Legal Issues in the Pipeline Environment

by Steven J. Adams, Esq.

Steven Adams is a senior attorney in the trial section of Gardere & Wynne. His work with the firm emphasizes environmental, labor/employment, business and tort litigation. Adams served as an Oklahoma District judge from 1987 to 1993, and as the presiding judge for the Northeastern judicial administrative district from 1989 to 1993. He is also an adjunct professor of law at the University of Tulsa College of Law, where he teaches trial evidence and pretrial practice.

Pollution prevention is viewed today as the best way to achieve further environmental quality, and therefore, the best demonstration of corporate environmental sensitivity. Environmental statutes and national pollution-control programs of the past 20 years have emphasized containment and treatment of pollutants after they are produced. During the 1990s and beyond, however, emphasis is expected to shift to preventing pollution by eliminating or reducing environmental impacts at their source.

Exposure to civil (and criminal) liability arising from environmental complaints can best be controlled and reduced by (1) a consistent, company-wide demonstration of environmental responsibility and sensitivity; (2) the effective communication and consistent documentation of environmental impacts (at all levels and across all relevant functional groups); (3) the formulation of an effective response to a problem and its ultimate resolution; (4) the aggressive identification and assessment of environmental concerns presented by a complaint or dispute; and (5) the prompt formulation and implementation of a strategy in response to an environmental action or complaint. This article addresses three areas impacted by the proliferation of environmental damage litigation:

- Right of way acquisition and divestiture: suggestions for avoiding problems.
- When problems arise, claims and defenses in surface and subsurface damage cases.
- Dealing with the problems; suggestions for effective handling of environmental damage claims.

ACQUISITION AND DIVESTITURE: SUGGESTIONS FOR AVOIDING PROBLEMS

The pre-acquisition stage is the best chance to avoid environmental liabilities. Federal and state environmental regulation places tremendous responsibility upon entities acquiring property to avoid problems that occur when a polluted property is acquired.

Before acquiring any property, an acquisition review must be conducted. The following is a checklist of inexpensive, efficient steps to take in due diligence before acquisition.

- Determination of existing use—suspected uses (dump, chemical processing)
- Visual site inspection—note suspect conditions (presence of transformers, disturbed areas, oily sheens, unusual odors, storage tanks, barrels or drums)
- Historical aerials/USGS topographic map
- Government agency check—records/permits—underground storage tanks.
- Interview seller, prior owner, neighbors, etc.

The only defenses to Superfund liability are those expressly listed in section 107(b) of CERCLA, 42 U.S.C. section 9601 et seq. In addition to acts of God or acts of war, the only defense available to a party is the so-called third-party-defense, where the defendant can avoid liability if the damages derive "solely" from an act or omission by an unrelated third party.

The acquiring party, after exercising due diligence, may be an innocent purchaser and thus avoid liability for clean-up. CERCLA requires the buyers of property if there are to be characterized as innocent purchasers, to conduct what has become known as the "environmental due diligence" investigation. To meet the statutory standard, the buyer must have undertaken (1) "at the time of acquisition," (2) "all appropriate inquiry into the previous ownership and uses at the property," (3) "consistent with good commercial or customary practice," (4) "in an attempt to minimize liability."

The level of inquiry that must be conducted will increase as certain threshold risks on the property are identified. Judged by the standards imposed by CERCLA regulations, due diligence of investigation requires thorough examination of all aspects of the property's history and use.

If, after purchasing property, the buyer learns of environmental problems with the property, the buyer may have the innocent purchaser (third-party) defense available. If, however, the buyer sells the contaminated property without disclosing the problems, the innocent purchaser defense is not available as a defense in a subsequent action by the future owners against past owners for CERCLA liability.

Indemnification agreements or releases can be used to shift CERCLA and common law liabilities to the seller or buyer. The courts generally enforce such agreements if normal contract considerations are present.

