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I. INTRODUCTION

DURING the survey period, Texas appellate courts and a federal district court heard several cases involving Texas environmental issues.[1] Two of the most significant cases provide interpretations of law that may have a substantial impact on the management of hazardous waste and the powers of the State to require remediation in Texas. In *Ex parte Elliott*,[2] the court ruled that in order to avoid constitutional invalidity for improper delegation of lawmaking power to a federal agency, those wastes that are considered hazardous under the Texas Solid Waste Disposal Act are those the U.S. Environmental Protection Agency listed or classified as hazardous waste as of July 30, 1991, not those listed or classified as hazardous waste by the EPA thereafter.[3] Under this holding, the State's power to regulate wastes as hazardous wastes may not be as extensive as previously thought. In *Hicks v. Humble Oil and Refining*

1. Several environmentally-related cases decided in Texas over the past year were not designated for publication, and thus are not reviewed at length in this article. These cases included: Evans v. Consolidated Services, Inc., 1998 WL 429619 (Tex. App.—Houston [14th Dist.] July 30, 1998, no pet. h.) (concluding that, despite earnest-money contract's "as is" provision, prospective purchaser's conduct in refusing to close due to possible environmental problems with the land constituted a repudiation of the contract); Coastal Incineration Corporation v. Rodgers, 1998 WL 426038 (Tex. App.—Austin July 30, 1998, no pet. h.) (holding that a tenant's taking on the responsibility to curtail and clean up pollution was valid consideration for the purposes of the lease); Maxus Energy Corporation v. Occidental Chemical Corp., 1998 WL 269994 (Tex. App.—Dallas May 28, 1998, pet. denied) (considering whether future costs could be within the jurisdiction of a court interpreting an environmental-cost-sharing provision of a stock-purchase agreement).

2. 973 S.W.2d 737 (Tex. App.—Austin 1998, no pet. h.).

3. *See id.* at 742.

Co.,[4] the court concluded that the Texas Water Pollution Control Act of 1961, the Texas Water Quality Act of 1957, Chapter 26 of the Texas Water Code, the Texas Clean Air Act of 1987, and the Sanitation and Health Act of former article 4477-1 of 1987 do not apply retroactively to activities occurring prior to the enactment of the statutes.[5] To the extent this holding is adopted statewide, and to the extent it may be extended to include the Texas Solid Waste Disposal Act, it could reduce the power of the State to take enforcement action or to require remediation of environmental contamination caused by activities occurring many years ago.

Two other significant cases involved environmental-tort claims. These two cases provide standards for evaluating a statute-of-limitations defense and the ability to challenge the causation element of plaintiffs' claims. Under the recent Texas Supreme Court pronouncements in the *Robinson*[6] and *Havner*[7] cases, courts must take a hard look at the expert opinions offered to prove causation in environmental-tort suits. Another significant decision limited the ability of current landowners to sue prior landowners, particularly under nuisance and strict liability claims.[8]

An important case in the Survey period addressed the constitutional limits of government to prohibit the use of property for oil and gas drilling in order to protect the environment.[9] Another decision addressed the standing of citizens to challenge environmental permits being considered by the Texas Natural Resource Conservation.[10] A federal court decided a potentially significant case for interpreting indemnities covering environmental liabilities.[11] Finally, another court upheld a jury finding that imposed liability on corporate shareholders for the costs incurred by the Railroad Commission of Texas for plugging and abandoning wells where the shareholders were accused of siphoning off the assets of the corporation to avoid this obligation, and to avoid reimbursing the State for completing the obligation.[12]

4. 970 S.W.2d 90 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

5. *See id.*

6. E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995).

7. Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1996).

8. *See* Hicks v. Humble Oil and Refining Co., 970 S.W.2d (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

9. *See* Trail Enterprises, Inc. v. City of Houston, 954 S.W.2d 625 (Tex App.—Houston [14th Dist.] 1997, pet. denied).

10. *See* Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Envtl. Justice, 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied).

11. Fina, Inc. v. Arco, 16 F. Supp 716 (E.D. Tex. 1998).

12. *See* Love v. State, 972 S.W.2d 114 (Tex. Civ. App.—Austin 1998, pet. denied).

II. CONSTITUTIONAL CHALLENGES OF ENVIRONMENTAL STATUTES

A. THE TEXAS SOLID WASTE DISPOSAL ACT DOES NOT VIOLATE THE TEXAS CONSTITUTION'S SEPARATION OF POWERS CLAUSE BY IMPROPERLY DELEGATING GOVERNMENTAL AUTHORITY TO A FEDERAL AGENCY BECAUSE THE COURT FOUND THAT HAZARDOUS WASTES ARE THOSE LISTED OR CLASSIFIED BY EPA AS OF JULY 30, 1991

In an appeal from a denial of a writ of habeas corpus from a criminal defendant, the Austin Court of Appeals in *Ex parte Elliott*[13] considered the defendant's contention that provisions of state statutes defining hazardous wastes as those identified or listed by the U.S. Environmental Protection Agency are invalid as an unconstitutional delegation of authority from the state legislature to a federal agency.

The defendant in *Elliott* was indicted for transporting hazardous waste to an unpermitted location and for illegal storage of hazardous waste.[14] The criminal statute defined "hazardous waste" as "'solid waste identified or listed as a hazardous waste by the administrator of the United States Environmental Protection Agency under the federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. Section 6901, et seq.).'"[15] Elliott contended that this provision constituted a delegation of power, by the Texas legislature to the federal government, to define hazardous waste under Texas law and that such delegation "constitutes a surrender of [Texas'] legislative power to the federal government."[16] Since the term "hazardous waste" was, at least in the defendant's words, an "essential element" of the prohibited conduct of which he was accused, the defendant claimed that relief from the criminal indictment should be granted.[17]

In analyzing this question, the Austin Court of Appeals reviewed Texas precedent concerning legislative delegation. The court acknowledged that according to factors for considering the constitutionality of a "public delegation," the nature of the Texas Solid Waste Disposal Act's hazardous waste provision could have, without more, placed in doubt the constitutionality of the provision.[18] The court stated that the Texas hazardous waste definition "may be read to say that the legislature has delegated to the EPA the power to define hazardous waste under the [Texas Health and Safety Code] and that definition may change from time to time at the will of the EPA without intervention by, or guidance from, the [Texas]

13. 973 S.W.2d 737 (Tex. App.—Austin 1998, no pet. h.).
14. *See id.* at 738.
15. *Id.* at 739 (quoting Former TEX. HEALTH & SAFETY CODE ANN. § 361.003(15) (Vernon 1992), *amended by* TEX. HEALTH & SAFETY CODE ANN. § 361.003(12) (Vernon Supp. 1998)).
16. *Id.*
17. *See id.* at 738-39.
18. *See id.* at 741 (quoting Housing Auth. of City of Dallas v. Higginbotham, 143 S.W.2d 79, 87 (1940)).

legislature."[19]

The court recognized, however, that the Texas Supreme Court has approved statutes that refer to other statutes and therefore make them applicable to the new statute. The catch, for purposes of validity under the "rule of incorporation by reference," is that "'when a statute is adopted by a specific descriptive reference, the adoption takes the statute as it exists *at that time*, and the *subsequent amendment* thereof *would not be* within the terms of the adopting act.'"[20] Therefore, the court in *Elliott* held that the Texas statute impliedly referred to the federal definition of hazardous waste as it existed as of the date the Texas statute was enacted, July 30, 1991.[21] The court concluded that this reference fixed in time survived constitutional challenge because the incorporation by reference of existing federal laws and regulations promulgated thereunder by federal agencies does not incorporate future amendments by Congress to statutes or changes to federal agency regulations. The court also determined that in defining hazardous waste under the Texas Solid Waste Disposal Act, the legislature does not need to provide limitations on the EPA's power to promulgate new regulations in the future because the discretion of the EPA is fixed in the form of regulations existing at a particular time.[22]

The court in essence held that the definition of "hazardous waste" is fixed in time under the Texas Solid Waste Disposal Act. But this questions the understanding of the Texas Natural Resource Conservation Commission (TNRCC), the regulated community in Texas, and the EPA—the latter having delegated authority under the federal Resource Conservation and Recovery Act to Texas to administer the federal hazardous waste laws. The assumption by relevant parties is that the TNRCC may amend its regulations to include newly listed or classified hazardous waste. *Elliott* suggests that the State and the TNRCC specifically do not have the power to regulate under the hazardous waste program wastes listed or classified by the EPA as hazardous wastes after July 30, 1991. This could have a very significant impact on how the TNRCC regulates wastes and how the regulated community addresses waste management activities.

B. Constitutional Challenge of City Ordinance Prohibiting the Drilling of Oil and Gas Wells in City's Watershed Held to Be Barred by Ten-year Statute of Limitations and to Be Valid Exercise of City's Police Power

The degree to which a governmental restriction on the use of property requires compensation under an inverse condemnation theory and whether it violates constitutional protections has long been a controver-

19. *Id.*
20. *Id.* (emphasis added) (quoting Trimmier v. Carlton, 296 S.W. 1070, 1074 (1927)).
21. *See id.*
22. *See id.* at 742.

sial issue. Courts in recent years have typically become more concerned with protecting private property interests. But the Fourteenth District Court of Appeals in Houston upheld a City of Houston ordinance that prohibited the drilling of oil and gas wells within the watershed of Lake Houston.[23]

In 1967, the City of Houston amended a prior ordinance that provided that no drilling of oil and gas wells shall take place closer than 1000 feet from Lake Houston or any of its drains, streams, or tributaries, or at an elevation of less than forty-eight feet above mean sea level.[24] This ordinance had no provision to allow a variance.

A parent company of the plaintiff acquired the leasehold interests in 1972. The plaintiff was assigned the mineral leases within the restricted area in 1986. In 1994, Trail Enterprises sought a variance from the ordinance, to which the City did not respond. The plaintiff filed suit in 1995. Both parties filed motions for summary judgment. The court denied plaintiff's motion and granted summary judgment to the City based upon the conclusion that the ten-year statute of limitations had expired.[25]

The plaintiff asserted that its property had been taken without just compensation in violation of the Fifth Amendment to the U.S. Constitution and the takings clause of the Texas Constitution. Courts have long recognized the claim of inverse condemnation.[26] The court identified several ways that inverse condemnation can occur: physical invasion of property; appropriation of property; unreasonable interference with the landowner's right to use and enjoy the property, such as by restricting access to the property or denying a permit for development.[27] It was the last means by which a taking may occur that was before the court. In this regard the court stated that "[g]overnmental restrictions on the use of property can be so burdensome that they result in a compensable taking."[28]

The court recognized, however, the countervailing ability of government to exercise its police power, particularly where necessary to protect the health, safety, and general welfare of its people.[29] After citing the seminal case on the issue, *Pennsylvania Coal Co. v. Mahon*,[30] the court concluded that property values to some extent exist under an "'implied

23. *See* Trail Enterprises, Inc. v. City of Houston, 957 S.W.2d 625 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

24. *See id.* at 628.

25. *See id.* at 629.

26. *See id.* at 630 (citing City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978); City of Abilene v. Burk Royalty Co., 470 S.W.2d 643 (Tex. 1971)).

