

ENVIRONMENTAL AND TOXIC TORT PRIMER

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I. Overview

The terms Environmental Law and Toxic Torts are often used interchangeably. For purposes of this review Environmental Law refers to property damage caused by toxic substances and/or contamination. While Toxic Torts involve injury to people from pollution. While environmental law is often broken down into the three categories of air, water, and land, discussing the different offending industries and/or chemicals along with the prevailing causes of action in this state will allow for a more practical guide.

Before diving into the different types of cases currently being filed, it is helpful to review the statutes, regulations and agencies involved with the environment. Of important note is that, for the most part, none of the federal or state statutes or regulations provide remedies for owners of contaminated lands, their remedies are still through common law theories of recovery.

A. Agencies

EPA, and its Alabama counterpart, ADEM (Alabama Department of Environmental Management) are responsible for oversight of all pollution sources and locations. ADEM was created by the Alabama Legislature, in 1982 to administer environmental legislation, implement the State's environmental programs, and develop a unified environmental regulatory permit system. ADEM issues permits to all companies that discharge pollutants into the air or water. The EPA's powers come from congressional acts such as The Clean Water Act, Federal Resource and Recovery Act of 1976 (RCRA), The Comprehensive

Environmental Response Compensation and Liability Act of 1980 (CERCLA) a/k/a Superfund, Oil Pollution Act, and The Clean Air Act.

B. Federal Regulations

RCRA is a comprehensive statute, granting EPA authority to regulate solid and hazardous waste from “cradle to grave.” RCRA seeks to prevent contamination by controlling the generation, transportation, and disposal of hazardous and solid waste. RCRA does not allow for the award of damages or restitution for cleanup costs, its relief is purely injunctive. Damage caused by oil and petroleum is covered under The Oil Pollution Act of 1990, but only when the oil is discharged into or upon a navigable waterway or the adjoining shorelines

CERCLA was enacted to clean up hazardous waste sites and allows for the recovery of those cleanup costs under certain circumstances. The only damages allowable under CERCLA are those actually incurred in the cleanup, damages for diminution in value and lost profits are unrecoverable. CERCLA covers the release of a hazardous substance, but that does not include oil or petroleum.

Section 9658 of CERCLA can save a plaintiff’s statute of limitations. In Alabama “the date of the injury is the day on which the Plaintiff was last exposed to the hazardous substance causing the injuries....A plaintiff’s ignorance of the facts of injury, if there is no fraudulent concealment by the defendant, does not postpone the running of the limitations period.” *Becton v Rhone-Poulenc, Inc.*, 706 So.2d 1134 (Ala. 1997) This would essentially lock the courthouse doors to anyone who did not realize within two years of their last exposure that a toxic substance caused their illness. 42 U.S.C, § 9658(a)(1) and (b)(4)(A) tolls the state statute of limitations for personal injury and property damage “caused or contributed to by exposure to any hazardous substance...released into the environment from a facility” until the discovery of the causal relationship between

the injury and the exposure. Most courts limit the application of §9658 to situations where an underlying CERCLA claim has been made or could exist based on the presence of hazardous waste - where there is an underlying claim dealing with, or cause of action providing for, cleanup and remedial activities. Unfortunately for the plaintiff in *Becton*, the Court held that the interior of a workplace is not part of the environment; therefore, CERCLA did not cover his claims as a former employee.

II. Common Law Remedies

A. Trespass

An interference with the plaintiff's interest in the exclusive possession of property is a trespass. The defendant must intentionally enter another's land or intentionally cause some "thing" to enter upon the land. To prove trespass, the plaintiff must show that the defendant acted with knowledge, to a substantial certainty, that the act will result in the entry of foreign matter. *Borland v. Sanders*, 369 So. 2d 523 (Ala. 1979) set forth the elements for such an "indirect trespass":

- 1) an invasion affecting an interest in exclusive possession of property;
- 2) an intentional doing of the act which results in the invasion;
- 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and
- 4) substantial damage to the res.

Modern day trespass, at least in the environmental sense, is very much like negligence. For instance, in *Hickox v. Vester Morgan*, trespass was a jury question where negligent maintenance of an oil pipeline allegedly caused the trespass of the oil onto plaintiff's property.

