



TOP ENVIRONMENTAL LITIGATION ISSUES THAT EVERY CONSULTANT SHOULD KNOW

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OUTLINE

- Typical environmental claims
 - Common law
 - Property damage claims
 - Personal injury claims
 - Statutory law
 - Claims to recover cleanup costs
 - Penalties for non-compliance with statutes
- Key Defenses

COMMON LAW – PROPERTY DAMAGE

- Typical parties include neighbors, subsequent owners, and surface estate owner
- Property damage to:
 - Air
 - Surface
 - Subsurface
 - Surface water
 - Groundwater

COMMON LAW – PERSONAL INJURY

- Typical parties include workers, tenants, and nearby residents
- Allegations include:
 - Person has been exposed to contaminants
 - Which has caused adverse health effects
 - Examples: benzene, asbestos exposure

TYPICAL COMMON LAW CLAIMS

■ Most Common

- Nuisance
- Trespass
- Negligence
- Breach of Contract

■ Less Common

- Negligent Misrepresentation
- Fraud
- Unjust Enrichment
- Impairment of Use of Property
- Premises Liability
- Fear of Developing Cancer
- Battery
- Intentional Infliction of Emotional Distress
- Strict Liability for Ultra-Hazardous Activities and Abnormally Dangerous Activities

NUISANCE

- Most common theory
 - Do not have to prove that the Defendant fell below the standard of care
 - Abnormal and out of place for surroundings
 - The same practical effect as strict liability
- Not available for aesthetic changes to scenery (i.e. windmills). *Rankin v. FPL Energy* (Tex. App.- Eastland 2008)
- Nuisance law is not preempted to by CAA, CWA. *Cerny v. Marathon Oil* (W.D. Tex. 2013)

TRESPASS

- Second most popular claim
 - an unauthorized physical entry onto the plaintiff's property by some person or thing
 - No permit shield. *FPL Farming v. Env'tl. Proc.* (Tex. 2011).
- Migration of odors and airborne particulates can be enough. *Sciscoe v. Enbridge Gathering* (Tex. App.- Amarillo 2015)
- Subsurface trespass is permitted. *FPL Farming v. Env'tl. Proc.* (Tex. App.- Beaumont 2012)

COMMON LAW – KEY DEFENSES

- Standing
- Causation
 - State action levels
 - Lone Pine Orders
- Permanent vs. Temporary Injury
 - Measure of Damages
 - Statute of limitation
- Collateral attack

STANDING

- Right to sue belongs to the person who owns the property at the time of the injury
- Cannot be a continuous lingering injury, must be new
- Subsequent owner needs either:
 - Express provision in deed or
 - Assignment granting him right to sue
- General warranty deed not sufficient. *Richey v. Stop-N-Go Markets of Texas* (Tex. 1983).
- Retroactive assignment? (yes – before filing suit). *DBMS Investment v. ExxonMobil* (Tex. App.- Corpus Christi 2009)

CAUSATION – STATE ACTION LEVELS

- *Taco Cabana Inc. v. Exxon Corporation* (Tex. App. – San Antonio 1999)
 - No causation – soil contaminants did not exceed state action levels which would trigger a duty for corrective action.
 - Common law duties were replaced by Legislature delegating to State appropriate clean up standards.
- *Scoma v. Chesapeake Energy Corp.* (N.D. Tex. 2010)
 - MSJ claimed that Plaintiff's claims fail as a matter of law since the test results are below the TCEQ's Safe Drinking Water levels.
- *Harris v. Devon Energy Production Company* (E.D. Tex. 2010)
 - Plaintiffs voluntarily dismissed claim because recent testing showed that the contamination was no longer at a toxic level.

CAUSATION – LONE PINE ORDER

- Scheduling Device - requires Plaintiff to make prima facie case that exposure caused harm before discovery can proceed.
 - **Entered then Overturned** - *Strudley, et al. v. Antero Resources, Corp.*, (Colo. Ct. App. 2013)
 - **Entered** - *Boggs, et al. v. Landmark 4 LLC*, (N.D. Ohio 2012)
 - **Agreed** - *Teekell v. Chesapeake Operating, Inc.*, (W.D. La. 2012)
 - **Denied** - *Kamuck v. Shell Energy Holdings GP, LLC*, (M.D. Pa. 2011)
 - **Denied** - *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293 (M.D. PA. 2012)

PERMANENT VS. TEMPORARY INJURY

■ Permanent

- Constant and continuous
- Presumed to last indefinitely
- Jury can determine impact on value

■ Temporary

- Intermittent, sporadic or recurrent
- Contingent on some irregular force such as rain
- Impact on value of property is speculative

MEASURE OF DAMAGES

- **Permanent damages**
 - Measured as the “diminution in value”
 - Difference in value of property before and after injury
- **Temporary damages**
 - Measured by the cost of restoration
 - If economically unfeasible, the proper measure is diminution in value
 - Restoration is economically unfeasible if it exceeds the diminution in value
- **Stigma damages permitted** – just hard to prove. *Houston Unlimited v. Mel Acres* (Tex. 2014)
- **Intrinsic value of trees.** *Gilbert Wheeler v. Enbridge* (Tex. 2014)

