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Drilling for Damages: Common Law Relief in Oilfield Pollution Cases

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DRILLING FOR DAMAGES: COMMON LAW RELIEF IN OILFIELD POLLUTION CASES

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I. INTRODUCTION

DOING business in America is becoming more and more of a challenge. Congress and the various state legislatures continue to generate volumes of laws, which are then detailed and implemented by the numerous federal and state agencies through more volumes of regulations. The oil and gas industry certainly has not escaped the strong arm of government. Industry operations have been significantly impacted by federal and state statutes and regulations and are likely to be only more so in the foreseeable future. The sobering potential for fines and penalties under the various federal and state regulatory schemes has created great financial exposure for oil exploration and production companies. In addition to this real intimidation by regulation, the oil and gas industry is also having to defend itself against a second offensive from the environmental movement, which could prove to be just as costly.

A trend has been developing in certain oil and gas producing states that should give concern to companies with past or present operations in those states. This additional challenge has provided the perfect context in which to allege natural resource damage from current or historical oilfield operations and obtain significant settlements and judgments.

Hundreds of oilfields throughout Texas, Oklahoma, Louisiana, New Mexico, California, Kansas, and Colorado have operated for decades. Older fields sometimes show their age in the form of older equipment, abandoned tanks and lines, and little or no vegetation in the immediate areas of operation. Older fields also often mean that the mineral owners have long since died or moved away, and that the current owners or occupants of the surface have no financial interest in the production. Consequently, the surface owner is often in a state of perpetual irritation at the presence of oilfield equipment on his or her property that reduces the amount of acreage available to the owner for farming, grazing cattle, or other uses that are more desirable. Even where the surface owner is also a royalty owner, the owner's

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share of the royalties typically is nominal, and declining production means the share will only get smaller. This absence of a financial stake in continuing production, coupled with a likely irritation over the oil company's interference in the surface owner's activities, essentially creates a volatile environment from which litigation almost inexorably is born.

The plaintiffs' bar is slowly discovering that bringing private pollution actions, using traditional common law theories, against oil companies on behalf of landowners is a more efficient, and often more lucrative, way to pursue these claims than by trying to avail themselves of citizen suit provisions or other forms of relief contained in the various federal and state environmental laws. There is a somewhat unholy alliance between the ever-increasing number of statutes and regulations and the familiar common law causes of action. Each new statutory or regulatory requirement sets a new standard against which a defendant oil company's operations can be measured. The arguable scientific basis for any new law becomes irrelevant, and the defendant, to a large extent, becomes the helpless victim of a plaintiff that has bootstrapped a regulation into a private cause of action for negligence.

There are also other common law causes of action that are used by plaintiffs pursuing property damage and personal injury claims resulting from alleged pollution caused by oilfield operations. These traditional theories are being dusted off and retooled for new and improved application in these times of strident environmentalism.

The media have also noticed these developments and have reported that oilfield pollution is yet one more example of how American industry is poisoning our nation's land and its people. Without much effort, the average man on the street is conditioned to believe that oilfield operations are evil and should be abolished from the land, without much consideration for the countless benefits generated by the oil and gas industry. As a result, you often read statements like: "Huge patches of West Texas have become oilfield deserts, because for years the saltwater that is a result of oil production was released to flow across the land, leaving it bare."[1] Statements like this are quite an exercise in hyperbole and would lead one to believe that West Texas, without oilfields, would otherwise be a lush and verdant land. Also heard are statements like: "For years, toxic waste from oil fields has been spilling onto ranches and farmland and into rivers and coastal bays, contaminating both rural and urban drinking water."[2] The average listener inescapably envisions a tidal wave of black poison covering the countryside. Planting these thoughts in the minds of the general population, from whom juries will be chosen, makes environmental litigation a rather ominous prospect for oil companies.

One particular kind of case that has been in vogue since the mid-1980s is alleged groundwater contamination by chlorides (i.e., salt) resulting from

1. Robert Bryce, *More Precious Than Oil*, TEX. MONTHLY, Feb. 1991, at 108.

2. *Morning Edition: Oil Waste Disposal a Problem in Southwest* (National Public Radio broadcast, Apr. 13, 1992).

contamination of the freshwater zone with produced water associated with the production of oil and gas. Groundwater, as a natural resource, is highly valued, especially in arid climates like the Permian Basin, where oil and gas operations are pervasive. As a result, suits can become highly volatile because of the scarcity of freshwater. Cattle ranchers have vigorously prosecuted these claims, proclaiming that freshwater is more precious than oil.[3] As one article described the trend, "[h]aving polluted water, a good lawyer, and a pending lawsuit against a major oil company has become a tradition in West Texas."[4]

II. THEORIES AND PRACTICE

A. THEORIES OF RECOVERY

Suits are being filed and cases are being tried. These are the theories that are being used.

