

# ELR

## NEWS & ANALYSIS

## Environmental Contamination Treatise: Overview of the Litigation Process

by Gary Mason, Nicholas Migliaccio, Dennis Reich, and Michael Howell

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*Editors' Summary: Toxic torts are among the most complex legal cases, often requiring extensive discovery and the use of expert witnesses. In this Article, authors Gary Mason, Nicholas Migliaccio, Dennis Reich, and Michael Howell provide a comprehensive overview of the toxic tort property damage litigation process. They begin with case evaluation, explaining how to identify potential plaintiffs, defendants, and causes of action. They cover class certification, discovery, and expert witnesses, concluding with sections on damages and settlement.*

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### I. Introduction

Emissions of toxic substances from commercial facilities frequently lead to litigation. In this Article, we will discuss the process by which toxic tort property damage litigation gets initiated, prosecuted and, hopefully, resolved. These cases can be worth a lot, or very little depending on the degree of interference with the value, use, and enjoyment of property. Toxic tort property damage cases involve complex legal issues, extraordinary expenses, and tremendous risk. The legal practitioner should proceed with care. From the defendant's perspective, toxic tort property damage cases can expose polluters to tremendous liability and frequently to very negative publicity. Two recent examples illustrate the range of possible verdicts.

A community in Cheshire, Ohio, recently settled with a large power company for property value and personal injury claims allegedly caused by exposure to toxic gases and particulate matter emanating from a large coal-fired power plant looming over the town.<sup>1</sup> Plaintiffs complained that they suffered respiratory ailments from the plant, and that

paint on their homes and cars was ruined by the emissions. In the settlement, the owners of 90 homes received three times the assessed value of their properties in return for releasing all property damage and personal injury claims against the power company. The homeowners also vacated their homes, and gave the power company title to the homes. The power company has begun to raze the vacant buildings in the town, and ultimately all evidence of the town's existence will be removed.

In 2003, a community near Denver, Colorado, received a judgment for personal injury and property damage claims arising from a plume of contaminated groundwater that had spread underneath over 1,000 homes. The community was situated adjacent to a rifle scope manufacturer that had discharged pollution into the groundwater over the course of many years. The plaintiffs alleged interference with use and enjoyment of property, and diminution in property value. The plaintiffs were not drinking well water, and personal injury claims were not present. The only exposure pathway for the contamination was through soil vapor.

The jury returned with a nominal award of \$1 million, or \$1,000 per home. The jury found that the contamination did impact the community, but that the degree of interference with plaintiffs' use and enjoyment of the property was minimal. As these cases illustrate, property contamination litigation creates risk for plaintiffs and defendants as a result of the highly variable and uncertain outcomes.

### II. Case Evaluation

In the pre-litigation section we will discuss the processes involved before a lawsuit is filed. This will include the potential plaintiffs, potential defendants, analyzing the merits of the claims, the legal causes of action involved, and potential venues to file the case. In addition, we will discuss the costs to the litigants, including the use of expert witnesses and the impor-

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*[Editors' Note: This Article appears in the book When Bad Things Happen to Good Property, by Robert A. Simons, Ph.D., published in 2006 by the Environmental Law Institute (ELI). The book can be ordered by either calling ELI at 800-433-5120 or logging on to the ELI website at <http://www.eli.org>.]*

1. Citizens Against Pollution v. American Elec. Power Co., No. 03-388 (S.D. Ohio May 12, 2004).

tance of effectively acquiring and managing documents. Finally, we will address the likelihood of recovery and whether to bring the case as a mass tort or class action.

Toxic tort cases are frequently initiated by property owners impacted by contamination. In the case of a one-time event, such as an oil spill, the basic facts and precipitating events would be obvious and usually well documented. Often in cases involving leaking underground storage tanks (LUSTs), property owners only gradually become aware of the situation as they are advised by governmental authorities or detect problems by smelling gasoline vapors or tasting contaminated water. Contamination from LUSTs may be the result of a one-time event, such as a catastrophic tank failure, or, as is more likely the case, a series of leaks over a number of years or even decades. The latter scenario typically presents difficulties in establishing liability because the ownership and/or control of the tanks may have changed hands during the time the multiple leaks occurred.

LUSTs are by far the most common form of toxic tort property damage costs due to the large number of former and active gasoline stations in the country. Other forms of contamination that lead to litigation can involve radioactive contamination, heavy metal contamination from mining and smelting operations, emissions from refineries and chemical plants, and catastrophic chemical releases that can involve almost any chemical used in industry or shipped via pipeline, railcar, tanker truck, barge, or ship.

Early on, careful assessment of potential health impacts must be made. This assessment first requires identification of the toxic chemicals involved. Next, an assessment must be made of potential pathways of exposure and actual exposures encountered by the potential plaintiffs. An early assessment must be made with the assistance of an epidemiologist or toxicologist in order to determine whether claims for personal injury and/or medical monitoring are viable. In this Article, personal injury claims will only be addressed to the extent that they bear upon the underlying property value diminution claims.

An initial assessment of the litigation also demands a careful review of applicable law. The relevant law is often state law and often varies only slightly state by state. Cases brought in federal court usually apply the state law where the cause of action accrued. Some of the important variations of state law will be addressed below.

#### A. Potential Plaintiffs

Potential plaintiffs in mass tort litigation involving property damages from contamination include all persons who have an ownership interest in property impacted by the contamination. Both residential and commercial property owners, as well as lessees, are potential plaintiffs, though their recoveries may differ based on their respective damage calculations. The presence of organized community leaders or a community association can often facilitate the organization of a case. Environmental cases in which federal or state authorities are active will also see cost efficiencies as much of the science will be developed by or at the direction of these authorities.

#### B. Potential Defendants

Potential defendants in this type of litigation include both the owners and operators of the facilities releasing the con-

tamination. The owners of the LUSTs are often major oil companies who lease out the station in a franchisee/franchisor relationship. However, in recent years the major oil companies have divested their ownership of many facilities to the station operators. This trend began in the late 1970s and early 1980s, and appears to be an effort to avert liability.<sup>2</sup> Where the major oil companies have divested their ownership of the tanks, the “mom and pop” independent operator may be an additional potential defendant. Although rare, distributors and “jobbers” may also be potential defendants if they exercised control over the tanks. The deep pockets in this type of litigation are the major oil companies, and the following analysis is aimed at establishing their liability.

#### 1. Liability for Presently Owned Leaking Underground Storage Tanks

The simplest scenario for establishing liability is where the oil company presently owns the LUSTs. Commonly, the oil company will lease out the station to an operator, and less commonly the oil company may operate the station itself through its own employees.<sup>3</sup> Recovery for damages may be sought under a number of statutes or under common-law theories, both discussed below.

#### 2. Liability for Historical Discharges

An oil company may be liable for contamination for a tank that it no longer owns because it owned the tank while it was leaking. Tank leaks may not be detected until years after the leaking began because of the slow migration of the contaminants. Because a substantial percentage of leaks are discovered only once the USTs are removed, gasoline vapors and foul-tasting water may only be noticed in the vicinity of a leaking tank years after the leak began.

In order to establish liability for historical discharges, it is necessary to establish the rate of the contaminant and groundwater flow. Plaintiffs will also need to establish the chemical signature of the gasoline in the groundwater through a gas chromatography, mass spectrometer analysis. Much of this costly analysis must be done by experts, although efficiencies may be achieved where a government agency is involved in the investigation. It may be technically difficult to establish liability, but if the plaintiffs are successful, they may recover directly from the oil company.

