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Timely Commentary from the *WLF Legal Pulse* blog

Eighth Circuit Properly Rejects "Fear of Nuisance" Suit Arising from Pipeline Leak

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Can a public-nuisance lawsuit be based solely on property owners' fear that their property values will be diminished by proximity to an adjacent contaminated tract? The U.S. Court of Appeals for the Eighth Circuit recently—and correctly—rejected a creative, but flawed, attempt by landowners to recover damages for such claims in *Smith v. ConocoPhillips Pipeline Co.*

The use of public nuisance litigation to redress environmental claims has proven extraordinarily controversial—and generally unsuccessful. Perhaps the most famous failure occurred when plaintiffs employed nuisance theories to redress environmental contamination at Love Canal, in which case over a decade of litigation failed to produce a solution.[1] Thereafter, appellate courts generally rejected the tort's use for a wide variety of claims ranging from lead paint contamination to climate change.[2]

Recently, however, the tort has been resuscitated. In a case involving lead paint, a California trial court rendered a nuisance judgment for $1.15 billion, which is now on appeal.[3] Thereafter, a Texas appellate court affirmed a nuisance judgment against a manufacturing facility that was operating in full compliance with its emissions permits. A petition for review of that decision is now pending in the Texas Supreme Court.[4] Other federal and state court decisions have conflicted concerning environmental-nuisance claims, in particular if they should be permitted to proceed beyond the pleading and summary judgment stages. The U.S. Supreme Court has thus far refused to resolve the divergent rulings.[5] In view of these troubling developments, the Eighth Circuit's decision in *Smith* merits close study.

In *Smith*, a group of landowners sought to certify a class action to redress an alleged nuisance caused by a petroleum pipeline leak. Although the defendant repaired the leak in the pipeline, it did not remediate the contamination. When contaminants affected nearby residential properties, the pipeline's owner purchased and demolished the affected properties, fenced the area, and set up monitoring wells to detect any contamination that spread beyond the sequestered area.

Even though contamination was never detected outside the fenced area, a group of neighboring property owners still claimed that the polluted site was itself a nuisance.

Although MTBE, a gasoline additive, was detected on one owner's property, the additive was not present on the original site. Indeed, none of the contaminants resulting from the pipeline leak were found on any putative class members' property. Nevertheless, because the district court could not "rule out the possibility that pockets of contamination exist" in the area, the court granted class certification.[6]

On appeal to the Eighth Circuit, the pipeline owner argued that class certification was improper, because no evidence proved that the class members were actually affected by pollution. The defendant claimed that without such a showing, the landowners did not sustain a common injury as a class. Although the landowners argued that the contaminants found on adjacent properties created a "cloud" of apprehension that diminished their property values, the court ruled that such a showing was legally insufficient to establish a class-wide injury. According to the court, "[t]he presence on only one property of a petroleum pollutant not found at the leak site cannot prove that actual contamination exists on class land."[7] Citing authorities from other federal circuits, Missouri, and other states, the court refused to allow recovery for a "decline in property value caused by unfounded perception of underground contamination."[8] The court held that "putative class fear of contamination spreading from the [adjacent property] is not a sufficient injury to support a claim for common law nuisance in the absence of proof."[9]

The Eighth Circuit's reasoning recalls courts' general reluctance to award speculative "stigma" damages when properties have not been physically affected by contaminants.[10] Although the *Smith* court relied on a number of federal and state cases in its reasoning, the decision is also supported by sound economic principles.[11] Research has consistently demonstrated that the mere presence of an environmental risk does not automatically indicate devaluation.[12] Moreover, persons who own real estate hold their properties as capital assets and they realize gains or suffer losses only when the properties are sold. The real estate market fluctuates on a daily basis, and is influenced by a host of factors, with environmental issues being only one of many concerns. Claims such as the ones made in *Smith* ask courts and juries to make awards based upon losses that have not occurred, and which may never occur. To avoid these uncertainties, "[t]he requirement of permanent and physical injury to property ensures that this remedy does not open the floodgates of litigation by every property owner who believes that a neighbor's use will injure his property."[13] Otherwise, such speculations would require clairvoyance, a discipline which, to date, has not been recognized in our jurisprudence.

The Texas Supreme Court recently addressed the propriety and proof difficulties of "stigma" claims in *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*:

> The struggle over whether to even allow recovery of stigma damages arises primarily from the conflicting goals of fully compensating the plaintiff for her injury while only awarding those damages that can be proven with reasonable certainty . . . *Even when it is legally possible to recover stigma damages, it is often legally impossible to prove them . . . Evidence based on 'conjecture, guess or speculation' is inadequate to prove stigma damages, not only as to the amount of the lost value but also as to the portion of that amount caused by the defendant's conduct*. In this case, even if Texas law permits recovery of stigma damages, [plaintiff's] evidence was legally insufficient to prove them.[14]

In *Mel Acres Ranch*, the plaintiff could offer no evidence of comparable sales transactions framing a "market" within which damages could be calculated.[15] Such proof failures are endemic when contaminated or formerly contaminated, isolated properties are involved. The situation is even more attenuated when only *proximity* to an impacted property is alleged.

