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PROPERTY DAMAGE CLAIMS AGAINST POLLUTERS WITH CLASS AND WITHOUT

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'Mid pleasures and palaces
though we may roam,
Be it ever so humble
there's no place like home.

John Howard Payne,
Home Sweet Home (1823)

Property damage claims are an important component of environmental litigation. The damages at issue can be quite substantial. Proof of these damages, normally made through an appraiser, is far simpler and far less expensive than proof of toxic physical injury. Property damages claims are more amenable to class treatment or the joiner of numerous plaintiffs in a single action than are claims for bodily injuries.

Real estate agents often repeat the cliche that there are three rules of real estate valuation: location, location, and location. Locations, like people, have reputations. We know of Love Canal, Times Beach, and Three Mile Island. It is hard to sell a house in a bad location. One need not be a real estate agent or be certified appraiser to understand the difficulties of selling a house if prospective buyers are told that the wells down the street are polluted with carcinogens and that the ground water nearby is contaminated with hazardous chemicals which continue to migrate into an ever broader plume.

Throughout the country, governments are finding it difficult to obtain land for hazardous waste sites. Ironically, a state-controlled hazardous waste site contemplates safe, secure handling of chemicals, in start contrast to the absence of care exercised by so many polluters.

This paper presents an overview of the relevant substantive law and class action procedural law along with some thoughts on site evaluation and the management of a class action for property damage.

I. SUBSTANTIVE PROPERTY DAMAGE LAW

The fouling of a person's air, land, or water has never been legal. Traditional legal principles relating to trespass, nuisance, ultra hazardous activities, and negligence generally form a sufficient legal foundation to support liability for whatever harm is done by a polluter. Likewise, traditional rules for the recovery of actual and punitive damages can justify an adequate award to compensate the victim and to deter the wrongdoer. A study of the relevant common law provides a legal basis for liability and a foundation to rebut the moralizing claims of corporate defendants who assert that they are now being held liable for acts which once were legal.

The law of nuisance comes from the English common law. The early case of Fletcher v. Rylands, (Eng.) L.R. 1 Exch. 265, established the principle that a person who engages in hazardous activity on his property, when this activity does damage to the property of others, is strictly liable for that damage. An individual who suffers injury to his property due to another person's conduct may sue to abate the nuisance or to recover monetary damages. 4 W. Blackstone, Commentaries, Ch. 13; E. Coke, Institutes of the laws of England, Sec. 56. Someone who maintains a nuisance that damages the value of other peoples' property is liable for the loss in value. Scott v. Reynolds, 70 Ga. App. 545, 29 S.E.2d 88 (1944).

It has long been held that, regardless of negligence, one who pollutes the soil and ground water on their own land is liable to other landowners whose soil and ground water is thereby polluted. Womersley v.Church, 17 L.T.N.S. (Eng.) 190 (1867) (cesspool); Kinnard v. Standard Oil Co., 89 Ky. 468, 12 S.W. 938 (1890) (oil spill); Sandstone Spring Water Co. v. Kettle River Co., 122 Minn. 510, 142 N.W. 885 (1913) (creosote plant); Annot., 55 A.L.R. 1385 (1928). One who pollutes a stream or river is liable to lower riparian owners for nominal and actual damages, injunctive relief, and, in the appropriate case, punitive damages. Annot., 38 A.L.R. 1388 (1925); Annot., 46 A.L.R. 8 (1927). Liability for air pollution is likewise nothing new. Whitney v. Bartholomew, 21 Conn. 213 (1851) (smoke and cinders from blacksmith shop); Savannah F. & W.R. v. Parish, 117 Ga. 893, 45 S.E.280 (1903) (noxious odors from foul ditch).

Many of the above cited cases contain no "contact" requirement limiting liability to those whose land is physically fouled. The only requirement is that the plaintiff be damaged by the defendant's nuisance. Damage can be in the form of loss of property value, loss of use of the property, or loss of enjoyment of the property.

Nuisance law does distinguish between significant and "trifling" harm, as stated in a comment to the Rest.(2d) Torts:

> By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or a private nuisance. Rest. (2d) of Torts § 821F (1979).