#### 3. Liability Based on Company's Ability to Control a Station It Does Not Own

Focusing now on the example of a gas service station, the independence of a purported independent gas station may be illusory. An oil company may have the ability to exert considerable control over a gas station's operation through a franchise agreement or other contracts. Actual control or the ability to control a station's operation is necessary to establish liability for USTs that an oil company does not

2. See, e.g., *Shell Oil Co. v. Meyer*, 684 N.E.2d 504, 516 (Ind. Ct. App. 1997).

3. Mark D. Oshinskie, *Tanks for Nothing: Oil Company Liability for Discharges of Gasoline From Underground Storage Tanks Divested to Station Owners*, 18 VA. ENVTL. L.J. 1 (1999).

own.<sup>4</sup> Courts have noted that franchise agreements setting forth standards for presentation, cleanliness, and legality may give rise to the responsibility for the daily operation of the USTs.<sup>5</sup>

Recent franchise contracts have taken into account the possibility of an oil company being held liable for control of LUSTs it does not own. Therefore, the current state of the industry is that oil companies have divested the vast majority of their stations. These independent stations are now supplied by third-party suppliers who buy the gasoline from the oil company, and then resell it to the independent station. An agency or control argument may therefore only be suitable for holding the third-party supplier liable.

### C. Causes of Action

There are numerous claims that a plaintiff may bring for a diminution in property value case. Most claims that plaintiffs will be able to bring are founded in common law which is based upon judge-made precedent set in earlier cases. Plaintiffs may also bring statutory claims based upon violations of federal or state statutes.

The first hurdle that plaintiffs must cross is whether their claims are barred by a statute of limitations. Statutes of limitations provide that certain claims are extinguished after a specific period of time and vary state by state. However, the existence of either the discovery rule or continuing tort doctrine may effectively abrogate the statute of limitations.

Federal law can also affect how the discovery rule is applied.<sup>6</sup> Assuming the statute of limitations has not been triggered, the causes of action typically pursued include: strict liability, negligence, negligence per se, nuisance, and trespass. These common-law causes of action vary state by state. For simplicity we have summarized the general outline of each cause of action below.

#### 1. Strict Liability

A defendant may be strictly liable for contamination that he caused under the common-law “abnormally dangerous activity” doctrine or under the *Restatement*, which has been adopted in many states. Strict liability derives from the common-law rule set forth in *Rylands v. Fletcher*,<sup>7</sup> an English case from 1865, which states in relevant part:

[T]he person, who for his own purposes, brings in his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril; and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.<sup>8</sup>

The concept underlying the rule in *Rylands* is that a person who elects to keep or bring upon his land something that exposes the adjacent land or its owner or occupant to an added

danger is obliged to prevent its doing damage.<sup>9</sup> Courts have held that the storage of large quantities of toxic pollutants immediately adjacent to a private residence comes within this rule and relieves the plaintiffs of the necessity of proving negligence.<sup>10</sup>

A more recent embodiment of the cause of action for strict liability is found in the American Law Institute’s *Restatement (Second) of Torts*. In the *Restatement*, §520 sets out the test for strict liability in connection with abnormally dangerous activities:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
- (b) Whether the gravity of the harm which may result from it is likely to be great;
- (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
- (d) Whether the activity is not a matter of common usage;
- (e) Whether the activity is inappropriate to the place where it is carried on; and
- (f) The value of the activity to the community.<sup>11</sup>

Strict liability is an advantageous claim for a plaintiff to bring because the plaintiff is relieved from the burden of proving that the defendant was negligent. However, strict liability may also be much more difficult to prevail on because there is well-established case law, which varies state by state, defining which activities fall within or are excluded from this doctrine.

#### 2. Negligence

Perhaps the most common cause of action an owner of contaminated property can bring is for negligence. A person is liable to another for negligence if (1) the defendant owed a duty of care to the plaintiff, (2) the defendant breached that duty, and (3) the breach of duty proximately caused damage to the plaintiff.<sup>12</sup> It is generally well-settled law that a landowner has a duty of common prudence in maintaining his property in such a way as to prevent injury to his neighbor’s property.<sup>13</sup> Most often, the applicable standard of care for negligence is the reasonable person standard which is defined as what a reasonable person would do in similar circumstances.

A plaintiff may bring a claim for negligence for both the original acts or omissions that led to the migration of the contamination, or the failure to effectively remediate the contamination after the defendant had knowledge of it. An environmental expert will most likely be necessary to determine the standard of care relating to the contamination’s migration and remediation.

4. See, e.g., *Parks Hiway Enters. Ltd. Liab. Co. v. CEM Leasing, Inc.*, 995 P.2d 657, 30 ELR 20349 (Alaska 2000), *Shell Oil Co. v. Meyer*, 705 N.E.2d 962, 977 (Ind. 1998), *Bahrle v. Exxon Corp.*, 678 A.2d 225, 227 (N.J. 1996), *Chevron, U.S.A., Inc. v. Lesch*, 570 A.2d 840, 846 (Md. Ct. Spec. App. 1990), *Giles v. Shell Oil Corp.*, 487 A.2d 610 (D.C. 1985).

5. *Meyer*, 705 N.E.2d at 977.

6. See 42 U.S.C. §9658.

7. 1866 L.R. 1 Ex. 265, *aff’d*, 1868 L.R. 3 H.L. 330.

8. *Id.* at 279.

9. *Toy et al. v. Atlantic Gulf & Pac. Co.*, 4 A.2d 757, 765 (Md. 1939) (“if the escape be of oil, gas, electricity, explosives, sewage or water artificially accumulated and stored and damage is done to an adjacent property, the occupier is within the rule”).

10. *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969); *Brennan Constr. Co. v. Cumberland*, 29 App. D.C. 554, 560 (D.C. 1907).

11. RESTATEMENT (SECOND) OF TORTS §520 (1965).

12. *Souci v. William C. Smith & Co.*, 763 A.2d 96, 99 (D.C. 2000).

13. See *Brown v. Conrail*, 717 A.2d 309, 316 (D.C. 1998).

### 3. Negligence Per Se

This cause of action can be brought for the violation of statute or regulation which the defendant has breached. Federal regulations govern technical standards and corrective action requirements for owners and operators of USTs.<sup>14</sup> All states are subject to these regulations unless they have adopted their own regulations modeled on the federal regulations.<sup>15</sup> The general rule for negligence per se can be described as follows: where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff's position or to prevent the type of accident that occurred, and the plaintiff can establish his relationship to the statute, unexplained violation of that standard renders the defendant negligent as a matter of law.<sup>16</sup>

Any failure to comply with the regulation constitutes negligence per se and removes the requirements of establishing, duty, breach of duty and standard of care that would be necessary in a straight negligence claim.

### 4. Nuisance

Nuisance may be brought as a cause of action where the defendant interferes with the physical condition of the land, disturbs the comfort of the occupants, or threatens future injury or disturbance. This interference must be substantial and unreasonable.<sup>17</sup> A nuisance is "anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property or that which renders the ordinary use and occupation by a person of his property uncomfortable to him."<sup>18</sup> Survey instruments or questionnaires may prove helpful in determining whether plaintiffs have experienced discomfort, annoyance, and inconvenience due to the existence of contamination inside and outside their properties. The degree of plaintiffs' discomfort, annoyance, and inconvenience may be measured by the extent of their need to alter, or otherwise limit the use of their homes and property. Investigation and remediation activities alone may rise to a nuisance, particularly if they involve such things as loud noises or offensive odors. If the plaintiffs are drinking contaminated well water, they will probably have a strong nuisance claim.<sup>19</sup>

The determination of damages resulting from a nuisance is left to the jury, taking into consideration the discomfort, annoyance, and inconvenience suffered, together with pecuniary losses.<sup>20</sup>

### 5. Trespass

This cause of action is founded on the invasion of interest in the exclusive possession of land.<sup>21</sup> The modern and majority

view of trespass is that the plaintiff must prove that the defendant had a conscious intent to do the act that constituted entry upon their real or personal property.<sup>22</sup> The element of intent does not require that the trespasser intended to enter a particular piece of land; it suffices that the trespasser knew that his conduct would result in such entry.<sup>23</sup>

The most difficult element of trespass to prove in an environmental contamination case will often be intent. Trespass may be found where a defendant intentionally "remains on the land, or fails to remove from the land a thing which he is under a duty to remove."<sup>24</sup> The requirement for an intentional act may be fulfilled by the defendant's failure to conduct a timely investigation of the surrounding community upon learning of the contamination, and the failure to remediate the contamination before it migrated to the plaintiffs' property. A trespass may also arise in the absence of intent where the invasion of property results from the defendant's negligence or abnormally hazardous activity.<sup>25</sup> There is a split of authority as to whether the operation of a LUST for gasoline constitutes an abnormally dangerous activity.<sup>26</sup>

A plaintiff may be able to recover mental distress and other damages that flow from trespass.<sup>27</sup> The ability to recover these damages varies by state, with some states restricting recovery by requiring plaintiffs to show a reasonable fear for their physical safety.<sup>28</sup> Other states, however, may award mental distress damages arising from trespass without any heightened showing.

