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Toxic Torts and Common Law Claims in Groundwater Contamination Cases

Introduction

Landowners often find that other parties have polluted the groundwater beneath their land. This could result from releases of chemicals by a tenant, prior owner/operator, at a neighboring property, or a more distant property with a large contamination problem. Contamination is also often detected in, or threatens, water supply wells operated by public and private water utilities. In addition, public agencies charged with the management of natural resources may need to clean-up contaminated groundwater to restore the resource.

This contamination has caused an adverse impact, damage, or injury. These may include, but may not be limited to, diminution in land value, loss of rental value, environmental liability, impact on reputation, stigma, water supply well treatment, loss of consumer confidence, aquifer remediation costs, etc. The damaged party, as plaintiff, can seek restitution from the party responsible for the contamination (the “RP”), as defendant, through the courts. These lawsuits use a variety of legal theories to recover money (i.e. damages) to offset the impact or injury. Such legal claims usually fall into one of two categories:

- Federal or State statutes
- Common law cause of action

Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) cost recovery actions are often used because of the strict, retroactive, and joint and several liability provisions within the statute. A more detailed discussion of CERCLA cost recovery actions is presented in a separate **Aquilologic, Inc. (aquilogic)** white paper. Other Federal statutes that can be used include the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (Section 311(d)), notably for petroleum related contaminants, which are exempt from CERCLA.

Many states have statutes that are similar to these Federal statutes. These allow the plaintiff to use similar legal approaches to Federal claims but remain within State court. For example, the California Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) (Health & Safety Code, §§ 25300-25395.40) is often referred to as California’s Superfund statute and the State’s counterpart to CERCLA. In addition to these “environmental statutes”, other State acts can provide a statutory claim to recover damages from contamination, such as the California Business and Professions Code, notably section 17200. Beyond these broad statutes, some



State acts often include language to allow public agencies to recover damages that result from contamination (e.g. certain acts creating water districts). In addition to Federal and State statutes, public agencies can also assert Natural Resource Damage Assessment (NRDA) claims using Federal or State NRDA laws to recover statutory fines and restoration costs.

Many suits will incorporate both statutory and common law claims. This paper will present further discussion on the second category of claims – common law claims under tort law.

General Principles of Tort Law

Tort law provides individuals the right to compensation for wrongs and/or injuries that do not result from a statute or a contract. In general, a tort is committed when: (1) one party owes a duty to the other party, (2) the duty is breached, and (3) the breach is the “proximate cause” of (4) injury or damage to the owner of a legally protected interest. A party (e.g. person, corporation) who commits a tort can be sued by another party (e.g. person, corporation, public agency) in a civil action for the resulting damages. Legal theories of tort recovery include negligence, trespass, nuisance, and strict liability. A “toxic tort” is a tort arising out of an injury caused by a toxic or hazardous substance. In particular, this paper will focus on how these principles create the right to sue for “toxic torts.” Other than scientific complexities and the difficulties of proof, a toxic tort case is really no different than any other personal injury or property damage case.

Duty

One of the requirements for tort liability is the existence of a duty to act. For example, just as a driver has a duty to other motorists and pedestrians to drive safely, a factory has a duty to protect its neighbors from water pollution. Generally, a party only has a duty to those it is “reasonably foreseeable” that they may harm.

The concept of “duty” has been construed fairly widely with respect to environmental issues. In general, the owner/operator of a facility that causes pollution is responsible; however, even a non-landowner can be held liable for creating environmental conditions causing a nuisance. A landowner may be liable for actions of a tenant if the owner has been made aware of contamination, but has failed to fully abate the situation, since the owner has “control over the premises.” A purchaser of contaminated property may be liable for clean-up of contamination, even if the purchaser did not cause the situation, if “upon learning of the nuisance and having a reasonable opportunity to abate it” the purchaser fails to do so. A seller’s liability may shift to the purchaser if, after a reasonable time after the transfer of title, the new owner fails to take steps necessary to remediate the continuing environmental problem.



Proximate Cause

There can be no tort liability without “proximate cause.” Proximate cause is defined as “that which in a natural and continuous sequence, unbroken by an intervening cause, produces the event, and without which the event would not have occurred.” Simply, the “but for” test is often used - but for the act, the event would not have occurred. If there is more than one cause, each of which could have independently caused the harm, under the “substantial factor” test each cause is considered a proximate cause.