27. *See id.* (citing Taub v. City of Deer Park, 882 S.W.2d 824, 826 (Tex. 1994), *cert. denied*, 513 U.S. 1112 (1995); Westgate, Ltd. v. State, 843 S.W.2d 448, 452 (Tex. 1992)).

28. *Id.* (quoting San Antonio River Auth. v. Garrett Bros., 528 S.W.2d 266, 273 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.)).

29. *See id.* (citing City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804, 805 (Tex. 1984); Woodson Lumber Co. v. City of College Station, 752 S.W.2d 744, 746 (Tex. App.—Houston [1st Dist.] 1988, no writ)).

30. 260 U.S. 393 (1922).

limitation'" based on the exercise of the government's police power.[31]

The court's analysis then turned to the question of whether the plaintiff had timely filed its claim against the city. The court ruled that the ten-year statute of limitations applies to claims for inverse condemnation.[32] The court rejected the mineral interest owner's argument that the taking did not occur when the ordinance was passed, which occurred *more* than ten years before suit was filed, but when the City denied a variance from that regulation, which occurred *less* than ten years before suit was filed.[33]

The plaintiff then argued that the city must prove the elements of adverse possession to prevail in its claim that the ten-year limitations period applied. The court rejected this argument. The court apparently ruled that an inverse taking is analogous to adverse possession, but that it was not in fact adverse possession.[34] Thus, while the same limitations period applied, the city did not have to prove the same elements.

The plaintiff asserted an alternative argument that the City was estopped from asserting its limitations defense. The basis for this argument was that the City had sold the mineral interests to the current or former landowner. The city allegedly had agreed to allow development of mineral interests by contract and in the mineral rights set out in the city deed. The plaintiff asserted that the ordinance impaired the plaintiff's contractual rights in violation of the federal and state constitutions.

The court ruled first that estoppel generally does not apply to a governing body exercising governmental functions.[35] Without an estoppel argument, the plaintiff could only rely upon the constitutional challenge of violation of contractual rights.

The court proceeded to address the question of violation of contractual rights. The court ruled that the Texas Constitution allowed laws to impair contractual rights where necessary to protect public safety and welfare.[36] Moreover, the court analyzed the contract with the city. The court con-

31. *See id.* at 630-31 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

32. *See id.* at 631 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.026 (Vernon 1986); Brazos River Auth. v. City of Graham, 354 S.W.2d 99, 100 (1961) (holding that ten-year limitations period applied while rejecting the claim that two-year limitations barred action for a taking that occurred when operation of dam and formation of lake cased flooding of sewage disposal plant); Waddy v. City of Houston, 834 S.W.2d 97, 102 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (affirming summary judgment where city established that sewer pipe's installation seventy years before suit was filed was significantly more than ten-year limitations period for inverse condemnation); Hudson v. Arkansas Louisiana Gas Co., 626 S.W.2d 561, 563 (Tex. App.—Texarkana 1981, writ ref'd n.r.e.) (reversing a summary judgment where the trial court failed to apply ten-year limitations period to inverse condemnation claim); Hubler v. City of Corpus City, 564 S.W.2d 816, 823 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) (distinguishing ten-year limitations period for "taking" from two-year period for "damaging" property)).

33. *See Trail Enterprises, Inc.*, 957 S.W.2d at 631.

34. *See id.* at 632.

35. *See id.* at 633 (citing Bowman v. Lumberton I.S.D., 801 S.W.2d 883, 888 (Tex. 1990); Dallas Cent. Appraisal Dist. v. G.T.E. Directories Corp., 905 S.W.2d 318, 322 (Tex. App.-Dallas 1995, writ denied); Farmer's Marine Copper Works, Inc. v. City of Galveston, 757 S.W.2d 148, 152 (Tex. App.—Houston [1st Dist.] 1988, no writ)).

36. *See id.* (citing Texas State Teachers Ass'n v. State, 711 S.W.2d 421, 424-25 (Tex. App.—Austin 1986, writ ref'd n.r.e.)).

cluded that the contract permitted drilling "only if there was no pollution of the lake."[37] The record contained evidence that the ordinance was passed after wells drilled in the area had caused pollution of the lake. Thus, the court ruled that the arguments made by the plaintiff did not prohibit the City's assertion of the statute of limitations.[38]

The Plaintiff also challenged the City ordinance on three other constitutional grounds. First, the plaintiff asserted that the passage of the ordinance involved improper notice, and therefore denied plaintiff due process as required by article I, section 19 of the Texas Constitution and the Fifth and Fourteenth Amendments of the U.S. Constitution. The court rejected this claim.[39] The court concluded that the plaintiff did not own the mineral interests when the ordinance was passed rendering the method of passing the ordinance immaterial.[40] When the parent company of the plaintiff originally purchased the mineral interests it was charged with notice of the ordinance.[41] The court also ruled that persons are "charged with constructive notice of the actual knowledge that could have been acquired by examining public records" and that those residing in a city or doing business with a city are presumed to have knowledge of the city's ordinances.[42]

The second constitutional challenge involved equal protection. The plaintiff contended that a small group of mineral interest owners within the city's extra-territorial jurisdiction were required to pay the cost of protecting the City's water supply, while mineral interest owners in the City limits are free to drill within the protected zone by the lake and drainage to the lake. The City contended that the ordinance applies equally to mineral interest owners in the extra-territorial jurisdiction of the City. The court concluded that the summary judgment does not contain any evidence of other drilling activity with the area of Lake Houston.[43]

The plaintiff further asserted that the ordinance violated substantive due process. Substantive due process required the ordinance to have a reasonable relation to a legitimate state purpose and to not be arbitrary or discriminatory. To pass equal protection muster, the classification must also be rationally related to a legitimate state interest. In reviewing city ordinances, the court ruled that to be revised by a court, the city ordinance must be arbitrary, unreasonable, or a clear abuse of power. The burden for the party challenging a city ordinance on constitutional

37. *Id.*
38. *See id.* at 634.
39. *See id.*
40. *See id.*
41. *See id.* (citing City of Dallas V. Coffin, 245 S.W.2d 203, 206-07 (Tex. Civ. App.—Austin 1953, writ ref'd n.r.e.)).
42. *See id.* (citing Mooney v. Hartin, 622 S.W.2d 83, 85 (Tex. 1981); Board of Adjustment of the City of San Antonio v. Nelson, 577 S.W. 783, 786 (Tex. App.—San Antonio), *aff'd* 584 S.W.2d 701 (Tex. 1979)).
43. *See id.*

grounds is extraordinary and the constitutionality of the ordinance is presumed.

In reviewing this issue, the court cited cases holding that the right to drill for oil and gas is subject to "reasonable restriction by the state."[44] The court concluded that the ordinance was "reasonably related" to the City's need to protect its water supply.[45] Accordingly, the court ruled the ordinance did not violate substantive due process or equal protection provisions of the state and federal constitutions.[46]

Finally, the court rejected the plaintiff's claim that the ordinance violated the constitution because it was retroactive in effect.[47] The court ruled that this restriction must be balanced against a government's interest in exercising its police power, and that the City's interest in protecting its water supply from pollution outweighed any retroactive concern.[48]

C. The Criminal Provision of the Texas Solid Waste Disposal Act Prohibiting the Dumping of Solid Waste in an Unauthorized Location Is Not Unconstitutionally Vague

In *Acosta v. State*,[49] the defendant, who was convicted of a misdemeanor offense of illegal dumping under the Texas Health and Safety Code, contended that the statutory definition of "solid waste" in that statute was unconstitutionally vague as it applied to his actions.[50] The defendant had used his pickup truck to transport dirt from a home construction site and had dumped that dirt at another construction site where other piles of dirt were located.[51]

The court noted that the relevant provision of the Texas Health and Safety Code forbids the knowing and intentional disposal of "'litter or other solid waste at a place that is not an approved solid waste site . . . .'"[52] However, the statutory definition of the term "solid waste" excepts "'soil, dirt, rock, sand and other natural or man-made inert solid materials used to fill land if the object of the fill is to make the land suitable for the construction of surface improvements.'"[53] Because the phrase "used to fill land" is undefined and, at least according to the defendant in *Acosta*, "susceptible to varying interpretations," this exception,

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44. *Id.* at 635 (citing Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561 (Tex. 1948); R.D. Oil Co. v. Railroad Comm'n of Texas, 849 S.W.2d 871, 875 (Tex. App.—Austin 1993, no writ)).
45. *See id.*
46. *See id.*
47. *See id.* (citing Tex. Const. art. I, § 16).
48. *See id.*
49. 972 S.W.2d 95 (Tex. App.—El Paso 1998, no pet. h.).
50. *See id.* at 98.
51. *See id.*
52. *Id.* (quoting Tex. Health & Safety Code Ann. § 365.012(a) (Vernon 1992 & Supp. 1998)).
53. *Id.* (quoting Tex. Health & Safety Code Ann. § 361.003(35)(A)(ii) (Vernon Supp. 1998)).

it was argued, rendered the definition of solid waste unconstitutionally vague.[54]

The *Acosta* court recited the following test to determine whether the definition was unconstitutionally vague:

> First, we must determine whether the law gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Second, we must determine if the law provides adequate standards to those who enforce it so that it cannot be arbitrarily and discriminatorily applied.[55]

The court concluded that based upon the record, Acosta and his son did not place the dirt and rock at the site to "make the land suitable for the construction of surface improvements."[56] The court also noted no evidence was found in the record that the dirt already present at the construction site was placed there for construction of surface improvements.[57] The court finally determined that, according to Acosta's own admissions, the dirt was merely left near other dirt.[58] Considering the specific conduct in which the defendant was engaged, the court found that no "person of ordinary intelligence would mistake the specific statutory exception for fill dirt as an open invitation to dump dirt and rock at any convenient construction site."[59]

What is missing in the *Acosta* decision is a discussion of the application of the second prong of the vagueness test which the court itself articulated. While the court may have been justifiably concerned about the possibility of bands of roaming trucks looking to dump their loads "at any convenient construction site,"[60] the decision gives little guidance on how a person who in fact has no intention of breaking the law must ascertain whether the fill-dirt exception to the solid waste rules applies in a given situation. For example, what advice should a practitioner give to a client (say, a construction contractor) who may routinely handle truckloads of debris ultimately utilized for construction fill? The *Acosta* decision gives little guidance to help that client develop procedures to ensure that he or she is at all times operating within the terms of the construction fill exception. Given the increase in criminal prosecutions in the environmental arena, concerns may perhaps be justifiably raised about the solid waste disposal laws being "arbitrarily and discriminatorily applied."[61]

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54. *Id.*
55. *Id.* at 97-98 (citing Bynum v. State, 767 S.W.2d 769, 773) (Tex. Crim. App. 1989)).
56. *Id.* at 98.
57. *See id.*
58. *See id.*
59. *Id.*
60. *Id.*
61. *See Bynum*, 767 S.W.2d 769 at 773.

