

THE AM LAW LITIGATION DAILY

Litigators of the Week: A Defense Verdict for Dow and PPG in Quarter Century-Old Environmental Litigation

By Ross Todd

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It took two-and-a-half decades, a handful of prior trials, and multiple trips to the California Court of Appeal and back, but last week The Dow Chemical Co. and PPG Industries Inc. finally got the result they were seeking.

After a six-week trial in San Francisco Superior Court, the companies secured a defense verdict in a lawsuit brought on behalf of the City of Modesto alleging perchloroethylene, or PCE, made by the companies and used by a local dry cleaner contaminated the city's groundwater.

This week's Litigators of the Week are **Mary Rose Alexander** and **Robert Collins** of **Latham & Watkins** who led the team representing Dow and **Jason Levin** of **Alston & Bird** who led PPG's team.

Litigation Daily: Who were your clients and what was at stake at trial here?

Mary Rose Alexander: Latham was retained by The Dow Chemical Company and Alston & Bird was brought on by PPG Industries Inc. after the California Court of Appeal remanded the case in 2018 for new trials. The case, filed by the City of Modesto in 1998, alleges hundreds of millions of dollars in past and future clean-up costs of alleged PCE contamination of drinking water, groundwater, soil, and sewers in connection with 39 different dry cleaners. The city asserted public nuisance, product liability, and negligence claims against Dow and PPG, two of several historical manufacturers of PCE. Many of the legal issues are cutting edge in California and around the country, resulting in several trips to the Court of Appeal. San Francisco is a particularly challenging forum for multiple jury trials.

How did you and your firms get brought into this litigation?

Jason Levin: Latham joined a stellar group for Dow at King & Spalding, led by Gus Filice, and my team joined Beveridge & Diamond, led by Gary Smith, in 2021 to represent PPG. Together, we were brought in to provide a fresh look and new trial strategy after the Court of Appeal remanded the case in 2018.



Courtesy photos

L-R: Robert C. Collins III, Mary Rose Alexander & Shannon Lankenau of Latham & Watkins, and Jason Levin of Alston & Bird.

Alexander: Dow initially retained our former partner **Tom Heiden** and me. Robbie Collins joined the team a little more than a year ago, shortly before the first trial involving the former Vogue Cleaners.

Get us up to speed on this case's history. Why has it been going on for so long? And why have there been so many prior trial phases and trips to the Court of Appeal?

Levin: The courts have essentially ruled that each of the 39 dry cleaners requires its own trial. It takes a long time to get through 39 separate trials!

Who was on your team and how did you divide the work on this particular trial?

Alexander: We are fortunate to have an excellent team of associates all of whom have prior trial experience. Our Chicago-D.C.-San Francisco-San Diego team is led by senior associate **Shannon Lankenau** and includes associates **Dylan Glenn, Joseph Thomas, Katherine Rouse** and **Nils Gilbertson**; with paralegal **Karin Sanders**. I delivered our opening statement and closing argument while Robbie and Shannon joined me in presenting the trial witnesses. Our cross-office associate team was invaluable to that effort and played a huge role in preparing our defense witnesses and preparing for cross-examination of the city's witnesses.

Robbie Collins: Our secret sauce also included Shook, Hardy & Bacon partners Andy Carpenter and Patrick Gregory and associate Andre Tinoco, who were with us throughout the entire trial, and prepared for, argued, and won motions on legal issues crucial to the defense, including motions in limine and critical jury instructions. We were thrilled with Dow's model of close collaboration with external counsel: Dow's associate general counsel Michael Glackin and managing counsel Chris Bowman participated heavily in defense strategy planning and Dow attorney Alex Nguyen was at trial every day and drove the strategic approach.

Levin: My gratitude to my partners Debbie Jones, Jay Smith and Jenny Hergenrother. They made it easy to split up the core issues in the case: warnings, hydrogeology, and toxicology. I think the jury appreciated seeing different faces with different witnesses.

What were your key trial themes, and how did you drive them home with the jury?

Alexander: This trial was specific to the former Acme Cleaners, and our goal was to keep the jury focused only on Acme-specific facts. For example, unlike other dry cleaners in Modesto, the former Acme Cleaners was only open from 1988 to 2000 and today is a taqueria in a busy shopping mall. Our primary theme—and how we won the case—was that although PCE was accidentally spilled during the 12 years the dry cleaner operated, there was no impact to the drinking water and therefore did not harm the City.

Levin: “No harm” was definitely the key issue. We elicited admissions from the city's own witnesses that the drinking water in Modesto was “absolutely safe.” We stressed the position of regulators who for decades had declared that “no further action” was required at the site. And we presented the property owner, who testified that he would have paid for and conducted further testing if necessary, but the city never asked.

What did you do differently here than prior defense teams in this litigation?

Collins: We made the city's lack of harm and its lack of action over 20 years the core theme, and we reiterated it with each witness. This took the focus off the product and chemical companies and kept it on the city, which was pursuing a property damage case when it did not actually own the property.

How did you manage to take punitive damages off the table before the case went to the jury?

Alexander: We marshaled the Court of Appeal's 2018 decision, which reversed a prior punitive damages award against Dow, to convince the court that the city still failed to present evidence of any malicious conduct by a Dow officer, director, or managing agent. There is simply no evidence in the 25-year record of this case of any such conduct, and we were pleased that the court agreed. This was an example of the incredible teamwork that led to our success. Our team developed this record throughout the discovery process and then Robbie and Andy Carpenter (for Dow) and Jason (for PPG) successfully convinced the court not to instruct the jury on the question of punitive damages.

What can other defendants in a similar position take from what Dow and PPG were able to accomplish here?

Levin: Top experts and good facts may no longer be enough for defendants to win environmental cases in many jurisdictions. It is hard to overcome the level of distrust of science and corporations that many jurors have. But jurors can be won over with honesty, good storytelling, and a strong effort to address their feelings head-on.

Alexander: Don't give up. Sometimes it takes decades to land on the winning themes.

What will you remember most about this matter?

Levin: Closing arguments. Everything came together perfectly. It's not easy convincing anyone, much less a San Francisco jury, that chemicals in the environment are not harmful. But in closing, Mary Rose and I were able to do just that. We found different ways to connect with the jury and explain how “Mother Nature” had the tools to remove the small amounts of contamination that had been found in the groundwater.

Alexander: The seamless camaraderie, and hard work among our team, which is a hallmark of Latham's practice that we truly live and breathe. The collaboration with Andy at his team at Shook Hardy made us better. It was incredible to achieve the first defense verdict from a jury in the 25-year history of the case. I'm also really proud of the diversity of our team and believe that helped our success in particular before a diverse San Francisco jury.

Collins: For better or for worse, I will remember coming down with COVID and a 102-degree fever the night before opening statements and before I was supposed to cross-examine the first witness—and, in particular, how the whole team responded to readjust on the fly.