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The Possibility and Consequences of the Recognition of Prescriptive Avigation Easements by State Courts

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THE POSSIBILITY AND CONSEQUENCES OF THE RECOGNITION OF PRESCRIPTIVE AVIGATION EASEMENTS BY STATE COURTS

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Abstract: As an increasingly greater number of Americans travel by air, the amount of flights required to accommodate this greater demand must necessarily increase. To cope with the greater number of flights, either new airports must be built or existing airports must expand their operations. Neighboring residents of these new or expanded airports will be burdened by the noise associated with the increased air traffic. This Note takes a state by state look at the ability of airports to acquire prescriptive avigation easements that shield the airports from lawsuits by those neighboring residents affected by airport operations. The Note analyzes the status of prescriptive avigation easements in several states that have already addressed the issue of their recognition, examines the consequences of the recognition of prescriptive avigation easements, and studies the trend toward the recognition of prescriptive avigation easements that may be influential to the large majority of states that have not yet addressed this issue.

INTRODUCTION

In the time since Orville Wright made the first successful powered flight on December 17, 1903 at Kitty Hawk, North Carolina, Americans have embraced air travel like no other country on earth.[1] The United States alone accounts for approximately forty percent of all commercial aviation and fifty percent of all general aviation in the world.[2] There are currently over 18,000 airports of various sizes in operation in the United States supporting this enormous volume of air

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[1] *See generally* FED. AVIATION ADMIN. UNITED STATES DEP'T OF TRANSP., REP. NO. DOT/FAA/ASC-96–1, 1996 AVIATION CAPACITY ENHANCEMENT PLAN (1996) [hereinafter FED. AVIATION ADMIN.]. Avigation pertains to the "navigation of aircraft." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 151 (1986).

[2] *See* National Civil Aviation Review Commission, *Airport Development Needs and Financing Options, available at* http://www.faa.gov/ncarc/whitepaper/airports/index. html (last visited June 4, 1997).

traffic.[3] According to Federal Aviation Administration estimates, the number of aircraft operations is expected to increase from about sixty-two million in 1995 to 74.5 million by 2007—a nineteen percent increase.[4]

While the growth of air travel has been of enormous benefit to the average American, this growth has come at a considerable cost to the many persons residing in close proximity to airports.[5] Those who own property neighboring many of these airports have faced several serious problems, the most obvious of which is the high level of noise generated by aircraft using the nearby airports.[6] Noise associated with airport operations can disrupt daily life, cause emotional distress, affect commercial enterprises, and result in the reduction of neighboring property values.[7]

Owners of property neighboring airports have attempted to remedy the damages imposed on their property through legal channels.[8] Many property owners have brought lawsuits seeking reparations for the monetary damages caused to their property and their persons by airport operations,[9] while others have sought injunctions to cease airport activity altogether.[10] But there may be a serious obstacle to any lawsuit brought by a property owner against a neighboring airport.[11]

Some jurisdictions have extended the concept of prescriptive easements—the idea that certain rights can be acquired simply by the passage of time[12]—to airport operations.[13] As a result, property own-

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[3] *See id.*

[4] *See* FED. AVIATION ADMIN., *supra* note 1, at 15. For the same period, the number of enplanements (plane boardings) is expected to increase fifty-nine percent the higher growth rate for enplanements is attributable to higher load factors and larger seating capacity for passenger aircraft. *See id.*

[5] *See, e.g.*, Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1605 (1990); Griggs v. County of Allegheny, 369 U.S. 84, 86 (1962); United States v. Causby, 328 U.S. 256, 259 (1946).

[6] *See, e.g.*, *Baker*, 220 Cal. App. 3d at 1605; *Griggs*, 369 U.S. at 86; *Causby*, 328 U.S. at 259.

[7] *See Baker*, 220 Cal. App. 3d at 1605; *Griggs*, 369 U.S. at 86; *Causby*, 328 U.S. at 259.

[8] *See, e.g.*, *Baker*, 220 Cal. App. 3d at 1605; Christie v. Miller, 719 P.2d 68, 69–70 (Or. Ct. App. 1986); *Causby*, 328 U.S. at 259.

[9] *See, e.g.*, *Baker*, 220 Cal. App. 3d at 1605; *Causby*, 328 U.S. at 259.

[10] *See, e.g.*, *Christie*, 719 P.2d at 69–70.

[11] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); *Christie*, 719 P.2d at 70.

[12] *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 810 (4th ed. 1998).

[13] *See Baker*, 220 Cal. App. 3d at 1609; *Insitoris*, 210 Cal. App. 3d at 14; Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

ers are precluded from recovering for damage to their property resulting from airport operations due to a neighboring airport's acquisition of an avigation easement.[14] An avigation easement is an easement of use of the airspace above property located within the direct flight path of an airport's runway.[15] The issue of prescriptive avigation easements has been addressed by a few jurisdictions in the United States, but the vast majority of jurisdictions has yet to decide whether to recognize their existence.[16] The recognition of prescriptive avigation easements could be the death of any lawsuit against a neighboring airport since such prescriptive easements bar any claims against the airport brought by property owners affected by airport operations.[17]

This Comment analyzes the current status of prescriptive avigation easements in the United States. Part I introduces the concept of avigation easements and discusses their emergence in American law. Part II provides a historical overview of prescriptive easements in general and introduces the elements necessary to establish such easements. Part III describes the concept of prescriptive avigation easements and outlines the legal implications of their recognition. Part IV details the status of the recognition of prescriptive avigation easements in California, Connecticut, Kentucky, Oregon, Washington, and West Virginia, including obstacles to their recognition. Finally, Part V outlines trends in the recognition of prescriptive avigation easements by state courts. Part V also posits that the expansion of air travel in the United States will inevitably force many state courts to deal with the issue of whether to recognize the existence of prescriptive avigation easements, but argues that expanded airport operations will fail to satisfy all of the elements necessary to establish a prescriptive avigation easement.

I. Avigation Easements and Their Emergence in the United States

An avigation easement is a property right that allows an airport to use the airspace above property that is located within the direct flight

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[14] *See Baker*, 220 Cal. App. 3d at 1609; *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d at 70.

[15] *See* County of Westchester v. Town of Greenwich, 793 F. Supp. 1195, 1204 (S.D.N.Y. 1992), *rev'd*, 9 F.3d 242 (2d Cir. 1993) [hereinafter *Westchester I*].

[16] *See* discussion *infra* Part IV.

[17] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609 (1990); *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d at 70.

path of an airport's runway.[18] The purpose of an avigation easement is to allow aircraft to fly at low levels through a given airspace in order to take-off from or land on one or more of an airport's runways.[19] An airport may be required to obtain an avigation easement when its operations interfere with a neighboring property owner's right to full enjoyment of his or her land.[20]

It is important to distinguish low-level flights that require an avigation easement from flights at higher, less-intrusive altitudes that have not required easements under federal law since the passing of the Air Commerce Act of 1926 ("Air Commerce Act").[21] The United States Code currently states that "[a] citizen of the United States has a public right of transit through the navigable airspace."[22] The Air Commerce Act explicitly rejected the long-standing English rule that a property owner owns everything from the soil to the heavens.[23] In its 1946 decision in *United States v. Causby*, however, the Supreme Court limited the easement-granting effect of the Air Commerce Act to those situations in which aircraft flights did not interfere with a property owner's right to full enjoyment of his or her land.[24]

The avigation easement concept was first recognized in *Causby*.[25] In *Causby*, the plaintiffs had been operating a commercial chicken farm; the noise and lights from low-level aircraft flights caused the chickens to fly into the walls of their coops in fright, resulting in approximately 150 chicken deaths and the end of the use of the property as a commercial chicken farm.[26] The Supreme Court held that a servitude had been imposed upon the plaintiffs' land by prohibiting the operation of a commercial chicken farm.[27] According to the Court, although the United States was allowed "complete and exclusive national sovereignty in the air space" under the Air Commerce

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[18] *See Westchester I*, 793 F. Supp. at 1204.