1. Nuisance

By far, this cause of action tends to be the most popular in groundwater contamination cases simply because the plaintiff need not prove the defendant's negligence to recover damages.[5] Instead, the plaintiff need only establish that the defendant has unreasonably interfered with the plaintiff's enjoyment of his or her property:[6] "A nuisance does not rest on the degree of care used, but on the degree of danger or annoyance existing even with the best of care."[7] In Texas, it is clear that a private nuisance claim can support an allegation of property damage and personal injury caused by pollution.[8]

Oilfield operations themselves, however, do not constitute a nuisance. There must be a material or substantial injury to a person of ordinary health and sensibilities in that particular locale.[9] Characterizing an oilfield operation as a nuisance typically results from the manner in which the activity is conducted.

The nuisance theory has been likewise pursued in other jurisdictions, such as Colorado,[10] Kansas,[11] and Oklahoma.[12] In Oklahoma, for example, the theory has been defined by statute.[13] Traditionally, the determination of nuisance turned in large part on whether the activity complained of was common to the area, as in the case of oil and gas exploration and production

3. Bryce, *supra* note 1, at 108.
4. *Id.*
5. Manchester Terminal Corp. v. Texas TxTx Marine Transp., Inc., 781 S.W.2d 646, 651 (Tex. App.—Houston [1st Dist.] 1989, writ denied).
6. *Id.*
7. *Id.* at 651.
8. Stanolind Oil & Gas Co. v. Smith, 290 S.W.2d 696 (Tex. Civ. App.—Beaumont 1956, no writ).
9. Vestal v. Gulf Oil Corp., 149 Tex. 487, 235 S.W.2d 440 (1951).
10. Miller v. Carnation Co., 516 P.2d 661 (Colo. Ct. App. 1973).
11. Miller v. Cudahy Co., 858 F.2d 1449 (10th Cir. 1988).
12. Briscoe v. Harper Oil Co., 702 P.2d 33 (Okla. 1985).
13. OKLA. STAT. tit. 50, § 1 (1988 & Supp. 1994).

in a producing state like Texas. The more common the activity, the less likely it would be considered a nuisance.[14] As the environmental movement grows and toleration of the oil and gas industry wanes, however, it is likely that yesterday's economic accommodation will become tomorrow's nuisance.

In addition to a claim of private nuisance, plaintiffs sometimes assert a claim of public nuisance. Plaintiffs usually find it difficult to sustain a claim of public nuisance because the act complained of must be shown to interfere with the right of the community at large.[15] Where the plaintiff is able to sustain such a cause of action, however, he or she is able to avoid the potentially significant impact of the statute of limitations.[16] Typically, public policy prohibits the applicability of the statute of limitations to a public nuisance.[17]

The traditional remedy is the cost of abatement or abatement of the nuisance itself.[18] Generally, plaintiffs in these cases are not as interested in seeing the nuisance abated as they are in recovering damages based on the estimated cost of abatement. The traditional measure of damages in property damage cases is the diminution in value of the property caused by the nuisance.[19] Currently, however, abatement costs usually far exceed the diminished value and, indeed, the total value of the property prior to injury. Although the traditional rule limits recovery to the diminished value, plaintiffs are arguing for removal of, and courts are finding ways to circumvent, such a cap.[20] Cases are being settled for sums of money that would indicate that the potentially greater financial exposure associated with abatement that exceeds the value of the property is a principal consideration for defendants.

Nuisance claims also permit recovery of punitive damages,[21] which may be limited in different ways from state to state. In Texas, a statute limits recovery to four times the actual damages or $200,000, whichever is greater, unless the plaintiff proves malice or an intentional tort, in which case no cap applies.[22] In Oklahoma, a punitive damage award may not exceed the amount of the actual damage award, unless the court finds clear and convincing evidence of wanton or reckless conduct, fraud, or malice on the part

14. Humble Pipe Line Co. v. Anderson, 339 S.W.2d 259, 265 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.).

15. Ballenger v. City of Grand Saline, 276 S.W.2d 874, 875 (Tex. Civ. App.—Waco 1928, writ ref'd).

16. *See, e.g.*, OKLA. STAT. tit. 50, § 1 (1988 & Supp. 1994).

