


Stigma Damages: Expect Déjà Vu All Over Again

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It is difficult to define "property damage," but one knows it when one sees it. Groundwater and soil impacts are readily discernible. However, owners of property that has been adversely affected by environmental conditions caused by others have recently sought recovery for the stigma which may attach to property which has in the past been affected by hazardous substances, even after remediation. These cases are particularly interesting in light of the traditional causes of action for negligence, trespass, and nuisance, and the statutes of limitations which may affect both rights to sue and damages. This article addresses "stigma" as an emerging area and an element of damages in environmental cases.

Example One: Present owners purchased land in 1979 for a price then close to its fair market value. In 1983, it became apparent that what was originally perceived as a minor environmental problem was actually a major one. The property is now a state Superfund site with a potential \$12 million dollar cleanup in progress. This prime real estate has been unusable and unsalable since purchased. Development cannot begin until the cleanup is complete, which will take another year.

Even when remediated, attitudes of potential purchasers and tenants, as well as lenders, are likely to be negatively influenced by the existence of prior contamination, the possibility of low-level residual contamination, and a deed restriction on a small parcel which would be exceptionally difficult and expensive to clean up. The owners have incurred substantial response costs, in addition to carrying costs including taxes, site security, and fees to guarantee future availability of sewer hookups. How much should the owners be able to recover from the unrelated parties that contaminated the property decades ago? Can they recover only out-of-pocket expenses and future costs, or the diminished value of the property? What about the fact that the property has been undevelopable, unleaseable, and unfinanceable for years, depriving the owners of their ability to utilize their asset and capital?

Example Two: Property adjacent and downgradient from a former underground storage tank farm is underlain by contaminated groundwater which was discovered in 1990. The owners of the downgradient property have expended substantial funds disproving regulatory agencies' contentions that their property is a source of the groundwater impacts. The

downgradient property cannot be sold or refinanced at today's more favorable rates because of the condition of the groundwater. The owners have been forced to reduce rentals, but the reductions may be at least partially due to general market conditions. Do the owners have a viable claim for damages? Could they recover damages for lost or reduced rentals? Diminished value? Excess interest paid due to an inability to refinance?

Property owners whose assets have been affected by contamination like that described in the above two examples are often very interested in exploring theories by which they can recover for their losses. One seemingly novel theory which has been utilized in reported cases recently is recovery for "stigma." Stigma damages reflect the concept that damaged property has a certain negative reputation that makes it not only more difficult to sell or finance, but also likely never to return to its original fair market value, even if it is remediated.

To understand the cases involving stigma and the arguments that may affect recovery, it is necessary to understand both the issues relating to, and the potential impact of, statutes of limitation and how they can limit recoveries under the more conventional general theories of recovery for property damage, which are negligence, trespass, and nuisance. To evaluate where this evolving area is going, it is useful to understand how stigma manifests itself in terms of damage, and how such damage can be measured.

STATUTES OF LIMITATION

Claims for property damage, which have often included claims for damages due to negligence, trespass, and nuisance, are limited by "statutes of limitation," sometimes referred to as "statutes of repose." Such laws set periods within which a suit for damages must be brought, or the right to bring such a suit will be lost (barred). For example, in California, a three-year statute of limitation applies to claims for property damage. Therefore, suits for negligent damage, nuisance, and trespass must be brought within three years or be forever "barred," since all are claims for injury to real property.

Generally speaking, a statute of limitation begins to "run" from the date that the last element essential to the cause of action occurred. For example, for negligence, the elements are (1) a breach of a duty owed to the landowner by another and (2) damage caused by that breach. In other words, a suit may commence on the date that the last event or circumstance which makes the cause of action complete, and the time within which a suit may be brought ends as of the day corresponding to the statutory time limit.

"Harm" is essential to any claim for property damage, but the "harm" involved in contamination does not occur at the time that an agency requires response actions, but rather at the time of the injury (the "harm") itself. Therefore, the statute of limitations for damage to property begins to run *at the time of the injury to property*, not when the plaintiff is finally forced to respond to an agency demand.

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THE "DISCOVERY RULE"

The "discovery rule" may delay the commencement of running of the statute of limitation in cases where it would be unjust to deprive a plaintiff of his claim before he is aware, or should have been aware, that he has been injured. In such circumstances, the claimant's cause of action—and therefore the right to sue—accrues, and the statute of limitations begins to run, when the injured party either discovers the injury and its negligent cause or could have discovered the injury and cause if reasonable diligence had been exercised.