[19] *See id.*

[20] *See* Griggs v. County of Allegheny, 369 U.S. 84, 89 (1962); United States v. Causby, 328 U.S. 256, 267 (1946).

[21] *See generally* Air Commerce Act of 1926, 49 U.S.C. § 40,103 (1994).

[22] *Id.* § 40,103(a)(2).

[23] *See id.*; ROBERT R. WRIGHT, THE LAW OF AIRSPACE 16 (1968) (translating the prhrase "*Cujus est solum, ejus est summitas usque ad coleum*" as "he who has the soil has everything up to the sky").

[24] *Causby*, 328 U.S. at 267; *see* 49 U.S.C. § 40,103.

[25] *Causby*, 328 U.S. at 267.

[26] United States v. Causby, 328 U.S. 256, 259 (1946).

[27] *Causby*, 328 U.S. at 267. A servitude is "[a] charge or burden resting upon one estate for the benefit or advantage of another . . . ." BLACK'S LAW DICTIONARY 1370 (6th ed. 1990).

Act,[28] "if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere."[29] After *Causby*, whenever there is some limit on the exclusive control of one's land or immediate airspace from low-level aircraft flights, an avigation easement has been taken.[30]

The Supreme Court further clarified its stance on the issue of avigation easements in 1962 in *Griggs v. County of Allegheny*.[31] In *Griggs*, aircraft taking off from and landing at a county-owned airport came within 30 to 300 feet of plaintiff's residence, resulting in noise comparable to a steam hammer at regular and continuous intervals.[32] Finding avigation easements necessary for the operation of an airport, the Court stated that it saw "no difference between [the airport's] responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built."[33] The Court thus firmly established that avigation easements, when required, were equivalent to any other property right necessary for the operation of an airport.[34] By holding that airports may be required to obtain avigation easements when their operations interfere with the rights of neighboring property owners to full enjoyment of their land, the Supreme Court has set the stage for much litigation in state and lower courts over the existence of avigation easements and the corresponding necessity on the part of airports to compensate neighboring property owners for such easements.[35]

II. Prescriptive Easements

An avigation easement is a positive easement which gives one a right to enter or perform an act on another's land.[36] As with other positive easements, avigation easements may be acquired by prescrip-

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[28] *Id.* at 260 (internal citations omitted).

[29] *Id.* at 264.

[30] *Causby*, 328 U.S. at 267.

[31] Griggs v. County of Allegheny, 369 U.S. 84, 89–90 (1962).

[32] *Id.* at 86.

[33] *Id.* at 89.

[34] *Id.* at 89–90.

[35] *Griggs*, 369 U.S. at 90; United States v. Causby, 328 U.S. 256, 267 (1946); *see, e.g.*, Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[36] *See* Dukeminier & Krier, *supra* note 12, at 783 (contrasting positive easements with negative easements, which forbid a property owner from doing something on his own land); Restatement of Property § 458 cmt. e (1944) (stating negative easements can only be created expressly, not via prescription).

tion.[37] This section introduces the concept of prescriptive easements, traces its historical basis, and outlines the elements necessary to establish a prescriptive easement.

A. *Prescriptive Easements in General and Their Historical Basis*

The doctrine of prescriptive easements is closely related to the doctrine of adverse possession.[38] In fact, courts often confuse the two doctrines.[39] Both rest upon the idea that certain rights can be acquired simply by the passage of time.[40] Moreover, pursuant to both doctrines, the running of a statute of limitations upon a cause of action allows a ripening of some property right.[41] Under adverse possession, the property right that ripens is one of possession whereby the original possessor is denied possession in favor of the adverse possessor.[42] A successful claim of adverse possession results in a change of title.[43] Under a prescriptive easement, however, the property right that ripens is one of use, not possession.[44] The fee owner retains ownership of the property, which is burdened by the successful claimant's limited right of use of that property.[45]

The theory of prescriptive easements arose out of an attempt by the English Parliament in 1275 to settle claims of earlier possession.[46] By statute, Parliament prohibited any challenges to rights of possessions that had been enjoyed since 1189 (the year in which Richard I acceded to the throne).[47] Originally intended to cover only possession, courts applied this statute by analogy to easements enjoyed since 1189.[48]

With the passage of time, it became increasingly difficult for claimants to prove an enjoyment of use against those property owners who owned land since 1189.[49] Since Parliament failed to amend the

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[37] *See Baker*, 220 Cal. App. 3d at 1609–10; Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); *Christie*, 719 P.2d at 70; discussion *infra* Part IV.A.

[38] *See* DUKEMINIER & KRIER, *supra* note 12, at 810.

[39] *See* 7 THOMPSON ON REAL PROPERTY, THOMAS EDITION § 60.03(b)(6)(i), at 435 (David A. Thomas ed., 1994).

[40] *See* DUKEMINIER & KRIER, *supra* note 12, at 810.

[41] *See id.* at 811–12.

[42] *See id.* at 123 n.10.

[43] *See* THOMPSON, *supra* note 39, § 60.03(b)(6)(i), at 435.

[44] *See* DUKEMINIER & KRIER, *supra* note 12, at 123 n.10.

[45] *See* THOMPSON, *supra* note 39, § 60.03(b)(6)(i), at 435.

[46] *See* DUKEMINIER & KRIER, *supra* note 12, at 811.

[47] *See id.*

[48] *See id.*

[49] *See id.*

earlier statute, English courts dealt with the problem themselves.[50] First, the courts created a presumption that any use in existence since the living memory of any person had existed since 1189.[51] Next, the courts created the presumption that any use that had continued for twenty years had existed since 1189.[52] Either of these presumptions, however, could be overcome by evidence that the use had not actually existed since 1189.[53]

To eliminate the rebuttability of these presumptions, English judges created the "fiction of the lost grant."[54] Under the fiction of the lost grant, any use that could be proven to have actually existed for 20 years created a presumption that a fictitious grant of an easement had been made, and that the fictitious grant had subsequently been lost.[55] Since this presumption could not be rebutted by evidence that no grant had been made, it was virtually impossible for a property owner to defeat a claim of a use easement that had been enjoyed by a claimant for at least twenty years.[56]

Since American courts could not require the element of continuous use since 1189, they developed the law of prescription.[57] The majority of jurisdictions used the analogy of adverse possession to develop the law of prescription. These jurisdictions set the same statute of limitations for adverse possession and prescriptive easement and generally required the same elements.[58] Some American jurisdictions, however, adopted the fiction of the lost grant.[59] Since there is a presumption that the owner has acquiesced to the use under the fiction of the lost grant, the claimant in those jurisdictions must show that the use was not permissive and that the owner did not object.[60]

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[50] *See id.*

[51] *See* DUKEMINIER & KRIER, *supra* note 12, at 811.

[52] *See id.*

[53] *See id.*

[54] *See* DUKEMINIER & KRIER, *supra* note 12, at 811; THOMPSON, *supra* note 39, § 60.03(b)(6)(ii), at 435.

[55] *See* DUKEMINIER & KRIER, *supra* note 12, at 811.

[56] *See id.*

[57] *See id.*

[58] *See* DUKEMINIER & KRIER, *supra* note 12, at 811; THOMPSON, *supra* note 39, § 60.03(b)(6)(ii), at 436; discussion *infra* Part II.B.

[59] *See* DUKEMINIER & KRIER, *supra* note 12, at 812.