Russell Corp. v. Sullivan 790 So. 2d 940 (Ala. 2001) discusses indirect trespass at length. In *Sullivan* the plaintiffs alleged that Russell and Avondale Mills were discharging effluent wastewater in Sugar Creek, which ran into Lake Martin past their lakefront properties. In this instance, Lake Martin is owned by Alabama Power Company; therefore, the court determined that in order to prove trespass the contaminated water would have to splash onto the plaintiff's property in order to satisfy the requirement that "some substance has entered upon the land itself effecting its nature and character in causing *substantial actual* damage to the *res*." The *Sullivan* plaintiffs presented evidence regarding contamination of the Sugar Creek Lake bed, but did not have expert testing of the plaintiff's soil. The Alabama Supreme Court found that without such testing there could be no proof of physical invasion on the plaintiff's property, which proved fatal for their trespass cause of action.

1. Who Can Bring A Trespass Cause of Action

Obviously, the party that actually disposed of the trespassing substance on plaintiff's property is a valid defendant. However, others can be liable to plaintiff for trespass of contaminated substances. The parties who created the waste can be liable, even when using an independent contractor to dispose of it, if it was foreseeable that the contamination could trespass on the plaintiff's property. The holder of a license may also be liable to plaintiff for trespass if their conduct goes beyond the scope of the license. The Alabama Supreme Court allowed the question of whether the owner of oil pipelines, which burst and contaminated plaintiff's property to go to the jury on trespass.

2. Statute of Limitations for Trespass

A trespass claim must be filed within six (6) years or it will be barred forever. However, trespass claims are subject to the "discovery" rule in Alabama as set forth in *Rumford v. Valley Pest Control, Inc.*, 629 So.2d 623 (Ala. 1993).

This means that the trespass claim does not accrue until the plaintiff discovers the trespass. This allows the plaintiff six (6) years after the discovery of their trespass to file their claim. It is important to note that a subsequent owner of land may recover for trespass if they discover after the purchase; however, the doctrine of caveat emptor restricts the subsequent owner from suing the party from whom they purchased the land, but not a third party trespasser.

3. Continuing Versus Permanent Trespass

A continuing trespass creates successive causes of action during its continuance. A transference of the land allows the subsequent owner to bring suit for the continuing trespass. It is not clear in Alabama precisely what will qualify as continuing trespass as opposed to a permanent trespass. The distinction is important however, because a permanent trespass does not extend the statute of limitations; whereas a continuing trespass renews itself with each successive trespass. The case law gives little instruction as what is permanent or continuing. In *Alabama Power Company v. Gielle*, 373 So. 2d 851 (Ala. Civ. App. 1979) an encroaching power pole was considered a continuing trespass, based on the reasoning that an encroaching structure on another's property is continuing in nature. *Motisi v. Alabama Gas Corp.*, 45 So. 2d 1157 (Ala. 1986), on the other hand, held that a trespass committed by the installation of a gas line was a permanent trespass and had to be brought within six (6) years of the trespass.

4. Damages

The measure of damages is typically the difference between the value of the property before the injury and its value after the injury. If the injury is not permanent, damages are limited to those that have occurred before and up to the time of the trial. These damages would include the costs of restoration coupled with loss of use or the diminution in the value of the land, whichever is less.

B. Nuisance

Anything that hurts, inconveniences, or damages another is a nuisance. Ala. Code 1975, §6-5-120. Even lawful acts can constitute a nuisance. Typically, conduct that supports a trespass claim will also support a nuisance claim. Nuisance can be created by intentional or unintentional conduct and/or conduct that is or is not negligent.

For example, a company can be liable for a nuisance even if it is complying with all applicable environmental laws. However, it is difficult to prove nuisance if a company is not acting negligently or intentionally. *Courtaulds Fibers, Inc. v. Long*, 779 So. 2d 198 (Ala. 2000) held that it was insufficient to show that a better technology existed to remove particulates when that technology was not the industry standard and the plant was not violating its ADEM permit. Additionally, the courts will not assume negligence. Alabama Code 1975, Section 6-5-127(A) provides in pertinent part:

“No . . . manufacturing or other industrial plant or establishment...shall be or become a nuisance, private or public by any changed conditions in or about the locality thereof after the same has been in operation for more than one year when such plant, facility, or establishment, its apertinences or the operation thereof was not a nuisance at the time the operation thereof began; provided, that the provisions of this sub-sections shall not apply whenever a nuisance results from the negligent or improper operation of any such plant...”

Nuisances are either public or private. “A public nuisance is one which damages all persons who come within the sphere of its operation though it may vary in its effect on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.” Ala. Code 1975, Sec. 6-5-121.

