REPRESENTING PLAINTIFFS IN A COMMON LAW POLLUTION ACTION

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I. INTRODUCTION

Although the specific allegations have differed, and the procedural frameworks have varied, over the years this firm has represented numerous property owners in lawsuits alleging that they have suffered damages arising from the polluting conduct of adjacent or neighboring -- and almost always commercial -- property owners.

In 1978, six property owners on the Vermont shore of Lake Champlain filed a class action suit against International Paper Co., in Ticonderoga, New York, alleging that the paper company's industrial practices created intolerable air and water pollution, which constituted a continuing nuisance to them and other similarly situated property owners, and seeking injunctive relief and damages.

In 1983, approximately twenty-six property owners in Williamstown, Vermont, jointly sued the Unifirst Corporation, alleging that the industrial laundering and dry-cleaning plant had allowed toxic materials to be disposed of improperly on its property, thus contaminating the groundwater, the public water supply, and the public schools, and that such pollution interfered with the plaintiffs' use and enjoyment of their properties, and greatly reduced their property values.

In 1988, a single family sued the Village of Waterbury, Vermont, and several individual and corporate defendants, alleging that they permitted an underground storage tank of petroleum gasoline to become corroded and full of holes, thus causing a plume of underground contamination to travel onto the plaintiffs' property, rendering their property unsafe and uninhabitable, subjecting them to health risks, and causing them permanent damage.

Also in 1988, eleven property owners jointly sued three corporations operating a gravel pit and quarry in Pittsfield, Vermont, alleging that the noise and dust from the operations were foul and unhealthful, that the traffic was noisy and unreasonable, and that the site was aesthetically unpleasing, all of which interfered with the plaintiffs' use and enjoyment and value of their properties.

In 1993, another single family in Fairlee, Vermont, claimed that pollution from an adjacent industrial park, owned and operated by MASKA Corp., created an underground plume of toxic contamination that rendered their property uninhabitable, and caused them other injuries.

In 1994, two Bellows Falls property owners adjacent to a closed landfill, owned and operated by Browning Ferris Industries ("BFI"), claimed that BFI allowed air and water pollution to travel offsite to contaminate their properties, interfering with their use and enjoyment and greatly reducing their properties' values.

Some of these cases were litigated in federal court, others in state court, and still others settled prior to litigation. One was managed as a class action, others as simple joinder actions, and still others as individual suits. Their unifying characteristics, however, were that the suits sounded primarily in simple common law causes of action: negligence, nuisance and trespass. In none were the plaintiffs claiming actual physical illness resulting from the toxic pollution (that is, the plaintiffs did not claim that the chemicals caused them cancer, or even an increased risk of cancer). Such "toxic tort" claims, even where medical evidence exists (and that is rare), are costly to litigate and challenging to win.[1]

Rather, these cases all made the "simpler" claim, that the defendants used their property in an unreasonable manner, and that such use substantially and unreasonably interfered with the plaintiffs' use and enjoyment of their

properties and reduced their values. This is the essence of a common law nuisance action.[2] Although the plaintiff bears the burden of proving that defendant's use of its property and its polluting materials was unreasonable, which almost always will require some expert testimony, the nature of the scientific evidence required is usually far less complicated and expensive than is generally required in a toxic tort case. To a certain extent, state environmental employees involved with managing the sites can be used as expert witnesses,[3] which lends credibility to the case and saves on litigation expenses. To the extent necessary, other experts can be retained to fill in any evidentiary blanks.

The common law nuisance action also allows the plaintiffs to recover, not only for their lost property values, but also for their nuisance-related personal injuries, such as annoyance, discomfort and inconvenience arising from the nuisance, without the overwhelming challenge of proving complex medical causation. Finally, these suits often contain claims for punitive damages, to the extent the corporate history reveals a disregard by the defendants for the management of their hazardous materials, and/or for the requirements of the state or federal regulatory bodies charged with overseeing their conduct.

II. VOLUNTARY JOINDER V. CLASS ACTION

If the potential exists for representing more than one individual property owner or family, it must be determined whether the case should be brought as a joinder action, under Rule 20, or a class action, under Rule 23. An environmental class action often starts when one or more people harmed by the environmental impact of an industrial discharge seek legal advice. Counsel can suggest that they get together with other people who have similar concerns, developing as broad a base as possible, with a view to bringing an action by means of a voluntary joinder. An alternative approach is to suggest

bringing a class action, which requires identifying plaintiffs who can fairly represent a class of similarly situated individuals. There are advantages and disadvantages to both approaches.

A. Voluntary Joinder.

The major advantage of a voluntary joinder action is that you have real clients, with a direct attorney-client relationship to you. You can make choices about conducting the litigation based exclusively on your expertise and what your clients want to do. If the number of clients is manageable (between 10 and 50), you have much better control over the litigation and settlement options than in a class action. Court certification of the class is unnecessary and numerous other procedural tangles may be avoided.

