

## Proximal Fear

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Injury: Owners of land that is not fully decontaminated or is located near contaminated property may not find it easy to recover stigma damages for loss of market value.

The term "stigma damages" can describe damages for significantly different injuries. In some cases, it is the loss in value of a property that, although remediated, is not totally decontaminated. In other cases, it is the diminution in value of an uncontaminated property that is located near contaminated land.

Although the term is used inconsistently, one consistent feature of stigma damages, regardless of the underlying injury, is that they do not fit readily within the traditional framework for property claims. According to the Restatement (2nd) of Torts Sections 158, 821D, 821F (1979), an element of a trespass case is proof that the property has been physically invaded, and an element of a nuisance case is proof of "a real and appreciable invasion of the [property owner's] use or enjoyment of his land." Clearly, an injury due solely to proximity to another's contaminated property does not readily meet these criteria.

### Relief Categories

The relief available for a property injury is traditionally divided into two mutually exclusive categories. For a permanent, nonabatable injury, the relief is ordinarily damages based on the difference between the market value of the property as is and the market value as if it were not injured. For a temporary, abatable injury, the relief is ordinarily either abatement or an award of cost of repair damages. Although a plaintiff whose property has suffered a temporary injury may recover damages for loss of use before the abatement is finished, he or she cannot recover damages for any permanent loss in property value. See generally Dan B. Dobbs, *Law of Remedies*, Section 5.2(2), at 716-18, Section 5.6 (2), at 755-56 (2d ed. 1993).

The injury in a pollution case is not always susceptible to a clear definition as either a permanent injury or a temporary injury. Often it is temporary because it is capable of being abated. But abatement frequently removes only enough contamination to meet regulatory levels. Then property owners claim a permanent injury based on residual contamination and seek stigma damages. An award of abatement plus stigma damages departs from the traditional limits on relief for property injuries.

Given the difficult fit between stigma damages and the traditional framework for property claims, it is not surprising that courts reach dramatically different results on stigma damages.

### Proximity to Contamination

A few courts have allowed plaintiffs to recover stigma damages for proximity to contamination. See *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1212-13 (6th Cir. 1988); *MHE Associates Ltd. Partnership v. United Musical Instruments USA, Inc.*, 1995 U.S. Dist. Lexis 5808 (N.D. Ohio Mar. 24, 1995); *De Sario v. Industrial Excess Landfill Inc.*, 587 N.E.2d 454 (Ohio App. 5 Dist. 1991) (appellate court did not reverse certification of property-damages class that included owners of uncontaminated property); *Allen v. Uni-First Corp.*, 558 A.2d 961 (Vt. 1988) (trial court erred in limiting jury's consideration to contaminated areas).

However, many courts have refused to allow such a recovery. A claim for proximity damages is inherently based on physical injury to property other than the plaintiff's. These courts rely on a long-standing principle of tort law -- the economic loss doctrine. This doctrine precludes recovery for economic losses that do not arise from an actual, physical injury to the plaintiff's person or property.

Therefore, the economic loss doctrine bars the claim for proximity stigma damages. See *Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir. 1995); *Ogden v. Star Enterprise*, 1995 WL 709862 (4th Cir. 1995) (unreported opinion); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993), cert. denied sub nom. *Cooper v. Armstrong Rubber Co.*, 510 U.S. 1117 (1994); *O'Neal v. Department of the Army*, 852 F.Supp. 327, 336 (M.D. Pa. 1994); *Good Fund Ltd. - 1972 v. Church*, 540 F.Supp. 519, 534-35 (D. Colo. 1982), rev'd on other grounds sub nom. *McKay v. U.S.*, 703 F.2d 464 (10th Cir. 1983); *Lamb v. Martin Marietta Energy Systems Inc.*, 835 F.Supp. 959, 968-70 (W.D. Ky. 1993); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 724-27 (Mich. 1992); *Leaf River Forest Products Inc. v. Ferguson*, 662 So.2d 648 (Miss. 1995).

As one court noted, a proximity claim is not based on any injury to or interference with the use of the plaintiff's property. Instead, it is usually based on negative publicity and claimed third-party fears, both of which may be unfounded. It is therefore "a loss without an injury in the legal sense." *Adkins*, 487 N.W.2d at 725.

## Residual Contamination

Some courts reject the concept that the value of a property that has been remediated can still be impaired. Their conclusion is dictated by the traditional analytical framework of a permanent injury versus a temporary injury in which recovery of both remediation and loss of market-value damages would be a duplicate recovery. These courts necessarily conclude that remediation will cure the injury to the property and there will be no permanent loss in value. See, e.g., *Santa Fe Partnership v. ARCO Products Co.*, 54 Cal.Rptr.2d 214, 220-24 (1996); *Gendreau v. C.K. Smith & Co. Inc.*, 497 N.E.2d 16, 17-18 (Mass. App. Ct. 1986); *T & E Industries Inc. v. Safety Light Corp.*, 587 A.2d 1249 (N.J. 1991).

Other courts accept the proposition that remediation may not completely restore market value. In essence, they acknowledge that contamination may be both a temporary injury and a permanent injury and therefore allow recovery for both remediation and loss of market value. See, e.g., *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 795-98 (3d Cir. 1994), cert. denied sub nom. *General Electric Co. v. Ingram*, 513 U.S. 1190 (1995); *Bisson v. Eck*, 667 N.E.2d 276 (Mass. App. Ct.), review denied, 671 N.E.2d 951 (Mass. 1996). See also *Westling v. County of Mille Lacs*, 543 N.W.2d 91, 92-93 (Minn. 1996) (tax assessor discounted property value due to post-remediation stigma); *Finkelstein v. Department of*

*Transp.*, 656 So.2d 921 (Fla. 1995) (condemnation award reflected loss of market value from past contamination).

The 3rd U.S. Circuit Court of Appeals has established a three-factor test for residual contamination stigma damages. This test states the:

- Defendants must have caused some (temporary) physical damage to the plaintiffs' property.
- Plaintiffs must demonstrate that repair of this damage will not restore the value of the property to its prior level.
- Plaintiffs must show that there is some ongoing risk to their land. *Paoli*, 35 F.3d at 798.

In formulating this test and finding for the plaintiffs in that case, the *Paoli* court was influenced by evidence of two facts. First, after remediation the land would still have polychlorinated biphenyl contamination in excess of the Environmental Protection Agency's standard. Second, the owners would also suffer from "the continuing stigma of living on property which once contained significant amounts of PCBs." 35 F.3d at 796-97. See also *In re Paoli R.R. Yard PCB Litigation*, 113 F.3d 444, 463-64 (3d Cir. 1997) (affirming jury instruction that plaintiffs must show actual physical damage to their property for a stigma-damages award).

Important evidence for a claim of residual contamination stigma damages includes:

- The nature and level of the contamination present on the plaintiff's property before and after remediation.
- How the post-remediation level compares to government health and safety standards.
- Any restrictions on the use of the property due to residual contamination.
- Any ongoing risk to persons living or working on the property. See, e.g., *Paoli*, 35 F.3d at 795-98; *Terra-Products Inc. v. Kraft General Foods Inc.*, 653 N.E.2d 89, 94-95 (Ind. App. 1995).

## Unsettled Law

Stigma damages have not yet been addressed by most appellate courts. Moreover, the courts have not yet discussed the impact on these claims of the brownfields programs and other mechanisms to encourage the marketability of environmentally impaired properties. Therefore, the law in this area is still very much unsettled.