Nonetheless, if the consequences are not “reasonably foreseeable”, they are not considered the proximate cause, even if they are in fact the cause. Certain hazards, such as the possibility that an underground storage tank (UST) may leak and cause groundwater contamination, may be foreseeable, and thus, preventable.

A supervening act is an act which occurs after the defendant's tort, and relieves the defendant of liability because it is the sole cause of the injury. For example, a company that stores hazardous wastes might not be liable for contamination caused when a waste haulage company ruptures a drum during waste collection, unless such an event is foreseeable.

Joint and Several Liability

If the actions of two or more parties (“tortfeasors”) result in a tort, and the harm they caused to the plaintiff is not divisible, their liability is generally “joint and several.” That is, each party is liable for all of the plaintiff's damages, even if the actions of the other party contributed to the harm. For example, if two parties released chemicals that resulted in contamination, but one party has no assets or insurance, then the other party is liable for the total cost of the damages. However, if the harm is divisible, there is no “joint and several” liability. That is, if the actions of a party caused one element of damage (e.g. polluted one water supply well), and the actions of the other party caused a separate element of damages (e.g. they polluted a different water supply well), then the damages are divisible.

Contributory Negligence/Relative Culpability

Under the common law doctrine of contributory negligence, a plaintiff who is also negligent or otherwise acted tortiously is barred from recovery, unless the defendant had the “last clear chance” to avoid the act that resulted in harm. Likewise, under the doctrine of assumed risk, which may be considered part of the doctrine of contributory negligence, a person who assumes the risk of a particular activity (e.g. drills a new water well next to a refinery) may be precluded from recovery for an injury caused by the acts of another (e.g. contamination at the refinery).

Many states have changed the rules of contributory negligence and assumption of risk by statute, and adopted a rule of “comparative negligence” or “relative culpability,” where the



“culpable conduct attributable to the claimant...including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant...bears to the culpable conduct which caused the damages.” While assumption of risk is a factor to be considered when applying this system, it may still result in a complete bar to recovery.

For example, if two or more parties are liable for the damages, their “relative share of responsibility is apportioned” in accordance with the relative culpability of each party liable for contribution.” However, each “joint tortfeasor” is liable for the entire verdict, and one joint tortfeasor may bring an action for “contribution” against the other joint tortfeasors for the amount they pay beyond their “equitable share.” Likewise, if by contract, such as an insurance policy, a party has promised to reimburse a tortfeasor for damages, the tortfeasor may bring an action for “indemnification” to enforce that promise.

Other Rules

Certain special rules limit a party’s ability to sue for torts. Under the common law doctrine of “sovereign immunity,” the government is generally not subject to tort liability. However, by statute, the federal and most state governments have surrendered their sovereign immunity, to some extent, except for acts or failures related to the performance of a discretionary function or duty. Under the Federal Tort Claims Act, 28 U.S.C. §2671, et seq., the United States government has accepted tort liability for itself and its agencies and employees. However, a tort suit can only be brought after a formal claim has been filed and denied by the administrative agency involved.

Under the doctrine of respondeat superior, a “principal” is liable for an agent’s torts or other wrongful acts (e.g. an employee’s actions), provided they were committed within the scope of the agent’s actual or apparent authority from the principal. Thus, a corporation may be liable in a civil or criminal proceeding for its employee’s torts, or the employee’s violations of statutes or regulations. However, such an agent is also personally liable for his or her own actions, unless indemnified by the principal. Accordingly, an individual corporate officer or employee that “controls corporate conduct and thus is an active participant in that conduct is liable for the torts of the corporation,” including those involving liability for environmental contamination.

Theories of Liability

There are several different categories of torts and other legal theories that can serve as a cause of action in a complaint of harm caused by others. In many cases, the “offensive action” might fit into more than one category, e.g. negligent conduct might also produce a nuisance. A plaintiff can plead numerous alternative claims, but this paper will focus the theories of tort liability as they relate to environmental pollution.



Trespass

Trespass is the intentional invasion of another's property. A trespasser is liable for property damages caused by his or her action, such that “[W]hile the trespasser, to be liable, need not intend or expect the damaging consequences of his intrusion, he must intend the act which amounts to or produces his unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or he does so negligently as to amount to willfulness.” Thus, trespass may include the unintentional (but inevitable) consequences of an intentional act. For example, a landowner who dumps wastes on their own land is liable for the inevitable migration of the contamination to the adjacent properties.