Releases or indemnification agreements must contain, in addition to standard contract terms, language that states at a minimum these general provisions:

- Specific problems released: the release must recite that it covers problems not only to the surface, but to the subsurface soils and waters as well.
- Intent: the release needs to state clearly that the parties understand and intend that the compensation paid by the release is for any and all damages, including both soils and water. (You may consider adding a statement that the compensation is being paid in lieu of further cleanup or remediation by ____.) The releasor must acknowledge that the release is releasing all present and future claims, and that the release covers presently apparent damages, as well as those that may not be presently known or evident.
- Disparity of bargaining power: there is case law that is relatively harsh in voiding a release where there is an obvious disparity in knowledge and bargaining power. Thus, the releasor should acknowledge the opportunity to consult counsel and state in the agreement that the releasor is not relying solely on the representations of the releasee.

Problem-free acquisition and divestiture is best achieved by a proactive rather than reactive approach. It is important to continually refine procedures for evaluation of prospective acquisitions and divestitures and to anticipate future problems.

When problems arise: claims and defenses in surface and subsurface damage cases

In developing plans for avoiding problem properties, it is important to know what are the areas of exposure for property owners or lessees. While not exhaustive, the theories of recovery most frequently relied on by plaintiffs include: nuisance (public/private), negligence/negligence *per se*, trespass, unjust enrichment, strict liability, and intentional/negligent infliction of emotional distress.

Nuisance

Nuisance is the most attractive common law theory because every activity or condition is arguably a nuisance; nuisance provides certain damages not recoverable under other theories; and certain common law defenses are not applicable to nuisance claims.

The Oklahoma Supreme Court has defined a nuisance to arise anytime one uses one's own property in a manner that results in injury to another, [1] and any conduct that results in injury to another. [2]

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Nuisance theory increases the number of potential defendants and permits suit against every defendant in the chain of title. This is because the common law imposes nuisance liability on the one who created the nuisance, all who have maintained the nuisance, and the current owner who fails to abate the nuisance.

Allegations of nuisance are also made by plaintiffs to seek abatement or cost of abatement as a measure of recovery so as to circumvent the otherwise applicable measure of recovery that limits damages to the lesser of the cost of restoration or the diminished value of the impacted property and after the injury. [3]

Nuisance also provides some additional benefits to plaintiffs. Plaintiffs can inflate their actual damages because damages for personal inconvenience, discomfort and annoyance can be recovered as part of nuisance relief. These damages, unlike damages to property, are not limited to a strict measure but are limited only by the jury's exercise of discretion. Thus, nuisance theory permits plaintiffs to boost the amount of their actual damages. Nuisance is a tort theory, which allows for the recovery of punitive damages.

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Negligence/negligence per se

Damages for injury to property can be recovered under the theory of negligence or negligence per se. Negligence requires a finding that 1) plaintiff sustained injury, 2) directly caused by 3) defendant's breach of a duty.

Negligence is usually defined as the failure to exercise ordinary care to avoid injury to another's person or property. Ordinary care is the care that a reasonably careful person would use under the same or similar circumstances.

Plaintiffs' recovery is more easily established under negligence per se. Negligence per se requires a finding that 1) defendant violated a statute or ordinance 2) defendant's violation was the direct cause of plaintiff's injury and 3) plaintiff's injuries were of the type intended to be prevented by the statute or ordinance and plaintiff was one of the class meant to be protected by the statute or ordinance.[4]

Plaintiffs frequently argue *res ipsa loquitur* in their effort to establish negligence. Negligence can be premised on the theory of *res ipsa loquitur* where 1) plaintiff's injury is caused by an instrumentality that is under the exclusive control and management of the defendant; and 2) the injury causing event was of a kind that ordinarily does not occur absent negligence on the part of the person controlling the instrumentality. Under this theory, defendant's liability can be established by mere proof of the fact that the injury occurred.

Trespass

A plaintiff's trespass claim is usually founded on an allegation that damages should be awarded because defendant has deprived plaintiff of the right to exclusive possession of plaintiff's property. The common law recognizes a claim for trespass where there is exclusion by deprivation of occupation, exclusion by interference with occupation, or exclusion by interference with use and enjoyment.

Unjust enrichment

Unjust enrichment is a term used to characterize the result of a benefit obtained by one party under circumstances that would result in detriment to another party that is unjust. The circumstances must also show a nexus between the benefit obtained and the unjust detriment. [5]

In the context of surface and subsurface damage litigation, plaintiffs' position is that the oil industry defendants saved money in failing to prevent damages and have been thereby unjustly enriched. Plaintiffs seek recovery of the so-called unjust savings realized by the industry defendants at the expense of the plaintiffs, plus interest from the time those savings or benefits were received. Like nuisance, plaintiffs look to unjust enrichment as a way to inflate actual damages, and to place before the court and jury the income or profit derived from the oil field by defendants.