Another advantage in a voluntary joinder, in contrast to a class action, is that there is no need to get court permission to settle the claim. Questions such as whether to go forward on a claim of punitive damages, or whether to pursue a higher-risk case to verdict after a settlement has been offered, can be resolved directly with clients.

In a class action, you must first consider fiduciary responsibilities to the entire class. Some litigants may strongly wish to pursue environmental claims for the principle of the matter; others may think the litigation goals have been achieved by a monetary settlement. In a joinder action, you may choose as your clients only those plaintiffs with similar goals, and chances of potential enmity in your own camp are reduced.

Bear in mind, however, the disadvantages of a voluntary joinder. The suit may have less strength or clout because there are not as many claimants as in a class action. There is also a greater likelihood that your clients' claims may be affected by competing lawsuits by other similarly situated claimants. A defendant may also offer settlement to some, but not all, of the plaintiffs causing potential conflict issues and undermining joint strategy.

B. Class Actions.

There are several advantages to bringing a class action. First, when you are counsel for plaintiffs in an environmental class action, you may be perceived as wearing the "white hat" in representing a significant, sympathetic citizen group. As such, you may have access to experts, as well as direct or indirect government support. Under similar circumstances, a voluntary joinder action might be perceived as a private lawsuit without larger implications. A class action may also be the only way realistically to justify the litigation economically.

There are also significant disadvantages to a class action. First, the procedural rigors of establishing and maintaining a class action under State or Federal Rule of Procedure 23 are numerous. Second, given the fiduciary responsibilities that counsel owes to the representative plaintiffs, as well as all class members, other issues arise. In a class action brought under Rule 23, the court will appoint certain plaintiffs as representative of the class. These representative parties have the responsibility for conducting the litigation, and they carry a fiduciary responsibility to the unnamed members of the class. For example, the representative parties' desire to fight for a principle may conflict with the financial interests of unnamed members of the class. The representative plaintiffs and counsel may think it advisable to take risks that are hard to justify from a fiduciary standpoint. Your responsibility to the class in those circumstances may lead to a conflict between your duties as the fiduciary and your duties as a strong-minded litigator.

Further, all settlements, legal fees, etc. are subject to court control. Ordinarily, you have only to convince the other side and your clients that settlement is in everyone's best interest. Attorney's fees are a matter of contract between you and your client, subject, of course, to the provisions of

the Code of Professional Responsibility. In a class action, the judge, as a third party, oversees all such matters. Thus, you must convince not only the other side and your clients, but also the court, of the wisdom of the decision to settle, the equity to the class, and the fairness of your legal fees.

III. COMMON LAW CAUSES OF ACTION

Attorneys differ on the efficacy of loading a complaint with numerous causes of action. Some feel the simpler the litigation, the less likely for jury confusion and the greater chance of a clean verdict. Others maintain that a wide net should be cast with the complaint, and that the scope of the litigation can be narrowed, if necessary, just prior to trial. Keeping that spectrum in mind, and without taking a position, the following discussion simply recognizes the various common law causes of action applicable to various types of pollution cases.[4]

In cases involving the migration of toxic chemicals off-site of the defendant's property and directly onto the plaintiffs' property, potential causes of action include nuisance, negligence, trespass, and strict liability for ultrahazardous activity.[5] Where the polluting constituents have migrated off defendant's property, and interfere with the plaintiffs' use and enjoyment and value of their property, but have not actually traveled onto the plaintiffs' property, the trespass count would not be brought. Where the polluting constituents are not necessarily toxic, but simply unhealthful, such as smoke, dust or noise, the strict liability claim might not be maintainable.

A. Nuisance

The Vermont courts have long recognized the tort of private nuisance. See e.g., Gifford v. Hulett, 62 Vt. 342, 346-47 (1890)(improperly maintained horsebarn held to be a private nuisance). "The essence of a private nuisance is an interference with the use and enjoyment of land. The ownership or rightful possession of land necessarily involves the right not only to the

unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." W. Prosser, Law of Torts § 89, at 591 (4th ed. 1971)("Prosser").

In the usual pollution case, the plaintiffs' private nuisance claim alleges that the defendant wrongfully conducted its business in such a manner as to allow chemical contamination to leave its property, and that such contamination substantially and unreasonably interfered with the plaintiffs' use and enjoyment of their properties. The defendant's wrongful conduct can include, inter alia, negligently and illegally depositing toxic and hazardous waste into the ground, the local landfill, and the municipal sewer system; mismanaging a landfill such that toxic materials were permitted in, and leached out over time; or failing to monitor a leaking underground petroleum storage tank, resulting in contamination of the air, groundwater and deep bedrock aquifer. The resulting interference with the plaintiffs' properties can manifest itself not only in severely diminished property values, but in unreasonable intrusions into the plaintiffs' quiet enjoyment of their properties.

