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8th Circ. Fights 'Fear Of Contamination' Nuisance Claims

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In a recent environmental contamination class action, *Smith v. ConocoPhillips Pipe Line Co.*,[1] the Eighth Circuit reversed a Missouri district court's order certifying a class of property owners who sought to recover under a nuisance theory for their fears that nearby contamination might spread onto their property. The Eighth Circuit held that unsubstantiated fears of contamination are insufficient to establish a nuisance claim. By requiring evidence of actual injury or contamination, this decision provides important clarification of common law nuisance doctrine and may deter the filing of "fear of contamination" claims in certain jurisdictions.

***Smith* Decision**

This case involved a leak of leaded gasoline from a ConocoPhillips-owned underground pipeline in the 1960s in West Alton, Missouri. The leak was repaired, but the gasoline was not recovered. In 2002, Phillips purchased the properties of certain West Alton residents after tests revealed unacceptable levels of benzenein their well water. The homes were subsequently demolished, and the properties voluntarily remediated by ConocoPhillips.

In 2011, other nearby landowners brought a putative class action alleging negligence and nuisance claims. The landowners sought monetary damages for diminution of property value and injunctive relief compelling both further remediation of the contaminated property and testing for soil and water contamination on nearby properties. The U.S. District Court for the Eastern District of Missouri granted in part and denied in part the property owners' motion for class certification. The district court granted certification to property owners within 0.25 miles of the contaminated site on the negligence claim for damages and injunctive relief on the theory that "pockets of contamination" might exist. The court, however, declined to certify a second proposed class seeking recovery for medical

monitoring on the ground that there was no evidence of actual exposure to contaminants.

The Eighth Circuit reversed the district court's decision granting class certification and remanded the case for further proceedings. The appellate court rejected the plaintiffs' "cloud on the class" theory, reasoning that "the presence on only one property of a petroleum pollutant not found at the leak site cannot prove that actual contamination exists on the class land."[2] That is, because the landowners lacked evidence that *their* properties had actually been contaminated, the class had failed to demonstrate a common injury. Relying on what the court called a "contemporary consensus reached by persuasive authority on the meaning of common law nuisance in the context of environmental contamination," the court explained that "the putative class fear of contamination spreading from the West Alton leak site to harm their property is not a sufficient injury to support a claim for common law nuisance in the absence of proof."[3]

Relevant Precedent

The Eighth Circuit's decision in *Smith* represents a significant development in a growing divide among courts in interpreting common law nuisance doctrine. The decision is consistent with similar holdings from the Fourth and Fifth Circuits,[4] as well as from the Michigan, Utah, Kansas and Ohio Supreme Courts.[5] Facing a similar "fear of contamination" nuisance claim, the Fourth Circuit required the alleged nuisance to be "visible or otherwise capable of physical detection from the plaintiff's property."[6] If plaintiffs could raise nuisance claims based solely on "stigma," the Fourth Circuit reasoned, Virginia's nuisance law would be extended "beyond its current boundaries."[7] Similarly, in a case involving the dumping of manufacturing waste, the Fifth Circuit affirmed the dismissal of nuisance claims that both "failed to show harmful levels of any toxic or hazardous substance in the well water" and lacked evidence of "some physical damage to plaintiffs' land."[8] The Fifth Circuit concluded that "stigma" caused by a property's proximity to the waste was insufficient to support a nuisance claim.[9]