The tort of nuisance " 'involves a *nontrespassory* invasion of property rights.' 4 Rest. of Torts, 2d, §821D, p. 100. Thus it is clear that a tangible physical intrusion is not necessary." Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 721, n. 12 (Mich. 1992) (emphasis provided by Court in Adkins).

In Exxon Corp. v. Yarema, 516 A.2d 990 (Md. App. 1986), the court held, "Nuisance is not contingent upon whether the defendant physically impinged upon plaintiff's property, but whether the defendant substantially and unreasonably interfered with plaintiff's use and enjoyment of its property." 516 A.2d at 1002.

Accord.DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454 (Ohio App. 5 Dist. 1991), Allen v. Uni-First Corporation, 558 A.2d 961 (Vt. 1988). A district court in Kentucky addressed this issue, noting:

> The court notes that some courts have allowed recovery in a nuisance case based upon the public's perception of contamination even though such perception may be unfounded. *See, e.g., DeSario v. Industrial Excess Landfill, Inc.*, 68 Ohio App.3d 117, 129, 587 N.E.2d 454, 461 (1991) (holding that a class action nuisance suit "may be premised on the public's perception of contamination irrespective of actual land contamination."; *Allen v. Uni-First Corp.*, 151 Vt. 229, 558 A.2d 961, 963-64 (1988) (finding that trial court failed to properly instruct the jury regarding damages based on the evidence of public perception of widespread contamination). Lamb v. Martin Marietta Energy Systems, Inc., 835 F.Supp. 959, 969 (W.D. Ky. 1993).

In In re Tutu Wells Contamination Litigation, 909 F.Supp. 991 (D. Virgin Islands 1995), the court held, "In addition to the Restatement, the more well-reasoned, recent environmental contamination opinions addressing nuisance claims suggest that interference with one's use and enjoyment of his land may, but need not, arise from a physical harm or invasion to that land." 909 F.Supp. at 996.

A Mississippi Supreme Court opinion held, "An actual physical invasion of the property in question is not required for recovery for nuisance." Leaf River Forest Products v. Ferguson, 662 So.2d 648, 662 (Miss. 1995). While the Court in Leaf River Products did find that the Plaintiffs, who owned riverfront property from eighty to more than one hundred miles down river from the offending pulp mill, did not present sufficient evidence to sustain their nuisance claims, it did so in a manner that repudiated a requirement that a physical invasion is a necessary prerequisite to a nuisance claim.

There is an unfortunate Kentucky decision, Lamb v. Martin Marietta Energy Systems, Inc., 835 F.Supp 959, (W.D. Ky. 1993) that holds, without citing a single Kentucky appellate decision, that Kentucky nuisance law requires proof of contact - a physical invasion.

Attorneys handling environmental property damage claim should be familiar with federal environmental statutes, including the Toxic Substances Control Act (TOSCA), 15 U.S.C. §§2601-2629; the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §136 et seq.; the Clean Water Act, 33 U.S.C. §§1251-1376; the Clean Air Act, 42 U.S.C. §§7401-7642; the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6901-6991i; The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§9601-9657; and the amendments set forth in the Superfund Amendments and Reauthorization Act of 1986 (SARA).

An action for property damage caused by the release of hazardous substances can include a claim for response costs under CERCLA. The claim for response costs can involve claims for

interlocutory relief which may help finance a cause of action. Additionally, some courts have taken the view that a claim for response costs is necessary if an attorney wishes to take advantage of the statute of limitations tolling provisions found in the 1986 SARA Amendments. These provisions hold that the statute does not begin to run until the date the plaintiff knew of or should have known of the damage and the cause of the damage. 42 U.S.C. §9658 et. seq.; Knox v. A.C. & S., Inc., 690 F.Supp. 752 (S.D. Ind. 1988).

II. CLASS ACTION LAW

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure and similar rules in most states. Rule 23(a) establishes four requirements that must be met in all class actions.

Rule 23 (a)(1) mandates that a class be so numerous that joinder of all of its members is impractical. Impracticality, however, does not mean "impossibility but merely difficulty or inconvenience." Republic Nat'l Bank of Dallas v. Denton & Anderson Co., 68 F.R.D. 208, 213 (N.D. Tex. 1975). See also 3 J. Moore, Moore's Federal Practice ¶23.05 (2d ed. 1982).