Even if there is no direct trespass of contamination onto their properties, the plaintiffs can recover in nuisance, under Allen v. Unifirst, 151 Vt. 229, 233-34 (1989), if they can establish that their properties were widely perceived to be contaminated, polluted, undesirable, unhealthy and unwholesome, and that people were loathe to travel to and visit them, much less purchase their property at full market value. Under this theory, as a direct, proximate and wholly foreseeable consequence of the defendant's unreasonable conduct, the plaintiffs' properties are no longer worth their full value, and their rights to uninterrupted use and enjoyment of their properties has been unreasonably impaired.

As set forth in the Restatement (Second) of Torts, a private nuisance is a "nontrespassory invasion of another's interest in the private use and enjoyment of land." Id. §821D. Comment b to §821D explores the nature of this invaded interest:

> The phrase "interest in the use and enjoyment of land" is used in this Restatement in a broad sense. It comprehends not only the interests that a person may have in the actual present use of land for residential, agricultural, commercial, industrial and other purposes, but also his interests in having the present use value of the land unimpaired by changes in its physical condition. . . . "Interest and enjoyment" also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or from a detrimental change in the physical condition of the land itself.

Id. at 101.

In order to succeed on their claim of private nuisance, the plaintiffs must establish that the defendant's "interference with the use and enjoyment of [plaintiffs'] property . . . [was] both unreasonable and substantial." Coty v. Ramsey Assoc., Inc., 149 Vt. 451, 457 (1988); Prosser, supra §87, at 577-80). See also Prosser, supra §89, at 591. Dean Prosser points out that most of the litigation in the field of nuisance has dealt with questions of the reasonableness of a defendant's interference:

> Each defendant is privileged, within reasonable limits, to make use of his own property or to conduct his own affairs at the expense of some harm to his neighbors. . . . It is only when his conduct is unreasonable, in the light of its utility and the harm which results, that it becomes a nuisance.

Prosser, supra §87 at 581. In addition to balancing the utility of defendant's conduct against the harm which results, the fact finder must also consider whether the interference is substantial:

> The standard for determining whether a particular type of interference is substantial is that of "definite offensiveness, inconvenience or annoyance to the normal person in the community. . . ." "Substantial harm is that in excess of the customary interferences a land user suffers in organized society."

Coty v. Ramsey Assoc., Inc., supra (quoting Prosser, supra §87, at 578; and 6-A American Law of Property §28.25, at 73 (A.J. Casner ed. 1954)).

Section 822 of the Restatement goes on to outline the elements necessary to prove private nuisance:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> 1. intentional and unreasonable, or
> 2. unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Id. at 108. Thus, a defendant can be liable to plaintiffs for causing a private nuisance as to them under two distinct nuisance theories: first, that defendant's conduct was "intentional and unreasonable;" and second, that defendant's conduct was "unintentional and otherwise actionable," either because it was negligent or abnormally dangerous. Id.

A private party may be restricted from suing in his or her own right for a purely public nuisance, i.e., a general nuisance that broadly affects all members of the community generally, unless that party suffers specific, individual damages. But the mere fact that other property owners may have suffered similar damage does not itself convert a private nuisance into a public nuisance case, and does not deprive plaintiffs of their right to proceed in private nuisance. As Dean Prosser made clear:

> [W]here there is any substantial interference with the plaintiff's use and enjoyment of his own land, as where a bawdy house, which disturbs the public morals, also makes life disagreeable in the house next door[,] [t]his makes the nuisance a private as well as a public one; and since the plaintiff does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree, there is general agreement that he may proceed under either theory, or upon both.

Id. §88, at 588-89. See also Soap Corporation of America v. Reynolds, 178 F.2d 503, 506 (5th Cir. 1949)("the mere fact that numbers suffer the same injury with plaintiffs does not make the nuisance a public one").

Comment as to §822 of the Restatement (Second) of Torts, supra, clarifies the distinction between public and private nuisances, emphasizing that they are "two distinct fields" of tort liability. Id. at 108. In Comment e to §821C it is clearly established that, in those cases where a nuisance may be both public and private, it is the right of the plaintiff to elect the theory on which to proceed:

> When the nuisance, in addition to interfering with the public right, also interferes with the use and enjoyment of the plaintiff's land, it is a private nuisance as well as a public one. In this case the harm suffered is different in kind and he can maintain an action not only on the basis of the private nuisance itself, but also if he chooses to do so, on the basis of the particular harm from the public nuisance.

Id. at 96 (emphasis added). See also Illustration 3, §821C, at 97; and §821B, Comment h, at 96 ("[T]he plaintiff . . . can maintain an action not only on the basis of the private nuisance itself, but also, if he chooses to do so, on the basis of the particular harm from the public nuisance.").

1. Intentional and Unreasonable Conduct

Under the first prong of the nuisance analysis, plaintiffs must establish that defendant's conduct was intentional and unreasonable. In order to determine whether defendant's conduct was intentional, it is important to bear in mind that "intent," as defined in private nuisance actions, has a "broad sweep and expansive meaning." Atlantic Cement Co. v. Fidelity & Cas. Co. of New York, 91 A.D.2d 412, 459 N.Y.S.2d 415, 428 (A.D. 1 Dept. 1983). This point is clarified in §825 of the Restatement:

> An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct.

