

THE AMERICAN LAWYER

THE AM LAW LITIGATION DAILY

Litigators of the Week: The Beveridge & Diamond Team that Made Sure Newark Didn't Face the Same Safe Drinking Water Act Woes as Flint

A Beveridge & Diamond team led by Bina Reddy, Eric Klein, and Roy Prather fended off two preliminary injunction efforts by the Natural Resources Defense Council before favorably settling the case for the New Jersey city this week.

By Ross Todd
January 29, 2021

At their base, the problems facing the City of Newark, New Jersey looked disturbingly similar to those facing Flint, Michigan: Aging water infrastructure. Elevated lead levels. And a Safe Drinking Water Act lawsuit from formidable legal foes at the National Resources Defense Council.

The outcome, however, was very different. This week U.S. District Judge Esther Salas signed off on a settlement Newark reached with the NRDC where the city agreed to finish remediation efforts that were already underway or completed. Notably, as part of the deal the NRDC team walked away without getting legal fees paid by the city for their two-and-half years' work on the case after they were awarded almost \$1 million for work on the Flint case.

That outcome has landed Litigator of the Week honors for Newark's legal team at **Beveridge & Diamond** led by shareholders **Bina Reddy**, **Eric Klein**, and **Roy Prather**.

Litigation Daily: Who was your client and what was at stake?

Bina Reddy: Our client was the City of Newark, New Jersey, including several City officials in their official capacities, as well as the City's Water and Sewer Department. The lawsuit was largely modeled on the same lawsuit filed by NRDC in Flint, Michigan after high levels of lead were detected in the water there. The Newark lawsuit, filed in June 2018, at its core alleged that the City violated the Safe Drinking Water Act and the federal Lead and Copper Rule by allowing lead levels to rise in the City's drinking water. The lawsuit's primary demand was that the City pay to replace



Courtesy photo

Beveridge & Diamond's Bina Reddy, Eric Klein and Roy Prather.

all of the approximately 18,000 lead-based water service lines (the pipes connecting each building to the water mains in the streets), which are private property, not City property, in Newark. The stakes rose quickly when NRDC filed a motion for a preliminary injunction in August 2018 that asked the Court to order Newark to make ongoing bottled water deliveries to most residences in Newark, at an estimated annual cost of between \$30 and \$80 million. Finally, but perhaps most importantly, the stakes involved the public, and in particular their trust in the City's water.

Who all was on your litigation team and how did you divvy up the work?

Eric Klein: Our core litigation team began with two junior shareholders (Bina and me), a senior associate (Roy), and a midlevel associate (**Collin Gannon**). Two senior shareholders (**Ben Wilson** and **John Guttmann**) were also available for strategic guidance. In the course of the litigation, Roy was promoted to shareholder.

Our team worked with an unusually high degree of collaboration. Bina and I made decisions by challenging each other while ultimately seeking and achieving consensus. As the case went on and Roy was promoted,

this system expanded to include him. We consulted our broader team on important decisions, always seeking dissents while working towards consensus. Beveridge & Diamond thrives on a lack of hierarchy and empowered junior partners.

Roy Prather: The core team met weekly to manage strategy and tasks. Collin and I took the lead on managing offensive and defensive discovery. Bina and Eric tended to divvy up and share motions practice, expert work, court advocacy, and negotiations. Bina brought particular expertise from prior work on issues involving lead and drinking water science, including defending B&D client DC Water, and took the lead in that area. Eric has a background in journalism (including a journalism masters from Northwestern) and often took the lead on the drafting work of our motions practice.

You beat back a couple of injunction bids in this case. What were your opponents seeking in those proposed injunctions and how were you able to convince the court to deny them?

Reddy: NRDC's initial injunction demand was ongoing citywide delivery of bottled water to most residents, with a backup demand for the citywide distribution and installation of point-of-use (e.g., faucet-based) water filters.

A key fact in Newark is that the city is served by two separate water sources, one serving the eastern side of the city and the other serving the western side. Water in the two different systems is treated at different facilities, and the two systems have historically used different types of lead corrosion control treatment. That corrosion control treatment ultimately failed in one of the two systems—the one serving the western side of the city—but not both.

While NRDC's injunction motion was being briefed, Newark received a recommendation from its water engineering consultant to provide water filters to affected residents in the western half of the city where lead corrosion control had failed. Newark accepted the recommendation and began providing filters to those residents immediately. NRDC then filed an "emergency" injunction request—separate from its pending preliminary injunction motion—to require Newark to expand its filter program to the other half of the city too. The judge ordered Newark to file a response within

three days, and then called the parties into court for a hearing. Our team focused on what was largely missing from NRDC's emergency motion: data, evidence, and expertise. Newark's eastern water system was within the federal "lead action level," and so the facts were on Newark's side. The challenge was to convince the court not to be swayed by the emotional appeal of alleged lead exposure to children, but on the facts and data—and the court did so, denying the emergency motion.