Rule 23(a)(2) requires that there be questions of law or fact common to the class. Common questions of law and fact arising in a property damage class action may include:

- the liability of the defendants;
- appropriate measure of damages and remedies;
- defenses raised by defendants;
- availability of exemplary damages;
- all factual issues relating to the operation of the facility owned and operated by a defendant, its use of toxic chemicals, and its release of hazardous substances;
- the need for declaratory relief;
- the need for injunctive relief;
- the plume of contamination; or
- the potential for aggravation or remediation of the contamination.

Rule 23(a)(3) requires that the representative parties' claims be typical of the class. In Piel v. National Semiconductor Corp., 86 F.R.D. 357 (E.D. Pa. 1980), the court stated that the "philosophy expressed in this and other judicial districts considers claims typical when the "essence"

of the allegations concerning liability, and not the particularities, suggest adequate representation of the interests of the proposed class members."

Determination of adequacy of representation under Rule 23(a)(4) depends on two factors: (1) the named plaintiffs must have interests common with and not antagonistic to the interests of the class; and (2) plaintiffs' attorneys must be qualified, experienced and generally able to conduct the litigation. See e.g., Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978); Georgia State Conference of Branches of NAACP v. Georgia, 99 F.R.D. 16, 28 (S.D. Ga. 1983); Davis v. Northside Realty Assoc., Inc., 95 F.R.D. 39, 44 (N.D. Ga. 1982).

The court must find antagonism between the plaintiffs and the class if they are found to be inadequate. Perryman v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983), on remand 580 F. Supp. 1015 (N.D. Ga. 1983). As the court stated in In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 208 (5th Cir. 1981), "[S]o long as all class members are united in asserting a common right, such as achieving maximum possible recovery for the class, the class interests are not antagonistic for representation purposes."

In addition, a class action must meet the requirements of Rule 23(b)(1), 23(b)(2), or 23 (b)(3). Generally, a class action for monetary damages to individual plaintiffs must meet the requirements of Rule 23(b)(3), which stipulate that the court must find that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available means for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

In Dura-Bilt Corp. v. Chase Manhattan Corp., 89 F.R.D. 87, 93 (S.D.N.Y. 1981), the court summarized the predominance requirements as follows:

> Rule 23(b)(3) does not require that all questions of law or fact be common, it only requires that the common questions predominate over individual questions. Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions. Id.

The issue of whether or not a class action is the superior method for adjudication of a particular dispute is of course, a matter for the trial court's discretion. Many believe that tort actions should not be handled as class actions, even where there are many common issues of law and fact. See Hobbs v. Northeast Airlines, 50 F.R.D. 76 (E.D. Pa. 1976); Causey v. Pan American World Airways, 66 F.R.D. 392 (E.D. Va 1975); H. Newberg, Newberg on Class Actions §17.02 (2d ed.). The clear trend in the law, though, is toward favoring class action treatment in mass tort cases, particularly where the individual damages claimed are not large or where the class seeks property damages as opposed to personal injury damages. H. Newberg, Newberg on Class Actions §§17.05, 17.06 (2d ed.).

Professor Charles Alan Wright stated:

> I was an ex-officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that is untrue. Unless we can use the class action and devices built on the class action, our judicial system is simply not going to be able to cope with the challenge of the mass repetitive wrong...Charles Alan Wright, In re School Asbestos Litigation Master File 83-0268 (E.D.Pa.) Class Action Argument, July 30, 1985, Tr 106.

The courts are rapidly developing procedures to facilitate class treatment of mass tort cases. Bifurcation and trifurcation to separate issues of liability from issues of proximate cause and damages can be appropriate. Certification can be limited to certain issues under Fed. R. Civ. P. 23(b)(4).

The U.S. Supreme Court has held, in a discrimination case, that class members are not barred from raising in subsequent lawsuits issues which were not decided in a previous class action. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984). The Cooper decision can be read to modify the rule barring the splitting of a cause of action in separate litigation in particular circumstances. See H. Newberg, Newberg on Class Actions §17.11 (2d ed.).