17. *See id.* § 7; City of Corsicana v. King, 3 S.W.2d 857 (Tex. Civ. App.—Waco 1928, writ ref'd).

18. *But see* OKLA. STAT. tit. 50, § 6 (1988 & Supp. 1994) (specifically providing that, in Oklahoma, abatement will not preclude recovery of damages caused by the nuisance).

19. Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309 (Tex. Civ. App.—Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975).

20. *See Cudahy Co.*, 858 F.2d at 1456-57 (holding that plaintiffs could recover punitive damages and temporary damages in excess of the diminished permanent value of the land).

21. Bily v. Omni Equities, Inc., 731 S.W.2d 606 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

22. TEX. CIV. PRAC. & REM. CODE § 41.007-.008 (Vernon 1986 & Supp. 1993).

of the defendant, in which case there is no cap.[23] In Colorado, a punitive damage award may not exceed the amount of the actual damage award, unless the act or conduct complained of is continuing, in which case the punitive damage award may be increased up to three times the amount of the actual damages.[24] Nuisance claims also permit recovery of "soft" actual damages, such as inconvenience, annoyance, and discomfort, which, after all, constitute the very nature of a nuisance claim.

2. Negligence

As in any other negligence case, the plaintiff must show that the defendant owed the plaintiff a duty, the defendant breached that duty, that the plaintiff was injured, and that the plaintiff's injury was proximately caused by the defendant's breach.[25] Although the plaintiff need not prove negligence under a nuisance theory, negligence is typically included in the laundry list of theories of recovery nonetheless. In this context, the plaintiff generally claims that the defendant owed a duty to conduct operations so as not to pollute the plaintiff's property.[26]

The standard of care used in determining the presence of negligence in these cases can be a frustrating moving target. Although plaintiffs may argue that the appropriate standard of care should be to conduct operations in a nonpolluting manner, it is clear that some pollution, technically speaking, is unavoidable in activities associated with the exploration, production, transportation, and refining of oil and gas. Spills will occur, lines and tanks will leak, and equipment upsets will happen because human action is involved. The correct standard of care, as a practical matter, must be to conduct operations in a manner that does not unnecessarily or inexcusably pollute the plaintiff's property.

Defendants typically argue that they have breached no duty and that they have in fact conducted their operations in a manner consistent with the rules of the state agency that regulates oil and gas operations as well as with the customary practices of the industry. As so many unwitting defendants have found out, however, relying on the defense that "you were only doing something the way it has always been done before" can be as ineffective as trying to avoid parental discipline by arguing that "all the other kids did it." Although there is certainly a great deal of objective merit in showing regulatory compliance and industry practice, such a showing almost always smacks of technical obfuscation and insensitivity, not the best impressions to leave with a jury.

One additional difficulty associated with identifying the appropriate standard of care is determining at what point in time a defendant's duty should be measured. In other words, should a defendant's past conduct be analyzed

23. OKLA. STAT. tit. 23, § 9 (1981 & Supp. 1993).

24. COLO. REV. STAT. § 13-21-102 (1993). Interestingly, for any award of punitive damages in Colorado, one-third of it must be paid into the state's general fund. *Id.*

25. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1989).

26. Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961).

according to the standards of the past or present? Oilfields tend to be long-lived operations, and oilfield technology has evolved significantly over the decades. Plaintiffs typically will attempt to indict the operations of a defendant from the 1950s or before, alleging that these operations led to the pollution being complained about today by describing how these operations fail to satisfy today's requirements. The inherent unfairness to the defendant in such an analysis is clear, and yet the psychological advantage for the plaintiff is undeniable. As a result, developing the negligence theory can also provide its share of rewards for the plaintiff.

3. *Negligence Per Se*

If establishing a standard of care proves to be difficult in an ordinary negligence case, the theory of negligence per se will likely satisfy the plaintiff's need.[27] Under this theory, the plaintiff must show that: (1) The defendant violated a statute, rule, regulation, or ordinance; (2) The violation was the proximate cause of the plaintiff's injury; and (3) The plaintiff is a member of the group whose protection the subject law contemplates.[28] Proof of the defendant's violation shifts the burden to the defendant to demonstrate an acceptable excuse for having committed the violation.[29] With the explosion of federal and state regulations pertaining to environmental protection and oil and gas industry operations generally, more and more ammunition is being made available to plaintiffs with which they can pursue claims against defendants under this theory. Negligence per se, then, can provide the definition to what would otherwise be somewhat amorphous arguments under a negligence theory. Indeed, although there will usually not be a lack of candidates for specifically alleged regulatory violations, most state agencies also include a universal catch-all regulation that prohibits pollution generally. This catch-all theory of recovery in fact has been put forward by plaintiffs in several unreported cases.[30] Relying on such broadly worded regulations, however, presents the same kind of problem with respect to defining the particular standard of care and, again, is becoming unnecessary with the proliferation of so many specific regulations. Moreover, despite the exposure for defendants that results from noncompliance, compliance not only fails to afford absolute protection, it merely becomes the minimum threshold of expected conduct.