[60] *See id.*

B. *Elements of Prescriptive Easements*

The elements necessary to establish a prescriptive easement vary greatly by jurisdiction, but typically can be characterized by a use that is open and notorious, continuous, exclusive,[61] and adverse.[62] These elements exist to protect a diligent landowner from having a servitude unwillingly imposed on his or her land by an undeserving outsider.[63] The element requiring a use that is open and notorious serves to put the property owner on constructive notice.[64] Actual notice relieves the claimant of proving the element of open and notorious use.[65] Moreover, in most courts, the burden of proof for establishing each of the elements of a prescriptive easement is on the party seeking the prescriptive easement.[66]

For the applicable state statute of limitations to satisfy the element of continuity, the use must be uninterrupted.[67] Continuity of use does not require constant use during the statutory period, but simply that "there be no break in the essential attitude of mind required for adverse use."[68] The element of continuity of use can be defeated by an effective interruption during the prescriptive period.[69] There are three methods of effective interruption: stoppage of the use by the owner, stoppage of the use through a statutory procedure, or initiation of "a legal action which results in establishing the landowner's right to terminate the use."[70]

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[61] Exclusivity, which is required in a majority of jurisdictions, is defined differently in the prescriptive easement context than in the adverse possession context. *See id.* at 813. "Exclusivity does not require a showing that only the claimant made use of the way, but that the claimant's right to use the land does not depend upon a like right in others." Page v. Bloom, 584 N.E.2d 813, 815 (Ill. App. Ct. 1991).

[62] *See, e.g.*, Petersen v. Port of Seattle, 618 P.2d 67, 70–71 (Wash. 1980); THOMPSON, *supra* note 39, § 60.03(b)(6)(vi), at 438.

[63] *See* THOMPSON, *supra* note 39, § 60.03(b)(6)(vii), at 439.

[64] *See* RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 2.16 cmt. h (Tentative Draft No. 3, 1993).

[65] *See id.*

[66] *See* THOMPSON, *supra* note 39, § 60.03(b)(6)(vii), at 439.

[67] *See id.* § 60.03(b)(6)(viii), at 447.

[68] Whittom v. Alexander Richardson P'ship, 851 S.W.2d 504, 508 (Mo. 1993). The ability to establish continuity without constant use in the context of prescriptive easements is also present in the context of adverse possession. *See* Howard v. Kunto, 477 P.2d 210, 213–14 (Wash. Ct. App. 1970) (holding that summer occupancy of a beach house is sufficient to establish the continuity element of adverse possession), *overruled on other grounds by* Chaplin v. Sanders, 676 P.2d 831, 861 n.2 (Wash. 1984).

[69] *See* RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 2.16 (Tentative Draft No. 3, 1993).

[70] *See id.* § 2.16 cmt. j, *quoted in* THOMPSON, *supra* note 39, § 60.03(b)(6)(viii), at 448.

The element of exclusivity is difficult to define in the context of prescriptive easements.[71] Exclusivity of use, as distinguished from exclusivity of possession, does not mean that the use is exclusive to the rights of the property owner.[72] Most courts, as well as the *Restatement (Third) of Property*, find that exclusivity of use is satisfied if the use of the claimant can be distinguished from that of the general public.[73]

The element of adversity of use merely means that the claimant acted against the owner's interest, or rather acted under the claimant's own authority.[74] Since the use is against the owner's interest, it is assumed that a property owner would attempt to prevent any adverse use before the running of the applicable state statute of limitations.[75] In the context of prescriptive avigation easements, the practical difficulty that a property owner faces in legally preventing any adverse use by an airport, namely physically preventing aircraft from flying over one's property, makes this element the most difficult to establish by an airport.[76]

III. Prescriptive Avigation Easements and the Legal Implications of Their Recognition

A prescriptive avigation easement is acquired if aircraft intrusions into a property owner's airspace occur for such a time that, under the applicable state statute of limitations, the property owner is unable to assert any claims based on the taking of the easement.[77] The idea that prescriptive rights of flight could possibly be acquired has been present since at least the 1930s, even if courts at the time seemed unwilling to hold that such rights had been acquired.[78] Courts in several states now openly accept that such prescriptive rights to airspace can

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[71] *See* Thompson, *supra* note 39, § 60.03(b)(6)(viii), at 445.

[72] *See id.* § 60.03(b)(6)(viii), at 446.

[73] Restatement (Third) of Prop. (Servitudes) § 2.16 cmt. g (Tentative Draft No. 3, 1993); *see* Thompson, *supra* note 39, § 60.03(b)(6)(viii), at 446.

[74] *See* Thompson, *supra* note 39, § 60.03(b)(6)(viii), at 440.

[75] *See id.*

[76] *See* Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 869–70 (Ky. Ct. App. 1968); discussion *infra* Part IV.D.1.

[77] *See* Pamela B. Stein, *The Price of Success: Mitigation and Litigation in Airport Growth*, 57 J. Air L. & Com. 513, 542 (1991).

[78] *See* Hinman v. Pacific Air Transp., 84 F.2d 755, 759 (9th Cir. 1936) (stating that "[i]t is generally held that an easement of or in the air may not be obtained by prescription"); Smith v. New England Aircraft Co., 170 N.E. 385, 393 (Mass. 1930) (stating that "[n]o prescriptive right to any particular way of passage could be acquired" because trespass did not occur in the same place in the airspace); *see also* Wright, *supra* note 23, at 191.

indeed be acquired.[79] Such prescriptive rights, however, can also be lost via counter-prescription by the erection of a barrier to the easement for the applicable statutory period.[80]

The prescriptive avigation easement issue may arise in a lawsuit in one of two ways. Most often, the issue is raised by a defendant airport as an affirmative defense to an inverse condemnation[81] or nuisance[82] action by one or more neighboring property owners.[83] The issue can also arise when a plaintiff airport seeks a declaratory judgment or an injunction[84] against one or more neighboring property owners to force the removal of some obstruction to aircraft access to the airport's runway—typically trees.[85]

As with the recognition of any prescriptive easement, the recognition of a prescriptive avigation easement has several legal implications for the burdened property owner.[86] Such an easement results in the imposition of a nonconsensual, uncompensated burden on a property owner's estate.[87] Moreover, it also prevents a property owner from recovering under several causes of action.[88]

Prescriptive avigation easements impose a burden on a property owner's estate without his or her consent and, in many jurisdictions,

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[79] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986); discussion *infra* Part IV.A.

[80] *See* Strother v. Pacific Gas & Elec. Co., 211 P.2d 624, 627–28 (Cal. Dist. Ct. App. 1949); *see also* WRIGHT, *supra* note 23, at 191.

[81] In an inverse condemnation action, a property owner institutes a suit against a government entity alleging that the government's actions have effectively constituted a taking of property. The claimant's objective is a forced purchase of the affected property. *See* DUKEMINIER & KRIER, *supra* note 12, at 1168.

[82] There are two types of nuisance: public nuisance and private nuisance. *See id.* at 745–46. A private nuisance arises when one's actions result in an unreasonable interference with the use and enjoyment of another's land. *See id.* at 745. A public nuisance is an act which interferes with the interests of the public at large. *See id.* at 745–46.

[83] *See Baker*, 220 Cal. App. 3d at 1606; *Christie*, 719 P.2d at 70.

[84] A declaratory judgment is a "[s]tatutory . . . remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights," while an injunction is "[a] court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury." BLACK'S LAW DICTIONARY 409, 784 (6th ed. 1990).

[85] *See* County of Westchester v. Town of Greenwich, 76 F.3d 42, 44 (2d Cir. 1996); Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 868 (Ky. Ct. App. 1968).

[86] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609-10 (1990); Insitoris v. City of Los Angeles, 210 Cal App. 3d 10, 21–22 (1989); Petersen v. Port of Seattle, 618 P.2d 67, 70 (Wash. 1980).

[87] *See Baker*, 220 Cal. App. 3d at 1609–10; *Petersen*, 618 P.2d at 70.