Cases interpreting the discovery rule hold that the statute of limitations begins to run not when the cause of a condition has actually been ascertained, but rather from the time the injured party has notice of information or circumstances which would put a reasonable person on notice of a potential injury, and which information or circumstances would give rise to a duty to inquire about the cause of the potential injury. If a person becomes aware of facts that would make a reasonably prudent person suspicious that harm has occurred, that person has a duty to investigate further and is charged with knowledge of matters that would have been revealed by such an investigation.

For example, in *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d 1225, 281 Cal. Rptr. 827 (1991), the injured party owned property that was formerly leased by the defendant Aerojet. During its occupation of the property, Aerojet disposed of hazardous substances on-site. The plaintiffs acquired the property in 1975, allegedly unaware of the hazardous conditions on the property. In April 1987, the local air pollution control district informed the plaintiffs that their property was contaminated. The plaintiffs conducted their own investigation and discovered extensive on-site disposal of hazardous wastes by the defendant. They filed suit on January 14, 1988, alleging causes of action for strict liability and negligence, among others.

Although the plaintiffs did not discover the conditions until their investigation in 1987, the court held that their claims for permanent trespass and nuisance were barred because, as early as 1979, they were aware of facts sufficient to put them on notice of the possibility that the defendant had disposed of hazardous waste on the property. The court cited three events which together constituted notice: (1) a recorded lease giving notice that the defendant had engaged in activities of a potentially hazardous nature on the property; (2) information provided in late 1979 by the Department of Justice, which informed the plaintiffs of an investigation of the defendant's hazardous waste disposal practices in the area; and (3) an April 1984 request from the defendant to enter the property for the purpose of inspecting and conducting tests on the property. (*Mangini* is discussed below with respect to continuing trespass and nuisance.)

In *CASMI IV v. Hunter Technology Corp.*, 12 Cal. App. 3d 1525, 282 Cal. Rptr. 2d 796 (1993), the defendant manufactured printed circuit boards on a parcel until 1983. The plaintiff acquired the property in May 1985. The defendant allegedly disposed of chlorinated solvents and other hazardous

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substances during its operations on the property. In July 1985, a regional water quality control board (RWQCB) ordered the plaintiff's predecessors-in-interest to remediate the property. The plaintiff filed suit in December 1988. Consistent with *Mangini*, the court barred the plaintiff's causes of action, holding that as of July 1985, the date of the RWQCB order, the plaintiff "possessed information sufficient at least to place it on notice of serious contamination problems on the parcel it owned, and from which notice, by exercise of reasonable diligence, it could have learned the full extent of the problems and the nature of their source."

PERMANENT VERSUS CONTINUING TRESPASS AND NUISANCE

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The damages that a party may receive depend on whether a trespass or nuisance is permanent or continuing. This distinction depends on whether the trespass or nuisance can be discontinued or abated without unreasonable hardship or expense. If it cannot be abated, it is permanent; if it can be abated, it is continuing. Because of a preference for abating trespasses or nuisances, there is a judicial preference for holding trespasses and nuisances to be continuing. This distinction is important, because a "permanent" cause of action for property damage may be barred by the statute of limitations if the harm should have been discovered more than three years ago (in California), while a "continuing" cause of action may still be pursued even though the first harm occurred outside the three-year statute of limitations.

Capogeannis v. Superior Court, 12 Cal. App. 4th 668, 15 Cal. Rptr. 2d 796 (1993), addressed this issue in the context of environmental contamination to property. The plaintiffs purchased property but were unaware that underground storage tanks were present on the property and that the tanks leaked gasoline. They commenced a lawsuit against the former owners more than three years after discovering the leaking tanks. Their complaint alleged causes of action, including nuisance. The defendants' motion for summary adjudication was granted by the trial court on the ground that the nuisance claim was barred by the three-year statute of limitations. On appeal, the appellate court acknowledged that the affected soil and groundwater could not be completely remediated and that the remediation effort might take several years, and it found the situation to be *close* or *doubtful* as to whether the nuisance was permanent or continuing.

The appellate court relied on an earlier Supreme Court case to hold that, in close or doubtful situations, a plaintiff may elect to treat nuisance as permanent or continuing. The appellate court was also influenced by the policy of encouraging private abatement of environmental conditions. The plaintiffs were able to defeat the defendants' motion for summary judgment by offering the declaration of a registered geologist and registered environmental assessor, who stated that the soil and groundwater remained contaminated, but that the contamination "is abatable through environmental remediation."