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27. *See* McAlister v. Atlantic Richfield Co., 662 P.2d 1203 (Kan. 1983) (plaintiff alleged the defendants had violated KAN. STAT. ANN. § 55-121, which prohibited those involved in oil and gas operations from allowing saltwater to escape from its intended confinement (e.g., well, tank, pipeline, pond)).

28. El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987).

29. Missouri Pac. R.R. v. American Statesman, 552 S.W.2d 99 (Tex. 1977).

30. Okla. Corp. Comm'n Rule 3-101 (1971); KAN. STAT. ANN. § 55-172 (1992); Tex. R.R. Comm'n, 16 TEX. ADMIN. CODE § 3.8 (West 1988) (Water Protection). *But see* Murfee v. Phillips Petroleum Co., 492 S.W.2d 667 (Tex. Civ. App.—El Paso 1973, writ ref'd n.r.e.) (holding that the language in the rule was too broad to form the basis for a finding of negligence per se).

4. Trespass

Trespass, as a theory of recovery, is routinely included in the laundry list of claims, but typically is not developed. Trespass has been defined traditionally as conduct that leads to the invasion of a person's interest in his or her rightful exclusive possession of property.[31] A trespass may be made in person or by causing a person or thing to enter another's property.[32] This cause of action can afford injunctive relief, as well as recovery of actual and punitive damages.[33]

Could an oil and gas lessee who is legally on the surface owner's property still run the risk of committing a trespass?[34] Introducing contaminants, such as chlorides from produced water, scale containing NORM (naturally occurring radioactive material), or other allegedly hazardous substances resulting from oil and gas operations onto someone's property might theoretically constitute a trespass. Trespass, however, always requires a showing of fault because it is an intentional tort.[35] If evidence of fault is lacking, cases have generally relied on the theory of nuisance;[36] where there is evidence of fault, negligence has been the preferred theory.[37]

The typical groundwater contamination case involves not only allegations of contamination of the freshwater zone by chlorides or other substances leaching down from the surface (i.e., "top-down" contamination), but it also involves allegations of contamination resulting from the escape of produced water or other fluids from the wellbore into the surrounding zone, ultimately migrating to the freshwater zone (i.e., "lateral" contamination). Lateral contamination occurs subsurface and introduces an interesting aspect into the applicability of trespass as a theory of recovery. Historically, Texas courts have viewed waterfloods favorably as a means to recover more oil, even though waterflooding a zone necessarily involves introducing a "thing" under someone's property, more often than not without permission. Stated practically, Texas has viewed waterflooding as a "permissible" trespass.[38] It is not at all clear, however, that such permission would include protection against the unintended or unexpected consequences of a waterflood, such as contamination of a freshwater zone.

5. Strict Liability

Common law strict liability, otherwise known as liability without fault,

31. Pentagon Enters. v. Southwestern Bell Tel. Co., 540 S.W.2d 477 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

32. Gregg v. Delhi-Taylor Oil Corp., 162 Tex. 26, 344 S.W.2d 411 (1961).

33. Southern Pine Lumber Co. v. Smith, 183 S.W.2d 471 (Tex. Civ. App.—Galveston 1944, writ ref'd).

34. Brown v. Lundell, 162 Tex. 84, 344 S.W.2d 863 (1961).

35. General Tel. Co. v. Bi-Co Pavers, Inc., 514 S.W.2d 168, 170 (Tex. Civ. App.—Dallas 1974, no writ).

36. Humble Pipe Line Co. v. Anderson, 339 S.W.2d 259 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.).

37. Miller v. Cudahy, 858 F.2d 1449 (10th Cir. 1988); Moran Corp. v. Murray, 381 S.W.2d 324, 325 (Tex. Civ. App.—Texarkana 1964, no writ).