[88] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal App. 3d at 21–22.

without compensation.[89] In *Petersen v. Port of Seattle*, the Supreme Court of Washington stated that a prescriptive avigation easement, "if prescriptively acquired, would not be compensible."[90] In *Baker v. Burbank-Glendale-Pasadena Airport Authority*, the California Court of Appeal stated that "[t]here was nothing to preclude plaintiffs from suing [the airport's previous owner] for nuisance when it occurred, thereby interrupting [the previous owner's] prescriptive use."[91] Since the airport's previous owner had acquired a prescriptive avigation easement, the defendant airport "was not required to compensate [the plaintiffs] for the easement . . . and could transfer it to [the current owner] . . . ."[92]

In addition, prescriptive avigation easements prevent a property owner from recovering under several causes of action, including actions based on public and private nuisance,[93] emotional distress,[94] and inverse condemnation.[95] Indeed, a finding of a prescriptive avigation easement will likely bar recovery under a nuisance theory for the noise and vibration of low-level aircraft flights.[96] Two cases from the California Court of Appeal illustrate this theory.[97]

In *Insitoris v. City of Los Angeles*, the plaintiff property owner alleged that the noise level from low-level flights over plaintiff's property constituted a nuisance.[98] The California Court of Appeal held "that the defendant's acquisition of an avigation easement over plaintiff's property interest precludes recovery for property damage on either public or private nuisance theory."[99] Similarly, in *Baker*, the plaintiff property owners claimed that the noise, smoke, and vibrations from low-level aircraft flights to and from the defendant airport created a nuisance that interfered with the use and enjoyment of their

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[89] *See Baker*, 220 Cal. App. 3d at 1609–10; *Petersen*, 618 P.2d at 70.

[90] 618 P.2d at 70. The Supreme Court of Washington did not, however, find that a prescriptive avigation easement had been acquired in this case. *See id.* at 71; discussion *infra* Part IV.C.3.

[91] *Baker*, 220 Cal. App. 3d at 1609.

[92] Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609 (1990).

[93] *See Baker*, 220 Cal. App. 3d at 1609; Insitoris v. City of Los Angeles, 210 Cal App. 3d 10, 22 (1989).

[94] *See Baker*, 220 Cal. App. 3d at 1610; *Insitoris*, 210 Cal App. 3d at 21.

[95] *See Baker*, 220 Cal. App. 3d at 1609; *see also Insitoris*, 210 Cal. App. 3d at 22.

[96] *See Baker*, 220 Cal. App. 3d at 1610; *Insitoris*, 210 Cal App. 3d at 22.

[97] *See Baker*, 220 Cal. App. 3d at 1605, 1610; *Insitoris*, 210 Cal App. 3d at 22.

[98] *Insitoris*, 210 Cal. App. 3d at 14.

[99] Insitoris v. City of Los Angeles, 210 Cal App. 3d 10, 22 (1989).

property.[100] Again the California Court of Appeal, citing *Insitoris*, held that the acquisition of a prescriptive avigation easement precluded recovery under either a public or private nuisance theory.[101]

Some states allow recovery for emotional distress resulting from a successful claim of nuisance.[102] Barring recovery under a nuisance theory due to the acquisition of a prescriptive avigation easement also prevents recovery for any emotional distress resulting from the nuisance of the continuous roar of low-level flights over one's home in any state in which this cause of action is recognized.[103] The California Court of Appeal, in *Baker*, found that the defendant airport had "acquired a prescriptive easement from [the previous airport owner] to do the very things alleged by plaintiffs as a basis for recovery of damages for emotional distress."[104] In that court's view, the preclusions accompanying the acquisition of a prescriptive avigation easement "include[d not recovering from] emotional distress suffered by any of the plaintiffs by reason of the permitted uses."[105]

Since many airports are owned by government entities, not private parties, claims based on inverse condemnation are often brought against the government entities that own the airports.[106] The presence of a prescriptive avigation easement will likely prevent a homeowner from recovering the loss of the market value of his or her land under a claim of inverse condemnation.[107] In both *Baker* and *Insitoris*, the California Court of Appeal found that prescriptive avigation easements had been acquired.[108] Consequently, the plaintiffs were precluded from bringing suit against the respective government entities under inverse condemnation.[109]

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[100] Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1605 (1990).

[101] *See id.* at 1609–10 (citing *Insitoris*, 210 Cal. App. 3d at 14).

[102] *See Baker*, 220 Cal. App. 3d at 1610; *Insitoris*, 210 Cal. App. 3d at 21.

[103] *See Baker*, 220 Cal. App. 3d at 1610; *Insitoris*, 210 Cal App. 3d at 21.

[104] 220 Cal. App. 3d at 1610.

[105] *Id.*

[106] *See, e.g.*, Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1605 (1990); Insitoris v. City of Los Angeles, 210 Cal App. 3d 10, 14 (1989).

[107] *See Baker*, 220 Cal. App. 3d at 1609; *Insitoris*, 210 Cal. App. 3d at 18.

[108] *Baker*, 220 Cal. App. 3d at 1609; *Insitoris*, 210 Cal App. 3d at 14.

[109] *See Baker*, 220 Cal. App. 3d at 1609; *Insitoris*, 210 Cal. App. 3d at 18.

IV. Status of Prescriptive Avigation Easements in State Courts

To date, courts in most states have not dealt with the possibility that airports in their respective jurisdictions might be able to acquire prescriptive avigation easements. The only two states to have recognized the existence of prescriptive avigation easements are California and Oregon.[110] The only state court that has refused to accept the existence of prescriptive avigation easements is the Supreme Court of Appeals of West Virginia.[111] A few other state courts have not ruled out the possibility that prescriptive avigation easements may be acquired, but have yet to recognize that one has been acquired based on the facts before them.[112]

A. *State Courts That Recognize the Existence of Prescriptive Avigation Easements*

1. California

The California Court of Appeal has upheld the existence of prescriptive avigation easements in two cases.[113] California decisions prior to 1989 acknowledge the existence of prescriptive avigation easements. However, rather than running the statute of limitations from the point in time when the noise intrusion actually commenced, these decisions delay the running of the statute of limitations for a cause of action until the time when the plaintiffs were first made aware that the aircraft noise could have an effect on the value of their property.[114]

In *Drennan v. County of Ventura* in 1974, the California Court of Appeal stated, "[w]e tend to disagree with plaintiff's contention that in this state an avigation easement may not be acquired by prescrip-

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[110] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14; Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[111] *See* Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981).

[112] *See* County of Westchester v. Town of Greenwich, 629 A.2d 1084, 1088 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993) [hereinafter *Westchester II*]; Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980); Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 870 (Ky. Ct. App. 1968).

[113] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal App. 3d 10, 14 (1989).

[114] *See* Smart v. City of Los Angeles, 112 Cal. App. 3d 232, 238 (1980); Drennan v. County of Ventura, 38 Cal. App. 3d 84, 88 (1974).

tion . . . ."[115] The plaintiffs in that case owned the land over which aircraft flew when arriving at and departing from defendant's airport.[116] The plaintiffs, however, did not actually live on the land at issue.[117] The court held that the plaintiff property owners' absence from the land made it impossible for the defendant airport to "interfere substantially with plaintiffs' actual use and enjoyment of their land since there was no such use and enjoyment. . . . [T]his being so, no prescriptive easement to overfly plaintiffs' land was acquired."[118]

Later, in the 1980 decision of *Smart v. City of Los Angeles*, the California Court of Appeal came to a similar conclusion.[119] The plaintiff in that case owned a vacant parcel of land that was overflown by aircraft from the defendant airport.[120] The plaintiff brought an action against the City of Los Angeles, the municipal owner of the airport, for inverse condemnation and nuisance after a prospective buyer of the plaintiff's land was refused financing because of the high level of noise emanating from overflying jet aircraft.[121] Applying the rationale of *Drennan* to establish a date of accrual of plaintiff's cause of action,[122] the court found that "[t]he reduction in the value of the property did not have a significant impact upon plaintiff until he attempted to sell."[123] According to the court, the prescriptive period did not commence until the plaintiff was made aware of the reduction in property value.[124] Consequently, as a result of fixing a later commencement date for the prescriptive period, the court held that the defendant airport had not yet acquired a prescriptive avigation easement.[125]

More recent decisions, however, have made it easier for airports in California to establish prescriptive avigation easements by recognizing causes of action based on the point in time at which the noise from the aircraft was sufficient to constitute a legal taking of the plaintiff's property by the government, regardless of the plaintiff's

