early June.

Alan Pemberton of Covington & Burling, one of the attorneys that represented ASARCO in Weiner's case, declined to comment for this story.

Asked how he'll use his final payment, the 91-year-old deBaca replies, "pay bills and so-and-so. ... I got to pay the nursing home."

He says Weiner is like a hero to the residents of south Globeville.

"Just about everybody knows Randy," deBaca says. "He's a nice guy. I like him."

"I'm glad we got this thing out of the way," he adds. "It makes me feel better that people will be getting their money." ❧

Respond: letters@boulderweekly.com