III. STANDING TO BRING CLAIMS UNDER ENVIRONMENTAL STATUTES

A. A Local Environmental Group Has Standing to Challenge the Renewal of a Permit for a Hazardous Waste Facility

The concept of "standing" in the context of litigation by environmental groups has long been a source of controversy.[62] A Texas court again entered the fray in 1998 in *Heat Energy Advanced Technology, Inc. v. West Dallas Coalition for Environmental Justice*.[63] In overturning a decision by the Texas Natural Resource Conservation Commission (TNRCC) whereby the TNRCC determined that a local environmental group did not have standing to challenge a hazardous waste facility's application for a renewal permit, the Austin Court of Appeals in *Heat Energy* considered issues concerning (1) the process of obtaining judicial review of administrative decisions, and (2) how a review by an agency of the decisions of an administrative law judge should be judged by the courts.

The controversy from which the *Heat Energy* case arose began when Heat Energy Advanced Technology (HEAT), a hazardous and industrial waste storage and processing facility in Dallas, applied to the TNRCC to renew its permit.[64] A group of individuals who lived near the HEAT facility, calling themselves the West Dallas Coalition for Environmental Justice (the Coalition), requested that the TNRCC conduct a hearing on the permit renewal.[65] An administrative law judge concluded that the Coalition had standing to participate in the hearing; however, the TNRCC disagreed, substituting its own findings of fact and conclusions of law.[66] The Coalition filed a motion for rehearing but, before the TNRCC had ruled on that motion, also filed a petition for judicial review by the district court.[67] The district court determined that the TNRCC had exceeded its authority in overturning the decision of the administrative law judge.[68]

1. Procedural Issues

The appeals court first had to consider whether the district court had in fact been divested of jurisdiction because the Coalition filed its petition for judicial review before the TNRCC had acted upon the Coalition's motion for rehearing.[69] As a general rule in Texas, an individual fails to invoke jurisdiction if a petition for such review is filed before receiving a

62. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972) (considering whether an environmental group had standing to challenge development of a wilderness area).
63. 962 S.W.2d 288 (Tex. App.—Austin 1998, pet. denied).
64. *See id.* at 289.
65. *See id.*
66. *See id.* at 289-90.
67. *See id.* at 290.
68. *See id.*
69. *See id.* at 290-93.

ruling on a motion for administrative rehearing.[70] The court also recognized, however, an exception to this general rule.[71] As the court noted in *Simmons*, the statute under which the controversy arose required that a petition for judicial review be filed "within 30 days of the date the agency sent him notice of the order."[72] Since the Administrative Procedure Act (APA) allowed an agency at least forty-five days to rule on the motion for rehearing,[73] the petitioner in *Simmons* was caught in a "catch-22."[74] Thus, the petitioner in *Simmons* properly invoked jurisdiction even though he filed the petition for judicial review while the motion for rehearing was still pending with the agency.[75]

Because the Texas Water Code required the Coalition to file its petition for judicial review "within 30 days after the effective date of the ruling, order, or decision," the *Heat Energy* court considered whether the so-called "*Simmons* exception" applied.[76] Key to this analysis, was when the agency order denying the Coalition standing became "effective." The court noted that agencies "have the discretion to set effective dates for their decisions and orders" and "[t]he legislative rather than the judicial branch is the appropriate authority to establish limits on agency discretion to set effective dates."[77] Since nothing in the record indicated that the TNRCC had manifested any particular intent with respect to when the order became effective, the court looked to the APA which, according to the court, "suggests the order might have become 'effective' when the Coalition received actual notice of it."[78] "[I]t was entirely reasonable for the Coalition to conclude that the order might become effective before the date it became final and appealable;" therefore, the Coalition had properly invoked jurisdiction even though its petition was "premature."[79]

2. *Standing Requirements*

Having determined that the district court had jurisdiction, the next step was analyze the TNRCC's reversal of the administrative law judge's opinion.[80] The court declined to decide which standard of review applied to the district court in making such an analysis since, in the appellate court's opinion, the commission's action was not supported even when applying the relatively deferential "substantial evidence" standard (which HEAT had argued was applicable).[81] Under the substantial evidence standard, a

70. *See id.* at 290 (citing Lindsay v. Sterling, 690 S.W.2d 560, 563 (Tex. 1985)).
71. *See id.* at 291 (citing Simmons v. Texas State Bd. of Dental Exam'rs, 925 S.W.2d 652 (Tex. 1996)).
72. *Id.* at 291 (citing *Simmons,* 925 S.W.2d at 653).
73. *See id.*
74. *Id.* (citing *Simmons,* 925 S.W.2d at 653-54).
75. *See id.*
76. *Id.* at 291-92 (citing TEX. WATER CODE ANN. § 5.351(b)).
77. *Id.* at 292.
78. *Id.* at 293.
79. *Id.*
80. *See id.* at 293-95.
81. *See id.* at 294-95.

court reviews an agency's legal conclusions for error of law, and reviews the agency's factual findings for support by substantial evidence.[82] The court concluded that the TNRCC "could not have reasonably determined the Coalition did not have standing":[83]

> Mr. Jose Acosta, a member of the Coalition, testified through an interpreter before the [administrative law judge] that his home was about one and one-half blocks from the HEAT facility. He said he detected odor coming from the direction of the HEAT facility, and that the odor was especially strong in the afternoons. He testified it affected his breathing, and that he had sought medical attention for throat problems caused by the odors. HEAT attempted to discredit Mr. Acosta's testimony by pointing out that the plant was south of his house, and that at one point Mr. Acosta said the odors were coming from the west. HEAT also suggested that other businesses in the area used chemicals and intimated that those facilities might have created the odors Mr. Acosta smelled. HEAT admitted, however, that it was planning to reduce its odor emissions in conjunction with the resolution of a separate [TNRCC] enforcement proceeding. This evidence suggests the HEAT facility had the potential to emit odors, and it lends credence to Mr. Acosta's assertion that he smelled odors coming from the HEAT facility.[84]

Since the proper standard to determine standing "does not require parties to show they will ultimately prevail in their lawsuits," merely that they "show only that they will potentially suffer harm or have a 'justiciable interest' related to the proceedings," the findings that the TNRCC substituted for the administrative law judge's, given the above recitation of the facts as the court saw them, were not supported by substantial evidence.[85]

While the *Heat Energy* case has been noted by others as potentially significant,[86] its precedential value may have been somewhat limited by a subsequent change in the TNRCC's administrative procedure. Decisions regarding standing will now be typically made before the commission itself rather than first before an administrative law judge.[87] Thus, the standards enunciated in *Heat Energy* regarding agency review of administrative law judge decisions may not in fact come into play in many instances. Nevertheless, if the holding of this case were interpreted as liberalizing standing requirements before the TNRCC itself, an increased

82. *See id.* (citing TEX. GOV'T CODE ANN. § 2001.174; Southwestern Public Serv. Co. v. Public Util. Comm'n of Tex., 962 S.W.2d 207, 214-216 (Tex. App.—Austin 1998, pet. denied); Lauderdale v. Texas Dep't of Agric., 923 S.W.2d 834, 836-37 (Tex. App.—Austin 1996, no writ)).

83. *Id.* at 295.

84. *Id.*

85. *Id.* (citing TEX. WATER CODE ANN. § 5.115(a); Texas Rivers Protection Ass'n v. Texas National Resource Conservation Comm'n, 910 S.W.2d 147, 151, 152 n.2 (Tex. App.—Austin, 1995, writ denied)).

86. *See, e.g.*, Note, Heat Energy Advanced Tech., Inc. v. West Dallas Coalition for Envtl. Justice, 28 ST. B. TEX. ENVTL. L.J. 183 (1998).

87. *See* 30 T.A.C. § 55.27(a) (1998).

number of commission hearings regarding similar matters could be expected in the future.

IV. COMMON LAW ENVIRONMENTAL CLAIMS

A. A Two-Hundred-Million-Dollar Judgment Was Reversed and Rendered Based upon Expiration of the Statute of Limitations and the Lack of Causation Evidence Provided by Plaintiffs' Experts

In what is perhaps one of the most significant and well-publicized opinions regarding environmental torts, the Fort Worth Court of Appeals reversed and rendered a $200,000,000 judgment that the trial court awarded to a group of plaintiffs in Wise County, Texas. In *Mitchell Energy Corporation v. Bartlett*,[88] the court ruled that the jury and judge had erred in not finding that all but a few of the numerous plaintiffs had failed to bring their causes of action within the applicable statute of limitations periods. The court further held that all of the plaintiffs had failed to provide sufficient causation evidence to prevail on their claims.[89]

The relevant factual background is that Mitchell Energy Corporation (Mitchell Energy) drilled numerous gas wells beginning in the 1950s in an area of Wise County. At the time of the trial, Mitchell Energy had about 2,000 operating wells in the area. The producing zone lies some 5,000 to 7,000 feet below the surface and the groundwater acquifer was found at 200 to 400 feet below the ground. The plaintiffs were numerous individuals who lived in Wise County and whose groundwater wells were drilled into the Twin Mountain aquifer, which was part of the Trinity Aquifer. These plaintiffs purchased their land at various times from about 1977 to 1993. The majority of the plaintiffs knew that their wells were not useful for drinking water purposes because of a bad odor they detected at the time, or shortly after, they purchased their property. According to the appellate court's opinion, all but a few of the plaintiffs knew of the adverse conditions affecting their wells more than two years before they filed suit against Mitchell Energy.

As in most environmental tort suits, the plaintiffs filed claims of nuisance, negligence, trespass, violation of Texas Railroad Commission Rules, and fraud. They also sought punitive damages based upon allegations of gross negligence, fraud, and malice. After trial, the jury awarded actual damages and punitive damages in the amount of $200,000,000.[90] The trial court rendered judgment based upon the jury's verdict.[91] Needless to say, the appeal was of significant import to those practicing in the environmental tort area because of the amount of the award and because of the legal issues that were before the Fort Worth Court of Appeals.

88. 958 S.W.2d 430 (Tex. App.—Ft. Worth 1997, pet. denied).
89. *See id.* at 447.
90. *See id.* at 435.
91. *See id.*

1. Statutes of Limitations

a. Knowledge of the Injury Alone, Rather than Knowledge of Both Injury and the Cause of the Injury, Is Sufficient to Begin the Running of Limitations

A critical issue in many environmental tort suits is whether the plaintiffs filed their claims within the relevant statute of limitations period. In many cases, the alleged harm, such as soil or groundwater contamination, has been present for years or decades. In these cases, Defendants usually attack plaintiffs claims through motions for summary judgment and, if not successful, at trial argue that the plaintiffs claims are barred on limitations grounds. Plaintiffs usually assert many rebuttals to the limitations challenge, including fraudulent concealment and continuing-tort theories. In *Mitchell Energy*, the issue was decided by a jury and not overruled by the trial court.[92] Thus, on appeal, one of the main issues out of thirty-one points of error was the question of whether the jury instruction was proper as to statute of limitations.[93]

The key issue decided by the court of appeals was the question of the applicability of what is known as the "discovery rule" under the law governing statutes of limitation. The first issue was whether plaintiffs were seeking damages for *permanent* or *temporary* injury to real property.[94] The second issue was whether the plaintiffs knew or reasonably should have known of the injury in order for the cause of action to accrue and the statute of limitations to begin to run.[95] In environmental and toxic tort cases, the question is often whether the plaintiff must know only of the *injury,* or both the injury and the *cause* of the injury before the cause of action accrues.