### D. Venue

A property damage plaintiff has relatively few choices on where to file his lawsuit. Since real property is involved, most states require the case to be filed where the cause of action accrued. This can be the location of the release or more commonly in the county/parish where the damaged property is located. In some circumstances a plaintiff may have the option of filing a case in either state or federal court. Federal courts have limited jurisdiction, preventing some cases being brought in them. However, federal jurisdiction can apply where there is complete diversity of citizenship or where plaintiffs plead a cause of action under federal law.<sup>29</sup> Federal causes of action typically include cases to recover costs spent to clean up the property. This relatively uncommon basis for jurisdiction may also be invoked when the controversy requires the necessary resolution of a novel question regarding a federal statute.<sup>30</sup>

Generally, diversity of citizenship means that the domicile of all the plaintiffs and all defendants are in different

14. 40 C.F.R. §280.65 (2005).

15. *Id.* §§281 et seq.

16. *Ceco Corp. v. Coleman*, 441 A.2d 940, 945 (D.C. 1982).

17. *See, e.g., National Tel. Coop. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 35-36, 29 ELR 21245 (D.D.C. 1998) (internal citations omitted).

18. *See, e.g., Reese v. Wells*, 73 A.2d 899, 902 n.6 (D.C. 1950) (internal citations omitted).

19. *See Ayers v. Township of Jackson*, 525 A.2d 287, 17 ELR 20858 (N.J. 1987).

20. *See, e.g., Sommerville v. Chesapeake & Potomac Tel. Co.*, 258 F. 147, 149 (D.C. 1919).

21. *See, e.g., Carrigan v. Purkhiser*, 466 A.2d 1243, 1243 (D.C. App. 1983).

22. *See, e.g., National Tel. Coop. Ass'n*, 38 F. Supp. 2d at 12.

23. *See, e.g., RESTATEMENT (SECOND) OF TORTS* §158 cmt. i; *see also Lofland et al. v. Segwick County*, 996 P.2d 334, 700 (Kan. Ct. App. 1999); *Phillips v. Sun Oil Co.*, 121 N.E.2d 249, 250-51 (N.Y. 1954).

24. *Rosenblatt v. Exxon Co., U.S.A.*, 642 A.2d 180, 190 (Md. 1994) (citing *RESTATEMENT (SECOND) OF TORTS* §158).

25. *Baltimore Gas & Elec. Co. v. Flippo*, 684 A.2d 456, 461 (Md. Ct. Spec. App. 1996) (internal citation omitted); *RESTATEMENT (SECOND) OF TORTS* §165.

26. *Cf. Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969) and *Arlington Forest Ass'n v. Exxon Corp.*, 774 F. Supp. 387 (D. Va. 1991).

27. *See Dobbins v. Washington Suburban Sanitary Comm'n*, 338 Md. 341 (Md. 1995).

28. *Id.*

29. *See* 28 U.S.C. §1331.

30. *Id.*

states. For diversity jurisdiction to apply a minimal amount in controversy, currently \$75,000, must also apply.<sup>31</sup> This amount is not difficult to meet when the claim involves property value diminution because most homes are worth in excess of \$75,000. The amount in controversy applies to each plaintiff and generally cannot be aggregated to meet the minimum amount, e.g., two plaintiffs claiming \$40,000 dollars each in damages may not add their damages together to satisfy the amount in controversy requirement.<sup>32</sup> Keep in mind that if diversity of citizenship and the jurisdictional amount are met, a plaintiff can file the case in state court, but a defendant can choose to remove the case to federal court. If this occurs, the federal court will first decide if it has jurisdiction or will remand the case to state court if no federal jurisdiction exists.

### *E. Costs to Litigate*

The cost associated with pursuing or defending a property damage claim arising from contamination can be very high without careful management from the lawyers involved. The major costs involved include expert witness fees, document acquisition and management, and attorney resources. The prudent plaintiff's lawyer will make an assessment before filing the case or shortly thereafter to evaluate the range of likely monetary recoveries available so that the client is not burdened with expenses that could easily exceed the available recoveries. On the other hand, the prudent defense lawyer will also make an early evaluation of the defendant's potential culpability and the damages they could ultimately pay in order to best assess the litigation strategies their client will want to pursue.

Litigation strategies from the defense side vary company by company. Some defendants will fight every case to the end regardless of their culpability. Others will fight claims where they have little culpability but settle relatively quickly those claims where their liability is obvious. This latter tactic can most likely save a defendant significant sums in attorneys fees and litigation expenses.

A more detailed discussion of the expert witnesses and document acquisition and management appear in the sections below.

### *F. Expert Witnesses*

Expert witnesses involved in property damage lawsuits usually include a combination of the following types of experts, depending on the source of the contamination involved and the litigation goals: real estate economist and/or an appraiser, environmental specialists with expertise in soil and groundwater remediation, habitat restoration experts, chemists, hydrocarbon finger printing experts, meteorologists/atmospheric modelers, and possibly a toxicologist. These experts typically work on an hourly or daily fee basis because they cannot ethically work on a contingency basis to avoid their testimony being conflicted by a potential financial gain. The typical rates of these experts vary widely from \$75 to beyond \$350 per hour. It is not uncommon that an expert will charge an additional fee for deposition or trial

time. The amount of time an expert spends helping lawyers develop a case is dependent on several factors including the complexity of the case, the amount of education necessary for the lawyers to understand the science being presented, and the amount of case-specific material the lawyer and her staff can provide to the expert. Generally, it is more cost efficient for the lawyer to provide as many relevant site-specific materials to the expert as possible. This lessens the time spent by the experts acquiring the site-specific materials and avoids multiple re-analysis of the information, which happens if the information is given to the experts in a piecemeal fashion.

Under the Federal Rules of Civil Procedure and most state rules, the law firm or client employing the expert must pay for the expert's efforts. An exception to this general rule exists under the federal rules and some state rules where the opponent bears the expense for the expert's testimony at deposition. It is not uncommon in those cost-splitting jurisdictions for parties to agree to bear the entire cost of their own experts when the number of experts per side is relatively similar as it reduces the amount of time a lawyer must deal with getting their expert paid by the other side. In rare cases, experts will perform their work for a predetermined flat fee usually tied to working on multiple projects for the same client. Careful management of expert expenses by the plaintiff's lawyer maximizes the amount of recovery actually received by a successful litigant. Similar management by the defense lawyer will minimize the cost of litigation for a defendant and can result in repeat business for the lawyer.

### *G. Document Acquisition and Management*

Property damage cases, like most environmental litigation, are document-intensive. Substantial document acquisition will occur in even the smallest environmental case. In the Discovery and Expert Witnesses section we provide an overview of where important documents can be found and how to acquire them for use in trial or deposition. We also discuss the management of these documents which is increasingly progressing toward electronic storage.

Management of the documents acquired in litigation is extensive for all sides in litigation. This is truly a learned skill in environmental cases involving tens if not hundreds of homeowners and demands tremendous organizational skills and resources. Simply maintaining communications and keeping track of the clients can be a burden upon a small law firm. Many law firms are using computer databases to track information on their clients and to manage their documents.