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[115] *Drennan*, 38 Cal. App. 3d at 86.
[116] *See id.* at 86.
[117] *See id.*
[118] *Id.* at 88.
[119] 112 Cal. App. 3d 232, 238 (1980).
[120] *Id.* at 234.
[121] *See id.* at 233–35.
[122] *See id.* at 238.
[123] *Id.*
[124] *See* Smart v. City of Los Angeles, 112 Cal. App. 3d 232, 238 (1980).
[125] *See id.* at 237–38.

knowledge of the commencement of a cause of action.[126] In *Insitoris v. City of Los Angeles*, decided in 1989, plaintiffs had subleased a leasehold interest in an airport hotel from January 1969 to May 1978.[127] The court found that the noise from aircraft associated with the defendant airport was sufficient to cause the taking and damaging of the property at issue in June 1967.[128] The five-year statute of limitations in California thus expired in June 1972, resulting in a prescriptive avigation easement.[129] Thus, the defendant airport was immune to plaintiffs' claims of inverse condemnation, public and private nuisance, and emotional distress by establishing the acquisition of a prescriptive avigation easement.[130]

In *Baker v. Burbank-Glendale-Pasadena Airport Auth.*, decided in 1990, plaintiff landowners alleged causes of action for inverse condemnation and nuisance based on noise, smoke, and vibration from the municipally-owned defendant airport.[131] The court found that acts amounting to taking or property damage began in 1973 at the latest.[132] As a result, the previous airport owner had acquired a prescriptive avigation easement in 1978.[133] The previous airport owner was not required to compensate plaintiffs for the easement, and was free to transfer it to the municipal defendant in the case.[134] In establishing that a prescriptive avigation easement had been acquired, the defendant airport successfully defended against claims of inverse condemnation, public and private nuisance, and emotional distress.[135] Thus, the California Court of Appeal now recognizes the existence of prescriptive avigation easements.[136]

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[126] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989).

[127] 210 Cal. App. 3d at 13.

[128] *See id.* at 14.

[129] *See id.*

[130] *See id.* at 22–23.

[131] 220 Cal. App. 3d at 1605.

[132] Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609 (1990).

[133] *See id.*

[134] *See id.*

[135] *See id.* at 1609–10.

[136] *See Baker*, 220 Cal. App. 3d at 1609–10; Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989).

2. Oregon

In its brief opinion in *Christie v. Miller*, decided in 1986, the Oregon Court of Appeals effectively recognized the legal existence of prescriptive avigation easements, affirming the trial court's dismissal of the plaintiffs' action both to enjoin the use of the defendant's private airport and to seek damages from nuisance based in part on the acquisition of a prescriptive avigation easement.[137] In this case, the court found that the plaintiffs should have been aware of aviation activity since 1970.[138] Additionally, the court rejected the plaintiffs' argument that no prescriptive avigation easement could arise, reasoning that the element of continuity could not be satisfied because aircraft do not continuously land or take off.[139]

The Oregon Supreme Court was the first court in the country to allow neighboring plaintiffs to state a cause of action against a defendant airport for inverse condemnation due to noise nuisance from aircraft in the landmark decision of *Thornburg v. Port of Portland*.[140] The Oregon Supreme Court, however, has yet to address the acceptance of prescriptive avigation easements recognized by the Court of Appeals.[141]

B. *State Courts That Do Not Recognize the Existence of Prescriptive Avigation Easements*

1. West Virginia

The only state court that has unequivocally refused to accept the existence of prescriptive avigation easements is the Supreme Court of Appeals of West Virginia.[142] In the 1981 decision of *Sticklen v. Kittle*, the plaintiff airport and concerned citizens brought suit against a local school board to enjoin the construction of a high school within 3,000 feet of the general aviation runway of the airport, arguing that the airport had acquired a prescriptive avigation easement.[143] This decision, however, was handed down before the Court of Appeals of

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[137] 719 P.2d 68, 70 (Or. Ct. App. 1986).

[138] *See id.*

[139] *See id.*

[140] 376 P.2d 100, 110–11 (Or. 1962).

[141] *See Christie*, 719 P.2d at 70.

[142] *See* Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981). The Supreme Court of Appeals of West Virginia is the state's highest court.

[143] *See id.* at 151.

Oregon had decided *Christie* and the California Court of Appeal had decided *Insitoris* and *Baker*.

In *Sticklen*, the West Virginia court stated that, based on its analysis of cases from other jurisdictions, it was "evident that courts are reluctant to support the assertion . . . that a prescriptive easement in airspace can be obtained over property by continuous overflights."[144] The court noted that such an easement would be difficult to define, would change whenever different types and numbers of aircraft flew over one's property, and would create questions of whether different easements would be needed for different flight patterns over the same tract of land.[145] The Supreme Court of Appeals of West Virginia has yet to reverse this opinion, which is almost two decades old, in light of the more recent California and Oregon decisions.[146]

C. *State Courts That Have Yet to Recognize the Existence of Prescriptive Avigation Easements Based on the Facts Before Them*

Courts in several other states have asserted that prescriptive avigation easements may possibly be recognized. However, due to the failure of the airports to satisfy all of the elements required for a prescriptive avigation easement, these courts have not yet upheld airports' assertions of prescriptive avigation easements.[147] In particular, courts in Connecticut, Kentucky, and Washington have refused to recognize prescriptive avigation easements due to the airports' failure to show that their use of neighboring land was adverse.[148]

1. Connecticut

The Supreme Court of Connecticut, in the 1993 decision of *County of Westchester v. Town of Greenwich*, addressed a certified question from the Second Circuit Court of Appeals inquiring whether a prescriptive avigation easement could be acquired in the State of Con-

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[144] *See Sticklen*, 287 S.E.2d at 155; Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[145] *See Sticklen*, 287 S.E.2d at 155; discussion *infra* Part IV.D.2.

[146] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d 68 at 70.

[147] *See Westchester II*, 629 A.2d 1084, 1087–88 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993); Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980); Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 870 (Ky. Ct. App. 1968).

[148] *See Westchester II*, 629 A.2d at 1087–88; *Petersen*, 618 P.2d at 71; *Shipp*, 431 S.W.2d at 870.

necticut.[149] The plaintiff in *Westchester* was the County of Westchester, New York, which owned and operated an airport that bordered the Town of Greenwich, Connecticut.[150] The runway of the airport abutted the Connecticut border and the approach to the runway was located almost entirely above Connecticut.[151] The defendants were Connecticut landowners whose trees had grown into the airspace in the approach zone.[152] Unable to acquire the out-of-state property through eminent domain, the plaintiff airport owner claimed that a prescriptive avigation easement had been acquired and sought an injunction authorizing it to cut down or top the trees that infringed on that easement.[153]

The Supreme Court of Connecticut noted that although prescriptive easements were recognized by the state, it was essential that the use be adverse in order to create a cause of action in favor of the property owner.[154] Since the property owners were prohibited by the Air Commerce Act from obtaining injunctive relief against aircraft using the navigable airspace of the United States, the court reasoned that the property owners could not have reclaimed the exclusive use of the airspace above their property.[155] Thus, the airport's use of the airspace could not be considered adverse, so no prescriptive easement had been acquired.[156]

In reaching its decision in *Westchester*, the Supreme Court of Connecticut did not discuss the fact that the defendant property owners could have brought a separate action alleging monetary damages based on claims of nuisance or inverse condemnation.[157] Although these claims would have had merit, the court probably did not take this into account because the property owners were not plaintiffs in this case, but rather defendants in an action by an out-of-state plaintiff airport seeking a declaratory judgment to force property owners to cut trees on their property that were creating an obstruction to the use of the airport's runway.[158] Supporting this fact-specific analysis is

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[149] *Westchester II*, 629 A.2d at 1086.

[150] *See id.*

[151] *See id.*

[152] *Id.* at 1086.

[153] *Westchester II*, 629 A.2d 1084, 1086–87 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993).