The jury instruction in *Mitchell Energy* referred to both.[96] On this basis, *Mitchell Energy* challenged the jury decision. In analyzing claims for property damage to real property, it is important to understand the case law in Texas governing permanent versus temporary injury to real property. Permanent injury is one that is caused by an event or activity such that the injury "is presumed to continue indefinitely; the injury must be constant and continuous, not occasional, intermittent or recurrent."[97] A temporary injury to real property is one that is recurrent, intermittent, or occasional, such as one caused by rain or wind. There was apparently no dispute that the plaintiffs in *Mitchell Energy* were seeking damages for permanent injury because they described their injury as "ongoing and continuous."[98]

In reviewing the question of whether the jury decision on this issue

92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.* at 436.
96. *See id.*
97. *Id.* (quoting Bayouth v. Lion Oil Co., 671 S.W.2d 867, 868 (Tex. 1984)).
98. *Id.*

should stand, the court not only reversed but rendered the decision.[99] The court did so because it believed the issue was largely a legal one based on uncontroverted facts; thus, there was nothing for the jury to decide.[100]

In analyzing the question of whether a plaintiff must have known or should have known of the cause of the injury, the court looked to the law governing the discovery rule in permanent injury to real property cases.[101] The rule expounded by the Texas Supreme Court is that limitations start to run "'upon discovery of the first actionable injury and not on the date when the extent of the damages to the land are fully ascertainable.'"[102] In applying this rule, the *Mitchell Energy* court reasoned that if discovery of the first actionable injury did not initiate the running of limitations, then a plaintiff could wait until the full extent of the damages were determined before filing suit, and thereby allow the damages to grow and maximize the damage award.[103]

The court next considered how it should address what it considered error by the trial court in submitting a question or instruction to the jury regarding the discovery of the cause of the injury before the limitations began to run.[104] While noting that ordinarily an appellate court would reverse and remand an issue to the trial court for a new jury finding, the court determined that there was no factual issue for the jury to decide.[105] The court reviewed the evidence in the record and concluded it showed that all but a few of the numerous plaintiffs were aware of the injury—alleged contamination of their groundwater—more than two years before they filed suit against Mitchell Energy.[106] The court concluded as a matter of law that those plaintiffs' claims were time-barred by the applicable two-year statute of limitations.[107] Knowledge that the water had a bad odor or taste was sufficient notice of the injury.[108]

b. To Use Fraudulent Concealment as a Means of Tolling the Running of Limitations, Plaintiffs Must Prove Reasonable Reliance on Statements by Defendants

The court also rejected the plaintiffs' argument that the statute of limitations was tolled because Mitchell Energy had allegedly fraudulently concealed the causes of action from the plaintiffs.[109] Frequently, plaintiffs in environmental torts allege fraudulent concealment to attempt to

99. *See id.* at 437.
100. *See id.*
101. *See id.* at 438.
102. *Id.* at 436 (quoting *Bayouth*, 671 S.W.2d at 868; Hues v. Warren Petro. Co., 814 S.W.2d 526, 529 (Tex. App.—Houston [14th Dist.] 1991, writ denied)).
103. *See id.*
104. *See id.*
105. *See id.* at 437.
106. *See id.* at 437-38.
107. *See id.* at 437.
108. *See id.*
109. *See id.* at 438.

avoid their claims from being time-barred. The court considered Mitchell Energy's appeal of the jury determination that Mitchell Energy had engaged in fraudulent concealment.[110] The issue was whether there was no evidence to support this jury finding. The relevant standard that the court applied was whether "the evidence offered to prove a vital fact is no more than a mere scintilla of evidence."[111]

The element of fraudulent concealment that was central to the court's analysis was reasonable reliance on deception by the defendant. Once a plaintiff knows or should have known of the alleged fraud, then "reliance is no longer reasonable, and the tolling effect ends."[112] The court concluded that the evidence in the record did not reveal any reliance on statements of either Mitchell Energy, or any statements by Mitchell Energy passed on to the plaintiffs by the Texas Railroad Commission; thus, the fraudulent concealment claim failed and the jury determination was reversed.[113] Despite any actions or statements by Mitchell Energy or the Railroad Commission, the court determined that the plaintiffs were either (1) still suspicious or believed that Mitchell Energy's wells were the cause of the problems with their groundwater or (2) that some of the plaintiffs had no contact with Mitchell Energy or the Railroad Commission at all.[114]

c. The Continuing-Tort Doctrine Does Not Apply to Claims for Permanent Injury to Land and Does Not Toll the Running of Limitations

The next argument the plaintiffs made in order to prevent their claims from being time barred was that their claims were for a "continuing-tort."[115] The continuing-tort doctrine is frequently asserted by plaintiffs as another mechanism to attempt to avoid the application of the statute of limitations to bar their claims. Under the continuing-tort doctrine, if the defendant's tortious conduct and the resulting injury to plaintiff are both ongoing and continuing, the statute of limitations is tolled or simply does not begin to run until the tortious conduct ends.[116] One example of the application of this concept in Texas cited by the court is in cases involving intentional infliction of emotional distress.[117]

The court refused to apply the continuing-tort doctrine to cases involv-

110. *See id.*

111. *Id.* at 439 (citing Blount v. Bordens, Inc., 910 S.W.2d 931, 933 (Tex. 1995); Catalina v. Blasdel, 881 S.W.2d 295, 297 (Tex. 1994); Juliette Fowler Homes, Inc. v. Welch Assoc., 793 S.W.2d 660, 666 n. 9 (Tex. 1990); In re King's Estate, 244 S.W.2d 660, 661-62 (1951); Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)).

112. *Id.* (citing Arabian Shield Dev. Co. v. Hunt, 808 S.W.2d 577, 585 (Tex. App.—Dallas 1991, writ denied)).

113. *See id.* at 442.

114. *See id.* at 440-43.

115. *Id.* at 443.

116. *See id.*

117. *See id.* (citing Newton v. Newton, 895 S.W.2d 503, 506 (Tex. App.—Fort Worth 1995, no writ)).

ing permanent injury to land.[118] The court cited numerous cases in which Texas courts had refused to apply the continuing-tort doctrine and had required that claims be made within two years of the first injury.[119] The application of statutes of limitations to permanent injuries to land by Texas courts was determined to be directly contrary to the continuing-tort doctrine.[120] The continuing-tort doctrine tolls limitations until the tortious conduct ceases, and theoretically until the full extent of the damages may be known. The rule for applying limitations to claims for permanent injury to land is that the statute begins to run from the date the first actionable injury is discovered and "*not when the extent of the damages to the land are fully ascertainable.*"[121] The court noted that the continuing-tort doctrine is typically applied to tortious conduct which can be prevented by a court injunction.[122] While stating that temporary injury to land might be prevented by injunction, a permanent injury could not because it will continue indefinitely.[123]

Plaintiffs argued that not all of their claims were for permanent injury to land. They also asserted personal injuries. The appellate court ruled that all of the alleged personal injuries were based upon permanent injury to their land. The court ruled that because they based their claims on permanent injury to land, they could not claim temporary damages on appeal. Thus, all of the plaintiffs claims were barred.[124]

d. Except for the Claims of Three of the Seventeen Plaintiffs, No Evidence Existed to Support the Jury Finding that the Defendant Committed Fraud

Another claim that had been brought by plaintiffs was that Mitchell Energy had committed fraud. The court addressed this claim in a manner similar to how it addressed the fraudulent concealment argument asserted to defeat limitations. The court ruled that there was no evidence to support the claim of fraud against all the plaintiffs except a few. The claims of these persons had also been ruled not to be time-barred by limitations.

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118. *See id.*

119. *See id.* (citing Tennessee Gas Transmission Co. v. Fromme, 269 S.W.2d 336, 337 (1954); Austin & N.W. Ry. Co. v. Anderson, 15 S.W. 484, 485 (1891); Hues v. Warren Petro. Co., 814 S.W.2d 526, 529 (Tex. App.—Houston [14th Dist.] 1991, writ denied)).

120. *See id.*

121. *Id.* (quoting *Bayouth*, 671 S.W.2d at 868 (citing *Tennessee Gas Transmission*, 269 S.W.2d at 337)).

122. *See id.* n.8.

123. *See id.*

124. The plaintiffs also asserted constitutional challenges to the application of limitations to their causes of action under theories of violation of due process, equal protection, and the open courts provision of the Texas constitution. The court rejected these challenges as well. *See id.* at 444.

2. *All of the Plaintiffs' Claims Failed Because They Were Unsupported by Sufficient Expert Testimony on Causation*

In many environmental cases, a central challenge to plaintiffs' claims in pretrial motions and at trial is whether the plaintiffs can prove the defendant or defendants *caused* the injury allegedly suffered by plaintiffs. In *Mitchell Energy*, this proved to be the ultimate success of the defendant because no evidence existed to prove the defendant's gas wells contributed hydrogen sulfide to plaintiffs' groundwater.[125] Hydrogen sulfide is often associated with the production of natural gas and specifically is associated with natural gas wells in Wise County and certain Mitchell Energy wells.

The key to the plaintiffs' claims was to show that hydrogen sulfide in their water migrated from Mitchell Energy's wells. The plaintiffs' expert testimony on this point was ruled to be insufficient under the standard announced in the Texas Supreme Court decisions of *Robinson* and *Havner*, addressing the appropriate use of testifying experts.[126] Both decisions require that the expert's testimony be based upon a reliable foundation; if not, then the expert's testimony is insufficient to support the plaintiff's claim.[127]

The plaintiffs had engaged two experts to testify at trial. One expert, Joe Neal, was a petroleum engineer, the other Dr. Randy Bassett, a geochemist. The plaintiffs offered these two experts to testify that hydrogen sulfide was present in the plaintiffs' groundwater and in Mitchell Energy's gas wells, and that the hydrogen sulfide in the plaintiffs' groundwater *could* have originated from Mitchell Energy's gas wells.[128]

Mr. Neal testified that Mitchell Energy had not properly maintained its wells. According to Mr. Neal, this improper maintenance resulted in the *likely* leakage of Mitchell Energy gas into the Trinity Aquifer, from which the plaintiffs would have drawn their water supply. The court ruled that this was insufficient to prove Mitchell Energy caused the contamination of plaintiffs' groundwater. The reasons were two-fold: (1) Mr. Neal did not testify that gas from Mitchell Energy's wells was present in plaintiffs' groundwater; and (2) Mr. Neal did not testify that either the plaintiffs' groundwater or Mitchell Energy's gas wells contained hydrogen sulfide.[129] Thus, the court ruled that this testimony did not show that hydrogen sulfide from Mitchell Energy's gas wells had migrated into plaintiffs' groundwater.[130]

Dr. Bassett testified that with a reasonable degree of scientific certainty (1) gas was present in plaintiffs' groundwater wells, (2) the gas in Mitchell

125. *See id.* at 447.
126. *See id.* at 446 (citing E.I. du Pont De Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995)); *Havner* 953 S.W.2d at 714).
127. *See id.*
128. *See Mitchell Energy*, 958 S.W.2d at 446.
129. *See id.*
130. *See id.*