### *H. Likely Recovery*

As toxic tort cases are most commonly prosecuted on a contingency basis, practitioners must first attempt to assess the potential damages incurred. In cases involving lost property value, the starting point is frequently public tax records. While the public tax records are a fine source of information for purposes of an initial calculation, they are often inaccurate and do not provide fair market value, which will need to be assessed by an appraiser as the litigation proceeds. As the literature suggests, permanent devaluation is in the 10 to 30% range, and a quick assessment can often thereby be made of the impact of the contamination on residential prop-

31. *Id.* §1332.

32. *See Zahn v. International Paper Co.*, 469 F.2d 1033, 2 ELR 20616 (2d Cir. 1972), *aff'd*, 414 U.S. 291, 4 ELR 20100 (1973).

erty values. Damages are often enhanced by the particular facts of the case, especially if the case involves nondisclosure, reckless behavior, or other facts stressed in reckless or punitive damages.

### *I. Mass Tort or Class Action?*

Mass torts consist of a collection of many individually filed complaints. Mass torts create the problem of organizing a large number of individuals, each of whom will be responsible for responding to discovery and demands of litigation. A mass tort action also presents manageability problems at trial. One way to overcome these problems is to choose only a small number of “bellweather” plaintiffs to go to trial first. Findings of fact and law during the bellweather trials may have the benefit of encouraging settlement for the remaining plaintiffs, and thus achieve judicial economy.

A class action by contrast arises from the filing of a complaint by only a small number of individuals who then alone bear the responsibilities of pursuing the litigation. The difficulty with the class action is class certification. While a successful effort to get a class certified can greatly enhance the settlement value of the case and increase the likelihood of a settlement, the procedure involves a considerable amount of additional briefing and discovery. If a case is certified by the trial court, extra delay can occur because most jurisdictions allow the defendants to appeal the certification rather than proceeding to the merits of the case.

Commentators have noted that different factors and circumstances surrounding particular mass tort litigation often provide predictability about the use or rejection of the class action device. These factors can reveal similarity or dissimilarity of the claims and circumstances when considering the use of the class action device:

(1) The number of tort victims affected by the alleged wrongdoing underlying the suit. Both questions of numerosity and class manageability are raised by the multitude or paucity of individuals who may potentially have their grievances redressed in the class suit.

(2) The degree of injuries created by the underlying wrongful conduct. Are the injuries throughout the class serious, minor, or both? If the injuries suffered are the result of toxic exposure, are the injuries or diseases generated thereby of the same nature, or has the incident underlying the suit created a multitude of different injuries, i.e., cancers, pulmonary diseases, central nervous disorders, etc.?

(3) The number of individual suits presently pending and the potential number of suits that may be filed as a result of the mass tort.

(4) Whether the damages incurred are for personal injury, property losses, or both. Property damage suits may be less complicated for common causation and damage issues, but individual damages do not preclude class treatment.

(5) The geographic location or locations where injuries took place and where the injured parties reside.

(6) Whether all of the injuries incurred by the potential class were the result of conduct by the same tortfeasor or combination of tortfeasors.

(7) Whether trials of the cases on an individual basis will involve time-consuming and repetitive evidence if the cases are tried in *seriatim*.<sup>33</sup>

Generally, in cases involving property value diminution arising from LUSTs, the class action device is appropriately employed. Personal injuries arising from the gasoline constituent contamination will probably not predominate over property damages if the plaintiffs have only been impacted by low levels, or are connected to municipal water. Numerous courts have certified classes for property damages with facts and legal claims commonly found in LUST cases.

### **III. Class Certification**

In this section we will discuss the mechanics of class certification in environmental cases involving property damage. Class certification raises a host of issues. Before a court will certify a case as a class action, the court must be satisfied that the plaintiffs have fulfilled the requirements of numerosity, commonality, typicality, and adequacy.<sup>34</sup> In addition, plaintiffs must demonstrate that the class action is the superior mechanism for the prosecution of the case as compared with other means.<sup>35</sup> This section of the Article is to aid the lay person and practitioner with a review of class action certification issues where the claims involve diminution in property value caused by environmental contamination.

Federal Rule of Civil Procedure 23(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>36</sup>

Plaintiffs must also satisfy another section of Rule 23 in order to certify a class action. The most commonly sought certification for property value diminution cases is under Rule 23(b)(3), which provides, in part:

[Q]uestions 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 methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.<sup>37</sup>

Plaintiffs can often readily meet the first four prerequisites of class certification. Environmental accidents generally involve large groups of people, and accidents generally impact individuals the same way making it easy to identify a class representative whose claims are typical and representative of the other members of the class. The more difficult burden is demonstrating to the court that a class action is superior to individual adjudications. Frequently, courts are inclined to certify classes in environmental litigation because

34. Fed. R. Civ. P. 23.

35. *Id.*

36. *Id.* 23(a).

37. *Id.* 23(b)(3).

33. See H. NEWBERG & A. CONTE, *NEWBERG ON CLASS ACTIONS* §2.3 (4th ed. 2002) [hereinafter *NEWBERG & CONTE*].

of potential enormous demands on the court's resources. On the other hand, on some fact patterns, the variations amongst individuals may be so great that there is not much benefit to be gained by first resolving common issues.

#### A. Numerosity

The purpose of the numerosity requirement is to ensure that there is a need for the class action; if the joining together of all of the individual plaintiffs' actions is practicable, then the class action device is unnecessary. Plaintiffs need not state a number with specificity; a good-faith estimate is ordinarily sufficient.<sup>38</sup> Courts have held the numerosity threshold satisfied in cases where the class consisted of 25 to 30 people.<sup>39</sup> Similarly, courts have held that a class consisting of as few as 25 to 30 members raises the presumption that joinder would be impracticable.<sup>40</sup> Other courts have held that classes ranging from 75 to 250 people are well within the range appropriate for class certification.<sup>41</sup>

The numerosity requirement will not prove difficult to satisfy in cases arising from LUSTs which have contaminated property in urban or suburban areas. Depending on the size of the contaminant plume, and the density of the property zoning, frequently at least 25 properties will be impacted, thereby meeting the lower threshold for class certification.

#### B. Commonality

Questions of law or fact common to the class must be present to sustain class certification. Generally, the threshold of commonality is not a high one and is easily met in most cases.<sup>42</sup> Commonality calls for class certification because it is senseless to repeat the presentation of the same evidence against the same defendants in successive, individual trials or mini-consolidations.<sup>43</sup>

The commonality prong of the class certification rule only requires that some questions of law or fact be shared by the putative class members, not that all questions be raised in common.<sup>44</sup> Courts will generally look for a common nucleus of operative facts to satisfy this requirement.<sup>45</sup> A common nucleus of operative facts is usually found where the defendant has engaged in some standardized conduct toward the proposed class members.<sup>46</sup> In property damage

cases arising from environmental contamination, courts have held that commonality is easily met.<sup>47</sup>

#### C. Typicality

The requirement that the claims of the representative party be typical of the class members' claims generally follows from the presence of common questions of law or fact. Indeed, Federal Rule of Civil Procedure 23(a)(2) and (a)(3) have been construed as duplicative.<sup>48</sup> Typicality demands a common-sense inquiry into whether the incentives of the plaintiffs are aligned with those of the class, and is meant to ensure that representative parties will adequately represent the class.<sup>49</sup> A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.<sup>50</sup> When it is alleged that the same unlawful or negligent conduct resulted in damages to both the named plaintiff and the class sought to be represented, the typicality requirement is usually met regardless of varying fact patterns which underlie individual claims.<sup>51</sup>

Courts have found typicality in property value diminution cases arising from contamination where the named plaintiffs' claims are identical to those of the class, both factually and legally, and there is, therefore, no antagonism of interests.<sup>52</sup> As the U.S. Court of Appeals for the Sixth Circuit has stated: "Where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy."<sup>53</sup>

#### D. Adequacy

The adequacy requirement is met where the class representatives have no conflict of interest with the class they seek to represent. The class representatives must be a part of the class and possess the same interests and suffer the same injury as the class members on the claims they represent.<sup>54</sup> The U.S. Supreme Court has stated: "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."<sup>55</sup>

38. See NEWBERG & CONTE, *supra* note 33, §3.15; 7A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL §176.2, at 152 (2d ed. 1986) [hereinafter WRIGHT ET AL.].