The distinction between public and private nuisance is very important. “A private nuisance gives a right of action to the person injured, while a public nuisance gives no right of action to any individual, but must be abated by a process instituted in the name of the state.” *Russell Corp. v. Sullivan*, 7907 2d 940 (Ala. 2001) (Quoting Ala. Code 1975, Sec. 6-5-121). An individual may maintain a cause under a public nuisance theory if that person has suffered a “special damage...in which the public does not participate.” Ala. Code, §6-5-123. The special damage must be different in kind and degree from the damage suffered by the public in general. *City of Birmingham v. City of Fairfield*, 375 So. 2d 438, 441 (Ala. 1979)

In *Stone Container Corp. v. Stapler*, 837 2d 283 (1955), plaintiff lived next to a public stream that would flood and leave large sheets of pulp waste all over plaintiff’s yard. The pulp waste trapped water, which would stagnate and breed mosquitoes. Since the mosquitoes terrorized only the plaintiff and anyone on his property, the court held that he could maintain a public nuisance theory because he suffered a “special damage”, quite different from others affected by the flooding. Likewise, the court in *Monsanto Chemical v. Fincher*, 133 So. 2d 192 (Ala. 1961), allowed the plaintiff to enjoin a public nuisance. Monsanto operated an insecticide plant that emitted gases and odors that invaded the homes and offices close to the plant.

In *Russell Corp. v. Sullivan*, 790 So. 2d 940 (Ala. 2001), the court declined to find either a private nuisance upon which plaintiff could recover or that they had special damages to allow recovery based upon a public nuisance. The plaintiffs claimed discharge into Lake Martin was a nuisance. They offered evidence that they were unable to use and enjoy the lake due to its contamination. The court found that Lake Martin is a public area, and that the use and enjoyment of a public area is a public right. In making this determination, the court examined water rights and held that a private nuisance is created when water that flows through a plaintiff’s property, wherein the

plaintiff owns the streambed, is contaminated. In this case, Alabama Power owned the lake and the plaintiffs had no possessory interest. Therefore, any nuisance created by the discharge of the contaminants was a public nuisance.

C. Negligence and Wantonness

Practitioners know these counts are included in almost every case we see these days, but in an environmental context they can be very powerful claims. Unlike trespass and nuisance, negligence must be proven by a failure of the defendant to exercise due care. However when you consider the danger and toxicity of the substances used in industry and the by products of manufacturing, the harm to others is very foreseeable if these materials are mishandled.

Negligence per se, can alleviate the need to prove failure to exercise due care. It is always important to look at the governing state and federal environmental laws to see if the defendant is in compliance. To prove negligence per se, the Plaintiff must show: 1) he is within the class of persons the statute was enacted to protect; 2) the injury was of the type contemplated by the statute; 3) there is a violation of the statute; and 4) the violation proximately caused the injury. *Fox v. Bartholf*, 374 So.2d 294, 295-6 (Ala. 1979).

III. Toxic Torts

Some of the most prevalent toxic chemicals and substances that cause damage to people and property are asbestos, toxic mold, benzene, dioxins, mercury, CCA, lead, creosote and PCB's. All of these substances, except toxic mold, are used in or created by manufacturing industry. The chemical industry, petroleum industry and paper industry are major contributors to the proliferation of toxic substances in the environment. Even more concerning than these

substances in the environment are the people who are exposed to dangerous substances every day at work.

A. Asbestos

The primary cause of action is no longer based on asbestosis, but rather mesothelioma. Mesothelioma is a form of cancer where the malignant cells are located in the sac lining of the lung or abdomen. Currently there is treatment, but no known cure for mesothelioma. It can take years of exposure to asbestos before the disease appears. Since asbestos is still found today in roofing, fireproofing, insulation, and flooring, it is likely that these cases will be filed for years to come.

B. Toxic Mold

Toxic mold is a generic term for stachybotrys chartarum, aspergillus, penicillium, and others. Toxic mold can occur anywhere ordinary mold spores encounter steady and significant amounts of water as in a leaky roof or pipe. Toxic mold secretes mycotoxins, which enter the respiratory, and digestive systems.

Toxic mold cases are growing steadily and have prompted insurers in Texas to seek to remove water damage coverage from their new policies. The reason for such a move are cases such as Melinda Ballard's of Texas who received a \$32,000,000.00 jury verdict against the Farmers Insurance group based on evidence that showed Farmers improperly handled her water damage claim resulting from burst pipes in her multi-million dollar home.