DAMAGES RECOVERABLE FOR PERMANENT TRESPASS AND NUISANCES

A permanent nuisance exists generally when a single occurrence causes permanent injury, and damages are assessed once and for all. If the trespass or nuisance is permanent, plaintiffs must bring one action for all past, present, and future damages within three years (or whatever statutory period applies in that jurisdiction) of its creation. The measure of damages for a permanent trespass or nuisance is the diminution in market value of the property caused by the trespass or nuisance. Damages are not dependent on any subsequent use of the property but are complete when the trespass or nuisance comes into existence.

Diminution of property value is generally measured as of the date of the injury to the property—not as of the time of trial. As an alternative to diminution in value, a plaintiff may recover the cost of repairing or restoring the property. The traditional common-law rule limits damages to the lesser of the cost of repairing and restoring the property or the diminution in value. Where the costs of removal, repair, and abatement exceed the pre-injury value of the property, damages have traditionally been limited to the pre-injury value of the property, although the rationale for this traditional limitation arguably does not apply in the modern context of contaminated properties because under today's environmental laws owners are typically not free to abandon property (and thereby limit their losses to the property value) without remediating environmental conditions, even if the cost of remediation exceeds the property's value. A plaintiff cannot seek both diminution in value and cost to repair or restore, however. "Double recovery" is not allowed.

STIGMA DAMAGES

A new damage theory, referred to as stigma damages, has recently been considered by courts. Stigma cases reflect the fact that reputation and history of property can have a significant effect on its value, and that ill repute can depress the value of property. Stigma, therefore, means some condition which adversely affects the value of property due to real or perceived risk. Some cases have held that even *unreasonable* fears of the potential buying public that, for example, a gas or oil pipeline may rupture and depress the market value of land and entitle the owner to incremental compensation in eminent domain.

Although stigma damages are arguably an element of diminution in value, they arguably should be awarded in cases traditionally where the plaintiff elects damages for repair and restoration, because stigma reflects the degree of diminution in value that cannot be mitigated by repairing or restoring the property. Thus, stigma damages would not constitute a double recovery.

The issue of the extent of recoverable stigma damages was recently raised in *Federal Deposit Insurance Corp. v. Jackson Show Partners Ltd.*, 850 F. Supp. 839 (N.D. Cal. 1994), involving leaking underground storage tanks. In that case, the three-year statute of limitation for permanent injury

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to property had run. The plaintiff was thus barred from recovering the diminution in value of its property. The court stated, however, that if a claim for permanent nuisance had still been viable, "the [plaintiff] would, in all likelihood, be able to recover diminution in value as damages, which might include a component relating to the stigma caused by the contamination, although this remains an open question." This statement implies that permanent nuisance and trespass claims allow recovery for stigma, leaving open the question as to whether such a recovery also exists when the injury is "continuing."

In a case involving a nuisance lawsuit among residential neighbors, the trial court awarded the plaintiffs a permanent injunction against the defendants, and the jury returned a verdict for \$28,000 in damages reflecting the diminution in property value attributable to the stigma created by the neighbors' offensive conduct. The court overturned the jury's award of damages on the ground that prospective damages may not be recovered if the offensive conduct is enjoined by court order. The court recognized that the defendants' mere presence might stigmatize the neighborhood, even if they comply with the injunction, but nevertheless denied stigma damages.

Stigma damages were awarded by a jury in the highly publicized *Bixby Ranch* case, decided in Los Angeles Superior Court in December of 1993. In the context of environmental contamination of commercial and industrial properties, stigma can arise from risks that did not exist prior to enactment of modern environmental laws—the possibility of liability for future costs due to operation of those laws. Stigma may therefore be viewed as persisting only as long as the adverse condition, and, therefore, the risk, exists. As property is remediated, and risks are reduced, stigma damages should become less. *Bixby* has not yet been decided at the appellate level, and no published opinion exists discussing limitations on stigma damages. In *Bixby*, the court held that an owner could recover damages based on "permanent postclosure stigma" for the loss of value that allegedly exists even after a contaminated property is cleaned up to regulatory standards. The plaintiff argued that, due to residual concentrations of chemicals, there was no guarantee that additional cleanup would not be demanded in the future and that the property's reputation as a contaminated parcel would make it more difficult to market. The jury awarded \$826,500 in damages, which represented an 18-percent diminution in value.