39. See *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 78 (D. Md. 1991).

40. See *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 595 F. Supp. 1404, 1408 (D. Md. 1994).

41. See *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984); *Lewis v. National Football League*, 146 F.R.D. 5, 8 (D.D.C. 1992); *Johns v. Rozet*, 141 F.R.D. 211, 216 (D.D.C. 1992).

42. See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); NEWBERG & CONTE, *supra* note 33, §3.10.

43. See *ACandS, Inc. v. Godwin*, 667 A.2d 116, 146 (Md. 1995).

44. See *Kohl v. Association of Trial Lawyers of Am.*, 183 F.R.D. 475, 484 (D. Md. 1998); see also *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994).

45. See *Insolia v. Phillip Morris et al.*, 186 F.R.D. 535, 542 (W.D. Wis. 1998); *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); cf. WRIGHT ET AL., *supra* note 38, §1778, at 528.

46. See *Mejdrech v. Met-Coil Sys. Corp.*, 2002 U.S. LEXIS 14785, at \*\*9-10 (N.D. Ill. 2002), *aff'd*, 319 F.3d 910, 33 ELR 20152 (7th Cir. 2003) (citing *Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D.

302, 307 (N.D. Ill. 1995) (citing *Franklin v. City of Chicago*, 102 F.R.D. 944, 949-50 (N.D. Ill. 1984)).

47. See, e.g., *id.* at 911; *Amerada Hess Corp. v. Garza*, 973 S.W.2d 667, 676 (Tex. Ct. App. 1996).

48. See JAMES W. MOORE ET AL., 5 MOORE'S FEDERAL PRACTICE §23.24[3] (3d ed. 1997); see also *Walsh v. Ford*, 130 F.R.D. 260, 268 (D.D.C. 1990); *Gonzalez v. Brady*, 136 F.R.D. 329, 331 (D.D.C. 1991).

49. See *Baby Neal*, 43 F.3d at 55 ("even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories"); WRIGHT ET AL., *supra* note 38, §1764, at 232-33.

50. See NEWBERG & CONTE, *supra* note 33, §3.16.

51. *Id.*

52. See, e.g., *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 33 ELR 20152 (7th Cir. 2003); *Amerada Hess Pipeline Corp.*, 973 S.W.2d at 676; *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196-97, 19 ELR 20404 (6th Cir. 1988).

53. *Velsicol Chem. Corp.*, 855 F.2d at 1196-97.

54. See *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998).

55. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26, 28 ELR 20173 (1997).

The named plaintiff must not have potentially antagonistic or conflicting objectives with the other class members. The adequacy requirement also looks to whether class counsel will competently and vigorously prosecute the lawsuit.<sup>56</sup>

In property value diminution cases, the claims will most likely have identical aspects between the named plaintiffs and the class members. This is because the named plaintiffs will likely possess the same interests and have suffered the same injury as the other class members, namely diminution in property value caused by contamination. While there may be differences in the particular extent, composition or concentration of the contamination on each plaintiff's property, courts have held that these factual differences will not foreclose class certification.<sup>57</sup>

Counsel's adequacy can be demonstrated through substantial class action experience, and substantial environmental litigation experience. Inexperienced practitioners would be well advised to associate with more seasoned counsel.

#### E. Predominance

Rule 23(b)(3) requires the court to find that common questions of law or fact predominate over individual issues. The rule states: "It is only where . . . predominance exists that economies can be achieved by means of the class-action device."<sup>58</sup> The predominance test does not require that common issues be dispositive of the action or determinative of the liability issues. Rather, as the Court has said, courts should inquire into "whether proposed classes are sufficiently cohesive to warrant adjudication by representation."<sup>59</sup> In order to satisfy the predominance test, "common issues must constitute a significant part of the individual cases."<sup>60</sup>

As stated above, numerous state and federal courts have certified classes of residential property owners in pollution cases. In all of those cases, the common issues were held to predominate even though damages issues may not have been certified for class resolution. This may occur when personal injuries have resulted from the contamination, in addition to diminution in property values. Judges may bifurcate cases where there is a great variation in damages amongst individuals, deciding liability as a class action, but determining damages on an individualized basis. Bifurcation has been adopted by a number of courts when faced with significant variations in damages between individual class members.<sup>61</sup> In cases where a hedonic regression analysis is used, the property damage claims may have an even stronger pre-

dominance, because there may be no need for individual appraisals of each class member's property.

#### F. Superiority

The superiority requirement looks for indications that the class action device is the most efficient means of adjudicating the matter. The courts examine at least four factors in determining whether the class vehicle is the superior method for resolving the disputes:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.<sup>62</sup>

Under the first factor, the greater the stakes for each individual class member, the less superior the class action device is likely to be. In property value diminution cases arising from LUSTs, the damages will likely be a relatively modest percentage of the property value (less than 33%), as determined by the real estate economist. The presence of many small claims that would be prohibitively expensive to individually litigate weighs strongly in favor of superiority.<sup>63</sup>

The second factor focuses upon the extent and nature of litigation concerning the controversy that has already been commenced to determine whether there is so much litigation in progress that a class would be unproductive.<sup>64</sup> If many plaintiffs have filed individual suits, the rationale for employing the class action device diminishes. In property value diminution cases arising from LUSTs, the complexity and cost will discourage individual litigation.

The third factor looks to whether certification (1) would lead to duplicative results or (2) would be an inconvenient forum.<sup>65</sup> Class certification will avoid duplicative results by unifying litigation of numerous common issues of fact and law. Where the forum is geographically close to the impacted properties and the LUSTs, it will be as convenient as any other available forum for the witnesses and the parties.

The Court has stated that the final factor encompasses the "whole range of practical problems that may render the class action inappropriate for a particular suit."<sup>66</sup> Proposed class actions for property value diminution generally pose no managerial problems. Individual trials will not be required because choice of law and causation will likely be identical for all class members. In property value diminution cases, the class vehicle will clearly be superior to numerous inconsistent adjudications of identical issues.

56. *Dameron v. Sinai Hosp. of Baltimore, Inc.*, 595 F. Supp. 1404, 1409 (D. Md. 1984).

57. *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 637 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993); *In re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 78, 79 (D. Md. 1991).

58. Fed. R. Civ. P. 23(b)(3).

59. *Amchem Prods., Inc.*, 521 U.S. at 623.

60. *See Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1022 (5th Cir. 1992), *reh'g granted*, 990 F.2d 805 (5th Cir. 1993), *dismissed on reh'g*, 53 F.3d 663 (5th Cir. 1994); *Harding v. Tambarands, Inc.*, 165 F.R.D. 623, 629 (D. Kan. 1996).

61. *See, e.g., Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 33 ELR 20152 (7th Cir. 2003), *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 19 ELR 20404 (6th Cir. 1988).

62. Fed. R. Civ. P. 23(b)(3).

63. *See NEWBERG & CONTE, supra note 33, §5.7.*

64. *Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628 (D.S.C. 1992), *aff'd*, 6 F.3d 177 (4th Cir. 1993).

65. *WRIGHT ET AL., supra note 38, §1780, at 572-73.*

66. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 164, 4 ELR 20513 (1974).



#### IV. Discovery

Environmental contamination cases typically involve extensive discovery and the use of at least four different experts, such as: a real estate economist; an appraiser; a toxicologist; and an environmental specialist. In this section, we will discuss discovery strategies and their implementation. We will also discuss the use of expert witnesses with an eye toward maximizing their value.

