Contamination of Common Law

The Challenges of Applying the Statute of Limitations to Private Nuisance, Trespass, and Strict Liability Claims in the Context of Environmental Law

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INTRODUCTION

When considering what causes of action to allege when attempting to recover damages for contaminated land, a plaintiff may elect to bring claims under common law theories such as nuisance, trespass, and strict liability, rather than under more modern environmental statutes such as CERCLA or RCRA for a variety of reasons. Because common law causes of action are not tailored to address environmental disputes, their applicability can be muggy at best. This article examines a specific issue: the application of a statute of limitations defense to common law causes of action in the context of environmental contamination.

Evaluating whether there is a viable defense based on the statute of limitations for claims arising under private nuisance, trespass, and strict liability in the context of soil contamination quickly exposes the disarray of the modern state of the law. A variety of tests have been created by courts in California to evaluate whether the statute of limitations has expired in nuisance and trespass cases. Currently, none of the array of tests have been overturned, leaving their applicability in the environmental context up for interpretation and argument. This article will explore the varying tests in California that are potentially applicable to contamination scenarios.

SUMMARY

Whether Plaintiff's claims are barred due to the three-year statute of limitations generally applied to nuisance and trespass claims will depend on whether the nuisance/trespass is determined to be "continuing" or "permanent." If the nuisance/trespass is classified as "permanent," the claims are more likely to be barred by the statute of limitations. If the nuisance/trespass is classified as "continuing," the claim is less likely to be time-barred, but Plaintiff's damages will be limited to those incurred in the last three years. This may be a factual issue, an thus, not appropriately addressed in a pre-trial motion. The strict liability claim is also likely barred by the same three year statute of limitations.

I. Statement of the Law: The Statute of Limitations in Private Nuisance & Trespass

The key issue in applying the statute of limitations to a nuisance/trespass action is whether the nuisance/trespass is classified as "permanent" or "continuing." This article will first discuss how each classification affects the application of the statute of limitations. Next, it will discuss how courts determine whether a nuisance/trespass is "permanent" or "continuing."

The application of the statute of limitations on both trespass and nuisance requires the same analysis. See Mangini v. Aerojet-General Corp. ("Mangini III") (1996) 12 Cal. 4th 1087,

1097 ("The crucial test of the permanency of a trespass or nuisance is whether the trespass or nuisance can be discontinued or abated."); Spar v. Pac. Bell (1991) 235 Cal. App. 3d 1480, 1485-1486. Therefore these two causes of action will be discussed together.[1]

A. Statute of Limitations

The characterization as "permanent" or "continuing" determines how the statute of limitations is applied to the plaintiff's cause of action. A classification as "permanent" can often result in a complete time-barring of an action. This section will discuss the differences in how the statute of limitations is applied.

A permanent nuisance claim is subject to a three year statute of limitations. Cal Code Civ. Proc., 338(b). Generally, the statute of limitations begins tolling on a claim for permanent nuisance at the time the nuisance is *created*. Mangini v. Aerojet-General Corp. ("Mangini II") (1991) 230 Cal. App. 3d 1125, 1143. The tolling date of the statute of limitations period, however, is adjusted by the discovery rule when the harshness of the statute of limitations would be manifestly unjust to deprive a plaintiff of a cause of action before he is aware he has been injured.[2] Leaf v. City of San Mateo (1980) 104 Cal. App. 3d 398, 406.

In such case, the limitations period begins once the plaintiff *has notice or information of circumstances to put a reasonable person on inquiry*. Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1110-1111. Subjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation. Id. The court has found that even where a soil test did not reveal contamination, a plaintiff can be charged with knowledge if a reasonably prudent investigation would have revealed such contamination. Wilshire Westwood Associates v. Atlantic Richfield Co., (1993) 20 Cal. App. 4th 732, 740 (finding the statute of limitations began running at the point the plaintiff should have discovered the contamination based on a reasonably prudent investigation, time-barring the claim).

In a continuing nuisance action, on the other hand, a new cause of action accrues every day until the interference comes to an end. Wilshire (1993) at 744. A plaintiff may bring successive continuing nuisance actions as long as the harmful interference continues. Id. Because a new action arises every day that the nuisance continues, the three year statute of limitations begins running on that new claim each day. Therefore, the real affect of the statute of limitations on a continuing nuisance action is the extent of damages available. Remedies are limited to injunctive relief to abate the nuisance or an action for damages that accrued during the nuisance limitations period, or both. Prospective damages are unavailable. Baker v. Burbank-Glendale-Pasadena Airport Auth., (Cal. 1985) 705 P.2d 886, 869.

