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Doctrine Of Consent Will Blossom Again In Calif.

Law360, New York (October 04, 2013, 12:10 PM ET) -- "It is a fundamental principle of the common law that volenti non fit injuria — to one who is willing, no wrong is done."[1] This bedrock concept is embodied in the doctrine of consent, which has been a staple in tort law from its very beginnings. And though tort law has been the longest-standing means of addressing environmental concerns, the doctrine of consent is in only a nascent stage of its evolution with respect to contamination cases in California.

It was first applied just a little more than 20 years ago in Mangini v. Aerojet-General Corporation[2] and saw important expansion through the 1990s. The doctrine has seen no noteworthy developments since that time, but this article posits that the consent defense is on the verge of expanding once again in the context of contamination cases.

Perhaps one explanation for its slow development in the case law has something to do with another doctrine that, to the undiscerning eye, bears close resemblance to that of consent: the doctrine of coming to the nuisance, which, in California courts, "was long ago exploded."[3]

By the 1920s, "coming to the nuisance" had lost all force as a defense, and in 1932, the California Supreme Court formally rejected the notion that the plaintiff who comes to the nuisance cannot recover.[4] First-in-time as an absolute defense remains a distant memory to this day.

A long-conducted activity, initiated before the arrival of neighbors, may nonetheless constitute a nuisance in the context of the changing nature of a neighborhood. To find otherwise "would soon make a person who erects a nuisance the master of all owners or lessees who surround him" and would permit a defendant to appropriate to itself much of the value of neighboring land.[5]

The rejection of the doctrine thus makes sense from a policy perspective and also from an economic standpoint, which instructs that a nuisance-creating activity should be shut down if the externalized harms of the activity exceed the externalized benefits — regardless of the nuisance-generator having arrived first.

At a superficial level, it is easy to see how consent could be conflated with coming to the nuisance. Take a purchaser who buys a parcel with known soil contamination caused by the previous owner's tannery operations and who then later decides to sue the previous owner for damages incurred as a result of the contamination.

Similar to the facts found in a coming-to-the-nuisance case, the purchaser put himself in proximity of an existing nuisance and now wants the court to find that his arriving to a nuisance condition does not justify its continued existence in the context of the changing nature of the use of the property. These similarities may account for why it took more than half a century for the defense of consent to gain any traction in property contamination cases.

The difference, however, is that consent as a defense does not trigger the same policy and economic concerns because persistence of the nuisance condition at issue does not condemn surrounding property and does not produce externalized harms.

Consent is distinct from the repudiated "coming to the nuisance" defense in two important respects: It has applied only in cases where there is a known condition on the plaintiff's property, and the nuisance was created by a lawful activity that is no longer taking place.[6]

The California Court of Appeal first tipped its hat to the doctrine of consent in the context of property contamination in Mangini v. Aerojet-General Corporation in 1991. There, the defendant's lease explicitly authorized its rocket manufacturing operations, which polluted the leased property with a host of chemical contaminants.

A subsequent owner of the property sued the former rocket manufacturer for nuisance and trespass almost 20 years later. Though the court found that the statute of limitations had run on the claims, it also noted that consent would be a defense in the action, where defendant's activities were lawful and permitted by the lease.[7]

The court was clear that such a defense would not upset precedent: "Here, we have no occasion to quarrel with the rejection of the doctrine of 'coming to a nuisance.' This action does not involve a new use of property 'coming to' an older, established neighboring use. As is abundantly clear, this case involves a wholly different context: the assertion of a claim for damages by an owner of property against a former lessee."[8]

In the decade following Mangini, the doctrine was expanded to apply beyond the lessee-lessor relationship in both state and district courts. Purchasers may be found to have consented to known, existing contamination at the time a parcel is purchased, and such knowledge imputes to subsequent purchasers.

Beck Development Co. Inc. v. Southern Pacific Transportation Company[9] provided the stepping stone. In that case, the defendant conducted lawful activities on the property with the consent of the owner and was therefore protected from tort liability, just as in Mangini.