Before a suit is filed plaintiffs and/or their lawyer will typically acquire the environmental information available from the state environmental agency(ies) and the U.S. Environmental Protection Agency (EPA), presuming they are involved in oversight. Defendants will also typically acquire the portion of these records that they do not already have in their file such as interagency or intraagency memos. Most states have open records laws that grant the public access to most documents a polluter submits to the state agency. Acquiring documents from federal agencies are governed under the Freedom of Information Act and official rules promulgated by each specific federal agency.<sup>67</sup> It is prudent to search the records of all of the local, state, and federal agencies that have jurisdiction over environment, health, occupation, and transportation for relevant documents. In addition to the multiple jurisdictions, i.e., local, state, and federal, it is common for the same government agency to have multiple document repositories involving the same facility, i.e., a central office and a field or regional office. Without fail, these offices will have some documents that the other does not keep, despite official policies that generally indicate that one of the sources will house all of the documents.

Procedures for dealing with regulatory agencies to acquire copies of their documents vary widely as does the time it takes for the agencies to respond to these open record requests. For example, agencies will typically allow the public to copy a few pages for free. After the de minimus free copying amount, agencies' charges vary from approximately .10 cents per page for self-service copies to .25 cents per page for official agency-certified copies. For large duplication efforts some agencies allow pre-approved private copy vendors to remove the selected documents to an off-site location. This latter procedure is typically less expensive ranging from .6 cents per page to .12 cents per page depending on the amount and type of copying to be done and the amount of copy competition in the local market. In large cases, it is not uncommon to spend between \$50,000 to \$100,000 in copies alone. In the litigation discovery phase, plaintiffs typically are allowed substantial discovery from the defendant which may span many decades and yield records for a large refinery, chemical plant, or long-established gasoline station. Plaintiffs will typically acquire the documents from the defendant through discovery rules and will also subpoena records from the defendant's current and former environmental consultants. Polluting industries and businesses generally contract with environmental consultants to perform groundwater, soil, surface water, and/or air pollution studies and to generate the data necessary for these businesses to acquire operating permits from state and local governments. It is common for some mid-size businesses to perform a large portion of this work in-house for the available cost savings.

In mass torts, discovery can become overwhelming because defendants are entitled to discovery from any and all individual plaintiffs. One of the major advantages of a class action is that it greatly streamlines discovery. In a class action, defendants would be entitled to discovery from the class representatives but discovery from absent class members would be limited. From the plaintiffs' perspective, the discovery sought from the defendant would be the same whether it is a class action or a mass tort.

The primary focus of discovery is on the liability of defendants: why did the accident occur? This type of information can also be used to develop a punitive damages case concerning property sold in the contaminated area. Another important element is the determination of any deleterious effect, such as increased borrowing costs that the contamination may have had upon refinancing or otherwise borrowing against the equity in the contaminated properties. The denial of homeowners insurance may also point to diminution in property value. A standard survey or questionnaire of the plaintiffs will provide a good starting point in determining damages, and should be formulated in mind with responding to defendant's discovery requests.

In mass torts, discovery can quickly become enormously complex given the large number of plaintiffs. Discovery can be streamlined through the use of negotiated, simplified form interrogatories and document requests. Standard surveys or questionnaires may present significant efficiencies in responding to simplified form interrogatories. In cases involving medical injuries, however, it may be unavoidable to incur the cost of obtaining medical records. In mass torts, plaintiffs will also have to submit to depositions, which consist of sworn testimony in response to questions by the lawyer for the defendant. A plaintiff's lawyer will also be present to defend the depositions and object to any inappropriate question. A court reporter will record the depositions and produce a transcript which is admissible as evidence. The purpose of the depositions is to gather facts for the record. The plaintiffs will attempt to establish the defendant's liability, while the defendant will often attempt to establish that the plaintiffs have not been injured.

Plaintiffs may submit sworn affidavits attesting to specific facts in support of their case. Experts will also produce sworn affidavits, known as expert reports, which detail their expert opinion on the issues that fall under their specific expertise. Both plaintiffs' and defendant's experts will also in turn have to submit to depositions.

Due to the nature of the records the parties typically generate and keep, defendants generally acquire very little document discovery from individual party plaintiffs. If the litigation is between neighboring businesses, a polluting defendant may be able to acquire a modest amount of records from the plaintiff, which includes information on when the plaintiff learned of the pollution and information on the businesses financial history for damage purposes.

#### V. Expert Witnesses

In this section we will address what expert witnesses can do, and the legal and economic restraints that affect their use. We will also examine how the landmark Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>68</sup> affects the legal landscape of expert testimony.

67. See, e.g., 5 U.S.C. §552.

68. 509 U.S. 579, 23 ELR 20979 (1993).

In environmental litigation it is necessary to engage a host of experts. Typically the plaintiffs' team would include a real estate economist, an appraiser, a toxicologist or epidemiologist, and a soil, groundwater, and/or meteorological environmental expert. As stated earlier, experts must be paid for on an hourly basis because they cannot ethically work on a contingency basis.<sup>69</sup> This payment rule exists because of concerns that expert witnesses "should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise."<sup>70</sup>

The first element to prove in a case is that a defendant's wrongful (negligent, reckless, or intentional) conduct caused the injuries complained of. This typically requires environmental experts that can reconstruct a chain of events from a facility to the plaintiffs. The routes of pollution will almost always dictate the type of expert(s) used. For example, a meteorologist or air dispersion modeler will be used on an air pollution case while an underground plume will usually require the use of a hydrogeologic and/or groundwater remediation expert. Environmental experts will testify as to industry practice regarding pollution practices and environmental remediation. Depending on the environmental expert's scientific background, he may also testify as to chemical finger printing for purposes of tying the defendant's contamination to the impacted property.

Another important element is to prove the amount of damage suffered by plaintiffs. This is accomplished through the use of appraisers and real estate economists. The real estate economist advises the plaintiffs on the percentage amount of property value diminution caused by the contamination. This opinion is often arrived at through the use of a hedonic regression analysis, which requires a large data set of home sales within the impacted properties in order to be valid. Where the number of contaminated properties is too small, or where there is insufficient sales data, the real estate economist may render an opinion on the basis of the generally accepted peer-reviewed literature methodologies such as real estate trends analysis, surveys, or other similar techniques. It may be necessary for separate experts to define the unimpaired market value of the property and the percentage of diminution, respectively.

The appraiser should be locally based, and closely familiar with the impacted area. The local appraiser provides appraisals of impacted properties without taking into account the presence of, or impairment caused by, the contamination. The purpose of these appraisals is to establish the baseline, unimpaired value of the impacted properties, so that the real estate economist may calculate the diminution in value caused by the contamination. Depending on the homogeneity of the properties, and the number of properties in the impacted area, the appraiser may be able to appraise a representative sample preliminarily, in preparation for settlement talks. As the litigation proceeds, the appraiser may have to appraise some or all properties in the contaminated area.

The toxicologist or epidemiologist advises the plaintiffs on whether there are viable personal injury claims. Toxicologists identify the content of the contaminants, and look to establish whether it caused the plaintiffs' illnesses. Epidemiologists look at the prevalence of identified illnesses in

the contaminated area, and statistically compare it to the prevalence of the illnesses in larger subgroups of the population, or the population as a whole. Causation and exposure will likely be the most difficult elements to prove in a personal injury case. Fear of cancer and other unmanifested physical injuries are at best difficult to prove, and at worst may be unrecognized claims.