Unless plaintiffs can demonstrate a physical impact and a reliable methodology to prove the existence and the effects of "stigma," courts are justified in denying relief. Although determined plaintiffs' counsel will continue to pursue these questionable claims, decisions like the Eight Circuit's ruling in *Smith*, and the Texas Supreme Court's holding in *Mel Acres Ranch*, suggest that these adventures may be nearing an end. Even when this specific problem is resolved, however, the traditional boundaries of public nuisance litigation will probably remain under assault—as the tort's historic malleability tempts plaintiffs' counsel to draw ever more distant and diversified fact scenarios into its elastic embrace. Although public nuisance litigation remains a threat, the *Smith* and *Mel Acres Ranch* decisions demonstrate that defenses that incorporate both jurisprudential and economic analyses provide promising arguments against speculative claims.

Notes

1. *See* Eckardt C. Beck, *The Love Canal Tragedy*, Epa Journal (Jan. 1979) ("No secure mechanisms [were] in effect for determining such liability"); Charles H. Mollenberg, Jr., *No Gap Left: Getting Public Nuisance Out of Environmental Regulation and Public Policy*, 7 Expert Evidence Rpt. 474, 475-76 (Sept. 24, 2007).

2. *See generally,* Richard O. Faulk and John S. Gray, *Defendants Win "Round One" of Climate Change Litigation in United States Supreme Court,* 32 Westlaw Envtl. J. 1 (2011); Richard O. Faulk and John S. Gray, *The Mouse Roars: Rhode Island High Court Rejects Expansion of Public Nuisance,* Critical Legal Issues Working Paper No. 157 (Wash. Legal Found. 2008); Richard O. Faulk and John

S. Gray, *Alchemy in the Courtroom: The Transmutation of Public Nuisance Litigation,* 2007 Mich. St. L. Rev. 941 (2007).

3. *See* *SW and Other Defendants Appeal California Judge's 1.15 Billion Lead Paint Award*, Painting Pro Times (Feb. 24, 2015). For information regarding California's unique history and jurisprudence regarding public nuisance, *see* Richard O. Faulk and John S. Gray, *Public Nuisance at the Crossroads: Policing the Intersection of Statutory Primacy and Common Law*, 15 Chapman L. Rev. 495 (2011).

4. *See* *Sciscoe v. Enbridge Gathering (North Texas) L.P.*, No. 07-13-00391-CV (Tex. App. – Amarillo, June 1, 2015), *now pending*, No. 15-0613 (Tex. 2015).

5. Compare *North Carolina ex rel. Cooper v. Tennessee Valley Authority,* 615 F.2d 291 (4th Cir. 2010); *Comer v. Murphy Oil USA,* 839 F. Supp. 2d 849, 865 (S.D. Miss 2012) and *United States v. EME Homer City Generation L.P.,* 823 F. Supp. 2d 274, 296-97 (W.D. Pa. 2011) (concluding that state nuisance actions are preempted by the federal Clean Air Act) with *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3d Cir, 2014), *cert. denied*, 134 S. Ct. 2696 (2014) and *Grain Processing Corp. v. Freeman*, 848 N.W.2d 58 (Iowa 2014), *cert. denied*, 135 S. Ct. 712 2014) (holding that compliance with Clean Air Act permits does not preempt state nuisance actions). The same issue is currently pending before the Sixth Circuit. *See Diageo Americas Supply, Inc. v. Merrick,* No. 14-6198 (6th Cir., docketed Oct. 1, 2014).

6. 2015 WL 533245. at *3.

7. *Id.* at *3.

8. *Id.* at *4.

9. *Id.* at *5.

10. *See e.g., In Re Paoli* ("The requirements of"); *Santa Fe Partnership v. ARCO Prods. Co.,* 46 Cal.App.4th 967, 54 Cal.Rptr.2d 214, 224 (1996); *e.g., Walker Drug Co. Inc. v. La Sal Oil Co.,* 972 P.2d 1238 (Utah 1998); *Adkins v. Thomas Solvent Co.,* 440 Mich. 293, 487 N.W.2d 715, 721 (1992); *Berry v. Armstrong Rubber Co.,* 989 F.2d 822, 829 (5th Cir.1993); *Adams v. Star Enters.,* 51 F.3d 417, 423 (4th Cir.1995); *O'Neal v. Department of Army,* 852 F. Supp. 327, 336–37 (M.D.Pa.1994).

11. *See generally,* John C. McMeekin II, John Ehmann, and Aaron D. Mapes,, *Stigma Damages and Diminution of Property Claims in Environmental Class Actions,* 24 Env. Claims J. 260 (2012).

12. *Ibid*.

13. *Bradley v. Armstrong Rubber Co*., 130 F.3d 168 (5th Cir. 1977).

14. *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch,* 443 S.W.3d 820, 827 (Tex. 2014) (emphasis added).

15. *Id.* at 837-838.