While the Eighth Circuit observed a "contemporary consensus" in the treatment of nuisance claims, several earlier decisions had held that fear of harm or stigma from environmental contamination can suffice to state a nuisance claim.[10] In *In re Tutu Wells Contamination Litigation*, for example, the U.S. District Court of the Virgin Islands rejected the Fourth Circuit's requirement of physical perceptibility for nuisance claims based on environmental contamination.[11] The district court reasoned that the Fourth Circuit's *Adams* decision failed to provide lower courts with a workable nuisance standard. It further cited "public policy" concerns for its holding, observing that the Fourth Circuit's decision would both "work an injustice to deny any relief to ... plaintiffs" and "lead to underdeterence [sic] of environmental contamination."[12] For those reasons, the *Tutu Wells* court concluded that the Fourth Circuit's decision was "unpersuasive" and described the physical perceptibility standard as "novel."[13] In denying a motion to dismiss a nuisance claim, the U.S. District Court for the District of Massachusetts similarly rejected the Fourth Circuit's decision.[14] The court first cited "the basic tenets of nuisance law requiring merely an interference with use and enjoyment of land" as reason for denying the motion to dismiss.[15] The district court also justified its decision to split from the Fourth Circuit by noting the plaintiff's additional allegations of "fear for her children's health and safety."[16] Finally, the Supreme Court of Vermont allowed recovery on a nuisance claim for contamination-related diminution in property value caused by "public perception of widespread contamination."[17] Contrary to the Eighth Circuit, the Supreme Court of Vermont upheld recovery under the nuisance claim without requiring the plaintiffs to show that their specific land had been contaminated.[18]

Implications

By demanding a more exacting level of specificity from plaintiffs bringing nuisance claims, the Eighth Circuit's decision raises an additional hurdle for plaintiffs attempting to proceed as a class with nuisance claims. Also, the decision likely will increase plaintiffs' litigation costs by requiring expert testimony to demonstrate actual injury or contamination. Given the strong line of authority to which it adds, the *Smith* decision may deter plaintiffs from filing "fear of contamination" claims at the outset, at least in certain jurisdictions, and may provide persuasive precedent to defendants attempting to sway undecided jurisdictions. Going forward, practitioners must carefully scrutinize applicable nuisance law, given the variable treatment of these claims among jurisdictions.

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[1] No. 14-2191 (8th Cir. Sept. 15, 2015).

[2] *Smith* at *4.

[3] *Id.* at *6.

[4] *Adams v. Star Entm't*, 51 F.3d 417, 421-23 (4th Cir. 1995) (disallowing nuisance claims where alleged nuisance was not visible or "capable of physical detection from the plaintiff's property"); *Berry v. Armstrong Rubber Co*., 989 F.2d 822, 828-29 (5th Cir. 1993) (disallowing nuisance claims where there was no evidence of manufacturing waste actually invading plaintiffs' property).

[5] *Adkins v. Thomas Solvent Co*., 487 N.W.2d 715, 717 (Mich. 1992) (disallowing nuisance claims despite "negative publicity resulting in unfounded fear about dangers in the vicinity of the property"); *Smith v. Kansas City Gas Serv. Co*., 169 P.3d 1052 (Kan. 2007) (disallowing nuisance claims where leaked pollutants had not physically interfered with plaintiffs' land); *Walker Drug Co. Inc. v. La Sal Oil Co*., 972 P.2d 1238, 1244 (Utah 1998) (disallowing nuisance claims where plaintiff feared contamination of its property based on contamination of adjacent property); *Chance v. BP Chem. Inc*., 670 N.E.2d 985, 990 (Ohio 1996) (disallowing nuisance claims where there was concern about future contamination related to nearby deepwell waste disposal).

[6] *Adams*, 51 F.3d at 423.

[7] *Id*.

[8] *Berry*, 989 F.2d at 828.

[9] *Id.* at 829.

[10] *See, e.g.*, *Scheg v. Agway Inc.*, 645 N.Y.S.2d 687, 688 (N.Y. App. Div. 1996) (stating that plaintiff's nuisance claim, "insofar as it alleges that the value of [plaintiff's] property was diminished as a result of its proximity to the landfill, does state a cause of action").

[11] *In re Tutu Wells Contamination Litig.*, 909 F. Supp. 991, 998 (D.V.I. 1995).

[12] *Id.*

[13] *Id.* at 997.

[14] *See, e.g.*, *Lewis v. Gen. Elec. Co.*, 37 F. Supp. 2d 55, 61 (D. Mass. 1999).

[15] *Id.*

[16] *Id.*

[17] *Allen v. Uni-First Corp.*, 558 A.2d 961, 963 (Vt. 1988).

[18] *Id.* at 964-65