There is now substantial authority for the certification of property damage class actions. See, e.g., In re School Asbestos Litigation, 789 F.2d 996 (3rd Cir. 1986); Jenkins v. Raymark Industries, Inc., 782 F.2d 468 (5th Cir. 1986); Rowe v. E.I. Dupont De Nemors and Co., 262 F.R.D. 451 (D. N.J. 2009); Collins v. Olin Corporation, 248 F.R.D. 95 (D. Conn. 2008); 7-Eleven, Inc., et al. v. Bowens, 857 N.E.2d 382 (In. App. 2006); Daniels v. Witco Corporation, 877 So.2d 1011, 03-1478 (La.App. 5 Cir. 6/1/04); Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980); Ouelette v. International Paper Co., 86 F.R.D. 476 (D.Vt. 1980); Joiner v. Hercules, U.S.D.Ct., S.D. Ga., C.A. CV-294-170, Order of January 29, 1997 (copy attached).

Recent decisions of the Georgia Court of Appeals wisely defer to a trial court willing to certify a class.

III. SITE EVALUATION

Make a careful evaluation of any pollution site prior to bringing a class action for property damage. This evaluation cannot be made until substantial and reliable data has been assembled indicating the source and extent of contamination. A skilled real estate appraiser should be provided with this information and asked to review the site with the lawyer. Factors to be considered include the following:

- the availability of data to located and quantify the contamination;

- the number of affected property owners;
- the nature of the property (residential, commercial, industrial);
- the economic strength of the individual property owners; and
- the solvency of the defendant.

Real estate appraisers should provide assistance in determining the boundaries of the "neighborhood" of property substantially devalued by the contamination in question. The geographical boundaries of the neighborhood should be used to define the proposed class.

IV. CASE MANAGEMENT

The first line of defense to a property damage class action is defense counsel's oppression of the plaintiffs' attorney. Defendants can make the discovery and preparation for trial of a property damage class action as expensive, onerous, and protracted as possible. Defense counsel can do this with the expectation and, perhaps, hope that the plaintiffs' lawyer will complain loudly to the court. Such complaints will be used to support the defense's contention that the case at hand is unmanageable as a class action or, alternatively, that the case is too much for plaintiffs' counsel. In either case, defendant will argue against certification or for decertification.

Plaintiffs' counsel will need basic information from each class member. Defense counsel is likely to ask for similar information. It is much better to gather it before the defendant asks for it. The information from individual class members should include correct title data, date of purchase, purchase price, property use, tax and other appraisals, and efforts to sell the property.

The pivotal expert in a property damage claim is the appraiser. An effective appraiser is an enlightened appraiser. The appraiser should have taken courses or otherwise gained specific information concerning the effect of contamination on property values. Many seminars and publications currently deal with this topic. The appraiser should also be acquainted with the facts concerning the effect upon property values at similar contamination sites. Next, the appraiser must be very familiar with the relevant facts of the case. Such preparation will require the efforts of other experts. Engineers, geologists, hydro-geologists, and chemists may be necessary to establish the extent and nature of the contamination. Toxicologists and biologists are important to explain why exposure to these chemicals is bad. Bankers, insurance agents, and real estate lawyers can explain the effect of contamination upon the availability of loans and insurance and what disclosures must be made to prospective buyers. These experts are important for trial. They are also important as a foundation for the appraiser's opinion as to the effect of the contamination upon the market value and marketability of the property in question.

Management is critical in class actions. The voluminous amounts of paper that will be

generated in any class action must be dealt with as the case progresses. Do not throw documents into boxes for later organization or else the task will become overwhelming.

Effective demonstrative evidence should be developed. Maps and charts showing test results and plumes of contamination are worth thousands of words. Appraisal reports and other expert conclusions should be in writing, organized and indexed so that they can be put into evidence at trial without protracted testimony.

Preparation must at all times proceed with the assumption that the case will soon be tried before a jury. Skilled defense counsel readily recognize a lawyer who is preparing a case for settlement and will take full advantage of this knowledge.

Resist with all vigor undue extensions for discovery, delays in trial and interlocutory appeals. These actions rarely benefit injured class members.

Life has few pleasures greater that those which come to a lawyer who stands ready to try a case against a well-heeled defendant scared to entrust its financial future to a jury of fair-minded citizens.

John C. Bell, Jr.