CONTRACT CAN MODIFY DAMAGES

- *Corbello v. Iowa Production* (La. 2003)
 - Jury awarded \$33 million to restore land which was only worth \$108,000
 - Lease provided that the operator would “reasonably restore premises” at termination
 - Contract damages not limited to market value
- *Fenner v. Samson Resources Co.* (Tex. App. – Houston 2005)
 - Landowner sued for contamination
 - Lease required operator to only restore surface – not subsurface of land
 - Contamination was subsurface; therefore operator was not liable

STATUE OF LIMITATIONS

■ Permanent

- Within two years of discovery of first actionable injury
- Even if extent of damages is unknown

■ Temporary

- Only recover for damages within two years of filing suit

COLLATERAL ATTACK

- *Lipsky v. Range Resources Corp.*, (Tarrant County District Court, Tex. 2011)
 - Plaintiff's nuisance and trespass claims were an impermissible collateral attack on the Texas Railroad Commission's Final Order which found that Range's operations "have not caused or contributed, and are not causing or contributing to contamination of any domestic water wells."
 - Court held that Lipsky was required to appeal the RRC Order in Travis County.
 - What if Range lost before the RRC?

COMMON LAW VS. STATUTORY LAW

- Cannot sue prior owners of your property for nuisance or trespass
- Statute of limitations differs
- No causation requirement for statutory claims
- Joint and several liability for statutory claims
- No limit for monetary exposure of statutory claims – no relationship to value of property
- Federal court jurisdiction possible for statutory claims

STATUTORY LAW – CLEANUP COSTS

- Typical parties include potentially responsible parties (PRPs) and neighbors
- Property damage to:
 - Surface
 - Subsurface
 - Groundwater
- Typical claims: SWDA and CERCLA
 - Cleanup costs incurred
 - Some attorney's fees and consulting fees

STATUTORY LAW – PENALTIES

- Typical parties include government, citizen groups, counties
- U.S – or – citizen groups on behalf of U.S. for violations of federal statutes (i.e. CWA) (\$37,500/day/violation)
 - Attorney’s fees as prevailing party.
- Texas – or – counties on behalf of Texas for violations of state statutes (i.e. Water Code) (\$25,000/day/violation)
 - Section 7.351 of Water Code permits local governments to bring suit to enforce environmental laws and seek statutory penalties
 - State is joined as an “necessary and indispensable party”
 - Harris County most active (10 cases in 5 years)
 - Obtained \$29.2 million dollar settlement recently
 - HB 1794 – Any amount over \$4.3 million goes to the state

SWDA vs. CERCLA

- SWDA is the Texas equivalent to the CERCLA under Federal law
- “Solid waste” under SWDA is broader than “hazardous substance” under CERCLA
- SWDA is easier to prove – does not have to be consistent with NCP (public participation)
- Can bring in state court

STATUTORY LAW – KEY DEFENSES

- PRP status
 - Owner
 - Operator
 - Arranger
- Cleanup costs were not reasonable and necessary
- Ripe/Statute of limitations
- Unsuccessful Defenses

PRP STATUS – OWNER/OPERATOR

- Circular definitions
 - Apply plain meaning ... or construe broadly?
 - Look to site control? De facto “owner” test?
- How far does it extend?
 - Lessees?
 - Permit holders?
 - Easement holders?
 - Trust and estate beneficiaries?
 - Bankruptcy trustees?
 - Lenders liability?
 - Successor liability?

PRP STATUS – ARRANGER

- Based upon “totality of circumstances”
 - Ability and opportunity to control disposal activities
 - Knew or concealed of contamination
- Subsidiary that designed layout of dry cleaning operation did not “arrange” for disposal. *Vine Street v. Borg-Warner* (5th Cir. 2014).
- Sold a useful product or a sham sale? *Texas Tin v. Great Lakes* (S.D. 2008)

CLEANUP COSTS NOT REASONABLE AND NECESSARY

- Inconsistent case law:
 - Contamination alone is sufficient to show cleanup was reasonable and necessary. *American International Specialty v. 7-Eleven* (N.D. 2010)
 - Costs were incurred to reduce actual threat to public health – not theoretical. *Vine Street v. Borg-Warner* (E.D. Tex. 2006).
 - Approval of RAP alone proves reasonable and necessary. *City of Waco v. Schouten* (W.D. Tex. 2005)
 - Approval of RAP alone is insufficient. *Aviall v. Cooper Indus.* (N.D. Tex. 2010)
- If possible, try to communicate less costly alternatives with TCEQ

UNSUCCESSFUL DEFENSES

- “As Is” provision
 - Will not bar SWDA claims against seller
 - SWDA claims are based upon status liability (owner, operator, arranger) not causation. *Bonnie Blue v. Reichenstein*, (Tex. App. – Dallas 2004)
- Statute of Repose
 - Will not bar SWDA claims unless the claim arises out of construction or repair. *Celanese Corp. v. Coastal Water Authority* (S.D. Tex. 2008)
- Domestic Sewage Exclusion
 - Court rejected argument that perc once disposed into sewer system was no longer “solid waste” since it leaked into the ground prior to mixing with sewage. *Vine Street v. Borg-Warner* (E.D. Tex. 2006)

QUESTIONS?