38. Railroad Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 567-69 (Tex. 1962).

applies to lawful, as well as unlawful, activities because the level of care exercised by the defendant is irrelevant.[39] If the activity poses an extraordinary risk and causes an injury to another, it is actionable, even if the defendant did everything he could to prevent the injury.[40] This theory has been used with mixed success, depending on the jurisdiction. In Texas, strict liability was generally rejected as an available theory of recovery for pollution cases in *Turner v. Big Lake Oil Co.*[41] The *Turner* court held that where property is being put to its "natural" use, strict liability did not apply.[42] In *Turner* saltwater damage to the surface of the plaintiff's property resulted from the "natural" use of the property, which apparently included the production of oil and gas. A similar injury in an area where oil and gas is not produced would presumably have had a different result. *Turner* was reaffirmed as good law in *Atlas Chemical Industries, Inc. v. Anderson*.[43] Similarly, Oklahoma has rejected strict liability as a theory of recovery in this context.[44]

Kansas, however, has expressly adopted the doctrine of strict liability in an effort to regulate pollution.[45] Some unreported district court opinions in Colorado have also applied strict liability in cases involving environmental contamination.[46] A Utah case, in which the defendant's adjacent oilfield operation contaminated the plaintiff's water well, found the defendant's operation to be abnormally dangerous and therefore an appropriate subject for strict liability.[47] An oilfield case from Indiana held that a waterflood operation was an abnormally dangerous activity.[48]

Jurisdictions that heretofore have rejected the applicability of strict liability in the context of oilfield operations have done so on the basis that such operations are not considered to be "ultrahazardous," or "abnormally dangerous," or a "nonnatural" use of the land.[49] As environmental considerations increase in frequency and significance, however, the applicability of those terms to oilfield operations may change.

6. *Unjust Enrichment*

The essence of the unjust enrichment theory of recovery is that a defendant should not be permitted to enrich himself or herself at the plaintiff's expense, but instead should be required to make restitution for benefits un-

39. *General Tel. Co.*, 514 S.W.2d at 174.
40. *Id.*
41. 128 Tex. 155, 166, 96 S.W.2d 221, 226 (1936).
42. *Id.*
43. 514 S.W.2d 309, 313 (Tex. Civ. App.—Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975).
44. Sinclair Prairie Oil Co. v. Stell, 124 P.2d 255, 257 (Okla. 1942).
45. John T. Arnold Assoc., Inc. v. City of Wichita, 615 P.2d 814, 823-26 (Kan. Ct. App. 1980).
46. United States v. Colorado & E. R.R., No. 89-C-1786, 1993 WL 350171, at *2 (D. Colo., June 9, 1993).
47. Branch v. Western Petroleum, Inc., 657 P.2d 267, 274-75 (Utah 1982).
48. Mowrer v. Ashland Oil & Ref. Co., 518 F.2d 659, 662 (7th Cir. 1975).
49. Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221, 226 (1936).

justly received.[50] Unjust enrichment has been referred to as a prerequisite for restitution.[51] It is often characterized as a "quasi-contract" or a contract "implied in law."[52] Unlike an express contract, which is based on the consent of the parties, a quasi-contract is a legal fiction arising not from the consent of the parties, "but imposed by law to afford a remedy in cases where a duty devolves upon a party as a matter of law, irrespective of intention."[53] In the context of oilfield pollution cases, the plaintiff typically argues that the defendant has saved money by, and thereby has unjustly profited from, failing to adequately protect the plaintiff's property from pollution. In other words, at the expense and to the detriment of the plaintiff's property, the defendant has saved money that should have been spent on environmental protection. The plaintiff seeks recovery of the so-called "unjust savings" plus interest from the time the defendant received those benefits or savings.[54]

This theory has been articulated, albeit not in much detail, in oilfield pollution cases only in Oklahoma.[55] This is probably not so much a function of recognition of this theory in this context in Oklahoma caselaw, as it is the practice of a particular, prolific plaintiff's attorney, who happens to live in Oklahoma. It should be noted that this theory introduces the possibility of a plaintiff discovering financial performance information about a defendant, when it might otherwise be considered to be outside the scope of discovery.

7. *Intentional or Negligent Infliction of Emotional Distress/Mental Anguish*

This theory of recovery is usually included in the plaintiff's laundry list of theories in an attempt to spotlight the emotional aspect of his or her complaint. Invariably, the subject property is the "family farm" that has been passed down from generation to generation for which intangible, sentimental value is immeasurable. As a result, any degradation to the property prompts great trauma and unmitigated anguish, even though, for a sufficient amount, the distraught plaintiff will gladly trade the "family farm" for a condominium in Aspen.