Strict liability

The strict liability rule has not yet been recognized in the context of oil field pollution. The concepts supporting strict liability as a theory of recovery—nonnatural use of land, ultrahazardous activity and abnormally dangerous activity—have not been accepted with respect to pollution claims resulting from oil and gas operations. However, this theory of recovery is being advanced as a logical extension of liability under the law.

Infliction of emotional distress

This theory is usually included by the plaintiff in an attempt to emphasize the emotional aspect of the claim. Invariably, the subject property is the "family farm," which has been passed down from generation to generation and has great intangible value. Consequently, any injury to the property

allegedly causes great trauma to the owner of the property.

Damages

Traditionally, the "how much" aspect of plaintiff's approach to oil field and pipeline pollution litigation has been limited to recovery of the diminished fair market value of the damaged land. However, spurred by mounting environmental concerns and sensitivities, plaintiffs are aggressively seeking to expand the types and amounts of damages recoverable in these cases. [6]

Requests for recovery by plaintiffs frequently include damages attributable to: 1) cost of abatement; 2) cost of cleanup; 3) value of the loss or use of land; 4) unjust benefits realized by defendants at the plaintiffs' expense; 5) annoyance, inconvenience and discomfort; 6) exemplary damages; 7) expenses incurred to test and investigate pollution and develop a clean-up plan; 8) interest attributable to benefits unjustly realized by defendants; and 9) attorneys' fees and costs.

Additionally, in recent Texas pollution actions, the per barrel future market value of fresh water allegedly lost to oil field pollution has been raised as a measure of damages. Also, in Oklahoma, treble damages for trees allegedly impacted by oil field operations have been included as a measure of recovery.

Affirmative defenses

There are several affirmative defenses available to defendants in response to plaintiffs' claim of pollution. Defenses available to all theories are: 1) statute of limitations; 2) express easement or license by virtue of the oil and gas lease, release, or other written document; 3) implied easement or prescriptive rights; 4) release of liability by plaintiff or plaintiff's predecessors; and 5) the statute of repose. An additional defense to nuisance is generally referred to as "coming to the nuisance."

Statute of limitations

The majority of jurisdictions require that plaintiff's claim be brought within two years of the date when plaintiff knew or should have known of the injury. Plaintiff's claims can be limited by proof of knowledge, or that the plaintiff should have possessed the knowledge of an injury based upon the facts that gave rise to plaintiff's claim.

Express or implied easement or license

A grantor of property can burden the property with an easement permitting activity that would otherwise be prohibited by statute. Although there may not be an express easement of record, many times there is a written damage release that should be pleaded. These releases are usually very broad, and defendant should argue it is entitled to all the protection the general release was intended to provide.

Coming to the nuisance

"Coming to the nuisance" is a defense to liability based on nuisance. The key elements of the coming to the nuisance defense relate to whether plaintiff saw or should have foreseen the injury of which plaintiff complains. The key question is, did plaintiff have knowledge of the extent of the nuisance's effects? Application of the defense is fact specific, requiring extensive proof of plaintiff's knowledge when plaintiff purchased the property for which nuisance damage is claimed.

Statute of repose

The statute of repose, unlike the statute of limitations, cutts off actions even before they accrue. In Oklahoma, a statute of repose bars all claims to recover damages for personal injury and for injury to real or personal property arising from deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property if the claim is not brought within 10 years of substantial completion of the improvement.

Other jurisdictions, interpreting the meaning of "improvement to real property" for the purpose of the statute of repose, have held it includes excavation and grading of land regardless of whether it enhances or diminishes the value of the real property, the installation of underground lines, an oil leak from an underground pipeline, noxious fumes from sewer treatment plants, liquid ammonia leaks from refrigeration systems in meat packing plants, water drainage systems, a sewer line obstructing a navigable stream, and a water tank that constituted part of a water treatment system.