[154] *See id.* at 1087.

[155] *See id.* at 1088; *see also* Air Commerce Act of 1926, 49 U.S.C. § 40,103 (1994).

[156] *See Westchester II*, 629 A.2d at 1088.

[157] *Id.* at 1087–89.

[158] *See id.* at 1086.

the court's refusal in *Westchester* to decide whether a prescriptive avigation easement may ever be acquired in Connecticut.[159]

2. Kentucky

In the 1968 decision of *Shipp v. Louisville & Jefferson County Air Board*, the Court of Appeals of Kentucky (the state's highest court at the time) faced a fact pattern similar to that which the Supreme Court of Connecticut would later face in *Westchester*.[160] The plaintiff airport sought a declaratory judgment allowing it to remove the tops of two trees on defendant's property, claiming that it had acquired a prescriptive avigation easement.[161] The trial court found that the plaintiff had acquired a prescriptive right to the airspace.[162] The appellate court reversed the trial court's finding of a prescriptive avigation easement, however, "for the simple reason [that the airport] has not exercised adverse rights in the space involved for fifteen years . . ." since the airport had a federal statutory right to the use of the navigable airspace of the United States.[163]

3. Washington

In *Petersen v. Port of Seattle*, decided by the Supreme Court of Washington in 1980, the plaintiff property owners lived two miles south of the airport owned and operated by defendants.[164] In this case, the plaintiffs sought to recover the reduction in the value of their property caused by the operations of the defendant airport in an inverse condemnation action.[165] In defense, the airport argued that a prescriptive avigation easement had been acquired.[166]

In *Petersen*, the court stated that "[p]roof of such prescriptive right necessarily includes a showing of uninterrupted hostile use for 10 years which has been open and notorious."[167] The court found that

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[159] *Westchester II*, 629 A.2d 1084, 1088 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993). Perhaps the issue will be fully resolved when an in-state airport is involved in a similar lawsuit.

[160] Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 868 (Ky. Ct. App. 1968); *Westchester II*, 629 A.2d at 1086.

[161] *See Shipp*, 431 S.W.2d at 868.

[162] *See id.*

[163] *Id.* at 870.

[164] *See* 618 P.2d 67, 69 (Wash. 1980).

[165] *See id.* at 68–69.

[166] *See id.* at 69.

[167] *See id.* at 71.

the defendant airport's policy of paying voluntary sellers the unimpacted value of their land and its active encouragement of, and participation in, a community group that was designed to find alternative remedies for impacted land was evidence of the non-hostile nature of the airport's use.[168] Thus, the airport failed to satisfy all of the elements of a prescriptive easement.[169] Consequently, the court affirmed the trial court's order for the airport to compensate property owners for the reduction in the value of their property.[170]

D. *Obstacles to the Recognition of Prescriptive Avigation Easements*

As can be ascertained from the above cases, there are two legal obstacles to the recognition of prescriptive avigation easements by courts. The first obstacle, indicated by some of the above case discussions, has to do with the element of adversity, which is necessary for the recognition of all prescriptive easements.[171] The second obstacle is the difficulty of defining the precise use allowed by any prescriptive avigation easement that may be acquired by an airport.[172]

1. The Element of Adversity

In each of the decisions in which state courts have not ruled out the possibility that a prescriptive avigation easement could be acquired, the courts have found that the element of adversity was not met.[173] In *Petersen v. Port of Seattle*, the Supreme Court of Washington based its finding of non-adversity ("non-hostility," in that court's jargon) on the airport's close relationship with the community and its policy of buying out voluntary sellers.[174] While the relationship between the airport's neighborly attitude at ground level and its uncompensated use of the property owners' airspace may be less than direct, it is not difficult to understand the court's reasoning based on the facts, namely that the airport's dealings with the surrounding

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[168] *See id.*

[169] *See id.*

[170] *See* Petersen v. Port of Seattle, 618 P.2d 67, 73 (Wash. 1980).

[171] *See Westchester II*, 629 A.2d 1084, 1088–89 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993); *Petersen*, 618 P.2d at 71; Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 869–70 (Ky. Ct. App. 1968).

[172] *See Petersen*, 618 P.2d at 71; Highline Sch. Dist. No. 401 v. Port of Seattle, 548 P.2d 1085, 1090–91 (Wash. 1976).

[173] *See Westchester II*, 629 A.2d at 1088–89; *Petersen*, 618 P.2d at 71; *Shipp*, 431 S.W.2d at 869–70; discussion *supra* Part IV.C.

[174] *Petersen*, 618 P.2d at 71.

property owners were not very hostile.[175] The court might have found, however, that the requirement of adversity had been met under the more common factual scenario of a neighboring airport that is not so friendly with its neighbors.[176]

The reasoning of both the Court of the Appeals of Kentucky in *Shipp v. Louisville & Jefferson County Air Board*—one of the earliest cases dealing with the subject of prescriptive avigation easements—and the Supreme Court of Connecticut in *County of Westchester v. Town of Greenwich*—the most recent case dealing with the subject—seems to leave little hope that the element of adversity could ever be met by a neighboring airport seeking a prescriptive avigation easement in those states.[177] In *Shipp*, the highest court in Kentucky found that the simple fact that a federal statute had given the airport the right to use any airspace necessary for take-offs and landings precluded any finding of adversity.[178] The court stated that the right to use this airspace "is one derived from an act of Congress in its exercise of police powers and the regulation of interstate commerce by air."[179] Consequently, the court reasoned that no exercise of that right could be considered adverse.[180]

In *Westchester*, the Supreme Court of Connecticut found that the element of adversity had not been met because the property owners were forbidden by federal law from obtaining injunctive relief against aircraft using the navigable airspace of the United States.[181] The court impliedly limited adversity to only those uses of another's property that can be completely reclaimed by the property owner.[182] The court did not consider any use that could give rise to any other cause of action besides complete reclamation of the land (e.g., monetary damages for continuing or permanent nuisance) to be adverse.[183] The use of federal law to defeat the element of adversity in Connecticut and

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[175] *See id.*

[176] Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980).

[177] *Westchester II*, 629 A.2d 1084, 1088–89 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993); Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 869–70 (Ky. Ct. App. 1968).

[178] 431 S.W.2d at 869–70.

[179] *Id.*

[180] *See id.*

[181] *Westchester II*, 629 A.2d at 1088–89.

[182] *See id.* at 1088.

[183] *Westchester II*, 629 A.2d 1084, 1088–89 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993).

Kentucky makes it seem unlikely that an airport could ever satisfy this requirement in those states.[184]

The restrictive view of adversity taken by both the Court of Appeals of Kentucky and the Supreme Court of Connecticut sharply contrasts with the view taken by the Court of Appeal of California. The Court of Appeal of California does not require that a plaintiff have a cause of action for the complete reclamation of land in order for adversity to exist.[185] Rather, the court has found use to be adverse whenever the property owner could have made a claim for nuisance or a taking without regard to the property owner's ability to completely reclaim his or her airspace.[186]

2. Difficulty of Use Definition

The second legal obstacle to the recognition of prescriptive avigation easements by courts is the difficulty of defining the precise use governed by any prescriptive avigation easement that may be acquired by an airport.[187] The acquisition of a prescriptive avigation easement does not give an airport complete freedom over the extent to which it can burden a servient estate.[188] Such easements, when allowed, are limited only to the use that has already been legally recognized by prescription.[189] An established prescriptive avigation easement will not include any future increase in the volume of air traffic at the airport, nor will it include the use of aircraft that are noisier than those for which a use has been allowed, such as the use of noisier jet-powered

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[184] *Westchester II*, 629 A.2d at 1088–89; Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 869–70 (Ky. Ct. App. 1968); *cf.* Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986) (holding that plaintiff property owners, who did not make the argument at trial, were precluded from arguing on appeal that it would be impossible for an airport to obtain a prescriptive avigation easement since plaintiffs did not own airspace). It should be noted that in both *Westchester* and *Shipp*, the airports were the plaintiffs and the claims of prescriptive avigation easement were raised not as affirmative defenses, but as a means of forcing the defendant property owners to trim trees on their respective properties. *See Westchester II*, 629 A.2d at 1086–87; *Shipp*, 431 S.W.2d at 868.