Restatement (Second) of Torts, supra §825 (quoted in Copart Industries, Inc. v. Consol. Ed. Co. of New York, Inc., 41 N.Y.2d 564, 571, 394 N.Y.S.2d 169, 174, 362 N.E.2d 968 (1977)). See also 1 Rodgers, Environmental Law: Air and Water §2.4, at 45 and n. 23 (1986)("Virtually all other continuously or intermittently polluting activities [aside from those falling within the category of abnormally dangerous activities] can be described -- and fairly so -- as intentionally tortious conduct, not in the sense of having a design to bring about the forbidden result but in the sense of having knowledge that the effects are substantially certain to follow.")

Often, the plaintiffs can establish that defendant's management and controlling officers knew that, unless proper precautions were taken in the safe disposal of its chemical wastes, such wastes would escape and cause harm to the environment. Where proper precautions are not taken, defendant's chemical wastes predictably escape and cause pollution outside its property boundaries. On that basis, such pollution may be said to result from defendant's intentional conduct.

The Restatement defines the *unreasonableness* of a defendant's intentional invasion by means of a balancing test:

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
>
> 1. the gravity of the harm outweighs the utility of the actor's conduct, or
> 2. the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

Restatement (Second) of Torts, supra §826. "Fundamentally, the unreasonableness of intentional conduct is to be determined by the trier of

fact in each case in the light of all the circumstances of that case." Id. §826, Comment b, at 120.

The factors to be considered and balanced by the fact finder in undertaking such analysis are also set forth in the Restatement:

> In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> 1. The extent of the harm involved;
> 2. the character of the harm involved;
> 3. the social value that the law attaches to the type of use or enjoyment invaded;
> 4. the suitability of the particular use or enjoyment invaded to the character of the locality; and
> 5. the burden on the person harmed of avoiding the harm.

Id. §827.

The Restatement also sets out the factors to be considered in determining the utility of a defendant's conduct:

> In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
>
> 1. the social value that the law attaches to the primary purpose of the conduct;
> 2. the suitability of the conduct to the character of the locality; and
> 3. the impracticability of preventing or avoiding the invasion.

Id. §828.

The defendant may argue that its conduct was socially useful. However, while our commercial and industrialized society certainly needs commercial and

industrial facilities, they can and should be operated so as to dispose properly of the inevitable wastes produced by their processes.

> When a person knows that his conduct will interfere with another's use or enjoyment of land and it would be practicable for him to prevent or avoid part or all of the interference and still achieve his purpose, his conduct lacks utility if he fails to take the necessary measures to avoid it. It is only when an invasion is practicably unavoidable that one can be justified in causing it; and even then, he is not justified if the gravity of the harm is too great. . . . Thus, if the actor can carry on his activity with more skill or care or in a different manner or at a different time and thereby avoid a substantial part of the harm without substantially diminishing the value of his own enterprise, the invasion is practicably avoidable.

Restatement §829, Comment h, at 133.

Plaintiffs can often argue that any utility inherent in a defendant's activities is substantially undermined by the fact that the harm caused by defendant was easily or practicably avoidable. Moreover, a defendant's industrial activity may have been wholly unsuited to the character of the location, such as a paper plant on a bucolic, unindustrialized lakeside, or a chemical plant adjacent to and up gradient from a public school and playground. Id. §829, Comment g, at 132. Where practicable means existed to prevent or avoid the invasion which occurred, thereby reducing the utility of a defendant's conduct, and where the conduct was unsuited to the character of the locality, plaintiffs can maintain that the gravity of the harm caused by defendant's conduct outweighed its utility. Id. §826.

2. Unintentional and Otherwise Actionable Conduct.

However, should the defendant argue that its conduct was unintentional, or that its conduct was not unreasonable under all the circumstances, the plaintiffs can argue that sufficient evidence exists to render such conduct "otherwise actionable", either because such conduct was negligent, or because defendant was strictly liable for its handling of abnormally dangerous materials. Restatement (Second) of Torts, supra §822(b). Thus, although

independent causes of action for negligence and strict liability can be pled, they may in fact be subsumed into proving the nuisance itself.

B. Negligence

Evidence supporting a claim of nuisance arising out of defendant's unintentional, but negligent, conduct, is intensively fact-based. Did the defendant knowingly dispose of toxic materials on its property? If so, did the defendant ever exhume the buried wastes or notify the authorities of their location? If not, for years such toxic chemicals could have been leaching into the ground and the bedrock, contributing to the creation of a toxic contamination plume poisoning the aquifer. Negligence can also be evidenced by a defendant's disposal of toxic wastewater into a municipal sewer system. Such disposal is usually illegal, and frequently causes failures in the municipal sewer plant. Further evidence of a Defendant's negligent conduct can be found if it disposed of toxic materials and chemical wastes at a local landfill. If the defendant deposited such toxic waste without proper protective measures, over time these toxic chemicals probably leached into the groundwater under the landfill, forming a contamination plume and spreading the contamination with it. Simple mishandling of toxic materials--improper use, storage and transportation--may be adequate proof of negligence in some cases.