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Dealing with the problems: suggestions for effective handling of surface and subsurface damage claims

Suits concerning claims for environmental damage have become among the most complex types of litigation. Claims that once were

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brought only by the owner whose property had been directly affected by the alleged tort are now being brought by anyone who can allege even a tangential connection to the property, and even by citizens who are acting as private attorneys general and have no connection with the property at all. Damages that once were limited to diminution in property value now are likely to include claims for recovery on personal injury claims, both real and perceived, claims for abatement of the alleged nuisance and restoration of the allegedly damaged resource, and the most unpredictable category, punitive damages. Through creative application of environmental regulations and common law tort theories, the exposure of defendants has increased dramatically. Environmental litigation is complex litigation that involves multiple parties, claims, defenses, volumes of documents, and huge investment of resources. These cases are often expert-witness intensive.

Case management for complex litigation

Due to the complexities of issues and volumes of materials, every environmental case demands systematic management and computer-aided litigation support systems. The efficient gathering, storage and retrieval of information is crucial to the successful resolution of an environmental damage case. Corporate counsel and litigation counsel must work together to develop cost-effective representation for the defendant of an environmental claim. The following information highlights the important points of complex litigation case management.

The responsibilities of the defendant and defense counsel

The process of identifying and selecting experts should begin immediately upon being advised of a pending claim and certainly upon receipt of a complaint. Once general areas of expertise have been identified, expert witness candidates should be identified for those areas. Each area should be prioritized in its importance to the case.

Waiting several months to allow the plaintiff to prosecute a claim is a common error of defense counsel; this might be the most common and most aggravating mistake outside counsel can make. Procrastination leads to rushed, poorly researched choice of experts. An even greater risk is that the expert of choice will not be available. In environmental cases, the supply of experts is small, and the demand is great. If parties wait too long to find the right expert, it is likely that the plaintiff or a co-defendant will have already retained the expert, or the expert's schedule will not permit necessary dedication to the case.

In most environmental cases, the existence of some damage of some kind caused by somebody is easily established. The real battle concerns causation by whom, and when the damage occurred. Consequently, it is much more efficient to involve the experts from the outset of the case.

All witnesses, especially experts, must fit into the case management plan prepared by the client and counsel. It is the responsibility of in-house and outside counsel to prepare a detailed task-list approach for every

case. This systematic task oriented approach makes even the most complex case a manageable case. This approach is particularly important to minimize costs and maximize results when using expert consultants.

Experts are important

The aggressive use of expert witnesses is crucial to successful defense or prosecution of an environmental case. Naturally, parties should be aware and cautious of gathering information about the nature of the problem and the cost associated with utilizing expert witnesses. However, defendants who fail to investigate for fear of the unknown also fail to avail themselves of opportunities and strategies that can be discovered only through expert investigation.

Environmental cases require experts. Usually, they require many experts, and proper preparation requires much of their time. A lot of time from a lot of experts will, unavoidably, cost a lot of money. Clients must be shown that the aggressive use of experts is a justified and necessary cost of defense.

Expert witnesses and consultants should only be contacted after counsel assess the real needs of the case. After determining needs and structuring the consultant's tasks, the search for an expert can begin. Consultants can be located from several sources, such as professional associations, treatises, texts, articles, colleges and universities, research organizations, consulting firms, other litigation with similar claims, seminars, expert witness networks.

Counsel have the responsibility to request resumes from the most promising candidates and interview the candidates with the most impressive resumes. Clients should be involved to the extent desirable or necessary. A client's input in the selection process can be extremely valuable and can defuse later disagreements or dissatisfaction with a poorly selected expert witness.

The goal of the search is to find an expert who is sufficiently knowledgeable in an area of expertise and is capable of communicating that knowledge to others. The expert should not only be knowledgeable about the technical and scientific aspects of an area, but also knowledgeable about lawsuits, litigation strategy, and the ways in which experts' talents are to be used. Counsel should investigate the expert to evaluate the expert's litigation experience. Counsel should also check the expert's litigation references (do not hesitate to talk to other attorneys or clients for whom the expert has worked). Determine the expert's support capabilities, what staff is necessary and available. Although cost is an important consideration, do not make the mistake of choosing an inferior expert simply to save money. Make sure the expert's schedule will permit the degree of commitment you require. After selecting an expert, determine what kind of contractual arrangement meets expectations of the client and the expert. Meet with your expert and discuss the long-term strategy and general assignment. Experts should be required to break down the long-term assign-

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ment into short-term, manageable workplans. Each workplan can then be discussed and approved or rejected. The expert should be integrated into the defense team immediately, should visit the site and become generally familiar with the project as soon as possible.