Stigma damages may be overcome by showing that the diminished value of a property is due to an overall decline in property values unrelated to environmental conditions. In a case which preceded *Bixby*, the court held that an overall decline in values superseded any losses due to stigma, and the claimant could not prevail in its claim.

Courts have also awarded special damages as a further element in permanent trespass and nuisance cases. These special damages include injury to health, expenses incurred by reason of illness, loss of consortium, damages for annoyance, inconvenience, and discomfort, and "such other special damages as may be proved." If repair or restoration costs are the

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measure of damages, the plaintiff is entitled to damages for any loss of use of the property during the repair and restoration period.

RULES APPLICABLE TO CONTINUING TRESPASSES AND NUISANCES

If the trespass or nuisance is continuing, according to *Capogeannis*, then "every repetition of the continuing [trespass or] nuisance is a separate wrong, subject to a new and separate limitation period for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred." This means that an injured party can sue every three years to recover damages incurred in the previous three years. However, damages are limited to those expenses or injuries actually incurred or sustained within the preceding limitation period (three years prior to filing the complaint). Traditionally, therefore, there is no recovery for prospective damages such as diminution in value of the property, which, under traditional analysis, arises at the time the property was contaminated.

According to *Mangini*, the burden is on the plaintiff to prove that the trespass or nuisance is continuing, meaning abatable without undue hardship or expense. Generally, courts prefer to find continuing, rather than permanent, trespass or nuisance, except where the conduct, though constituting a nuisance or trespass, was legally privileged or publicly beneficial.

The general measure of damages for a continuing trespass or nuisance is the difference in the rental or usable value of the property before and after the injury. Loss of rental value is appropriate where the plaintiff has a nonpossessory interest in the property, and loss of use value is appropriate where the plaintiff is in possession. These types of damages, rather than repair and replacement damages, are appropriate to reflect the temporary nature of the injury.

LOSS OF VALUE ON A CONTINUING BASIS

Even though a plaintiff may recover for lost use or decreased rental income on a continuing basis, recovery for stigma, which is associated with diminution in market value, is a new area that will likely be revisited by the courts as plaintiffs seek new theories to recover for real economic losses in environmental contexts.

Defendants are likely to argue that stigma is difficult if not impossible to prove or quantify, and that, where it exists, it reflects permanent injury and is thus subject to the three-year statute of limitation applicable to permanent injury claims.

The issue may not be that cut-and-dried, however. The economic effects of stigma are not difficult to quantify, particularly where financing impacts exist. It is clear that an element of damages for a continuing nuisance or trespass is the "loss of use" of the property during the three-year period immediately preceding the commencement of the suit. Precisely what damages are included within "loss of use" is unclear, however, and is the crux of the issue with respect to stigma damages.

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In many cases, the stigma associated with even a temporary environmental impact can make it harder for an owner to use the property as collateral to obtain a loan. The owner might have to pay a higher interest rate reflective of the higher risk posed by environmental conditions. In this respect, the use of the property as a financial asset has been impaired, even if only temporarily, and the economic impact of that impairment is measurable. It is unsettled in California whether this loss of use is compensable as an element of damages in a continuing nuisance or trespass lawsuit. Other state and federal courts have considered the issue in analogous contexts, however.

In a 1987 Alabama case, *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 (11th Cir. 1987), the plaintiff sought damages for its inability to refinance a property at market interest rates due to the city's unconstitutional imposition of a regulatory restriction on the property. The court of appeals upheld an award of these damages, holding that the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction. Damages for lost opportunity to refinance have also been upheld in a Delaware lawsuit for intentional misrepresentation.

Illinois courts have rejected damages for loss of a property's use as a financial asset. Illinois views this element of damages not as an independent element of damages, but rather as "interest on damages." In one case, the plaintiff sued for fraud and sought to recover, among other damages, "the time value of approximately \$575,000." The court held that the "lost investment value of \$575,000 is not an element of damages in and of itself but, rather, interest on damages," and interest on damages may only be awarded pursuant to statute or contract.

CONCLUSION

There is little doubt that the topic of stigma damages will be addressed more fully and defined more clearly as case law develops. It is even more certain that claims for stigma will be raised frequently as an element of damage in settlement and allocation discussions where plaintiffs are willing to litigate are to a high level of confidence with respect to other types of recoveries, such as cleanup costs, and defendants have a stake in settling without litigation. In some recent cases, the authors have assisted parties in overcoming the effects of stigma so as to accomplish the goals of the parties without the payment of actual damages. In other cases, stigma damages will have a substantial impact on settlement amounts. ■

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