These and other activities on the part of the defendant may violate a number of statutes relating to land use and the disposal of wastes: conditions in a land use permit issued under 10 V.S.A. Chapter 151; 10 V.S.A. §§1259 and 1263, prohibiting the discharge of manufacturing wastes without, or in excess of, a state permit; 24 V.S.A. §2201, prohibiting the unlawful dumping of refuse; 18 V.S.A. §1213, prohibiting the discharge of such polluting matter as will contaminate a town water supply; 10 V.S.A. §6616, and Vermont Hazardous Waste Regulations 6-603 and 6-610, prohibiting the release of hazardous

materials; 10 V.S.A. §§558-59, and Vermont Air Pollution Control Regulations 5-241 and 5-261, prohibiting violation of the state's air pollution control statutes and regulations; as well as a variety of others.

Since these and other such statutes and regulations are "safety rules" designed to protect the very people who are injured in pollution cases, against the precise type of harm which in fact occurred, their violation raises a rebuttable presumption of negligence per se on the part of the defendant, shifting the burden to the defendant. Duncan v. Wescott, 142 Vt. 471 (1983); Weeks v. Burnor, 132 Vt. 603, 608 (1974). See also Zaleski v. Joyce, 133 Vt. 150, 153 (1975). See generally, D. Pepoy, "Toxic Substance Safety Statute Violations: Should Vermont Adopt the Negligence Per Se with Excuse Doctrine?" 10 Vermont L.Rev. 151, 154-55, 176-78 (1985)(arguing in the affirmative, with specific reference to the Williamstown litigation).

Even without such a presumption, however, a defendant's conduct can be found to be negligent if it falls "below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) of Torts, supra §282, at 9. Stated differently, a defendant is responsible for those injuries caused to others by the want of reasonable skill and care in the management of its property. Smyth v. Twin State Improve. Corp., 116 Vt. 569, 570-71 (1951); Sprecher v. Adamson Co., 636 P.2d 1121, 1123 (Cal. 1981). Finally, where a defendant has special expertise in the activities it conducts, or where it has access to information not available to the general public, it may be expected to exercise a higher degree of care in the management of its business than the ordinary person. Restatement (Second) of Torts, supra §32, at 161; Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1089-90 (5th Cir. 1973)(asbestos manufacturer). Expert testimony will often be necessary to establish the standard of care, its breach and the relationship to the harm that proximately results.

Thus, should the fact finder determine that a defendant's conduct was unintentional, there is often ample evidence from which it can find such conduct to be negligent, and on that basis determine that a defendant's interference constitutes a private nuisance as to plaintiffs. Alternatively, should it be determined that the harm which occurred could not have been prevented despite the exercise of reasonable care, then plaintiffs can still establish a private nuisance under the doctrine of strict liability. Restatement (Second) of Torts, supra §822(b).

C. Strict Liability for Abnormally Dangerous Activities

Imposing strict liability for ultrahazardous and abnormally dangerous activities grows out of the famous English case of Rylands v. Fletcher, LR 3 HL 338 (1868):

> The person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it 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.

Id. See also Prosser, supra §78. To establish this cause of action, plaintiffs must prove that a defendant used ultrahazardous materials in the operation of its industrial facility;[6] that it allowed these materials to escape from its property; and that their escape proximately caused damage to plaintiffs' property. Prosser, supra §78; Restatement (Second) of Torts, supra §§519-520.

Section 519 of the Restatement imposes strict liability if the harm that occurs is of the type that makes the activity abnormally dangerous, even though the defendant "has exercised the utmost care to prevent the harm." Id. Section 520 identifies the following factors to be considered in determining whether an activity is abnormally dangerous:

1. existence of a high degree of risk of some harm to the person, land or chattels of others;

2. likelihood that the harm that results from it will be great;

3. inability to eliminate the risk by the exercise of reasonable care;

4. extent to which the activity is not a matter of common usage;

5. inappropriateness of the activity to the place where it is carried on; and

6. extent to which its value to the community is outweighed by its dangerous attributes.

Id. The Restatement also makes clear that it is for the court to determine whether a defendant's activities on its site are abnormally dangerous, such as to warrant the imposition of strict liability. Id. Comment 1, at 42-43.

A growing number of courts in the Untied States have become increasingly aware of the dangers of industrial pollution, and so have imposed strict liability upon industrial polluters in order to "make industry in this technologically complex age more responsive to the public welfare by allowing private individuals to recover damages against manufacturers without regard to fault." G.A. Nothstein, Toxic Torts: Litigation of Hazardous Substance Cases, §11.11, at 318 (1984).[7]

In imposing strict liability in cases involving hazardous waste, courts have recognized the fact that the industrial polluter has a far greater capacity to bear the cost of the damage caused than the individual citizen who is harmed, since the polluter not only has insurance available to it, but also may pass the costs of liability on to its customers in the form of higher prices. Id. See generally Note, "An Analysis of Common Law and Statutory Remedies for Hazardous Waste Injuries," 12 Rutgers Law Journal, 117, 128-29 (1980)(manufacturer of hazardous waste should absorb cost of damages caused by such waste as a cost of doing business).