In the last decade the courts have become concerned with scientists who testify without proving to the court that their methods are reliable. Courts have been given a "gate-keeping" role to prohibit junk science from entering the court room.<sup>71</sup> *Daubert* is the landmark Court case which sets the standards for admissibility of expert testimony in federal court, and has subsequently become the law of many, but not all, state courts.<sup>72</sup> *Daubert* replaced the *Frye* standard of admissibility (based on the case, *Frye v. United States*<sup>73</sup>), which focuses solely on general acceptance of the experts' methodologies, and had been the law of the land for over 70 years. The shift from *Frye* to *Daubert* was intended to liberalize the admission of expert testimony. However, the applications of the *Daubert* decision have had a significant effect upon toxic tort litigation, because expert testimony is often the only evidence that plaintiffs rely upon to prove they are injured in toxic tort class actions.<sup>74</sup>

*Daubert* sets forth a two-part test, based on Rule 702 of the Federal Rules of Evidence, to determine the reliability of scientific evidence:

[T]he trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact [judge or jury] to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology properly can be applied to the facts in issue.<sup>75</sup>

The Court outlined several factors which bear on this inquiry, including: (1) the employment of scientific methodology; (2) peer review and publication of the methodology; (3) the potential rate of error; and (4) general acceptance.<sup>76</sup>

*Daubert* typically has the greatest relevance in personal injury claims involving exposure to toxic contamination.<sup>77</sup> The expert opinion rendered by the real estate economist employing hedonic regression analysis will not be typically subject to the same *Daubert* scrutiny as an opinion for causation or exposure in personal injury claims. The application of the *Daubert* decision in federal courts and the companion decisions in state courts are a highly specialized area of the law. Entire books are written on the subject and new cases come out every week applying the *Daubert* principles to new areas of toxic tort litigation.

71. See Mandi L. Williams, *The History of Daubert and Its Effect on Toxic Tort Class Action Certification*, REV. LITIG., Winter 2003, at 181, Carl F. Cranor et al., *Judicial Boundary Drawing and the Need for Context-Sensitive Science in Toxic Torts After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 16 VA. ENVTL. L.J. 1, 3 (1996).

72. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003) (*Frye* rule will continue to be applied in Pennsylvania).

73. 54 D.C. App. 46, 293 F. 1013 (1923).

74. See Williams, *supra* note 71 and Cranor et al., *supra* note 71, at 2.

75. *Daubert*, 509 U.S. at 590.

76. *Id.* at 592.

77. See, e.g., *Rider v. Sandoz Pharmaceuticals Corp.*, 295 F.3d 1194 (11th Cir. 1992), *Curtis et al. v. M&S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999), *Moore v. Ashland Chem., Inc.*, 151 F.3d 269 (5th Cir. 1998).

69. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2002) (the common-law rule in most jurisdictions is that it is improper to pay an expert witness a contingent fee).

70. *Id.*

## VI. Damages

Calculating damages is one of the most important aspects of a case because it will affect the plaintiffs' recovery. In this section we first address the legal framework for calculating damages. We will then discuss the process of developing the data that goes into calculating damages, which will include the development of real estate data to illustrate diminution in value. Medical reports and anecdotal evidence may also come into play.

### A. Legal Framework

The common-law rule for the measure of damages for injury to property is that where the damaged property can be restored to the condition it was in prior to injury, without cost disproportionate to the actual injury, the cost of such restoration is the measure of damages.<sup>78</sup> Where that is impracticable, then the difference between the value of the property before and after the injury is the correct measure.<sup>79</sup> In most cases, the property cannot be restored to its original condition without an enormous and impracticable expenditure. Therefore, the measure of damages will be the diminution in property value.

Damages must also be categorized as either temporary or permanent. Diminution in property value is the proper measure for permanent damages. The proper measure for temporary damages is the following: diminished rental value; reasonable costs of replacement or repair; restoration of the property to its pre- nuisance condition; and other added damages for incidental losses.<sup>80</sup> Some courts have placed time limits, such as 10 years, for categorizing a nuisance as permanent, while others have held that the nuisance must be present for an indefinite, but significant, period of time.<sup>81</sup> Courts have found that an underground spill of petroleum product is a permanent nuisance, and that the proper measure of damages is the diminution in market value.<sup>82</sup>

Owners of property located near, and at risk from, a source of contamination may often find it difficult to sell their property at fair market value. These owners suffer from "stigma" damages because the defendant's conduct has created a stigma with living near a source of pollution. Many courts have denied recovery for stigma damages finding that there is no interference with plaintiffs' rights when there is no causal connection between the injury of plaintiffs and the unreasonable conduct of the defendant.<sup>83</sup> Stigma damages for living near a source of contamination is still a relatively novel and unaccepted theory. Plaintiffs will have a much better chance of recovery if their property is actually contaminated.

Stigma damages also arise in the context of a permanent nuisance which involves a diminution of value, regardless

of the outcome of remediation. This is because there may often be a post-remediation injury to the reputation of the real property.<sup>84</sup> In such instance, stigma is one of the factors which may be utilized in determining market price.<sup>85</sup> Some courts have found that stigma damages may be recovered for permanent nuisances arising from environmental contamination.<sup>86</sup>

Plaintiffs may also be entitled to damages for nuisance and mental distress, in addition to the compensatory damages for property value diminution. A trespass claim will support damages for mental distress and for any other resulting harm.<sup>87</sup> Subjective damage claims, however, may prove difficult to value. For instance, an emotional distress claim may require the use of an expert psychologist or psychiatrist. Assuming that emotional distress may be proved, the calculation of damages will be left to the jury. A good understanding of the propensity of the judge and local jury pool is important when evaluating subjective nuisance and distress claims. Egregious conduct on the part of the defendant may help increase the value of the subjective damage claims and allow for the recovery of punitive damages. Exemplary damages, which are damages on an increased scale awarded when the defendant's conduct is wanton, may also be recoverable. Generally, none of the foregoing subjective damage claims may be explicitly recovered in the settlement context, which is usually limited to compensatory damages.

The measure of damages for personal injuries includes compensatory damages for medical expenses, and the more subjective damages for pain and suffering. Exemplary damages, and possibly punitive damages may also be recoverable, if the defendant's conduct merits them.

### B. Real Estate Data

The real estate economist should direct the gathering of this evidence. The real estate data should consist of all sales data and refinancing data for the impacted area from the time the contamination was publicly disclosed. The local appraiser should start with the multiple listing service to gather sales data. The relevant data includes the time on the market, the asking price, and the selling price. It is also necessary to determine if the sales transactions were at arm's-length, with full disclosure of the contamination to the buyer. Discovery should include reviewing the sales documents to see if disclosure was made. It may be necessary to depose or get affidavits from the buyers if they did not have disclosure.

### C. Medical Reports

It may be necessary to gather health records if the toxicologist and/or epidemiologist believe there are viable personal injury claims. It will be necessary to prove causation, and tie the personal injury to contaminant exposure emanating from the impacted property.

78. See, e.g., *Wentworth v. Airline Pilots Ass'n*, 226 A.2d 542 (D.C. 1975).

79. *Id.*

80. See, e.g., *Phillips v. Chesson*, 231 N.C. 566 (N.C. 1950).

81. See, e.g., *Santa Fe Partnership v. ARCO Prods. Co.*, 46 Cal. App. 4th 967, 977, 54 Cal. Rptr. 2d 214, 220 (Cal. Ct. App. 1996).

82. See, e.g., *Mel Foster Co. Properties, Inc. v. American Oil Co.*, 427 N.W.2d 171 (Iowa 1988).

83. See, e.g., *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992); *Twitty v. State*, 354 S.E.2d 296 (N.C. Ct. App. 1987), *review denied*, 358 S.E.2d 67 (N.C. 1987); *Escamilla v. ASARCO, Inc.*, No. 91 CV 5716 (D. Colo. 1992).

84. See, e.g., *Aas v. Superior Court*, 64 Cal. App. 4th 916 (Cal. Ct. App. 1998).

85. See, e.g., *In re Appeal of Camel City Laundry Co.*, 123 N.C. App. 210, 217, 472 S.E.2d 402, 406-07 (N.C. Ct. App. 1996), *review denied*, 345 N.C. 342, 483 S.E.2d 162 (N.C. 1997) (can discount value and deduct amortized cost of remediation because of contamination and remediation efforts).