Energy's four gas wells and plaintiffs' groundwater wells had the same chemical makeup, (3) that hydrogen sulfide was present in plaintiffs' groundwater wells, (4) hydrogen sulfide is a natural component of the Mitchell Energy gas, and (5) that Mitchell Energy's wells "could have been" the source of the hydrogen sulfide in plaintiffs' water.[131]

The court closely scrutinized Dr. Bassett's testimony. The court cited *Havner* for the rule that the mere recitation of the "'magic' words 'reasonable degree of [scientific] certainty,' alone, will not establish causation" through expert testimony.[132] The expert's conclusion must be supported by facts.[133] The court then applied this rule to several factual issues reviewed by Dr. Bassett. The court appeared to require the following analysis by Dr. Bassett: hydrogen sulfide is present in both Mitchell Energy's wells and the hydrogen sulfide was released from Mitchell Energy's gas wells in the area.[134]

The court concluded that Dr. Bassett's testimony did not provide a scintilla of evidence on either factual question.[135] With respect to proving the presence of hydrogen sulfide in both locations, the court first considered Dr. Bassett's reliance on the 1976 Railroad Commission's tests of Mitchell Energy's gas. The court determined that these tests showed the gas wells contained hydrogen sulfide on one day and was absent a month later. The court concluded this could not provide a reasonable basis for a juror to conclude that Mitchell Energy's wells were the source of any hydrogen sulfide in the plaintiffs' groundwater.[136] This conclusion was apparently reached because the absence of this gas in the second test eliminated the evidence from a prior test that found gas was present. Second, the court did not consider the isotopic signatures of gas in Mitchell Energy's wells and plaintiffs' groundwater proof that hydrogen sulfide was present in the gas wells or the groundwater as any proof that Mitchell Energy's wells contaminated plaintiffs' groundwater.[137] None of Dr. Bassett's testimony or analysis showed any hydrogen sulfide in the gas wells or the groundwater. Moreover, one of the Railroad Commission reports he relied upon showed no hydrogen sulfide in one of the gas wells that plaintiffs alleged released hydrogen sulfide into the groundwater.

According to the court, Dr. Bassett's most significant failure was his inability to eliminate alternative potential causes of the presence of hydrogen sulfide in the plaintiffs' groundwater wells. The court cited the *Robinson* case for the requirement that an expert must consider and eliminate alternative causes.[138] Interestingly, Dr. Bassett testified on the issue and concluded that the scientific method requires one to determine

131. *See id.* at 446-47
132. *Id.* at 447 (citing *Havner*, 953 S.W.2d at 712).
133. *See id.* (citing *Havner*, 953 S.W.2d at 712).
134. *See id.* at 447.
135. *See id.* at 448.
136. *See id.* at 448.
137. *See id.* at 447.
138. *See id.* at 448. (citing *Robinson*, 923 S.W.2d at 559).

which of alternative hypotheses has the highest scientific probability of being correct. He admitted that the other gas wells in the area not owned by Mitchell Energy would have similar, if not identical, isotopic signatures to the gas in other gas wells in the area. Of the twenty-two gas wells in the area, Mitchell Energy operated fewer than half. Thus, according to the court, Dr. Bassett failed to eliminate other gas wells that could have caused the release of hydrogen sulfide.[139] In addition, other evidence introduced at trial indicated that hydrogen sulfide-releasing bacteria could grow on the inside of the plaintiffs' water wells.

On the basis that Dr. Bassett failed to eliminate these alternative causes, the court concluded Dr. Bassett's testimony involved "'little more than speculation'"[140] Without a factual foundation that showed hydrogen sulfide originated from Mitchell Energy's gas wells, and without eliminating other potential causes of the hydrogen sulfide in plaintiffs' groundwater, the court ruled that Dr. Bassett's testimony provided no evidence for proving the causal element of each of the plaintiffs' claims.

3. *Analysis*

This case provides a favorable decision to defendants in environmental tort cases. The decision on the accrual date for claims for permanent injury to land avoids a potentially longer running limitations period. It creates a definite starting and ending point for the relevant length of time a plaintiff has to bring suit. The date injury is discovered is usually easier to prove than the date the cause is known or should have been known through appropriate due diligence. The court's decision on fraudulent concealment may help avoid this exception to the discovery rule by allowing scrutiny of whether the plaintiffs really believed a defendant's statement that it did not cause the harm. Finally, the ruling that the continuing-tort doctrine does not apply to claims arising from permanent injury to land avoids what in some cases could be a complete lack of a limitations period. In addition, if a permanent injury to land is defined as one that is ongoing and continuous, and the continuing-tort doctrine were applied to toll statutes of limitations, then the statute might never begin to run.

The causation analysis requires specific scientific decisions on causation by testifying experts. What is required is testimony showing a specific causal link between the plaintiff's alleged injury and the defendant's conduct. The possibility that causation exists is insufficient. Thus, a clear burden of causation, based on sound scientific evidence, must be shown.

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139. *See id.*
140. *Id.* (citing *Robinson*, 923 S.W.2d at 559).

B. Plaintiffs Must Provide Proof of the Causation Element of Negligence, Trespass, and Nuisance Claims to Avoid Summary Judgment

As in *Mitchell Energy*, many of the major battles in litigation over environmental releases or contamination involve causation questions that are fought through summary judgment motions. In *Cain v. Rust Industrial Cleaning Services, Inc.*,[141] the defendant filed a motion for summary judgment with supporting expert affidavits which opined that no contamination from Enclean's activities migrated on to Cain's property. This case provides precedent for challenging plaintiffs' cases on the basis of proof of causation.

This case should be of particular interest to environmental consulting and remediation firms, as well as the individuals or entities that engage such firms to perform environmental remediation. In *Cain*, the plaintiffs asserted contaminants were transported onto their property by stormwater runoff that occurred during remediation on adjacent property. Because such an event could potentially occur in a variety of remediation activities, parties performing remediation activities should consider these risks.

Rust Industrial Cleaning Services, Inc. was the successor to other companies that had apparently engaged in the remediation. The court referred to these companies collectively as "Enclean."[142] The plaintiffs owned property that had been contaminated by arsenic by a prior owner, Hi-Yield, which had also contaminated the adjoining property owned by a railroad. Enclean was hired to remediate the soils on the railroad property in response to a Texas Water Commission order.[143] The plaintiffs had refused to comply with a similar order, and instead, closed their furniture manufacturing business and abandoned the manufacturing facility.

The basis for the lawsuit was that Enclean had caused even more arsenic-containing soil to be transported in stormwater runoff onto plaintiffs' property.[144] There were two critical issues for the district court to decide in responding to the motion for summary judgment. The first issue was whether Enclean had presented sufficient proof to show that it had not contaminated plaintiffs' property, and the second issue was whether the plaintiffs had presented any evidence to contradict defendants' evidence. On appeal, the issues centered on the sufficiency of the expert affidavits and a factual dispute as to whether any arsenic-containing soils had washed onto plaintiffs' property as a result of Enclean's activities on the adjacent railroad property. Specifically, the plaintiffs' claim was that a heavy rainstorm washed the arsenic-containing soil onto the Cain prop-

141. 969 S.W.2d 464 (Tex. Civ. App.—Texarkana, 1998, pet. denied).

142. *See id.* at 464.

143. This agency is now known as the Texas Natural Resource Conservation Commission.

144. *See id.* at 466.

erty.[145] The plaintiffs urged that this was proved by the orange coloration left by ferrous sulfate used by Enclean on the adjacent property.

1. *Plaintiffs Are Required to Demonstrate a Causal Basis for Their Claims, Once the Defendant Submits Proof Challenging Causation*

Before discussing the actual issues on appeal, it is important to evaluate the elements of Cain's claims. As is typical in environmental tort cases, Cain asserted negligence, trespass, and nuisance claims. The elements of negligence include a breach of a legal duty that *proximately caused* an injury.[146] Trespass claims involve the entry in person or by a person allowing "a thing to cross the boundary of a property."[147] Finally, the appellate court listed three ways in which a nuisance may occur, only one of which the court concluded was relevant to the plaintiffs' claims: "physical harm to property, such as encroachment of a damaging substance . . . ."[148]

To show for purposes of its summary judgment motion that the plaintiffs could not prevail on these three causal elements of their claims, the defendants submitted two expert affidavits. The first affidavit was submitted by Davis L. Ford. Mr. Ford's affidavit set forth his educational background and his experience working at hazardous waste sites for over thirty years.[149] The affidavit listed an extensive list of documents he had reviewed, including the Texas Water Commission approved closure plan and ultimate approval of the closure of the site. The expert concluded there was nothing to indicate that any act of Enclean's activities had contaminated any adjacent property. Another affidavit was authored by Randy Tarpley, who opined there was no devaluation of the plaintiffs' property caused by Enclean's activities.[150]

2. *A Party Objecting to Expert Affidavits Must Show That the Affidavits Fail the Robinson Standard and Obtain a Written Decision from the Court in Order to Appeal an Adverse Ruling*

The trial court relied upon one or both of these affidavits in concluding that Enclean had offered proof that Cain could not meet the causal element of its causes of action. On appeal, the plaintiffs challenged these affidavits. The first issue involved the plaintiffs' failure to obtain a written ruling on objections to the affidavits. The plaintiffs also asserted that

145. *See id.* at 468.

146. *See id.* at 468 (citing Alm v. Aluminum Co. of America, 717 S.W.2d 588, 595 (Tex. 1986); Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex. 1990)).

147. *Id.* at 470 (citing Glade v. Dietert, 156 Tex. 382, 295 S.W.2d 642, 645 (1956)).

148. *Id.* (citing Ward v. Northeast Texas Farmers Co-op Elevator, 909 S.W.2d 143, 151 (Tex. App.—Texarkana 1995, writ denied); Maranatha Temple, Inc. v. Enterprise Products Co., 893 S.W.2d 92 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

149. *See id.* at 467.

150. *See id.* at 468.

the Ford affidavit did not list sufficient qualifications as an expert. Therefore, Ford's assertions were mere legal conclusions and not sufficient summary judgment evidence. The appellate court disagreed, holding that the affidavit sufficiently described Ford's education and thirty years of experience in the environmental engineering field.[151] The affidavit also listed the large number of documents that Ford reviewed in formulating his opinion.[152]

The court concluded that Ford had the sufficient level of expertise to opine on whether Enclean had exercised the proper standard of care.[153] The court also pointed out that in a case like this an expert is *required* because the standard of care involves a specialized area of science.[154] Guided by the recent Texas Supreme Court's decision in *E.I. du Pont de Nemours & Co., Inc. v. Robinson*,[155] the appellate court concluded that an expert must testify as to "whether appropriate procedures were used by the remediator."[156] The court ultimately decided that Ford's affidavit was proper summary judgment proof because it set out (1) his qualifications, (2) the relevant facts that he relied upon, and (3) his conclusions based upon those facts.[157]

With respect to Tarpley's affidavit, the appellate court denied the plaintiffs' challenge as well. The court stated that the plaintiffs did not identify any authority requiring the affiant "not only to state that he has such personal knowledge about the realty, but also to explain how he obtained the personal knowledge about the property."[158]

3. *If Expert Affidavits Are Not Defective, the Opposing Party Must Demonstrate Fact Issues to Defeat Summary Judgment*

In essence, the appellate court required the plaintiffs to show they had provided evidence that raised a factual controversy on the causation issue; that is, the plaintiffs were required to show arsenic-containing soil had migrated through rainwater onto the plaintiffs' property, in addition to the arsenic that was already present on the property, as a result of Enclean's activities.[159] The plaintiffs relied upon the fact that surface water had run off of the railroad property onto their property. Enclean had brought ferrous sulfate onto the railroad property to use in the remediation process. Part of the remediation process involved removal of the arsenic-containing soil. Another part of the remediation concerned the mixing of ferrous sulfate with soil left in place combined with additional clean soil brought from an off-site source. The Cains' sole ba-

151. *See id.* at 467.
152. *See id.*
153. *See id.* at 468.
154. *See id.*
155. 923 S.W.2d 549, 559-60 (Tex. 1995).
156. *Cain*, 969 S.W.2d at 468.
157. *See id.*
158. *Id.*
159. *See id.* n.11.

sis for arguing additional arsenic-containing soil washed onto their property was that the orange runoff colored by ferrous sulfate had stained their property.