Thus, in State v. Ventron Corp., 94 N.J. 254, 463 A.2d 893 (1983), the Supreme Court of New Jersey held the owners of a mercury processing plant strictly liable for the pollution of a tidal estuary resulting from the escape of toxic wastes stored on the plant's property. Id. at 900. The New Jersey Supreme Court pointed out that "pollution from toxic wastes that seep onto the land of others and into streams necessarily harms the environment" by causing groundwater contamination. Id at 902. The court noted that improperly disposed toxic wastes which escape their containment may "react synergistically with elements in the environment, or other waste elements, to form an even more toxic compound." Id. The court applied the factors listed in §520 of the Restatement to determine that "mercury and other toxic wastes are 'abnormally dangerous,' and the disposal of them, past or present, is an abnormally dangerous activity." Id. at 903. The court added that, although disposing of toxic wastes may be socially useful:

> the unavoidable risk of harm that is inherent in it requires that it be carried on at [the responsible parties'] peril, rather than at the expense of the innocent person who suffers harm as a result of it.

Id. (quoting Restatement (Second) of Torts, supra §520, Comment h, at 39).

A similar result was reached in Florida, in the case of Cities Services Co. v. State, 312 So.2d 799 (Fla. Dist. Ct. App. 1975). There, the court ruled that damage caused by toxic waste should be a cost of doing business, which is properly to be borne by the manufacturer of the waste, rather than by innocent parties. The court therefore held a generator of phosphatic mining waste strictly liable for damages caused when the reservoir containing the waste broke. The court held that the mining of phosphates, which results in phosphatic waste, constitutes an abnormally dangerous activity as defined in §§519 and 520 of the Restatement. The court acknowledged that the release of the waste was unintended, but nevertheless imposed strict liability in light

of the magnitude of the harm to the environment and the cost to innocent parties. Id. at 803. See also 12 Rutgers L.J., supra, at 128-29.[8]

In summary, a defendant's conduct may constitute a private nuisance, either from its intentional and unreasonable invasion of a plaintiffs' property rights, or from its unintentional invasion of such property rights. If the invasion is unintentional, liability in nuisance may arise either out of a defendant's failure to exercise reasonable care, or its conduct which was abnormally dangerous and necessarily involved risks which could not have been eliminated by the exercise of reasonable care. Any of the foregoing alternatives provides plaintiffs with a right to recover in private nuisance. Additionally, such evidence may also provide an independent basis for recovery in negligence and/or strict liability.

D. Remedies in Private Nuisance.

In a private nuisance action, plaintiffs may recover "both compensation for the lost use of property . . . and compensation for personal injuries such as annoyance, discomfort and inconvenience." Coty v. Ramsey Assoc., Inc., supra, 149 Vt. at 464 (citing Wilson v. Kay Tronic Corp., 40 Wash.App. 802, 811, 702 P.2d 518, 525 (1985); Rust v. Guinn, 429 N.E.2d 299, 302-04 (Ind.App. 1981); Prosser, supra §90, at 602-03)). See also, Pierce v. Riggs, 149 Vt. 136, 140 (1987)("[r]elief . . . can vary from injunctive relief to damages for the depreciation in rental and use value, or to special damages for discomfort")(citing Prosser & Keeton, The Law of Torts §89, at 637-40 (5th ed. 1984)).

In Coty, the plaintiffs were claiming damages for an abatable, or temporary, nuisance, and so such damages were to be calculated on the basis of diminished rental or use value. Id. at 464; Prosser, supra §90, at 602. Where the nuisance is permanent, the property damages are based upon the diminution in fair market value caused by the nuisance, but damages for

discomfort, inconvenience and annoyance are also proper. Prosser, supra §90, at 602-03.

Plaintiffs may establish a permanent nuisance by proving that, despite whatever cleanup efforts were made since the contamination was discovered, the affected aquifer or groundwater will remain contaminated for decades. In such a case, the nuisance would not be abatable by an injunction or some action by the defendant. As such, the plaintiffs may be entitled to recover their diminution in property value, as well as special damages for discomfort, annoyance, and inconvenience as a result of the nuisance. Coty v. Ramsey Assoc., Inc., supra; Prosser, supra. See also, Sundell v. Town of New London, 409 A.2d 1315, 1321 (N.H. 1979). In other words, a temporary nuisance is one that can be discontinued by some voluntary (or enjoined) act of the defendant, or that will naturally cease at a predetermined time. Most environmental pollution cases involve permanent nuisances because once toxic materials have been released into the environment, especially where groundwater is concerned, they are not susceptible to simple containment. Even if the defendant stops (or has already stopped) its discharge of pollutants, the nuisance will remain.