Plaintiffs may recover mental anguish damages in Texas even without any manifestations of a physical injury.[56] One Tennessee case awarded mental anguish damages to the plaintiffs because of their distress resulting from the diminution in value of their property.[57] Of course, if the plaintiff alleges personal injury, as a result of ingestion or inhalation of contaminated water

50. Conkling's Estate v. Champlin, 141 P.2d 569, 570 (Okla. 1943).
51. *Id.*
52. *Id.*
53. *Id.*
54. Teel v. Public Serv. Co., 767 P.2d 391 (Okla. 1987).
55. *Id.* at 398-99.
56. Moore v. Lillebo, 722 S.W.2d 683, 686 (Tex. 1986).
57. Sterling v. Velsicol Chem. Corp., 647 F. Supp. 303, 319 (W.D. Tenn. 1986), *aff'd in part and rev'd in part*, 855 F.2d 1188, 1212 (6th Cir. 1988).

or air, the mental anguish will more likely be associated with adverse health effects or the fear of adverse health effects.

8. Breach of Contract

Compared to the other theories of recovery that are available in this context, breach of contract does not lend itself as easily to recovery of significant damages, but does provide for the recovery of attorney's fees, which can be significant.[58] Under this theory, the plaintiff alleges that the defendant breached his or her covenant not to make excessive or unreasonable use of the property, which is the same allegation that could form the basis of a claim for trespass.[59] Some defendants, refusing to acknowledge the arrival of the era of environmentalism, continue to maintain that oilfield pollution cases really constitute nothing more than breach of contract cases all the way to trial, after which they generally concede their mistake, while seeking remittitur of a hefty judgment. Punitive damages under this theory are not available.[60]

B. ASSOCIATED ISSUES

1. Temporary or Permanent Injury

Temporary versus permanent injury is always one of the more significant issues in oilfield pollution cases. In addition to actually trying to determine the nature of the injury complained of, there are strategic considerations associated with choosing whether the injury is temporary, permanent, or both. The more astute plaintiff's attorney will allege both kinds of injury at the outset of the case and maintain these seemingly inconsistent charges until discovery more clearly defines the nature of the case; or, in plaintiff's language, until it becomes clearer which approach is less vulnerable to the defendant's arguments and, therefore, more sustainable to a jury. It is even possible in some jurisdictions to assert and recover for both temporary and permanent injuries.[61]

The difference between temporary and permanent injury is significant, primarily as it relates to the affirmative defense of the statute of limitations. Although claims for permanent injury to property are barred in most jurisdictions if brought more than two years after discovery of the injury,[62] claims for temporary injury to property can be brought for that part of the injury incurred during the two-year period preceding the filing of the action.[63] Claims for temporary injury are renewed with each subsequent act of pollution.[64] In Texas, permanent injury has been defined as injury that will

58. Gill Sav. Ass'n v. Chair King, Inc., 797 S.W.2d 31 (Tex. 1990).
59. Reimer v. Gulf Oil Corp., 664 S.W.2d 456, 457 (Ark. 1984).
60. Bellefonte Underwriters Ins. Co. v. Brown, 704 S.W.2d 742, 745 (Tex. 1986).
61. Briscoe v. Harper Oil Co., 702 P.2d 33, 33 (Okla. 1985). *But see* Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978) (finding permanent and temporary injury to be mutually exclusive and thus may not be brought in the same action).
62. *See, e.g.*, Bayouth v. Lion Oil Co., 671 S.W.2d 867 (Tex. 1984).
63. *Kraft*, 565 S.W.2d 223.
64. Miller v. Cudahy, 858 F.2d 1449, 1454 (10th Cir. 1988).

continue indefinitely and be constant; temporary injury has been defined as injury that is intermittent and dependent upon some event (e.g., rain).[65]

Courts have recognized that articulating a workable rule for distinguishing between temporary and permanent injury is problematic at best.[66] In fact, one Texas appellate court decision went so far as to try abolishing the distinction in an effort to prevent defendants from being able to avoid liability for permanent injury claims by relying on the statute of limitations.[67] If an injury is abatable or remediable, it is generally characterized as temporary.[68] As a result, the temporary or permanent nature of any injury is heavily influenced by the state of remediation technology. What was considered incapable of remediation yesterday, and consequently permanently injured, may become remediable tomorrow because of developments in technology, and suddenly be transformed into a temporary injury. It is also difficult to know when a temporary injury becomes so extensive and so difficult to remediate that it crosses the threshold and becomes permanent. For example, in *McAlister v. Atlantic Richfield Co.*,[69] the court noted that, according to expert testimony, it would take 150 - 400 years for the groundwater to cleanse itself of the contamination naturally, so the court determined that, practically speaking and for legal purposes, the groundwater had been permanently injured.[70]