Negligence

Negligence is the legal term for any careless behavior that causes (or contributes to) an accident or injury. A person bringing a negligence claim (the plaintiff) must prove that: (1) the defendant had an obligation to act with ordinary or reasonable care toward a certain person or toward the general public, (2) the defendant's action (or failure to act) did not meet this duty, and (3) the defendant's action or failure to act caused harm to the plaintiff.

A landowner is held to the standard of a “reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.” Thus, a landlord owes a duty to a tenant to maintain safe premises, and to avoid environmental hazards, such as friable asbestos. However, a landowner cannot have a duty with regard to conditions they did not know exist. Therefore, “[f]or negligence liability to ensue in cases involving the pollution of underground waters, the plaintiff must demonstrate that the defendant failed to exercise due care in conducting the allegedly polluting activity or in installing the allegedly polluting device, and that he knew or should have known that such conduct could result in the contamination of the plaintiff's well.”

Negligence can often be demonstrated in cases involving a leaking UST or other discharge of pollutants. Further, a landowner can be liable for pollution resulting from a failure “to use reasonable care to maintain” USTs or other facilities “in a reasonably safe condition.”

An environmental law or regulation may create a duty, so that violation of the law will constitute negligence. However, violation of a regulation is merely evidence of negligence, and does not automatically create tort liability.

Private Nuisance

In the seminal case, the New York Court of Appeals explained the nature of a private nuisance: “A private nuisance threatens one person or a relatively few, an essential feature being an



interference with the use or enjoyment of land. It is actionable by the individual person or persons whose rights have been disturbed.”

And the necessary elements of a private nuisance are as follows: “A party is subject to liability for a private nuisance if their conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities...”

Pollution may be actionable as a private nuisance (e.g. groundwater contamination migrating beneath a neighboring property). However, a private nuisance claim generally does not apply with regard to conditions created by a landowner or tenant on its own property where there is no off-site impact.

In order to bring their private nuisance claim, plaintiffs must show an interference with their property that is “substantial in nature” and “unreasonable in character.” This may require exceedance of an applicable regulatory or clean-up standard. In general, the courts around the country have held that a property owner may not sue for nuisance caused by nearby contamination if there is no physical invasion of the plaintiff’s property. However, there may be a claim for injunctive relief arising out of an anticipatory nuisance claim.

Public Nuisance

The New York Court of Appeals also explained the nature of a public nuisance: “A public, or as sometimes termed a common, nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency. It consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons...although an individual cannot institute an action for public nuisance as such, he may maintain an action when he suffers special damage from a public nuisance.”

As such, pollution may be actionable as a public nuisance.

Strict Liability

Under the doctrine of “strict liability,” certain actions are so dangerous that the common law imposes liability regardless of whether or not a party acts reasonably. This principle has historically applied to activities such as blasting or storage of explosives, and may apply to “generation and disposal of chemical wastes.” Thus, a person who uses all due care in the



storage of a hazardous chemicals, and complies with all applicable regulations, may still be liable for damages arising from an accidental spill under the theory of strict liability.

Fraud

Fraud is an intentional misrepresentation. If a seller intentionally deceives a buyer with respect to property conditions, the seller may be liable for fraud. Under the doctrine of caveat emptor (“buyer beware”), silence is not fraud; thus, unless a seller intentionally gives false information about the property, there is no fraud. The buyer has the duty to conduct “all reasonable inquiry” to satisfy themselves as to the quality of his bargain pursuant to the doctrine caveat emptor. However, the courts have eroded the doctrine caveat emptor, especially with regard to environmental matters, and may imply a duty to disclose defects to a buyer, even if no inquiry is made. Thus, in spite of caveat emptor, a seller who knowingly fails to disclose the presence of environmental contamination or other hidden defects on a property may be liable to the buyer for fraud even if no inquiry or representations were made with regard to environmental contamination. However, no fraud claim can be made if the buyer is on notice to the potential defect.

Mistake

If defective property is sold, but there is no intentional fraud (perhaps because the seller did not know), there might be a mutual mistake, whereby “a contract is voidable under the equitable remedy of rescission if the parties entered into the contract under a mutual mistake of fact which is substantial and existed at the time the contract was entered into.”

Relief for unilateral mistake is more restrictive. A “contract may be voided for unilateral mistake of fact only where enforcement of the contract would be unconscionable, the mistake is material and was made despite the exercise of ordinary care.”