86. See, e.g., *Santa Fe Partnership*, 46 Cal. App. 4th at 977, 54 Cal. Rptr. 2d at 220.

87. See 75 AM. JUR. 2D *Trespass* §145 (2005).

### *D. Anecdotal Evidence*

Survey instruments and questionnaires are essential to gathering anecdotal and other evidence on the interference with the plaintiffs' use and enjoyment of their property. Survey instruments and questionnaires used for litigation purposes are crafted by the plaintiffs' lawyers for measuring the damages that the plaintiffs have incurred as a result of the contamination. Plaintiffs may have smelled gasoline fumes, or tasted foul water. The survey forms can also reveal the extent to which the plaintiffs have limited the use of their property. Plaintiffs may limit the use of their basements, yards and gardens, and in some circumstances no longer drink their tap water.

## **VII. Settlement**

In this final section we discuss the likely resolution of environmental cases that have caused property value diminution. We address why these types of cases will settle, and what components may comprise the settlement. Several of the following components may be included: actual damages; property value protection; medical monitoring; community enhancements; and a comfort letter. We discuss the applicability of each of the preceding below, and their role in bringing about the successful resolution for these types of cases.

### *A. Why Cases Settle*

Settlement is primarily informed by the real estate economist's expert opinion of the percentage of property value diminution. While the plaintiffs may have also suffered nuisance damages, and there may be a punitive damages case, these more subjective damages are more difficult to fold into a settlement scenario. Defendants will be less willing to negotiate nuisance damages and punitive damages, and will stick closely to the percentage of diminution of the properties.

As the literature suggests, the percentage of property value diminution in an environmental contamination incident follows an established path over time. When then contamination is first discovered, property values plummet. As an investigation ensues, the values may further drop if the contamination is found to be severe. Once the contours and composition of the contamination are well defined, the property values will stabilize at a new, lower level.

At some point, however, once the problem is well defined, and remediation has begun, the values will begin to recover. The literature suggests that the recovery will vary depending on the nature and extent of the remediation activities undertaken. The point at which values start to recover provides a powerful impetus for the plaintiffs to settle. Plaintiffs' claims are not becoming any stronger at this point, and the costs of further litigation will reduce their net recovery.

### *B. How Cases Settle*

Prior settlements and judgments in analogous cases have important roles in influencing how cases settle. The degree of interference in the plaintiffs' use and enjoyment of their property will figure prominently in a settlement negotiation.

As discussed in the introduction, settlements and judgments for property damage and personal injury claims resulting from environmental contamination run the gamut from three times the appraised value of the homes in one recent settlement in Cheshire, Ohio, to only nominal damages from another recent judgment in Denver, Colorado.

Certain features in a case will exert influence on the settlement. If the governmental authorities have determined that the properties are habitable and pose no risk to the occupants, the settlement value will necessarily be lower because the personal injury and medical monitoring claims will probably be tougher to prove.

The defendants will be unwilling to pay 100% of the property value, and take title to the homes, if the governmental authorities have declared them safe to live in. Defendants will also be unwilling to pay 100% of the property value if the plaintiffs keep title to the house. A defendant will typically expect to buy the house outright if they are paying its fair market value to the plaintiff.

The degree of interference in the plaintiffs' use and enjoyment of their property will figure prominently at settlement. For example, plaintiffs with contaminated well water will present greater interference with use and enjoyment than plaintiffs using municipal water.<sup>88</sup> The following are other kinds of remedies a defendant may agree to provide in a settlement agreement.

#### 1. Technical Consultant

A technical consultant funded by the defendant may provide assurance and comfort to the impacted community. This expert can advise the community on any ongoing state environmental agency or EPA investigations, and planned remediation efforts.

#### 2. Medical Monitoring

A settlement that provides for the funding of an independent medical expert or panel of experts to advise and assure the community of its long-term health and well being may be beneficial to the plaintiffs. Plaintiffs may be willing to compromise their medical monitoring claim with such an expert. Further, the settlement agreement should preserve plaintiffs' ability to bring or re-file personal injury claims if the medical consultant makes adverse findings.

#### 3. Comfort Letter

Another important element of a settlement is the provision for defendant's assistance and cooperation in the issuance of a comfort letter from appropriate government officials stating that the residents' health is not at risk by living on the subject properties. Such a letter would not only provide comfort to homeowners but would facilitate property sales at fair market value.

#### 4. Community Enhancements

The funding of community enhancements directed at making the community a more attractive place to live will thereby enhance property values. These enhancements

88. *Ayers v. Township of Jackson*, 525 A.2d 287, 17 ELR 20858 (N.J. 1987).

could include: neighborhood beautification and landscaping; the establishment of a state-of-the-art computer lab in a local elementary school; or the establishment of college scholarships exclusively for residents of the impacted area.

#### 5. Property Value Protection Plan

The Property Value Protection Plan (PVPP) provides the essential underpinnings to any settlement. The purpose of such a plan is to guarantee that the plaintiffs will receive fair market value for their homes if they are not able to sell them in a reasonable amount of time at fair market value. This feature captures any additional diminution in property value on the back end that the cash settlement did not on the front end.

One example of a PVPP plan that has been implemented is in the Mantua subdivision of Fairfax County, Virginia. Defendant Texaco Corporation's above-ground tank farm had contaminated an area of nearly 300 homes. One home was evacuated because of explosive levels of gasoline vapors inside. As part of a settlement, Texaco implemented a PVPP which was effective for 10 years, beginning in 1992, and ending in 2002. The first element of the plan was the establishment of a base value for the impacted properties. This base value was increased at specified intervals, to take into account general market appreciation. Throughout the 10-year effective period, there was a three-member appraisal board, consisting of one member chosen by Texaco, one member chosen by the plaintiffs' counsel, and a third member mutually selected by the first two appraisers. When an owner of impacted property covered by the settlement decided to sell his property, he would submit a notice of intent to sell to the appraisal board. The board would then appraise the individual's property, and the neutral third appraiser would have the final say if the first two appraisers did not agree. The seller needed to use reasonable efforts to sell the property, and Texaco had a right of first refusal to purchase the property. If the property failed to sell at the appraised price, Texaco reimbursed the seller for a specified percentage of the property value, calculated by using the current base value. Throughout the 10-year period, no seller took advantage of the PVPP. The homes have appreciated smartly, in line with the rest of the Fairfax, Virginia, area.

PVPPs can be mutually beneficial for plaintiffs and defendants. Plaintiffs get the security of knowing that their home value will be protected, while defendants often need not pay out on this seemingly expansive settlement component because eventually the property values may recover.

#### VIII. Conclusion

Toxic tort property damage litigation is fraught with complexities and risks. The outcome of these cases can vary widely depending upon the particular fact pattern presented. Plaintiffs who have been greatly impacted by contamination will have a more compelling argument for recovery than plaintiffs who have not had serious interference with use and enjoyment of their property, or who may only have suffered stigma damages from neighboring contamination.

Choosing between a mass tort and a class action is an important decision that must be approached with due care. Mass torts avoid the briefing for class certification, but can be burdened by overwhelming discovery responsibilities and trial manageability problems. Class actions require extensive briefing on class certification, are subject to both interlocutory appeals, and a fairness hearing after settlement.

Discovery in these types of cases can be extensive. Good document management and expert witnesses with relevant subject matter expertise are absolute necessities. An environmental expert will be needed to establish liability, and both a real estate economist and appraiser will be necessary to establish damages. Each plaintiff's expert must be able to survive a *Daubert* motion for exclusion.

These cases will often settle after the parties get a good understanding of the facts of the case, and can reasonably predict the outcome of further litigation. There are many components of fair, reasonable, and adequate settlement, including a PVPP. Other settlement components such as medical monitoring or the provision of a technical consultant may be warranted depending on the circumstances.

In sum, these cases can be extremely interesting and rewarding, but must be approached with the greatest of care, after a sober evaluation of the facts, the law, and the likely recovery.