Enclean, however, provided summary judgment proof that it did not engage in the earth moving activities that the plaintiffs alleged caused the soil migration until after the relevant heavy rainstorm. The ferrous sulfate was placed on the railroad property before the storm and before it was mixed with the soil left in place. The court also pointed out that Enclean had provided evidence that it excavated a twenty foot wide ditch to prevent runoff onto the adjacent property in the event of rain. Thus, in the court's view, the ferrous sulfate that washed onto the Cains' property did not contain any arsenic-containing soil that migrated as a result of Enclean's earth moving activities.[160]

Cain argued that he had met his burden of proof that additional arsenic-containing soil washed onto his property since water runs in a downhill pattern. The court, however, identified the flaw in this argument. The claims were filed against Enclean, not the owner of the property. In order to prevail against Enclean, the court required that the plaintiffs show something that Enclean did caused contaminated soil to migrate to the plaintiffs' property. The fact that it rained and contaminated soil had migrated did not create any claim against the non-owner of the property. In essence, the court was stating that no duty existed on Enclean's part to stop all runoff onto the plaintiffs' land. In addition, the court indicated at one point that a landowner downhill must accept runoff from the natural flow from higher ground.[161]

Cain testified that Enclean had disturbed the property prior to the relevant rainstorm. The appellate court found that this testimony was insufficient to raise a factual issue because Cain did not testify whether this area of the railroad property drained onto his property. Enclean had provided evidence that the only area of the railroad property that was disturbed prior to the rainstorm drained away from the Cains' property. The court noted that no other evidence was submitted by the plaintiffs to controvert Enclean's summary judgment evidence.[162]

The court specifically noted the fact that ferrous sulfate migrated onto Plaintiffs' property did not show that contaminated soil washed onto their property.[163] No soil analysis or other means of proving this occurred was provided by the Cains. The court would not accept the presumption that soil moved with the ferrous sulfate in the stormwater runoff.[164] The court also would not accept a second necessary presumption that if soil mi-

160. *See id.* at 469-70.

161. *See id.* at 469 (citing Bunch v. Thomas, 49 S.W.2d 421 (Tex. 1932); Jefferson Cty. Drainage Dist. No. 6 v. Lower Neches Valley Auth., 876 S.W.2d 940, 950 (Tex. App.—Beaumont 1994, writ denied)).

162. *See id.* at 469-70

163. *See id.* at 470.

164. *See id.*

grated onto the plaintiffs' property, it necessarily contained arsenic.[165]

Having failed to controvert Enclean's evidence that no additional contaminated soil ran off onto their property, the Cains failed to defeat Enclean's motion for summary judgment. Thus, the court upheld the district court's granting of summary judgment on the plaintiffs' claims for negligence, trespass, and nuisance.

C. The Duty to Subsequent Landowner for Dangerous Condition on Land Is Limited

An area of law frequently litigated in environmental tort cases is the question of what duty a prior landowner owes to subsequent owners of the land. This issue was the main point of contention in an appeal of a summary judgment awarded in favor of a prior landowner. In *Hicks v. Humble Oil and Refining Co.*,[166] subsequent landowners sued an oil company for alleged personal injuries. The plaintiffs claimed that these personal injuries were caused by drinking groundwater contaminated by crude oil that was stored in crude oil pits on the property.

The background of this case is not unlike other cases filed against oil companies by owners of property where crude oil was once stored in their pits. In 1921, Humble Oil and Refining Company, which is now Exxon Corporation (Exxon), purchased a 45-acre tract of land in Webster, Texas. Two pits were excavated and covered with wooden covers. The pits were used for the storage of crude oil. Subsequently, Exxon ceased using the pits and, in 1945, conveyed the property to Thomas H. Hicks (Hicks). Hicks was aware that the pits were present on the property and that crude oil had been stored in the pits. While the deed did not mention the pits, Hicks had signed an affidavit in 1958 in which he stated that he was aware of the pits and that they were used to store crude oil. No evidence was presented by the plaintiffs that Hicks was not aware of the pits or the storage of crude oil. Plaintiffs argued, however, that Hicks was never notified of contamination of the land and that Hicks, as an uneducated man, was not aware of the toxic contamination that could arise from such pits.[167]

1. A Seller of Land Is Not Liable for Claims for Dangerous Conditions on Land After Sale Unless the Seller Does Not Disclose or Actively Conceals the Existence of the Condition

The Fourteenth District Court of Appeals in Houston considered the fundamental issue of whether *any* duty was owed for subsequent physical injuries by a seller of land to the purchaser or other parties once the land is sold. The general rule cited by the court is that a vendor of real prop-

165. *See id.*
166. 970 S.W.2d 90 (Tex. App.—Houston [14th Dist.]1998, pet. denied).
167. *See id.* at 93.

erty is generally not liable for injuries caused by "dangerous conditions" present on the property after title to the property is conveyed by the vendor.[168] The exception cited by the court is when a dangerous condition is present on the property at the time of conveyance and the seller "does not disclose or actively conceals the existence of the condition."[169] However, this exception does not apply when "the vendee discovers or should have discovered the dangerous condition and has a reasonable opportunity to take precautions, or when the vendee has actual notice of the condition."[170] The interesting aspect of the case is that plaintiffs argued that actual notice was required of the *contamination* or the toxicity of the contamination, not the mere presence of the *pits*. They argued that Exxon did not disclose the contamination that might arise from the pits.

The court, however, did not adopt this reasoning. The court noted no cases had been cited that held the resulting danger from conditions on property is what must be disclosed, or for which the buyer of land must receive notice, rather than the condition itself.[171] In other words, the *Hicks* court considered the oil pits to be the dangerous condition.[172] On this basis, the court ruled, per *First Financial*, that no duty was owed Hicks or the other plaintiffs and summary judgment on this basis was proper.[173]

2. *Negligence Per Se Is Inapplicable Because the Texas Water Pollution Act of 1961, the Texas Water Quality Act of 1957, Chapter 26 of the Texas Water Code, the Texas Clean Air Act of 1987, and the Texas Sanitation and Health Act Do Not Apply Retroactively to Activities Occurring Before Their Passage into Law*

The next issue the court addressed was whether Exxon was liable under a negligence per se claim.[174] As the basis for their negligence per se claims, the plaintiffs cited several statutes and a Texas Railroad Commission rule that they claimed Exxon violated.[175] The first step in the court's analysis was to review the statutes that the plaintiffs claimed Exxon violated. The statutes were the Texas Water Pollution Control Act of 1961, the Texas Water Quality Act of 1957, Chapter 26 of the Texas Water Code, the Texas Clean Air Act of 1987, and the Sanitation and Health

168. *See id.* at 93 (citing First Fin. Dev. Corp. v. Hughston, 797 S.W.2d 286, 291 (Tex. App.—Corpus Christi 1990, writ denied)).

169. *Id.* (citing *First Financial*, 797 S.W.2d at 291).

170. *Id.* (citing *First Financial*, 797 S.W.2d at 291-92). The court in *First Financial* cited Section 353(2) of the RESTATEMENT (SECOND) OF TORTS. However, as the court in *Hicks* noted, the Texas Supreme Court has not yet adopted Section 353 of the Restatement because it concluded that Section 353 did not apply to the facts of the particular case in which the issue arose. *See Hicks*, 970 S.W.2d at 93 (citing Lefmark Management Co. v. Old, 946 S.W.2d 52, 54 (Tex. 1997)).

171. *See Hicks*, 970 S.W.2d at 93-94.

172. *Id.* at 94.

173. *Id.*

174. *Id.*

175. *See id.*

Act of former article 4477-1 of 1987.[176]

The court addressed these statutes by considering whether they were retroactive in application to activities that occurred before 1945. The court concluded that statutes are presumed by courts not to be retroactive "unless it is clear from a fair reading of the statute that the legislature intended it to apply to both past and present controversies."[177] The court also cited Section 311.022 of the Texas Government Code, which states "a statute is presumed to be prospective in its operation unless expressly made retrospective."[178] The court then cited a prior Texas appellate court decision that held that "a statute is retroactive and prohibited if it impairs vested rights acquired under existing laws."[179] The court applied these tests in reviewing the environmental statutes cited by the plaintiffs. It concluded that the statutes did not provide any language that would retroactively apply their prohibitions or restrictions "to Exxon's use of the land in the 1920's."[180]

3. *Negligence Per Se Does Not Apply Where the Statute or Regulation Was Not Intended to Protect the Class of People That Includes the Plaintiffs*

The court then turned to a review of Rule 39 of the Railroad Commission order.[181] This rule provided that storage of oil in open earthen pits is prohibited unless the Commission grants special permission in an order in response to an unforeseen emergency.[182] The Rule further stated that where such storage is occurring at the time the rule was effective, it was required to be discontinued within a reasonable period of time.[183] This rule was adopted in 1920.[184] Exxon argued that this rule was designed to prevent the waste of oil and gas and not to protect human health.[185] Exxon concluded that this rule could not then serve as a basis for a negligence per se claim because the plaintiffs were not within the class for whom the rule was designed to protect.[186]

The Texas Supreme Court has adopted the concept of negligence per se found in the Restatement (Second) of Torts Section 288B (1965).[187] Under this rule, a court must adopt the statute or administrative regulation as the standard of care.[188] But the Houston appellate court did not

176. This statute is now codified in the TEX. HEALTH & SAFETY CODE ANN. § 341.001 *et seq.* (Vernon 1992).
177. *Hicks*, 970 S.W. 2d at 94 (citing *Ex Parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981)).
178. TEX. GOV'T CODE ANN. § 311.022 (Vernon 1992).
179. *Id.* (citing Trahan v. Trahan, 894 S.W.2d 113, 118 (Tex. App.—Austin 1995, writ denied), *cert. denied*, 517 U.S. 1155 (1995)).
180. *Id.*
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*
186. *See id.*
187. *See id.* (citing Southern Pac. Co. v. Castro, 493 S.W.2d 491, 497 (Tex. 1973)).
188. *See id.*

find any court that had adopted rule 39 as the standard of care.[189] Citing Texas Supreme court precedent, the Houston appellate court stated that a court will not adopt a statute or regulation as the measure of the standard of care unless it is designed to protect from the particular hazard the class of persons of which the plaintiff is a member.[190] Under this analysis, the appellate court ruled that Rule 39 was promulgated by the Railroad Commission under statutory provisions and in the context of efforts to prevent waste of and to conserve oil and gas in Texas.[191] The plaintiffs therefore did not fall within the class of people to be protected, and the hazard complained of did not qualify as the problem Rule 39 was designed to address.[192] The court then upheld the grant of summary judgment as to the plaintiffs' claim of negligence per se.[193]