[1] From this point forward, the term "nuisance" is meant to include both nuisance and trespass.

B. Continuing vs. Permanent Nuisance

To determine whether a nuisance is "permanent" or "continuing," California courts look at whether the nuisance is "abatable." Mangini III" (1996) 12 Cal. 4th at 1103. If a nuisance can be abated, it is considered continuing. Id. If it cannot be abated, it is considered permanent. Id.

The classic example of a "permanent" nuisance is a structure that encroaches on a neighbouring property. The classic example of a "continuing" nuisance is an ongoing disturbance caused by noise, vibration, or foul odor. Mangini II (1991) 230 Cal. App. 3d at 1146. Pollution cases, however, present peculiar problems in applying traditional nuisance doctrines. Often they do not fit easily into the continuing-use/permanent-encroachment dichotomy because the harmful effects of the pollution may continue beyond the termination of the activity that gave rise to them. The Mangini court offered one test to assist in the application of nuisance law in an environmental case. Other courts have used other tests to classify a nuisance.

1. Mangini Test

In 1996, the California Supreme Court, in deciding an environmental contamination case, observed that Plaintiff's land may be subject to a continuing nuisance even though defendant's offensive conduct ended years ago. Mangini III (1996) 12 Cal. 4th at 1103. That is because the "continuing" nature of the nuisance refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur. Id., at 1223.

In Mangini, the court found that "abatable" means that the nuisance can be remedied "**at a reasonable cost by reasonable means.**" Id. Under this test, a nuisance is considered "permanent" if it is not abatable at a reasonable cost by reasonable means. It is "continuing" if it is abatable at a reasonable cost by reasonable means.

In considering the reasonableness of the cost, courts have weighed the cost of the remediation against the detriment to the plaintiff from a failure to remediate. Beck Dev. Co. (1996) 44 Cal. App. 4th at 1222 (finding that the cost of remediation greatly outweighed the benefit to plaintiff in performing the remediation). This can be done by comparing the cost of the remediation to the loss in property value of the plaintiff's property. Id. Reasonableness can include the consideration of monetary expense, burden on the public, and cost of remediation versus the value of the land. Id. at 1221-1222. The issue of reasonableness is a question of fact to be decided by a properly instructed jury. Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 602.

The following list provides some examples of have the Mangini test has been applied in a variety of environmental cases:

- *Permanent:* The court found that an underground, migrating plume of toxic waste constituted a permanent nuisance because plaintiff did not know the full extent of the contamination or the expected cleanup costs. Therefore, it could not be abated at a reasonable cost by reasonable means. Mangini III (1996) 12 Cal. 4th at 1103.

- *Permanent:* By special verdict, a jury found that it was "unknown" whether oil spilled on the ground that had allegedly migrated downhill was abatable at a reasonable cost by reasonable means. The court found that the nuisance was "permanent" because the evidence did not show that the contamination reasonably could be abated. McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 64

- *Permanent*: An oil reservoir installed by a previous land owner was found to be a permanent nuisance under the "Reasonable Cost by Reasonable Means Test" because the only detriment to the plaintiff was his inability to develop the *entire* property for single-family residences. While this would be the highest yielding use of the property, the plaintiff had other options for the small portion of the property that did not meet residential standards. There was no evidence to establish that the buried oil was migrating to other properties or into public water supplies, or that it was otherwise injurious to the public. Therefore, plaintiff provided no evidence to assess the actual detriment suffered if abatement were denied. Beck Dev. Co. (1996) 44 Cal. App. 4th at 1222.

2. Other Tests

Although the Mangini test is the most applicable to environmental nuisance cases and is generally applied by courts in environmental nuisance actions, this section will examine other tests that courts may consider in addition to the Mangini test in making a determination. These older tests are still relevant because some California courts do not simply pick one test. Rather, they take the stance that the determination of whether something is "abatable" is made on a case by case basis, taking "guidance from, but not straightjacket conformance with, earlier decisions." Beck Dev. Co. (1996) 44 Cal. App. 4th at 1217.

a. Varying Impact Over Time

Some courts have found that contamination may be shown to be a "continuing" nuisance by evidence that the contaminants continue to migrate through land and groundwater causing new and additional damage on a continuous basis. Beck Development Co. (1996) 44 Cal. App. 4th at 1218-1219.