Toxic mold cases are hybrid of environmental and bad faith claims, because there can be no recovery without wrongdoing by the insurance companies. The reason companies fall into toxic mold litigation is the company

that repairs damage or assesses the amount of water damage does not inform the insured of the existence or likelihood of development of mold in the floors, between the walls, and/or in the ceilings where the long-term water exposure occurred. Insurance companies are generally liable for remediation of the contaminated areas, which is extremely costly as it must be treated as a hazardous area and not allowed to spread to other areas of the building or home.

C. Benzene

Benzene is widely used in industrial plants and is formed both from natural processes and industrial activity. Benzene is used to make plastics, resins, nylon, synthetic fibers, rubbers, dyes, lubricants, detergents, drugs, pesticides, and is found in crude oil, gasoline, and cigarette smoke. Benzene ranks in the top 20 chemicals producing volume in the U. S.

Alabama Courts have recognized the relationship between Benzene and Leukemia Lymphoma. In *ATEC Associates, Inc. v. Stewart*, 674 So.2d 1296 (Ala. Civ. App. 1995) the Court held that “[a]fter a careful review of the record, it is clear that the evidence supports the trial court’s finding that Stewart’s exposure to Benzene while working for ATEC was a contributing cause of his leukemia lymphoma.” ATEC Associates is a worker’s comp case in which Stewart sued his employer for causing him to develop leukemia from his exposure to toxic gasoline fumes. “It is a well-established precedent of our supreme court that if the job caused the injury then the injury was an ‘accident’ within the intent of the [Workmen’s Compensation] Act.”

Benzene evaporates easily in the air, it can quickly move into the environment, even reacting with other chemicals. Benzene breaks down more slowly in water and can pass into underground water. Industrial workers and people who live near industrial plants run the greatest risk of unhealthy exposure.

D. Dioxins

Dioxins are widely recognized as some of the most toxic chemical humans have ever made. They are the unwanted by-products of industrial processes in a variety of industries. Dioxins are unusually stable chemicals and do not readily break down in the environment. Therefore, they accumulate in soil, sediment and on vegetation. Dioxins can then be ingested by a variety of animals and fish life, which are then in turn eaten by humans. Dioxins ingested by cattle and fish are concentrated and passed on to us through meat and dairy.

In 2000 the EPA classified Dioxins as a human carcinogen. In addition to cancer they are associated with altered sexual development, reproduction problems, diabetes and organ toxicity, to name a few. Only recently, the Irish government discovered livestock feed imported from the US was heavily contaminated with Dioxins. The supplement, Carbosan, was made by Quali Tech of Chaska, Minnesota and sold to US farmers and exported by feed companies. Carbosan, composed of copper sulphate, kelp, silica, dextrose, mineral oil and brewers wort, is used to add minerals to the diets of cattle. A real danger is posed to humans by these contaminated feed supplements.

E. Mercury

Mercury poses a significant danger to pregnant women and developing fetuses as an accumulation in the body and brain has been linked to birth defects, nerve damage, psychomotor retardation and even Cerebral Palsy in children of mothers who consume mercury contaminated food during pregnancy. Fish is a major source of mercury in the diet.

The Mobile Register recently reported that oil well drilling muds are disposed from the platforms. These muds have generally contained about 8ppm

mercury and all 50,000 gulf wells have dumped it. The mercury is taken up in bacteria that are moved up the food chain eventually concentrating in popular fish, such as Grouper, Amberjack, Red Snapper, Trigger Fish, and Red Fish.

F. CCA

Chromated Copper Aresenate is a toxic chemical used to treat wood for use in such products as playground equipment, picnic tables, decks, landscape timbers, and fencing. It is used to protect wood from decay and insects. CCA is made with chromium oxide, copper oxide and arsenic oxide. Over thirty per cent (30%) of a compound is usually arsenic oxide. CCA is typically forced deep into the wood using vacuum pressure. The U. S. wood products industry is the largest consumer of arsenic, using about half of what is produced. The chemical CCA is listed as a hazardous waste by the EPA under RCRA; however, wood products treated by CCA are currently not listed as hazardous waste.

Arsenic in drinking water is a danger that has been known for quite some time, but recently the government has determined that the amount of arsenic that is dangerous to people is much lower than originally thought. The Bush Administration has further reduced the allowable level of arsenic in public drinking water. Obviously the more the government learns of arsenic in potable water, the greater their concern is for even low levels.

As dangerous as arsenic is in drinking water, arsenic in lumber is just as dangerous. This is why so many groups are working for a ban on CCA treated wood, particularly in children's play sets. Experts are worried because the arsenic that leaches from the wood can be picked up by children, on their hands and be transferred to the child's mouth, either directly or by handling food. In fact, the Connecticut Department of Public Health issued a statement that "It is now clear that arsenic exposure from CCA-treated wood can be a major source of arsenic for children who frequently play on CCA-treated play sets, tree houses,

or decks.” This same department has also cited studies that show rainwater leaches CCA from treated wood into the soil.