4. *Landowner Cannot Bring Nuisance Claims Against a Former Owner of the Same Property*

As mentioned in the previous discussion of the *Cain* case, nuisance is a frequent cause of action in environmental tort suits. Where suit is filed by a party who purchased the property from the defendant or a subsequent landowner, a particular difficulty arises when attempting to maintain this theory of recovery. In the *Hicks* case, the plaintiffs alleged nuisance as one of their causes of action.[194] Exxon cited *Jones v. Texaco, Inc.*[195] for the proposition that a current landowner cannot maintain a claim of nuisance against a prior landowner for activities occurring on the property when the prior landowner held title.[196] In *Jones*, Texaco had disposed of oil sediment and other wastes in earthen pits on land at the time Texaco had owned the land. At the time Jones purchased the land from Texaco, the pits were apparently covered and waste did not begin to seep out until after the sale was complete. Jones filed suit claiming negligence, gross negligence, and strict liability. While the court in *Jones* did not recognize the doctrine of strict liability in the context of an environmental suit, the court ruled that Texaco "was not responsible for harming land it owned at the time it engaged in the offensive activity."[197] Considering the *Jones* case as relevant precedent, the *Hicks* court upheld Exxon's summary judgment on the grounds that a nuisance claim required harm to land of another, not land it owned.[198]

189. *See id.* (citing Carter v. William Sommerville and Son, Inc., 584 S.W.2d 274, 278 (Tex. 1979); Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201, 205 (1959); Moughon v. Wolf, 576 S.W.2d 603, 604 (Tex. 1978)).

190. *See id.* at 95 (citing Nixon v. Mr. Property Management, 690 S.W.2d 546, 549 (Tex. 1985)).

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.* at 92.

195. 945 F. Supp. 1037, 1051 (S.D. Tex. 1996).

196. *See Hicks*, 970 S.W.2d at 96.

197. *Hicks*, 970 S.W.2d at 96 (quoting *Jones*, 945 F. Supp. at 1051-52).

198. *See id.*

5. *Strict Products Liability Does Not Apply to Claims for Oil Stored in Pits*

For a similar reason, the court rejected the plaintiffs strict liability claims. As in *Jones*, the *Hicks* court concluded that the harm must be to another party even if Texas courts had adopted strict liability under the products liability doctrine or abnormally dangerous activities sections of the Restatement (Second) of Torts.[199] More importantly, as the federal district court held in *Jones*, the *Hicks* court ruled that Texas courts have not adopted Sections 402A involving products liability in cases where oil has been stored in pits and that the abnormally dangerous activities provision under Sections 519 and 520 of the Restatement had not been adopted by Texas courts either.[200]

Without some other claim, the Houston court of appeals ruled that no basis for liability had been pled by the plaintiffs that survived Exxon's motion for summary judgment. Thus, the trial court's judgment was affirmed.

The court's analysis of the issues of the harm done to property by a seller or prior owner of real property is consistent with a majority of other Texas case law. Another aspect that was not discussed is the law of *caveat emptor*, which still applies in Texas to sales of real property. The analysis of the "dangerous conditions" issue is similar to the law of *caveat emptor*. The dangerous conditions cases and the Restatement (Second) of Torts Sections 351-353 appear to address personal injury to a buyer or third parties after purchase of the lands. In *Cain*,[201] the plaintiffs sought relief for alleged personal injuries purportedly caused by consuming contaminated groundwater. An interesting question would be whether the same analysis would apply to claims for diminution in property values or to recover environmental remediation costs.

Another interesting aspect of the court's decision involved the implication for retroactive liability under other environmental statutes. Federal courts have determined that, despite the lack of express language in the statute, the structure of the statute and its legislative history demonstrated a clear Congressional intent that liability under the federal Comprehensive Environmental Response, Compensation and Liability Act[202] (known as the "Superfund" statute), for example, should be applied retroactively.[203] While this may be a convenient rationalization to avoid laws prohibiting retroactive effect and constitutional infirmity, this is generally how federal courts have used the federal Superfund statute to impose liability for remediation of contamination resulting from actions that occurred decades before the statute was passed.[204] The *Hicks* case raises

199. *See id.* at 97.
200. *See id.* at 97.
201. 969 S.W.2d at 464.
202. 42 U.S.C. § 9601-9675 (1998).
203. *See, e.g.* United States v. Olin Corp., 107 F.3d 1056, 1511-15 (11th Cir. 1997).
204. *See id. But see* Superfund: Asarco seeks Dismissal of $1 Billion Suit, Citing Recent Decision on Retroactivity 29, BNA Envt'l Rep. 1107 (Oct. 2, 1998) (reporting arguments

questions as to whether Texas courts will interpret Texas statutes to allow such a retroactive effect.

V. ENVIRONMENTAL CONTRACT PROVISIONS

A. For Purposes of an Indemnity Agreement, a Claim Does Not Accrue Until the Statute Creating the Cause of Action is Enacted.

In *Fina, Inc. v. Arco*,[205] the United States District Court for the Eastern District of Texas held that, under Texas law, an indemnification provision in a sales agreement signed in 1973 covered liability for cost recovery actions brought under the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA).[206] Whether the indemnity provision covered liability under the Resource Conservation and Recovery Act (RCRA), the Texas Solid Waste Disposal Act, and the Texas Water Code was not contested. But the federal district court noted the *Hicks* opinion, which concluded that the Texas environmental statutes listed above only applied prospectively, not retroactively to acts or omissions occurring before enactment of the statutes.[207] The court granted summary judgment to the defendants on the CERCLA claims, holding that the indemnity provided by Fina, the purchaser of the refinery, covered the CERCLA claims Fina filed against the seller and the other prior owner whom the seller had indemnified. This decision was based on the conclusion that the language of the indemnity applied to claims that accrued after the sale, and any CERCLA claim could only accrue when CERCLA was enacted seven years after the sales agreement was executed.[208]

The background of this case is important in understanding how the court addressed the issue. Defendant Atlantic Ritchfield Corporation (Arco) constructed an oil refinery in the 1920s. It sold the refinery in 1968 to British Petroleum, Inc. (BP) and Sohio Pipeline Company (SPL). In 1973, BP and SPL sold the refinery to Fina, Inc. (Fina) as part of an asset sale.[209] The indemnification provision that was part of the 1973 asset sales agreement read as follows:

> Fina shall indemnify, defend, and hold harmless BP and SPL against all claims, actions, demands, losses or liabilities arising from the use or the operation of the Assets, or arising under or relating to any lease, contract, license or other agreement assigned to or assumed by

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that the U.S. Supreme Court's ruling in Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) renders the Superfund law unconstitutional if applied retroactively).

205. 16 F. Supp. 716 (E.D. Tex. 1998).

206. *See id.* at 726.

207. *See id.* at 721 n.8.

208. *See id.* at 721.

209. *See id.* Also a plaintiff in the lawsuit was Fina, Inc.'s successor-in-interest, Fina Oil and Chemical Company. The 1973 sales agreement provided that it would be binding upon Fina, Inc.'s successors and assigns. *See id.*

Fina or a subsidiary of Fina and accruing from and after closing.[210]

Fina ultimately assigned the agreements or assets to another Fina-related company. The sales agreement between Arco and BP and SPL contained virtually identical indemnity language to the indemnity language between Fina and BP and SPL. This created, in the court's view, a circular indemnity between Arco, BP, SPL, and Fina.[211] The court held that Fina's indemnity passed through BP to Arco,[212] but also noted that BP and Arco had stipulated that any obligation to indemnify Arco belonged, in turn, to BP.[213] Fina contended that it only became aware of certain areas of contamination at the refinery in 1990 and brought an action to recover costs of clean-up.[214] Fina alleged that the contamination was caused by the activities of Arco, BP, and SPL at the refinery from sometime between the 1920's until the date of closing in 1973.[215] Both the defendants and the plaintiffs filed motions for summary judgment and the defendants filed a motion to dismiss. The court ruled on the motion for summary judgment in favor of defendants under the indemnity agreements.[216]

In analyzing the construction of the indemnities, the court first considered whether the doctrines of "express negligence" and "express strict liability" applied to the indemnity language at issue.[217] These doctrines require that contract provisions purporting to indemnify the indemnitee against its own negligence or strict liability must express this intent in specific terms within the contract's four corners.[218] The court concluded that these doctrines did not apply because the doctrines generally only apply to indemnity language that attempts to relieve a party of its liability in advance for *future actions*.[219] The court determined that the oil companies had drawn a "bright line" dividing liability accruing before and after the date of closing, and it was clear that the parties had not intended the indemnity provisions (which, after all, were drafted by "sophisticated businessmen, international oil companies, and corporate attorneys") to apply to future acts.[220] The *Fina* decision did not include a discussion of how the indemnity language at issue would have been analyzed had the doctrines been held to apply.

Although the *Fina* court's holding may have applied to the plaintiff's cost recovery claims brought under the Resource Conservation and Recovery Act (RCRA), the Texas Solid Waste Disposal Act, and the Texas

210. *Id.*
211. *See id.* at 719.
212. *See id.* at 726.
213. *See id.* at 720.
214. *See id.* at 720.
215. *See id.*
216. *See id.* at 719.
217. *Id.* at 721-22.
218. *See id.*
219. *See id.* at 722 (citing Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 387 (Tex. 1996); Dresser Industries, Inc. v. Page Petroleum Inc., 853 S.W.2d 505, 507 (Tex. 1993)).
220. *Id.*

Water Code, the defendant's argument was rooted in—and the *Fina* court limited its explicit analysis to—the plaintiff's CERCLA claims.[221] The Fina court cited a Fifth Circuit decision for the proposition that, if the intent of the parties is manifested in broad enough language, an indemnity provision entered into prior to the enactment of CERCLA could apply to CERCLA liability.[222]

Key to the district court's decision granting summary judgment for defendants in *Fina* was the question of when the cause of action "accrued." As the purported conduct by the sellers occurred well before the enactment of the environmental statutes under which the purchaser's clean-up liabilities arose, the purchasers claimed that the term "accruing" referred to "complet[ion] of the factual predicates or actions leading to subsequent liability."[223] Ultimately, it was held that the claim accrued when the legal right to file suit came into existence, i.e., when the statutes authorizing the claims were enacted.[224]

As the nature of environmental contamination is such that it may be discovered years, or even decades, after the actions that caused it, the *Fina* case provides important guidance on how typical indemnification provisions, which may have themselves been drafted long before the major state and federal environmental laws were enacted, may be interpreted under Texas law. In reviewing prior indemnities or drafting new indemnities that may cover environmental claims, it is important to consider this case. A practitioner should be careful to consider this court's interpretation of "accrue" and perhaps use language that addresses any claims arising from *conditions* existing *at or before* the time of closing and *conditions* existing *after* closing. Fina interpreted the indemnity it had given to BP and SPL to apply to all condition existing on or before closing. The court concluded that this would only apply to causes of action for such conditions that accrue after closing.[225] Interestingly, if the discovery rule applied to claims for pre-closing conditions, then arguably, the buyer, rather than the seller, would be liable for all claims discovered after the closing.