[185] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal App. 3d 10, 14 (1989); *Westchester II*, 629 A.2d at 1088–89; *Shipp*, 431 S.W.2d at 869–70.

[186] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14.

[187] *See* Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981); Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980); Highline Sch. Dist. No. 401 v. Port of Seattle, 548 P.2d 1085, 1091 (Wash. 1976).

[188] *See Sticklen*, 287 S.E.2d at 155; *Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091.

[189] *See Sticklen*, 287 S.E.2d at 155; *Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091.

aircraft when the easement allows for only propeller-powered aircraft.[190] Any such uses that exceed the scope of an existing prescriptive avigation easement will require an entirely new easement, be it through purchase or prescription.[191]

Thus far, however, only one state court—the Supreme Court of Appeals of West Virginia—has justified a refusal to recognize any prescriptive easement partly on the basis of this obstacle.[192] In *Sticklen v. Kittle*, the court's concern with the definition of use contributed to its holding that no prescriptive avigation easement could be acquired in that state. Furthermore, the court stated that this obstacle was one of "the practical problems [that] would make such an easement difficult to define."[193]

V. Analysis

A. *Trends in the Recognition of Prescriptive Avigation Easements by State Courts*

The relevant case law in the area of prescriptive avigation easements shows a general trend toward greater acceptance of the existence of such easements by state courts.[194] Such a trend could be influential to the vast majority of state courts that have yet to decide whether prescriptive avigation easements should be legally recognized in their respective states.

From the late 1960s to the early 1980s, state court decisions were characterized by a reluctance to find that a prescriptive avigation easement had been acquired based on the facts presented before the courts.[195] During that period, state courts in California, Kentucky, and Washington refused to find that the elements required to establish

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[190] *See Sticklen*, 287 S.E.2d at 155; *Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091.

[191] *See Sticklen*, 287 S.E.2d at 155; *Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091.

[192] *See Sticklen*, 287 S.E.2d at 155.

[193] Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981).

[194] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[195] *See* Smart v. City of Los Angeles, 112 Cal. App. 3d 232, 238 (1980); Highline Sch. Dist. No. 401 v. Port of Seattle, 548 P.2d 1085, 1090–91 (Wash. 1976); Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980); Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 870 (Ky. Ct. App. 1968).

prescriptive avigation easements had been present.[196] Only the Supreme Court of Appeals of West Virginia, however, ruled out the possibility that a prescriptive easement could ever be acquired, due to the problems associated with the precise definition of use of prescriptive avigation easements and the problem of discontinuity associated with increased airport operations.[197]

The reluctance to accept prescriptive avigation easements began to wane by the mid-1980s.[198] With the exception of the Supreme Court of Connecticut's decision in *County of Westchester v. Town of Greenwich*, each relevant decision since the mid-1980s has supported the acceptance of an airport's ability to acquire a prescriptive avigation easement in the airspace of neighboring property.[199] Though not yet addressed by the highest court of either state, decisions by appellate courts in both California and Oregon have recognized the existence of prescriptive avigation easements in their respective states since the mid-1980s.[200]

It may be too early to judge whether the Supreme Court of Connecticut's *Westchester* decision signals the end of the expansion of prescriptive avigation easement acceptance, or whether the decision is just an anomaly in the trend towards greater acceptance.[201] Most likely, however, the *Westchester* decision is a mere anomaly.[202] First, the factual peculiarity of the *Westchester* case distinguishes it from the usual prescriptive avigation easement dispute.[203] Airports rarely appear as

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[196] *See Smart*, 112 Cal. App. 3d at 238 (finding use not adverse when aircraft noise commenced, but when plaintiff attempted to sell property; thus, statute of limitations had not run); *Highline Sch. Dist.*, 548 P.2d at 1090–91 (finding use not continuous due to increase in aircraft operations); *Petersen*, 618 P.2d at 71 (finding use not adverse because airport paid voluntary sellers unimpacted value of neighboring land and because airport owner participated in community group to find alternative remedies for land adversely affected by airport activity); *Shipp*, 431 S.W.2d at 869–70 (finding no adversity because of airport's right to use navigable airspace under federal law).

[197] *See Sticklen*, 287 S.E.2d at 155.

[198] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d at 70.

[199] *Westchester II*, 629 A.2d 1084, 1088–89 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993); *see Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d at 70.

[200] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[201] *Westchester II*, 629 A.2d at 1088–89.

[202] *Id.*

[203] *Id.* at 1086–87.

plaintiffs in prescriptive avigation easement disputes.[204] Generally, in the cases in which airports have appeared as plaintiffs, the airports attempt to force neighboring property owners to remove some obstruction to the flight paths of the aircraft.[205] Plaintiff airports have fared poorly in establishing prescriptive avigation easements, perhaps because courts are less inclined to recognize prescriptive avigation easements when the result would be to force a neighboring property owner to perform some service, as compared to when prescriptive avigation easements are used as an affirmative defense to prevent a property owner from hampering the operations of an airport.[206]

Second, the underlying interstate tension between the New York county-owned airport and the Connecticut neighbors is unlikely to be repeated in another decision involving the issue of prescriptive avigation easements.[207] Indeed, such tension may have influenced the Supreme Court of Connecticut's decision. Moreover, it should be noted that the federal district court, prior to the appeal to the Second Circuit and the subsequent certification of questions to the Supreme Court of Connecticut, had little trouble finding that the airport had indeed acquired a prescriptive avigation easement.[208]

B. *How the Trend Toward Recognition of Prescriptive Avigation Easements Will Affect State Courts That Have Not Addressed the Issue*

1. Airports with Consistent Levels of Operations

In those cases in which the operations of airports have remained relatively stable over the years, the general trend toward greater acceptance of the existence of prescriptive avigation easements by state courts could be influential to the great majority of state courts that have not had occasion to deal with the issue.[209] For example, the typical scenario occurs when a plaintiff property owner brings suit against a neighboring defendant airport for monetary damages or an injunc-

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[204] *Westchester II*, 629 A.2d at 1086–87; Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 868 (Ky. Ct. App. 1968).

[205] *See Westchester II*, 629 A.2d 1084, 1086–87 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993); *Shipp*, 431 S.W.2d at 868.

[206] *See Westchester II*, 629 A.2d at 1088–89; *Shipp*, 431 S.W.2d at 870.

[207] *Westchester II*, 629 A.2d at 1086–87.

[208] *See Westchester I*, 793 F. Supp. 1195, 1208–09 (S.D.N.Y. 1992), *rev'd*, 9 F.3d 242 (2d Cir. 1993).

[209] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

tion.[210] In such cases, state courts may be influenced by the fact that no plaintiff property owner has successfully withstood a prescriptive avigation easement defense since 1980,[211] while two state courts since that time—California and Oregon—have accepted the existence of prescriptive avigation easements.[212]

Assuming that the airport's operations have remained relatively stable for the applicable statute of limitations, the problem of definition of use is unlikely to be an obstacle to any state court that must address the issue.[213] Courts will simply define the use as that which existed for the duration of the statute of limitations.[214] Thus, airports will likely to be able to establish the element of continuity required for a prescriptive avigation easement.[215]

The element of adversity required to establish a prescriptive avigation easement would likely be a greater obstacle to the recognition of a prescriptive avigation easement in any given fact pattern than definition of use.[216] Courts in Connecticut and Kentucky have found that the element of adversity was not satisfied based on the simple fact that a federal statute grants a right of use of the navigable airspace of the United States.[217] Even in those states, however, the difficulty of establishing the element of adversity has not led the state courts to explicitly rule out the possibility that a prescriptive avigation easement could ever be acquired.[218]

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[210] *See, e.g., Baker*, 220 Cal. App. 3d at 1605; *Christie*, 719 P.2d at 69–70.