CCA is a health concern because arsenic is known to cause cancer. High levels of arsenic are not immediately deadly, but can cause nerve damage, fatigue, nausea, diarrhea, or loss in red blood cell production. Long term exposure to low levels of arsenic can have similar effects in addition to damage in the immune system, high blood pressure, diabetes, and cardiovascular disease. There are currently, at least, two class actions regarding children being exposed to CCA.

G. Lead

Lead is an extremely toxic metal that often poisons children. For decades, lead was used in gasoline and paint, not until 1978 did the federal government ban the residential use of lead in paint. Despite this ban, many older homes still contain lead. According to the Centers for Disease Control and Prevention (CDC), childhood lead poisoning continues to be one of the most widespread childhood diseases. A small quantity of lead exposure can pose a serious threat to children. Lead exposure can cause reduced short-term memory, lower IQ, learning disabilities, developmental problems, reduced height, as well as hearing loss. Higher levels of lead can severely damage the kidneys and the central nervous system, as well as cause coma or death. Generally, dust from lead-based paint is responsible for child exposure. The CDC has determined that lead can have harmful effects on children in as little as 10mcg/dl. Lead is not just detrimental to children; workers often inhale lead dust and fumes. In addition, particles of lead are brought home on workers' clothes, again posing a threat to children in the home. Many manufacturers do not notify their employees of the prevalence of lead in their factories or their hazards, despite federal regulations to the contrary.

H. Creosote

Creosote is used primarily to protect and preserve wood products, such as railroad ties, telephone poles, and fencing. There are three types of creosote, but the most common is coal-tar creosote. It is a complex mix of about thirty (30) chemicals. The major chemicals in coal-tar creosote that are harmful to people are polycyclic aromatic hydrocarbons (PAH's), phenols and cresols. While creosote does not occur naturally in the environment, it can be released to water and soil through its use. Hazardous waste sites, wood-treatment facilities, and wood products treated with creosote are the primary sources of creosote exposure. Because creosote can enter your body through the lungs, the stomach, the intestines, and skin contact with soil, water, or air contaminated as a result of waste disposal sites and wood-treatment facilities and the burning of treated wood can all cause dangerous exposure.

Short-term exposure to a large amount of creosote can cause a rash, sever skin irritation, chemical burns to the eyes, convulsions, mental confusion, kidney problems, liver problems, unconsciousness, or even death. Long-term exposure to low levels of coal-tar creosote can result in skin sensitivity or respiratory tract irritation, skin cancer, and cancer of the scrotum. There is also evidence from animal testing that immune suppression, birth defects, and human mutations are caused by creosote.

I. PCBs

Polychlorinated biphenyls (PCBs) are organic chemicals containing carbon, hydrogen and chlorine. They were produced exclusively by the Monsanto Chemical Company for about 50 years and were widely used in industrial products. The manufacture, distribution, use and disposal of PCBs has been regulated by the Toxic Substances Control Act since 1976. Recent cases in Anniston and the Hudson River have brought the media's attention and

thereby the nations attention to how truly devastating PCB contamination is and how the chemical industry hid the truth from the world. While there are many uses, the main use of PCBs was in transformers. Leaking transformers account for a good deal of contamination, but the vast majority came from the gross mishandling and disposing of PCB by Monsanto and its customers.

PCBs are no longer manufactured; therefore, chronic rather than acute exposure is typical. Studies have linked PCB exposure to alteration of neurotransmitters in the brain, cancers, malignant tumors, melanoma, a variety of skin conditions, teratogenesis (mutations), immune dysfunction, liver pathology, thyroid dysfunction as well as blood pressure elevation. PCBs can enter the body by any route of contact, through the skin, digestive system or respiratory system. In Anniston residents are warned not to track any dirt in the house, due to the PCB contaminated soil. They are also encouraged not to let their children play outside in the yard and to wash their hands often. Anniston is an excellent example of the devastating long term effects of corporate contamination.

IV. Conclusion

This paper was intended to give attorneys who do not practice in environmental law an overview of this area of the law. Environmental and Toxic Torts are difficult cases to prove and require expert testimony from multiple disciplines supported by epidemiological studies, documentary evidence, and typically the local treating physician. While it is possible for any competent lawyer to handle these cases the expense and time commitment generally are prohibitive.