In Arcade Water Dist. v. United States (9th Cir. 1991) 940 F.2d 1265, plaintiff argued that chemical contamination of soils by an enterprise that ceased operations several years prior to the commencement of the suit was liable for a continuing nuisance on the basis that the contamination continued to leach into plaintiff's well. Id. at 1268. It was this leaching of contaminants, not the operations of the facility, that was relevant in characterizing the nuisance. Id. The court found it sufficient that plaintiff submitted an affidavit that the contamination to their well may abate on its own over time absent the continuing contamination. Id. Therefore, the nuisance was abatable and was characterized by the court as a continuing nuisance.

The Field-Escandon court found a buried sewer line to be a permanent nuisance after identifying the main feature of a continuing nuisance is that its **impact may vary over time**. Field-Escandon v. DeMann (1988) 204 Cal. App. 3d 228, 234. Relying on the Field-Escandon decision, the court found buried underground telephone lines to be a permanent nuisance because

they were intended to be permanent structures and had caused long standing, unchanging damage. Spar v. Pac. Bell. (1991) 235 Cal. App. 3d 1480, 1482.

In Kafka v. Bozio (1923) 191 Cal. 746, defendant's foundation wall shifted so that it projected into plaintiff's premises after an earthquake. Defendant built a new building on this foundation wall, causing it to continually sink further onto plaintiff's property. Although permanent structures, such as buildings, are generally found to be permanent nuisances, this court found the nuisance to be "continuing," based on the fact that the condition was continually worsening and was maintained by the defendant. Id.

Additionally, some courts have found that an insufficiency of evidence to assess the possibility of changes over time should be held against the plaintiff, not the defendant. Beck Dev. Co. (1996) 44 Cal. App. 4th at 1218.

b. Continuing-Use vs. Permanent Encroachment Test

Some courts consider a more traditional, continuing-use test. This test examines the *use of the property that causes the nuisance* to determine whether the nuisance is abatable. Under this test, a nuisance is considered "permanent" if the "damages are not dependent upon any subsequent use of the property but are complete when the nuisance comes into existence." Baker, (1985) 39 Cal. 3d at 868-869. A "continuing" nuisance is an ongoing or repeated disturbance, which discontinuing of an activity would terminate. Id.

In Baker, plaintiff's complaints about a neighboring airport causing noise, smoke, and vibrations from flights were found to be a continuing nuisance because the plaintiff was complaining about the activity of the neighbor, rather than an encroachment erected upon their land. The nuisance could have been abated by the discontinuance of the activity. Baker (Cal. 1985) 705 P.2d at 869-870.

In applying this test, the court in Beck found that an oil reservoir installed by a previous landowner was found to be a permanent nuisance under the continuing-use test. The court based this decision on the fact that the plaintiff was "complaining of the location of a substance rather than ongoing activities of the defendant." Beck Dev. Co. (1996) 44 Cal. App. 4th at 1218.

II. Statement of the Law: Strict Liability

Strict liability for an ultrahazardous activity is subject to the same three-year statute of limitations for injury to real property. Code Civ. Proc., § 338(b); Wilshire, (1993) 20 Cal. App. 4th at 743. This three-year statute of limitations is moderated by the same CERCLA discovery rule. Under this rule, subjective suspicion is not required. If a person becomes aware of facts which would make a reasonably prudent person suspicious, he or she has a duty to investigate further and is charged with knowledge of matters which would have been revealed by such an investigation. Mangini II (1991) 230 Cal. App. 3d at 1150.

The court has found that even where a soil test did not reveal contamination, a plaintiff can be charged with knowledge if a reasonably prudent investigation would have revealed such contamination. Wilshire, (1993) 20 Cal. App. 4th at 740 (finding the statute of limitations began

running at the point the plaintiff should have discovered the contamination based on a reasonably prudent investigation, time-barring a claim for strict liability—ultrahazardous activity). Therefore, the statute of limitations for ultrahazardous activity commences once the plaintiff has presumptive knowledge of that activity. Id.

III. Conclusion

Until a court clarifies the applicability of these tests in the context of environmental disputes, it is unclear how and when which test applies to determining whether the statute of limitations has expired. Furthermore, because the issue of "abatability" is largely factual, it may be inappropriate to ask the court to determine whether the claim is barred by the statute of limitations in a motion for summary judgment. Defendants are left rolling the dice in leaving a jury to decide whether the contaminated common law bars their opponents claims.