

Zott, '86, and Zeiger, '01: Solving a Complex Puzzle

By Amy Spooner

Building a lawsuit can be similar to assembling a jigsaw puzzle. A puzzle whose number of pieces is unknown at the beginning; a puzzle without a clear picture of the finished product to follow. And, for David Zott, '86, and Jeff Zeiger, '01, a puzzle that can take five years to construct.

Long-abandoned uranium mines in the Navajo Nation. A one-stoplight town in Mississippi. A mountain community in Pennsylvania. Wall Street. Each was a piece that Zott and Zeiger meticulously, patiently put together to garner the largest bankruptcy award in history related to governmental environmental claims and liabilities.



GLENN CARPENTER

David Zott and Jeff Zeiger

For Zott and Zeiger, both partners in the Chicago office of Kirkland & Ellis LLP, the puzzle began with one piece: Their client, Tronox (a spinoff of Kerr-McGee Corp.), was declaring Chapter 11 bankruptcy. As Tronox faced a sort of corporate death, its birth story became the focal point of what eventually evolved into a \$5 billion settlement.

A settlement that affected people like the Navajo, who for decades had watched their land be mined, then used as a dumping ground for the byproduct waste. About 50 former Kerr-McGee abandoned mines are scattered across Navajo land. Uranium waste lies in piles near communities and is carried by rainwater across land frequented by hikers, fishermen, medicine men, and shepherds. "The Navajo were attempting to clean up radioactive waste using shovels and backhoes," says Zott. "It was a situation that seemed largely hopeless."

One billion dollars of the settlement will go toward cleanup of Navajo lands, a sum that won't eradicate all of the damage but

will allow for dramatic improvement, says Ben Shelly, president of the Navajo Nation. "The settlement will be a great help in restoring the abandoned uranium mine sites, but we must not forget about the 460 other sites still in need of cleanup funds," Shelly said in a statement. "Any funds resulting from this lawsuit are welcomed and long overdue."

The Usual Suspects

Zott and Zeiger's client, Tronox, originally was Kerr-McGee Corp., an oil and gas company founded in the 1920s in Oklahoma. A 2005 IPO spun off Tronox from Kerr-McGee as a separate chemical company. Zott and Zeiger didn't know for sure but suspected that Kerr-McGee executives deliberately set up Tronox to fail by leaving behind decades upon decades of environmental and tort liabilities with minimal assets to support them. On Zott's and Zeiger's advice, Tronox sued Kerr-McGee (and Anadarko Petroleum Corp., which acquired Kerr-McGee in 2006), claiming that Tronox's creation constituted fraudulent conveyance designed to protect Kerr-McGee's profitable oil and gas assets from the company's legacy environmental and tort liabilities.

Zott and Zeiger were retained to continue prosecuting the claims on behalf of a litigation trust after Tronox emerged from bankruptcy in 2011. The pair previously had represented Solutia Inc. in litigation related to its bankruptcy in the mid-2000s. The chemical business had been spun off from Monsanto, but Zott and Zeiger ultimately concluded that Monsanto had adequately capitalized Solutia and that its failure was not related to the spinoff.

"There's nothing inherently wrong with spinoffs, but they are prone to abuse because there's no counterparty," says Zott. "It's just one company, with their own self-interest, making the decisions."

Zeiger says that early in their investigation into the Tronox case, it was obvious that Tronox was failing from day one. "Tronox only had one quarter during its existence where it turned a profit, and that was the result of a litigation settlement. Any time your legal department is your primary profit center, you know things aren't going well."

While it was obvious to the Kirkland & Ellis team that Tronox had a case, the extent initially wasn't clear. "If Kerr-McGee management already was planning on a spin when they separated their oil and gas assets three years prior to the spinoff, meaning it was a single integrated scheme as opposed to two separate steps, then we would have something that would go from a billion-dollar case to a multibillion-dollar case," Zott says.

On the Road Again

So Zott and Zeiger, along with partner Andrew Kassof, got to work. Zott took on the solvency and damages case, while Zeiger led the environmental damages case and Kassof focused on the accounting-related issues.

Identifying third-party witnesses, and determining whether they are helpful or harmful to your case, can be a challenge to any litigator. But in this case, the close history between Kerr-McGee and Tronox made it extra difficult. “Because Tronox was a spinoff, everyone had been employed by Kerr-McGee at some point,” says Zott. “Many had received promotions when they moved to Tronox. They were honest people who acted in good faith and did everything they could to make Tronox work. So when it didn’t, it was hard for some of them to recognize it had failed because the company they’d worked for for 25 years set them up for failure.”