Waste

A tenant who damages property either through neglect or unreasonable acts, may be liable for “waste.” As such, a tenant may “waste” property by leaving behind environmental contamination.

Restitution

A claim for restitution arises where “it would be against equity and good conscience to permit the defendant to retain what is sought to be recovered.” Restitution must be made for “unjust enrichment” for “property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefore.” The “essential inquiry in any action for



unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.”

For restitution, there is no need to prove any wrongdoing by the defendant. Thus, some courts have recognized claims for restitution where a defendant should, in fairness, be held accountable for the clean-up of contamination. However, if a contribution claim can be brought under CERCLA §113, 42 U.S.C. §9613, a restitution claim is preempted.

Indemnification or Contribution

Where two parties are both under a duty to clean-up contamination, and the duty, as between the two parties, should have been discharged by the defendant, the plaintiff may recover clean-up costs under a theory of “implied indemnification” or contribution. If a contribution action is available under CERCLA §113, 42 U.S.C. §9613, such a claim may be preempted.

Quasi-Contract

“Quasi contracts are not contracts at all,” but are “imposed by law where there has been no agreement...to assure a just and equitable result.”

Contract

A breach of contract - which is not a tort claim - may also form the basis for an environmental claim. For example, a landlord may have a cause of action for breach of lease if a tenant contaminates the landlord’s property. However, environmental contamination does not make the title to property unmarketable, or result in breach of the warranties of title.

Inverse Condemnation

The doctrine of inverse condemnation has long been recognized by the courts “as a procedural vehicle for granting damages where an entity clothed with the power of eminent domain has interfered with the property rights of a landowner to the extent that it amounts to a compensable taking.”

Statute of Limitations

Torts (and most other legal claims) are subject to statutes of limitations. Once the period of time prescribed by law has run, a plaintiff is barred from bringing a lawsuit. In most states, most actions for personal injury and property damage must be brought within three years of the date of the tort (i.e. within three years of knowing of the harm caused by the action of the defendant). However, an action for fraud or breach of contract can be brought within six years. Thus, the statute of limitations for a claim for injuries due to contamination runs from the time of discovery of the harm caused by the contamination.



In general, shorter limitation periods apply to claims against the government. For example, a claim against the federal government must be filed within two years under the Federal Tort Claims Act, 28 U.S.C. §2401. In many states, a claim must be filed against the state or municipality within 90 days, and suit against a municipality must be filed within one year and 90 days.

In some states, the “discovery rule” is applied to toxic torts; whereby, the three-year limitations period, as well as the limitations periods for filing claims and suits against the state and municipalities, applicable to a claim for personal or property injuries caused by “latent effects of exposure to any substance,” runs “from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.” Thus, even if it takes decades after chemical exposure to discover the injury, a lawsuit could still be brought within three years after that discovery. The issue of when a plaintiff “should have known” is generally a question of fact, and the statute is construed liberally in a plaintiff’s favor.

In addition, some jurisdictions recognize the doctrine of “continuing torts,” so that the statute of limitations for a continuing trespass (e.g. seeping water) recommences each day the tort continues.

Section 309 of CERCLA, 42 U.S.C. §9658, provides an “exception to state statutes,” pursuant to which the “federally required commencement date” supersedes any date for commencement of the state statute of limitations in a case involving “personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility.” The “federally required commencement date” is defined as “the date plaintiff knew (or reasonably should have known) that the personal injury or property damages...were caused or contributed to by the hazardous substance or pollutant or contaminant concerned.”

Claims for response costs in the nature of indemnification or contribution (as opposed to property damages to the claimant) are subject to the six-year statute of limitations in many jurisdictions, and for each cost, the six years begins to run at the time of the expenditure.

In addition to statutes of limitation, some state courts have applied statutes of repose to environmental claims. Statutes of repose differ from statutes of limitation in that the deadlines imposed by statutes of repose are, in general, enforced much more strictly. In essence, all statutes of limitation are statutes of repose, but some statutes of repose operate differently from statutes of limitation. A statute of repose, in contrast to a statute of limitations, “is designed to bar actions after a specified period of time has run from the occurrence of some event other than the injury which gave rise to the claim.” Simply put, the difference is that a

statute of limitations is triggered by an injury, while a statute of repose is triggered by the completion of an act that resulted in injury.