Klein: NRDC subsequently narrowed its PI request to an extension of the filter program to the eastern side of the city. That hearing took place in August 2019, and roughly followed the pattern of the first: NRDC simply had insufficient data and witnesses to show that water conditions in the eastern side of the city required an expanded filter program. The judge rejected NRDC's argument that the court should enter an injunction on the precautionary principle (the argument that in the absence of evidence protective measures should be taken), in the face of Newark's actual evidence on the lack of lead exposure risk.

Your opponents here appear to have followed a playbook that was successful in litigation against the City of Flint. How were you able to convince Judge Salas that your client was already taking appropriate actions and that court intervention wasn't needed?

Reddy: It was difficult defending this case against the background of the tragedy in Flint, particularly where NRDC was deeply familiar with that case. The biggest factor is that Newark's circumstance is quite distinct from Flint's. Unlike in Flint, in Newark there was no city-initiated change in corrosion control treatment that precipitated treatment failure, and there was no credible allegation that any requirement of the Lead and Copper Rule was actually violated. In Flint, there have been serious allegations of personal and official misconduct, including the alleged coverup of lead-related developments and data. Nothing of the sort can be alleged in Newark.

Klein: In part, our strategy was to slow things down sufficiently that the court could properly absorb the environmental data in Newark, which favored us throughout. The City was acting quickly on the ground, instituting a water filter program, changing the corrosion control treatment in the water, etc., thereby giving

the court comfort that the City was working hard and an injunction was not necessary.

Prather: We also made sure the court heard from Newark's water professionals, particularly the incredibly knowledgeable Director of the City's Water and Sewer Department, Kareem Adeem, who managed and oversaw the City's engineering response to the lead situation. Director Adeem testified at the second injunction hearing in August 2019, and persuaded the judge with his command of the situation, his work ethic, and credibility. As a lawyer, it was a pleasure to watch his testimony.

We believe that Judge Salas refrained from an injunction because of the detailed evidence we presented that the City was focused on public health, that the City was diligent, and that it was open and straightforward with the court and the public. We tried to reflect this in our oral arguments and in our litigation tactics—for example, by trying to minimize discovery disputes to the extent possible, to underscore Newark's cooperativeness and seriousness.

How was the settlement the court signed off on this week a win for your client?

Klein: The settlement greatly favored Newark. The City basically only agreed to continue doing the things it has already voluntarily been doing for months or years: sharing information with the public, sending periodic reminders about existing city programs, replacing the City's lead service lines (around 95% done at the time of settlement), and maintaining the water filter program. Presuming no unexpected spike in lead in 2021—an extremely unlikely circumstance given the replacement of almost all of the lead service lines—the agreement will terminate almost entirely at the end of June 2021. By contrast, the Flint settlement and litigation around it is still ongoing years later.

Reddy: Importantly, NRDC walked away from the case without a dollar in legal fees, a rare outcome in a citizen suit and particularly one helmed by the NRDC.

The Safe Drinking Water Act allows plaintiffs in private enforcement actions to recover their attorneys' fees for successful actions. Such fees are routine and expected in the settlement of actions brought by environmental groups like NRDC. The organization received almost \$900,000 in fees for its work in Flint. Here, though, NRDC never won any significant motion in court in 2.5 years of litigating, and finally ended the case without fees and no significant new remedial measures.

What guidance does this case provide to cities like your client that face potential environmental issues stemming from aging infrastructure and the potential litigation threats that come with them?

Reddy: Newark has shown that cities that tackle their problems openly and energetically should also be unafraid to unapologetically fight against aggressive but poorly-founded environmental enforcement litigation by interest groups like NRDC. Newark is successfully and independently tackling its drinking water issues, but even amidst an emotional news environment, the City did not give in to private citizen suit litigation in federal court that was not properly based in law. Our many municipal clients facing citizen suits know that we will defend them zealously while recognizing their obligations that safe drinking water and environmental protection are the overriding priority.

What will you remember most about handling this matter?

Reddy, Klein and Prather: Data and science matter. We're grateful for judges like Judge Salas who encourage litigators to drill down on the evidence and separate rhetoric from facts. And our amazing client, the City of Newark, which heroically rose to the challenge.

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