221. *See id.* at 721, 722 n.11, 726.

222. *See id.* at 721 (citing Joslyn Mfg. Co. v. Koppers Co., Inc., 40 F.3d 750 (5th Cir. 1994)).

223. *Id.* at 721.

224. *See id.* at 722-23, 726 (citing Ferguson v. Johnston, 320 S.W.2d 906, 911 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.); Hensley v. Conway, 29 S.W.2d 416 (Tex. Civ. App.—Eastland 1930, no writ)). While noting that state law governs the interpretation of indemnification provisions, and that the 1973 sales agreement contained a Delaware choice-of-law provision, the court found that the result would be the same whether Delaware or Texas law applied.

225. *Fina*, 16 F. Supp. at 726.

VI. ENVIRONMENTAL LIABILITY OF CORPORATE SHAREHOLDERS

A. Shareholders Who Siphoned off Assets of a Corporation Found Liable for Plugging and Abandoning Costs under Theory That They Operated the Corporation as a Sham to Perpetrate a Fraud

Love v. State[226] affirmed a district court's decision holding former shareholders and directors of a corporation individually liable for the corporation's failure to plug inactive oil and gas wells.[227] This case provides an important analysis of how the "corporate veil" can be pierced to impose liability on individuals for pollution caused by corporations in which the individuals hold or previously held an interest.

Love v. State centered around a corporation, Sopresa Petroleum, Inc. (Sopresa), owned and operated by the appellants, Jeff L. Love and Daniel L. Welch.[228] The evidence presented at trial suggested that the wells on two of the leases owned and operated by Sopresa—those on two leases, one known as the VIM lease and one known as the Klein lease—were inactive as early as 1982.[229] In contrast, a third lease owned by Sopresa, known as the "Ogden lease," was evidently producing in marketable quantities. In 1984, and again in March and October of 1986, the Texas Railroad Commission sent notices to Sopresa of several violations of the Commission's rules at the VIM and Klein locations, including failure to plug abandoned oil wells and to cleanups, oil spills and pollution.[230] Then, in December of 1986, Sopresa sold its interest in the "Ogden lease" to a different company, Calidad Petroleum, which was also owned by the appellants.[231] The remaining assets of Sopresa were the VIM and Klein leases. Additionally, days after the sale of the Ogden lease, the appellants sold Sopresa to a third party for $1000.[232]

In 1988, the Railroad Commission sent Sopresa notice of a formal hearing for the violations on the VIM lease. In 1992 the Commission did the same for the Klein lease.[233] The Railroad Commission then plugged and abandoned all the wells and attempted to assess administrative penalties.[234] Because these efforts apparently failed, a lawsuit was filed by the state against Sopresa, Love, and Welch.[235] As to the individual liability of Love and Welch, the state advanced three theories: (1) that Love and Welch, in failing to file a franchise tax report, were liable pursuant to

226. 972 S.W.2d 114 (Tex. Civ. App.— Austin 1998, pet. denied).
227. *See id.*
228. *See id.*
229. *See id.*
230. *See id.* at 115-16.
231. *See id.* at 116.
232. *See id.*
233. *See id.*
234. *See id.*
235. *See id.*

Section 171.255 of the Texas Tax Code; (2) the corporation was an alter ego of the individual owners; and (3) the corporation was operated as a sham to perpetuate a fraud.[236]

On appeal, the court concluded that Love and Welch could not be held liable for their failure to file a tax report, because the jury did not find that Love and Welch were shareholders, officers, or directors when the final administrative orders were issued or when the wells were plugged.[237] The jury did find, however, that both Love and Welch had operated the corporation as a sham to perpetuate a fraud and that Love had been the alter ego of Sopresa.[238]

This split result spawned the first issue considered on appeal: whether the jury finding on the tax code issue was in fatal conflict with the jury finding on the sham to perpetuate a fraud and alter ego theories.[239] Specifically, the appellants claimed that the jury's failure to find that the appellants were shareholders, officers, and directors on the specific dates of the final administrative orders and well pluggings could not be reconciled with the finding that the appellants used Sopresa as a sham to perpetuate a fraud and that Love was Sopresa's alter ego.[240]

In addressing this issue, the court relied upon the Texas Supreme Court case of *Bender v. Southern Pacific Transportation Co.*[241] *Bender* held that when a court reviews jury findings for conflict, the threshold question is whether the findings are about the same material fact.[242] The appeals court, however, noting that there were many prior cases where individuals had been "held liable under the sham theory long after the corporation in which the individual had some prior interest is dissolved, bankrupt, or sold," held that the "shareholder status of the individual at the time liability is assessed or at the time the [Railroad] Commission's orders became final is not a prerequisite to liability under the sham-to-perpetuate-a-fraud theory."[243] With respect to the alter ego theory applied to Love, the court saw no need to decide the fatal conflict allegation, since the sham to perpetuate a fraud theory was a valid, separate basis to hold Love liable.[244] But the court, in citing *Stewart & Stevenson*

236. *See id.*

237. *See id.* at 117. Section 171.255(a) of the Texas Tax Code provides in part that "[i]f the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or penalty, each *director or officer of the corporation* is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." TEX. TAX. CODE ANN. § 171.255(a) (Vernon 1998) (emphasis added).

238. *See Love*, S.W.2d at 116-117.

239. *See id.* at 117.

240. *See id.*

241. 600 S.W.2d 257, 260 (Tex. 1980).

242. *See Love*, 972 S.W.2d at 117 (quoting *Bender*, 600 S.W.2d at 260).

243. *Id.*(citing Huff v. Harrell, 941 S.W.2d 230, 234 (Tex. App.—Corpus Christi 1996, writ denied); Seaside Indus., Inc. v. Cooper, 766 S.W.2d 566, 569-70 (Tex. App.—Dallas 1989, no writ)).

244. *See id.*

v. Serv-Tech, Inc.,[245] implied that the court may have reached a different result on the fatal conflict issue with regard to the alter ego theory.[246]

The next issue considered on appeal was whether it was necessary for there to be evidence that Love and Welch were actually shareholders.[247] The appellate court determined that no such evidence was necessary, since there was no dispute that Love and Welch were shareholders, officers, and directors for the relevant time.[248] Following the logic applied to the fatal conflict issue, the court held that the appellants "cannot escape liability merely because they were no longer in those positions when the wells were plugged or the final orders entered."[249]

Third, the appeals court considered whether evidence of actual fraud was necessary in order for the appellants to be held liable under the sham to perpetuate a fraud theory.[250] Both appellants and the appellate court focused their attentions on Article 2.21 of the Texas Business Corporation Act, which states:

> A holder of share[s], an owner of any beneficial interest in shares, . . . or any affiliate thereof or of the corporation shall be under no obligation to the corporation or its obligees with respect to: any contractual obligation of the corporation or any matter relating to or arising from the obligation on the basis that the holder, owner, subscriber, or affiliate is or was the alter ego of the corporation, or on the basis of actual fraud or constructive fraud, a sham to perpetuate a fraud, or other similar theory, unless the obligee demonstrates that the holder . . . did perpetuate an actual fraud on the obligee. . . .[251]

The court's view was that this language required that an actual fraud be proven only with respect to claims for contractual obligations.[252] The court concluded that debts arising from the State's claims relating to violations of rules for the prevention and control of pollution and for reimbursement of plugging expenses are "fundamentally different from contractual obligations."[253] Thus, no finding of actual fraud was required.[254]

Finally, the appellants made a general challenge to the sufficiency of the evidence that there was in fact a sham to perpetuate a fraud. The court, however, pointed to the evidence that Love and Welch, "on behalf

245. 879 S.W.2d 89, 108 (Tex. App.—Houston [14th Dist.] 1994, writ denied). The *Love* court cited this case for the proposition that if the "basis for disregarding [the] corporate fiction is alter ego[,] it is necessary that there be some financial interest, ownership, or control by [the] individual sought to be held liable for [the] tort of the corporation." *Love*, 972 S.W.2d at 117 n.3.

246. *See Love*, 972 S.W.2d at 117 n.3.

247. *See id.* at 117.

248. *See id.*

249. *Id.*

250. *See id.*

251. TEX. BUS. CORP. ACT ANN. art. 2.21 (Vernon 1980 & Supp. 1998); Love v. State, 972 S.W.2d at 117-18.

252. *See Love*, 972 S.W.2d at 118.

253. *Id.* (quoting Serna v. State, 877 S.W.2d 516, 519 (Tex. App.—Austin 1994, writ denied)).

254. *See id.*

of Sopresa, [had] transferred to their other company, Calidad, Sopresa's most valuable asset, the Ogden lease, shortly after the [Railroad] Commission sent notice of the violations and just days before they allegedly sold Sopresa to [the third party in 1986]."[255] Love and Welch disputed evidence that they were aware of the regulatory violations on the leases before this sale. Nevertheless, the court noted:

> The [Railroad] Commission had notified appellants that their wells were in violation of the law. The jury could have reasonably concluded that any sale of the corporation was part of a sham to perpetuate a fraud upon the [Railroad] Commission by selling a company with thousands of dollars of potential liabilities in penalties and very few assets. On the other hand, the jury may have believed appellant's testimony that they were not aware of the violations until 1988 because they had not been out to the oil-well sites for several years. This irresponsibility and neglect of a potential environmental hazard may have led the jury to find Love and Welch ignored their statutory obligations because they thought they could hide behind the corporate veil.[256]

The court concluded that the evidence was sufficient for the jury to conclude that the defendants manipulated the corporate form for the purpose of avoiding the statutory obligations that were imposed upon the closely held corporation.[257] The court cited other decisions in which shareholders had taken steps to "siphon off revenues and sell assets, or do other acts to hinder the company's ability to pay its debts, such as start up a new business with the same shareholders."[258]

In upholding the jury finding and district court judgment on the issue of operating a corporation as a sham to perpetuate a fraud,[259] the opinion raises concerns about the extent to which a shareholder must maintain assets in a company when it has received notice of potential environmental liabilities. Perhaps the facts of this case were fairly obvious to this appellate court. But in today's corporate environment where companies are bought and sold, corporate structures are changed in terms of rearranging corporate parents and subsidiaries, continuing creation of new partnerships, limited liability partnerships, and limited liability corporations, a broad application of the sham theory would seem inappropriate. Where corporate structures are changed for a variety of reasons, such as from the sale of operations that are no longer seen as being part of a specific entity's "core business," to tax reasons, etc., applying this theory too liberally could lessen the long-time protection that the corporate veil has provided shareholders. The holding suggests that individuals or business firms may not be blatant about stripping the assets of a business entity when claims have been asserted for environmental liabilities.

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255. *Id.* at 119.
256. *Id.* at 120.
257. *Id.* at 120.
258. *Id.* at 120.
259. *See id.* at 121.