Some states, notably tobacco producing states, have very restrictive statutes of repose that limit the claim for a period after the product was used rather than when the injury was discovered. Such that, for a State with a five year statute of repose, a party who smoked cigarettes between the ages of 18 and 28 and was diagnosed with lung cancer at the age 36 would be barred from asserting a claim, as the statute of repose had expired. In the context of groundwater contamination, if a release of a chemical from a tank in 1985 migrated through groundwater and impacted a water supply well in 1993, the defendant could argue that the statute of repose had run, and any claim for damages should be barred.

Remedies

A variety of remedies may be awarded to a successful plaintiff in a tort action. These remedies have been extended by application of the particular problems of “toxic tort” cases involving chemical contamination. Normally, a plaintiff sues for damages, i.e. an award of money paid by the defendant.

Property Damages

The general rule is that “[a] person whose property is taken, damaged, or destroyed by the negligent or wrongful act or omission of another is entitled to compensation for the damage sustained in such a sum as will restore him as nearly as possible to his former position.” “[T]he proper measure of damages for permanent injury to real property is the lesser of the decline in market value and the cost of restoration.” In addition, permanent property damages can include loss due to stigma that remains even after a property is cleaned up.

Where injury to property is temporary, damages are usually measured by “the reduction of the rental or usable value of the property...Even if there is a partial restoration, property damages include both damages due to the temporary loss in rental value, as well as ‘further damage, if any, caused.’”

Other Economic Damages

Other economic damages may flow from property contamination, such as business interruption, lost profits, additional business expenses such as rental expense, lost subscriber revenue, lost installation revenue, employee overtime, lost sales commission, employee wages, and additional advertising expense. Under the doctrine of avoidable consequence, a plaintiff may also be able to recover for the costs of such things as bottled water, testing water, and installing filters in order to avoid damages from a contaminated water supply.



Injunction

A plaintiff may also be able to obtain the “equitable” remedy of injunction, if he or she can show “irreparable harm.” An injunction, in effect, prohibits the defendant from continuing offensive conduct, or requires the defendant to take certain action. For example, a court may require a polluter to stop polluting, or to clean-up contamination.

Since an injunction is an equitable remedy, the court must balance the equities of the situation, and take into consideration whether the plaintiff has an adequate remedy “at law” by obtaining damages. For example, a court might allow a refinery to continue to emit air pollution which causes a private nuisance due to the public interest in maintaining the local economy, but still require the refinery operator to pay damages to the injured neighbors.

Punitive Damages

Punitive damages go beyond the amount necessary to make a plaintiff “whole,” and are usually assessed to deter the defendant and other persons from similar egregious conduct. In general, punitive damages are only allowed if a defendant acted with a “conscious disregard of the rights of others or conduct so reckless as to amount to such disregard.”

Attorney's Fees

Under the “American rule,” attorney's fees are not recoverable by a successful litigant. The only exceptions are cases of “outrageous” conduct by a defendant, or where a statute specifically provides for recovery of fees. A number of environmental statutes have attorney's fee provisions that citizen plaintiffs can utilize, and federal and many state civil procedure codes provide for attorney's fees in “frivolous” cases.

Other Damages

Damages are not available for the mere increase in risk of developing a disease due to exposure to a chemical, but rather the damages can only be awarded when a disease is discovered. However, exposure to a chemical may increase the risk of future disease such that regular medical checkups are warranted. In such a case, some courts have allowed a recovery for the cost of future “medical monitoring.” This is not damages for increased risk, but merely to pay for the necessary cost of addressing the risk. Many courts have required that where medical monitoring is required, the court should administer a trust funded by the defendant to pay out medical expenses, rather than awarding money directly to the plaintiff.

Courts have long recognized that an element of damage for nuisance is compensation for discomfort or annoyance. In toxic tort cases, this principle has been extended to allow recovery



for “loss of quality of life,” including damages for “inconveniences, aggravation, and unnecessary expenditures of time and effort...as well as other disruption in their lives.”

Closing

Caveat: **Aquilologic** is not a law firm and no **aquilologic** employee is admitted to any State Bar. This article is provided for information purposes only, and should not be construed as legal advice or opinion. If your property has been impacted by contamination, you have released chemicals that may have impacted groundwater, or you a party to a lawsuit involving groundwater contamination, we can provide technical support in these matters. However, you will need to retain legal counsel to support you in any possible, pending, or active litigation.

Much of the content of the above paper was taken from:

<http://nyenvlaw.com/Data/Documents/Chapter%202.pdf>. Legal citations can be found within this source document.

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