Whether an injury is temporary or permanent also impacts the measure of damages for that injury. Traditionally, in most jurisdictions, the measure of damages for a temporary injury is the cost of repairing the property, plus compensation for the loss of use of the property.[71] The measure of damages for a permanent injury is the diminution in fair market value of the property caused by the pollution.[72] In neither situation, traditionally, are the damages supposed to exceed the total fair market value of the property.[73] Although the potential recovery for a temporary injury would generally seem to be less than the potential recovery for a permanent injury, a practical problem for a defendant is trying to show what portion of the temporary injury occurred within the two year statute of limitations and is thus recoverable, and what portion occurred more than two years ago and is therefore barred. From the jury's standpoint, it is always going to be easier to think in terms of the entire injury having occurred within the most recent two-year period.

Despite the traditional rule limiting damages to the total fair market value

65. *Bayouth*, 671 S.W.2d at 868.

66. *Miller*, 858 F.2d at 1453.

67. Atlas Chem. Indus., Inc. v. Anderson, 514 S.W.2d 309 (Tex. Civ. App.—Texarkana 1974), *aff'd*, 524 S.W.2d 681 (Tex. 1975).

68. *Miller*, 858 F.2d at 1453.

69. 662 P.2d 1203 (Kan. 1983).

70. *Id.* at 1212.

71. Thompson v. Andover Oil Co., 691 P.2d 77, 83 (Okla. Ct. App. 1984); Kraft v. Langford, 565 S.W.2d 223, 227 (Tex. 1978).

72. Nichols v. Burk Royalty Co., 576 P.2d 317, 321 (Okla. Ct. App. 1977); *Kraft*, 565 S.W.2d at 227.

73. *Thompson*, 691 P.2d at 83-84; *Anderson*, 514 S.W.2d at 319.

of the property, certain cases indicate that courts are willing to entertain damage awards based on remediation or restoration costs, even if the costs exceed the value of the land itself. The Tenth Circuit affirmed a district court's decision in Kansas to award actual damages for a temporary injury that exceeded the value of the property.[74] Colorado has opened the door to the possibility of basing a damage award on restoration or remediation costs, even if they exceed the diminished market value of the property, if the court finds that such restoration costs would more fairly compensate the plaintiff for his or her injury.[75] A 1993 Colorado district court decision walked through that door and let stand a jury award of $20,125,000, which represented restoration costs, even though the diminution in market value was only $4,159,000.[76] In fact, the approved award even exceeded the pre-tort market value of the property.[77]

A recent Louisiana Supreme Court decision also recognized the possibility of allowing restoration damages to exceed the value of the property.[78] Plaintiffs in Texas and Oklahoma continue to request damages based on restoration costs, although no reported case has yet recognized restoration costs as an acceptable measure of damages. Because remediation is typically very expensive, and the property in litigation is typically rural farm or ranch land with a relatively moderate value, the trend will likely continue to favor protecting the plaintiff and giving him or her the ability to be "made whole" through remediation instead of limiting damages to the comparatively insignificant diminished value.[79]

2. *Primary Jurisdiction*

One defensive strategy invariably discussed and occasionally pursued is to seek a stay of the court action and have the matter referred to the appropriate state regulatory agency for handling under the doctrine of primary jurisdiction. A defendant often believes that the nature of the pollution complaint compels agency action in lieu of, and certainly in advance of, any kind of private suit, especially where the plaintiff cites violations of various regulations as part of a negligence per se theory. In other words, the defendant considers the complaint to be one of operational deficiency, in which case the state agency responsible for regulating his or her operations and possessing specialized knowledge about the industry should review and handle the complaint.

The benefit sought by the defendant in such a maneuver usually works to his detriment. Instead of asserting primary jurisdiction, the agency typically opens its own file and either initiates its own investigation at that time or waits for the conclusion of the court case. Instead of deferring to the agency,

74. *Miller*, 858 F.2d at 1456-57.
75. Weld County Bd. of Comm'rs v. Slovek, 723 P.2d 1309, 1316 (Colo. 1986).
76. Escamilla v. ASARCO, Inc., No. 91-CV-5716 (D. Colo. Apr. 26, 1993).
77. *Id.*
78. Magnolia Coal Terminal v. Phillips Oil Co., 576 So. 2d 475, 484 (La. 1991).
79. *But see* Briscoe v. Amoco, No. CIV-91-2072-L (W.D. Okla. June 7, 1993) (holding that diminution in value was the proper measure of damages).