E. Trespass

To prevail in a trespass action, plaintiffs must establish that contamination from a defendant's facility has actually invaded the plaintiffs' properties. See Restatement (Second) of Torts, supra §§157-166. "A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. Id. §§157-166. In contrast, a nuisance is an interference with the interest in the private use and enjoyment of land, and does not require interference with the possession." Restatement Second) of Torts, supra §821D, Comment d.

Thus, a trespass action is maintainable whenever there is evidence that pollution from a defendant's property has entered onto plaintiffs' property -- whether in the form of groundwater contamination, particulate matter, debris or rubble. A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land, or for any consequences of any condition created by the trespass. Restatement of Torts 2d, §162.

Moreover, a defendant who recklessly or negligently causes something to enter the land of another is subject to liability if the presence of the thing on the land causes harm to the land, or to the possessor of the land. Restatement of Torts 2d, §165. A defendant acts "recklessly" or "negligently" when the defendant's operation creates an unreasonable risk of invasion of another's property. Restatement of Torts 2d, §165. Thus, if the defendant knew or should have known that its operation caused contaminants to travel onto the plaintiffs' lands, or that it was creating an unreasonable risk that such would occur, and if the invasion of plaintiffs' lands created any damage to plaintiffs, then plaintiffs are entitled to such damages as are just compensation for the trespass. Such damage may include any interference with the use or enjoyment of their property, annoyance, inconvenience or discomfort. Where business interests are harmed, damage to business interests may be recovered including, in appropriate cases, lost profits.

IV. PUNITIVE DAMAGES

Under Vermont law, the plaintiff is entitled to punitive damages if there is proof that the defendant's conduct manifests "bad spirit and wrongful intention." Hilder v. St. Peter, 144 Vt. 150, 165, 478 A.2d (1984). A plaintiff produces such evidence by showing that the defendant's conduct manifested "personal ill will, or [was] carried out under circumstances of insult or oppression, or even [that the defendant's] conduct manifest[ed] nothing worse than a reckless and wanton disregard of the plaintiffs' rights .

. . ." Sparrow v. Vermont Savings Bank, 95 Vt. 29, 33 (1921)(emphasis added); accord, Hilder v. St. Peter, supra; Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 143 Vt. 66, 79 (1983), aff'd, 472 U.S. 749 (1985); Pezzano v. Bonneau, 133 Vt. 88, 90 (1974).

A corporate defendant is liable for punitive damages resulting from its employees' reckless conduct if it "either directed . . . , participated in . . . , or subsequently ratified" the employees' acts. Shortle v. Central Vermont Public Service Corp., 137 Vt. 32, 33 (1979). Punitive damages are awarded under Vermont law to "stamp the condemnation of the jury upon the acts of defendant." Pezzano, supra (quoting Goldsmith's Administrator v. Joy, 61 Vt. 488, 500 (1889):

> The purpose of punitive damages . . . is to punish conduct which is morally culpable . . . . Such an award serves to deter a wrongdoer . . . from repetitions of the same or similar actions. And it tends to encourage prosecution for a claim of a victim who might not otherwise incur the expense or inconvenience of private action . . . The public benefit and a display of ethical indignation are among the ends of the policy to grant punitive damages.

Hilder, supra, 144 Vt. at 164 (quoting Davis v. Williams, 92 Misc.2d 1051, 402 N.Y.S.2d 92, 94 (N.Y.Civ. Ct. 1977)).

Where a defendant through its supervisors, managers and corporate officers, clearly directed, participated in and ratified the waste disposal practices found to form the basis for the nuisance, they may be liable for punitive damages. Awards of punitive damages have been affirmed by the Vermont Supreme Court in cases in which the defendant's conduct was reckless and wanton in causing a private nuisance. Coty v. Ramsey Assoc., Inc., supra. Punitive damages have also been awarded and affirmed in cases in which the plaintiff suffered purely economic harm. Greenmoss, supra; Pezzano, supra.

Once plaintiffs have presented the requisite evidence of a defendant's reckless conduct, they will then be permitted to introduce evidence of its financial condition: "Where exemplary damages are awardable . . . the defendant's pecuniary ability may be considered in order to determine what would be a just punishment . . ." Lent v. Huntoon, 143 Vt. 539, 550 (1983)(quoting Kidder v. Bacon, 74 Vt. 263, 274 (1902)).

V. OTHER FORMS OF RECOVERY

In many environment pollution cases, especially where a class action is brought, it may be essential to think beyond the traditional forms of relief available if you are going to accomplish your clients desired results. There may be strictures on how funds are distributed when a case actually goes to judgment, either for compensatory or punitive damages, but there is no reason that, as a part of a package settlement, funds cannot be designated for more creative ways to benefit the glass generally.[9] Although settlement agreements must be court approved in a class action, it is still possible to be creative in how monies are to be used to benefit the goals of the litigation, as well as to compensate members of the class. Trust funds for research, grants for public improvements, and assistance to underfunded environmental organizations can be considered, as long as they are consistent with the ultimate goals of the lawsuit. Settlements involving such creative relief may be viewed favorably by the courts, regulatory bodies, and the public at large. They may advance your image as wearing the "white hat" in these cases--and may ultimately help contribute to a cleaner environment. Industrial defendants may be inclined to agree to a creative settlement as an image-enhancing mechanism, or even out of actual concern for goals of the project.