[211] *See* Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980).

[212] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d at 70.

[213] *See Baker*, 220 Cal. App. 3d at 1608–09; *Insitoris*, 210 Cal. App. 3d at 14. Only the Supreme Court of Appeals of West Virginia has justified a refusal to recognize a prescriptive avigation easement partly based on the obstacle of use definition. *See* Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981).

[214] *See Baker*, 220 Cal. App. 3d at 1608–09; *Insitoris*, 210 Cal. App. 3d at 14.

[215] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1608–09 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[216] *See Westchester II*, 629 A.2d 1084, 1087–88 (Conn. 1993), *certifying questions from* 986 F.2d 624 (2d Cir. 1993); *Petersen*, 618 P.2d at 71; Shipp v. Louisville & Jefferson County Air Bd., 431 S.W.2d 867, 869–70 (Ky. Ct. App. 1968). It should be noted that the establishment of the element of adversity is independent of the stability of the operations of the airport (i.e., the use is adverse whether there is one flight per day or 100 flights per day).

[217] *See Westchester II*, 629 A.2d at 1087–88; *Shipp*, 431 S.W.2d at 869–70. In *Petersen*, the Supreme Court of Washington also found that the element of adversity had not been met; the facts in that case—the airport's relationship with the community and its policy of buying out voluntary sellers—are unlikely to be duplicated. Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980).

[218] *See Westchester II*, 629 A.2d at 1088; *Shipp*, 431 S.W.2d at 869–70.

The Supreme Court of Connecticut's *Westchester* decision, although relatively recent, will probably have limited influential value on a state court deciding the issue of adversity.[219] The oddity of the facts of the Supreme Court of Connecticut's *Westchester* decision, which included a rare plaintiff airport and the possible presence of interstate rivalry,[220] will probably limit the influence of the decision in other state courts. Instead, it is more likely that state courts will be influenced by the California and Oregon decisions, which have no trouble finding the element of adversity to be satisfied in the prescriptive avigation easement context.[221] As a result, state courts dealing with cases in which airport operations have remained relatively stable for the applicable statutes of limitations will likely exhibit a tendency to accept the existence of prescriptive avigation easements.[222]

2. Airports with Expanding Levels of Operations

The number of aircraft operations is expected to increase to 74.5 million by 2007.[223] This is a nineteen percent increase from the 1995 level of 62 million.[224] Moreover, the projected expansion of air travel in the United States will likely force many state courts that have not previously dealt with the issue of prescriptive avigation easements to decide the matter.[225]

The expansion of air travel will mean increased air traffic at many existing airports.[226] This increased air traffic will inevitably result in more noise.[227] Greater noise levels will affect neighboring property owners in two ways: (1) those neighboring property owners who were previously affected by airport noise will be affected to an even greater extent, and (2) those neighboring property owners who were previ-

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[219] *Westchester II*, 629 A.2d at 1086, 1087–88.

[220] *Id.* at 1086–87.

[221] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[222] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d at 70.

[223] *See* FED. AVIATION ADMIN., *supra* note 1, at 15.

[224] *See id.*

[225] *See* discussion *supra* Part IV.

[226] *See* FED. AVIATION ADMIN., *supra* note 1, at 15. Due to the enormous cost of new airport construction, capacity enhancement is most likely to be achieved through the construction of new runways and the extension of existing runways at existing airports. *See id.* at 29–30.

[227] *See, e.g.*, Griggs v. County of Allegheny, 369 U.S. 84, 86 (1962); United States v. Causby, 328 U.S. 256, 259 (1946).

ously on the fringe of the noise boundary will now be engulfed by the increased noise boundary.[228]

Many of the affected property owners will likely seek redress in court for the increased or newly-created burdens on their property.[229] Defendant airports will almost certainly claim the acquisition of a prescriptive avigation easement as an affirmative defense to any claims by plaintiff property owners.[230] Thus, state courts that have not previously dealt with the issue of prescriptive avigation easements may be forced to confront the issue due to the expansion of air travel.[231]

While influential in those cases in which an airport's operations have remained relatively stable,[232] the trend toward greater acceptance of prescriptive avigation easements is unlikely to be persuasive in those instances in which an airport has expanded its operations. The problem is not that state courts that have yet to recognize the existence of prescriptive avigation easements will be hesitant to do so. Rather, the problem is that airports with increased operations will be hard-pressed to establish one element of the prescription: continuity.[233]

The difficulty with establishing the element of continuity for an airport with expanded operations stems from the problem of definition of use.[234] Any easement that an airport may acquire would be limited to the use that has actually been acquired by prescription.[235] Thus, while a court may find that an airport had acquired a prescriptive avigation easement for its prior level of operations, it will deny a prescriptive avigation easement for the airport's expanded operations if those expanded operations have not been continuous for

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[228] *See, e.g., Griggs*, 369 U.S. at 86; *Causby*, 328 U.S. at 259.

[229] *See, e.g.*, Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1605–06 (1990); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[230] *See, e.g., Baker*, 220 Cal. App. 3d at 1605–06; *Christie*, 719 P.2d at 70.

[231] *See* discussion *supra* Part IV.

[232] *See Baker*, 220 Cal. App. 3d at 1609; Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); *Christie*, 719 P.2d at 70.

[233] *See* Petersen v. Port of Seattle, 618 P.2d 67, 71 (Wash. 1980); Highline Sch. Dist. No. 401 v. Port of Seattle, 548 P.2d 1085, 1091 (Wash. 1976); Sticklen v. Kittle, 287 S.E.2d 148, 155 (W. Va. 1981); discussion *supra* IV.D.2.

[234] *See Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091; *Sticklen*, 287 S.E.2d at 155; discussion *supra* IV.D.2.

[235] *See Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091; *Sticklen*, 287 S.E.2d at 155; discussion *supra* IV.D.2.

the applicable statute of limitations.[236] Consequently, the expanded operations will require an entirely new easement.[237]

Neighboring property owners who bring suit for the nuisance created by an airport's increased operations will likely defeat a prescriptive avigation easement defense if suit is brought before the running of the applicable statute of limitations.[238] If neighboring property owners fail to bring suit before the running of the statute of limitations in those states that have yet to recognize the existence of prescriptive avigation easements, then courts in those states may be influenced by the general trend toward the greater acceptance of prescriptive avigation easements.[239] Should state courts be influenced by this trend, neighboring property owners would be left with no legal redress for the burdens imposed on their property.[240]

CONCLUSION

The acquisition of a prescriptive avigation easement by an airport against neighboring property owners prevents property owners affected by airport operations from asserting any claims against the airport for nuisance, inverse condemnation, and emotional distress. There is a general trend toward greater recognition of prescriptive avigation easements by state courts. In those cases in which airport operations have remained relatively stable for the applicable statute of limitations, state courts that have yet to recognize the existence of prescriptive avigation easements will likely be influenced by this trend if and when the issue arises. Airports that expand their operations, however, will have difficulty in any state court proving the element of continuity that is required to establish a prescriptive avigation easement.

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[236] *See Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091; *Sticklen*, 287 S.E.2d at 155; discussion *supra* IV.D.2.

[237] *See Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091; *Sticklen*, 287 S.E.2d at 155; discussion *supra* IV.D.2.

[238] *See Petersen*, 618 P.2d at 71; *Highline Sch. Dist. No. 401*, 548 P.2d at 1091; *Sticklen*, 287 S.E.2d at 155; discussion *supra* IV.D.2.

[239] *See* Baker v. Burbank-Glendale-Pasadena Airport Auth., 220 Cal. App. 3d 1602, 1609–10 (1990); Insitoris v. City of Los Angeles, 210 Cal. App. 3d 10, 14 (1989); Christie v. Miller, 719 P.2d 68, 70 (Or. Ct. App. 1986).

[240] *See Baker*, 220 Cal. App. 3d at 1609–10; *Insitoris*, 210 Cal. App. 3d at 14; *Christie*, 719 P.2d at 70.