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## ENVIRONMENTAL LAW

## **CLASS ACTIONS**



John C. McMeekin II

In times of economic crisis and property foreclosures, the free flowing transaction of real estate is constrained. While this truism can be attributed to a myriad of economic factors unrelated to environmental conditions, litigants are now seeking to recover monetary damages for diminished property value and



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delayed sales premised on the mere possibility of future damages or harms resulting from subjective concerns over environmental contamination. Increasingly, the vehicle of choice to monetize these fears is through stigma and diminution of property value class actions directly or tangentially related to contamination of groundwater, air, soil, and the atmosphere.

Conservation and Recovery Act (RCRA) in the 1970s and the Comprehensive Environmental Compensation and Liability Act (CERCLA) in the early 1980s and their state equivalents which were enacted in an effort to promote remediation and apportion the cost of the environmental harms to those responsible, today's litigants are motivated by monetary gain fueled by presumptions of strict liability and recovery of the costs of litigation for the prevailing party. In many cases, the avarice of the litigants is so predominant that the environmental condition which formed the basis for the claim subsequently goes unaddressed for a lack of additional financial resources. Rooted in the general negative perception of the general public and judiciary of environmental contamination, litigants have taken advantage of both traditional tort theories and statutory presumptions of liability to expand the available remedies for unsubstantiated fears, subjective assessments of future

Rawle's Reports Volume 14 • Number 4

adverse effects, speculation, and conjecture of the unknown into financial riches. In doing so, courts have permitted an insidious and irrational belief system to take hold, namely that all environmental exposures cause compensatory damages and all exposures, regardless of proximity or dose place persons and property at risk for future harm. These beliefs defy rational assessment and run contrary to the core sciences of hydrogeology, geology, environmental science and the regulatory limits for permissible exposure limits which govern environmental exposures on state and federal levels.

### Stigma Damages

In the context of environmental exposures, stigma can be defined as the subjective potential by a purchaser of a property relating to either the willingness to purchase the property or diminishing the value of the property below the fair market value. Although there has been research in an attempt to quantify the effect of stigma, whether it exists on a class level and, if so, to what degree remains largely subjective and of varying significance based on the level of sophistication of the parties and availability of information. Research has consistently demonstrated that while there may be an adverse effect to the value of an impacted property, the mere presence of an environmental risk does not automatically imply devaluation. Albert Wilson, The Environmental Opinion: Basis for an impaired opinion, The Appraisal Journal (July 1994). Moreover, studies have shown that diminished value dissipates as a function of time, the progress of remediation and the permissible use of the property (i.e. a gasoline station with soil contamination will suffer little to no diminished value). Id. However, this is not true where the contamination is to an adjacent or adjoining property in which case the damage is referred to as stigma or the potential for future damage. In the case of indirect contamination, it is often the case that the nature and extent of contamination is unknown or misunderstood. It is often the case that the contamination is not as significant as rumored and more restricted than perceived. In fact, properties further removed from the zone of contamination may well have no stigma or diminished value at all. This leads to the first fundamental issue in the defense of stigma class actions: namely that the potential for stigma damages is distinct and unique depending on perception and ability to accept risk as well as objective factors such as geography, topography and time. The potential for stigma damages will be effected by the nature of the contamination and availability of information such that it is highly unlikely that one or more "representative" plaintiffs can adequately represent the summation of the concerns of an entire community.

#### Use of Experts

Defending against environmental contamination diminution stigma damages requires more than a strictly legal analysis. Experts are vital to any defense – even at the class certification stage. Use of experts at this stage not only buttresses a defendant's legal argument, but oftentimes is the lynchpin of the certification defense. Defendants often retain hydrogeologists or industrial hygienists to address theories of contamination or exposure through specific analytical frameworks. A toxicologist can be used at the class certification stage to educate the court on the true nature of the alleged contaminate to dispel "the

Rawle's Reports Volume 14 • Number 4

sky is falling" arguments often raised in environmental cases. Demonstrating to the court that a particular contaminate is not a health concern at the levels in question may make it more palatable for the court to appreciate that plaintiffs professed fears or claims of market devaluation are unreasonable and scientifically unfounded. A local real estate expert is frequently necessary to address case specific market conditions and local disclosure requirements. Additionally, a national real estate expert or economist may be needed, particularly on the issue of stigma damages, generally.

#### Strategies to Avoid Litigation

Numerous studies and in the experience of the authors, the key to avoiding or minimizing future claims for stigma damages is a fine balance between proactive responses to contamination events, dissemination of relevant information, and publicizing the successes of remedial efforts. Specifically, studies show that stigma damages are minimized or eliminated when property owners and potential buyers are well informed as to the characterization of the contamination, the future plan for closure, and that the stigma, if any, dissipates with time. See, The Impact of Hazardous Material on Property Value, The Appraisal Journal (April 1992)(internal citations omitted) Further, it goes without saying that there is an emotional component to environmental contamination cases that needs to be recognized and addressed. It is imperative that the party responsible for the contamination be perceived in the community, either through public forums or other forms of communication to be sensitive and responsive to the concerns of potentially impacted residents. You should consider whether it is appropriate to purchase impacted properties early on or even to offer Property Value Protection plans whereby the owner is guaranteed that she can sell the property without a loss attributable to the contamination. Finally, one must bear in mind that all contamination diminishes with time and that with the inclusion of active remedial measures that time cycle is accelerated. You will find that contaminant levels will markedly improve giving cause to celebrate your success in remediating the contaminant event. Consider whether the information which, although typically available as a public record, should be provided to community residents directly or even local news organizations. When managed properly you can get out ahead of a contamination event ease tensions and establish a level of trust and respect with the community that may avoid class action litigation in the future from distrusting and disassociated community members.

#### Conclusion

It is the considered experience of the authors that stigma damages, while widely believed to exist for all environmental impairment cases, are subjective in nature and simply to speculative and individualized to form a basis for class certification. It is up to the defendant(s) to focus on the merits of the case and avoid the intellectually lazy but simple conclusion that stigma damages must exist and thus the claims are susceptible to class certification. The failure to do so may well result in significantly larger exposure and damage to the perception and reputation of the defendant in the community.

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