ENDNOTES:

1. When we refer to a "toxic tort" case, we usually mean a case requiring proof that toxic materials actually caused physical injury to the plaintiff. This entails providing complex and expensive expert evidence of at least the following: that the defendant's materials were toxic (a controversial concept in itself); that the materials traveled off-site and came into contact with the plaintiff; that the materials and the amounts in question were sufficient to cause the harm alleged; and that the harm resulted from the exposure to such materials and not from some other cause. Even where such expert evidence exists, and the plaintiffs can afford to present it, recent developments in the law regarding the presentation of expert testimony may threaten the plaintiffs' ability to introduce it.

2. Although these cases are referred to as "nuisance actions," the pleadings invariably contain counts in negligence, trespass, strict liability for ultrahazardous activity. Some contained statutory causes of action under state groundwater and/or air pollution statutes. See Sec. III, infra.

3. The state Department of Environmental Conservation, like the EPA before it, is starting to limit access to its employees for private litigation, except under certain circumstances. However, it is still possible to subpoena key state witnesses actively involved in managing in-state contamination cases. These witnesses may technically be considered "fact" witnesses, but they may nonetheless testify to the contents of their files and to their scientific findings.

4. As a complicating factor, however, which will be evident from the discussion of nuisance, infra, the theories of negligence and strict liability can also be incorporated into alternative methods of meeting the legal prerequisites of the nuisance itself.

5. There is, as yet, no Supreme Court case law in Vermont explicitly recognizing this cause of action in the context of a pollution case.

6. Plaintiffs may frequently be able to establish a defendants' use of the following volatile chemicals, heavy metals, and other toxic substances, which are highly toxic, carcinogenic, and otherwise extremely hazardous and unhealthful: tetrachloroethylene, trichloroethylene, toluene, 1,1,1-trichloromethane, 1,1,2,1-tetrachloroethane, naphthalene, benzene, 1,3-dichlorobenzene, 1,1-dichloroethane, trans 1,1-dichloroethene, biochemical oxygen demand (BOD5), total suspended solids, chromium, nickel, cadmium, silver, copper, zinc, lead, grease, and oil.

7. Adoption of strict liability also clearly provides generators and disposers of hazardous wastes with an incentive to develop "more environmentally sound methods of disposing of wastes that may cause harm." C. Hensley, "The Plaintiff Injured by Chemical Wastes: A Difficult Road to Recovery," Trial, Feb. 1985, at 48; Note, "Strict liability for Generators, Transporters, and Disposers of Hazardous Wastes," 64 Minn. L. Rev. 949, 970 (1980).

8. Other cases which have adopted strict liability for damages caused by abnormally dangerous activities or substances include: Adams v. Union Carbide Corp., 737 F.2d 1453 (6th Cir. 1984)(chemical toluene diiocyanate); Halphen v.

Johns-Manville Sales Corp., 737 F.2d 462 (5th Cir. 1984)(asbestos); Menna v. Johns-Manville Corp., 585 F.Supp. 1178 (D.N.J. 1984)(asbestos); Herman v. Welland Chemical Ltd., 580 F.Supp. 823 (M.D. Pa. 1984)(chemical spill from truck accident); Reed v. Armstrong Cork Co., 577 F.Supp 246 (E.D. Ark. 1983)(asbestos); Yommer v. McKenzie, 257 A.2d 131, 140 (Md. 1969)(court applied factors of §520 of Restatement and held operators of gas station strictly liable when their gas storage tank was placed next to plaintiffs' water supply and gas leaked into the water); Bridgeton v. B.P. Oil, Inc., 146 N.J. Super. 169, 369 A.2d 49 (1976)(storage of oil and gas); State v. Schenectady Chemicals, Inc., 459 N.Y.S. 2d 971 (1983)(clean-up of toxic waste disposal site); Loe v. Lenhardt, 227 Or. 242, 251, 362 P.2d 312, 318 (1961)(aerial crop sprayer); Atlas Chemical Industries, Inc. v. Anderson, 514 S.W.2d 309 (Tex. Ct. Civ. App. 1974), aff'd, 524 S.W.2d 681 (Tex. 1975)(discharge of process water containing lignite and other wastes); Langen v. Valicopters, Inc., 88 Wash. 2d 855, 865, 567 P.2d 218, 223 (1977)(aerial crop sprayer); See also State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985)(imposing strict liability for all cleanup costs under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §11601-1657).

9. See e.g. the consent decree filed in settlement of Natural Resources Defense Council, Inc. and Sierra Club v. General Elec. Co., D. Mass. (No. 88-2629-WF (filed June 3, 1989)) (defendant agreed to fund study of toxicology of metals in some fish taken from river into which defendant had discharged wastes). In the Vermont case against International Paper Co., part of the settlement involved the creation of a trust to fund research and education concerning the southern portion of Lake Champlain.