the court usually finds that the plaintiff is entitled to prosecute his claims in court without having to await any agency review.[80] The result of the defendant's best laid plan, then, is that he still has to defend himself in the court action, but now he also has to defend himself in an agency action. While the plaintiff typically seeks monetary damages, an agency typically seeks cleanup. The defendant has effectively inflicted upon himself the ignominy of a double recovery; and it has happened to defendants more than once in Texas and Oklahoma. In short, the primary jurisdiction argument never wins and often compounds the defendant's problem.[81]

3. *Other Measures of Damages*

In this kind of case, of course, there is always the specter of punitive damages, often the most significant component of any damage award.[82] For example, in the previously mentioned *Marshall v. El Paso* case, the jury awarded $400,000 in actual damages but $5,000,000 in punitive damages.[83] Although many states have enacted various tort reform measures, including attempts to limit punitive damage awards, there are usually ways around the caps, so defendants can take little comfort.[84]

In addition to the potential for punitive damages, however, other damage theories in these cases have the potential to make the exposure for defendants very high. As previously mentioned, the cost of remediation is making progress as the preferred measure of actual damages over the traditional rule of diminution in value.[85] With remediation costs typically far in excess of the value of the property, a defendant's exposure is virtually unlimited.

4. *Miscellaneous Theories and Issues*

Another theory, yet untested, involves seeking recovery of the value of the loss of groundwater as a marketable commodity. In Texas, courts have previously considered a water well (and, by implication, the aquifer into which the well has been drilled) to be part of the realty and, therefore, have not recognized injury to an aquifer to be a separately compensable item of damages.[86] Consequently, for the proposed theory to prevail, existing caselaw would have to be overturned. As environmentalism grows and groundwater as a resource increases in significance, however, it is possible that courts or

80. Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1377 (10th Cir. 1989); *Magnolia Coal Terminal*, 576 So. 2d at 484.

81. *See* Town of Cyril v. Mobil, No. CIV-91-702-R (W.D. Okla. 1992) (granting defendants' motion for summary judgment in the court case). *But see* Report of the Administrative Law Judge-Okla. Corp. Comm'n, No. 21,825 (Aug. 12, 1992) (ordering defendants in the *Cyril* case to conduct and pay for a study of the pollution on the subject property, which will likely precede an order to remediate the polluted property).

82. *Marshall*, 874 F.2d at 1376.

83. *Id.*

84. In *Marshall*, the punitive damage award was imposed despite Oklahoma's recent enactment requiring a higher standard to support punitive damages. *Id.* at 1383-84.

85. Miller v. Cudahy, 858 F.2d 1449, 1453 (10th Cir. 1988).

86. *See, e.g.*, Haynes B. Ownby Drilling Co. v. McClure, 264 S.W.2d 204, 207 (Tex. Civ. App.—Austin 1954, writ ref'd n.r.e.).

legislatures could start considering aquifers separately and assigning them their own value independent of the surface realty, much like the mineral estate was separated from the surface and given a distinct value. For example, in Oklahoma, a statute provides for recovery of treble damages for wrongful injury to a tree.[87] It is unclear whether recovery under this statute would be in addition to, or in lieu of, other recoverable damages.

Finally, it is important to note that Oklahoma has a statute concerning claims for property damage that provides for the recovery of attorney's fees and costs by the prevailing party.[88] Technically, if a plaintiff recovers any actual damages at all, the plaintiff is entitled to recover fees and costs incurred. Because these cases are so expensive to prosecute, the amount of recoverable fees and costs could be quite substantial. This particular statute, in fact, can significantly distort the analysis of exposure by a defendant, since fees and costs would be recoverable by a plaintiff, regardless of how well a defendant did at trial, short of a "zero" award.

III. CONCLUSION

Environmentalism has definitely come to the oilfield. In addition to responding to the statutory and regulatory barrage of the federal and state governments, oil and gas companies must defend themselves against "new and improved" applications of common law theories of recovery and measures of damages. Since government began enacting environmental legislation, most of the attention has been focused on regulatory compliance and potential fines and penalties. Defendants should beware, however, of the familiar weapons of the common law. At the end of the government rainbow is remediation of the polluted property, but at the end of the private action rainbow is truly a pot of gold. Given the choice of remedies, it is not difficult to discern which course will prove to be more popular with plaintiffs.

87. OKLA. STAT. tit. 23, § 72 (1987).
88. OKLA. STAT. tit. 12, § 940 (1988).