Zott and Zeiger traversed the country, interviewing potential witnesses who worked—or previously had worked—for Kerr-McGee and/or Tronox. “When you’ve got a company that went from the diversity and size of Kerr-McGee to a small, failing chemical company, there’s going to be a lot of attrition and people moving all over,” Zeiger says. “We tracked down and met with anyone who was willing to talk with us, whether they liked our case or not, in order to get a clearer picture of what had happened.”

The picture that emerged included widespread environmental damage that had gone on for decades. In the 1950s, the company had mined uranium in the Navajo Nation in the southwestern United States, leaving behind countless piles of radioactive waste. In Henderson, Nevada, perchlorate (a chemical used to produce rocket fuel, fireworks, flares, and explosives) that was leaking from Kerr-McGee’s plant had threatened the water supply of Los Angeles. In a Manville, New Jersey, community that had been built on top of an old Kerr-McGee site, creosote (a chemical used to treat railroad ties) had suddenly begun bubbling up into people’s homes.

“The damage was so varied, and so far-reaching, that it was an incredible challenge to try to understand it and to present it in a way that was compelling as a major piece, but just one piece, of a very complex case,” says Zeiger. All totaled, the Kirkland & Ellis team identified 2,700 sites nationwide that had incurred environmental damage as a result of Kerr-McGee’s negligence.

Preparation and a Four-Month Trial

The experts that Zott and Zeiger hired on behalf of Tronox logged 40,000 hours analyzing the sites, and ultimately produced a 2,000-page report homing in on 372 of them for the trial. Kerr-McGee’s and Anadarko’s expert countered with an 8,000-page report, which left Zeiger with a lot of late nights devoted to not-so-light reading. From 10,000 pages of analysis by the environmental engineers, Zeiger started to develop about 15 themes that he decided to press in trial. “I began to see that they had really cut some corners in their analysis,” he says, “so I thought that my approach was

going to be sufficient. As it turned out, we had a two-day cross examination of their environmental expert. If we’d attacked all 8,000 pages, we might still be there.”

During the long, difficult lead up to and throughout the four-month trial, Zott and Zeiger both say it was the people they’d met—those impacted by Kerr-McGee’s actions—who motivated them to keep going, to not leave any literal or figurative stone unturned. Both were especially impacted by the time they spent in the Navajo Nation, where navigating the cultural barriers presented unique challenges. The litigators were seen as outsiders, and many Navajo distrust the legal system. In addition, they don’t readily discuss personal suffering. “But as [a Navajo leader] spoke and showed us documents and photos, it really brought home how destitute the area is, and the almost-hopeless situation they were left in. We knew people would be helped at a very fundamental level if we prevailed,” Zott says.

“Talking to all these victims reminded us why we take on these types of cases,” adds Zeiger.

Cleaning Up

In December 2013, U.S. Bankruptcy Judge Allan Gropper in New York City ruled in favor of the Tronox litigation trust, saying Kerr-McGee’s spinoff of Tronox Ltd. was a fraudulent transfer designed to hide billions of dollars’ worth of assets from individual claimants, multiple states and municipalities, the Navajo Nation, and the federal government. In May 2014, Judge Gropper approved Anadarko’s \$5.15 billion settlement offer, which includes a \$600 million trust for tort claimants—the largest such settlement in U.S. history. “The Tronox case makes it clear that companies like Kerr-McGee cannot restructure their way out of substantial environmental liabilities and leave taxpayers holding the bills,” says David Uhlmann, the Jeffrey F. Liss Professor from Practice at Michigan Law and director of the Environmental Law and Policy Program.

For Zott and Zeiger, the completed puzzle includes gratitude from a diverse group of people affected by the outcome. “There is appreciation unlike anything I’ve ever seen from so many people across the country,” says Zeiger. “Everybody recognizes that this case will have a positive impact for generations to come.”

Some of the most appreciative are the Navajo. “I was privileged to work with David and Jeff,” says David Taylor, an attorney with the Navajo Nation Department of Justice. “They exhibited the highest standards of professionalism, legal expertise, and civility, and they have the heartfelt gratitude of the Navajo Nation government and the Navajo people.”

The Navajo Nation EPA (NNEPA) “is grateful for the opportunity to work with lawyers such as Jeff Zeiger and David Zott in the *Tronox v. Anadarko* case,” says Stephen Etsitty, executive director of the NNEPA. “Their leadership helped raise the bar for the inclusion of indigenous people and of tribal government perspectives in major environmental litigation.”