SUGGESTIONS FOR EFFICIENTLY AND EFFECTIVELY MANAGING THE CASE

- Reach an agreement with opposing counsel concerning gaining access to the property for observation and testing, and resolve document production issues.
- Establish a protocol for communicating with outside counsel. Allowing multiple lines of communication to exist is unavoidably confusing for everyone.
- The experts should never reduce any of their work to writing a report until they are sufficiently comfortable with their preliminary conclusions and they have been specifically instructed by counsel to do so.
- Develop an overall defensive strategy for the case and the experts, and make short-term assignments designed to implement that strategy.
- Experts should understand the nature of the litigation and the objectives of the defense.
- Schedule regular meetings with your staff and experts to ensure completion of assigned tasks.
- Prepare and utilize written task lists to make sure everyone understands the job to be done. Consultants should be guided in their assignments. Instruct the experts to submit their recommended work in writing, along with cost and time estimates.
- Monitor performance between meetings by making regular calls to the experts.
- Involve the experts in the discovery process. Not only have them participate in responding to discovery requests, but also involve them in the formulation of discovery requests served on the opposition.
- Always make the plaintiff's experts give their depositions first.
- Always have your experts attend the depositions of the other experts.
- Have the experts practice using any exhibits or demonstrative aids they intend to use.
- Have all witnesses rehearse giving responsive and communicative answers. Challenge their answers and opinions. Identify problems such as argumentativeness, loss of focus, narration and non-responsiveness.
- If a deposition is to be videotaped, rehearse posture, facial expressions, voice projection and inflection.

Preparation prevents poor performance by the client, counsel and the witnesses. A thoroughly planned task-oriented approach to management of a complex case is vital to achieving a successful result. In the forums of complex pollution litigation, the best prepared stand the greatest opportunity to achieve successful results.

REFERENCES

1. Fairlawn Cemetery Ass'n. v. First Presbyterian Church, *496 P.2d 1185, 1187 (Okla. 1972)*
2. Briscoe v. Harper Oil Company, *702 P.2d 33, 36 (Oka. 1985).*
3. *The Oklahoma and Texas courts have adopted and, to date, maintain the rule that plaintiffs generally cannot recover permanent or temporary damages or restoration costs in excess of the diminution in value of the affected property.* Peevyhouse v. Garland, *382 P.2d 109 (Okla. 1964);* P.G. Lake, Inc. v. Sheffield, *438 S.W. 2d 952 (Tex. Civ. App. 1969). However,* see Miller v. Cudahy Co., *585 F.2d 1449 (19th Cir. 1988) applying Kansas law and permitting the recovery of temporary damages (cost of abatement) even though such damages exceeded the diminution in fair market value of the impacted property.*
4. *Plaintiffs have a number of state statutes and regulations to draw from in attempting to establish negligence per se. Particularly popular in this regard are the so-called "thou shall not pollute" rules of the respective states' agencies responsible for regulating the activities of the oil industry. (See, e.g. Oklahoma Corporation Commission Rule 3-101A; Rule 3-104(a); Rule 3-110.1 D.2; and Rule 3.110,6)*
5. *Unjust enrichment has been often referred for restitution. It has generally been held to be synonymous with "quasi-contract," defined as a contract implied in law.* First Nat. Bank of Okmulgee v. Matlock, *226 P. 328 (Oka. 1924). Matlock distinguishes express contract and contract implied in fact, which are based on the consent of the parties, from quasi-contract or constructive contract,which is a legal fiction arising not from the consent of the parties, but from the law of natural justice and equity.*
6. *A plaintiff can recover for both permanent and temporary damages to his property. However, the combined award of both types of damages cannot exceed the diminished value of the property due to the injuries. Temporary damages are reflected by the costs of restoring the property to its condition prior to the injury. Permanent damages result when the property cannot be restored. The diminished value of the property is the proper measure for permanent damages.* See Briscoe, v. Harper Oil Co., *702 P.2d 33 (Ikla. 1985);* Thompson v. Andover Oil, *692 P.2d 77 (Okla. App. 1984)*