The owner later sold the parcel to a buyer who had "full knowledge of the past use of the property."[10] The buyer's knowledge at the time of purchase also functioned as consent but to the contamination itself.[11] Consent on the part of the initial buyer then prohibited the plaintiff, a subsequent purchaser, from asserting a successful nuisance claim.

As was the case in Mangini, the court made it clear that it was "considering the consent defense … and not the repudiated 'coming to a nuisance' doctrine."[12] In imputing consent to the plaintiff, the court reasoned that because the initial buyer "acquired no right to sue Southern Pacific for private nuisance, [he] could have passed no such right to [the plaintiff, a subsequent grantee]."[13]

The result comports with the Restatement (Second) of Torts Sections 373 and 840A, which together provide that where a subsequent purchaser has had a reasonable opportunity to take precautions against a condition that it knew or should have known about, liability to the previous owner ends.

Tenaya Associates Limited Partnership v. U.S. Forest Service[14] sheds light on the economic considerations that also justify the defense. The court found consent to bar a property owner's nuisance and trespass claims against the United States, where the United States sold the property at issue a decade before the plaintiff purchased it and had informed the initial buyer of the contamination.

The court reasoned that "the [initial] buyer, informed of the nuisance, pays less for the tainted parcel, and is thereby compensated at the inception of any taint to that parcel. Accordingly, the buyer of the single parcel who has been informed of the harm has already been compensated for that harm and is precluded from further compensation."[15]

To this point, all of the cases contemplating the defense with respect to contaminated property have in common that the nuisance condition originated on the property at issue and that the activity that created the nuisance in the first place had ceased. California courts have yet to rule on the application of consent to a case where a plaintiff who buys a parcel with known contamination, that originated from lawful activity on another property, seeks to sue the polluter.

After all, a property purchaser who suffers an existing nuisance created on a neighboring property looks a lot like a coming-to-the-nuisance case. A key fact differentiating the consent case from the coming-to-the-nuisance-case, however, is that the nuisance-generating activity has ceased, thereby mooting the policy and economic concerns addressed by disallowing coming to the nuisance as an available defense.

In such a case, as to a fully informed subsequent purchaser, the reasoning from Mangini, Beck and Tenaya Associates should apply with equal force. Regardless of where the contamination originated, a consenting purchaser pays for the value of the land in light of the condition and also has a reasonable opportunity to take precautions against the condition (he can decline to buy the parcel). The policy interest in cleaning up pollution would continue to be protected by public nuisance (brought by a public entity) and regulatory action and so would not necessarily stifle the application of consent to these facts.

Moreover, this type of case is distinct from precedential consent cases in that a viable claim against the nuisance-generator does exist at some point; the seller of the property would have a cause of action against the nuisance-generator and also could seek recovery for the lost property value factored into the sale price.

Given the continued prevalence of nuisance and trespass to address environmental concerns, the migrating and enduring nature of soil and water contamination and the ever-progressing technology to detect it, consent is ripe for this next stage of its evolution.

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[1] Prosser and Keeton on the Law of Torts, W. Page Keeton Ed., 5th ed. 1984, § 18, 112.

[2] 230 Cal. App. 3d 1125 (1991).

[3] Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 293 (1927).

[4] Vowinckel v. N. Clark & Sons, 216 Cal. 156 (1932).

[5] Bly v. Edison Electric Illuminating Co., 172 N.Y. 1, 15 (1902).

[6] See, e.g., Mangini v. Aerojet-General Corp., 230 Cal. App. 3d 1125, 1138-38 (1991).

[7] Id. at 1139-40 ("In these circumstances…we are convinced that the lessee must have a defense that his use of the property was lawfully undertaken pursuant to the lessor.").

[8] Id. at 1139.

[9] 44 Cal. App. 4th 1160 (1996).

[10] Id. at 1216.

[11] See also Rev 973 v. Mouren-Laurens, 2009 U.S. Dist. LEXIS 38462, *23 (C.D. Cal. Apr. 22 , 2009) ("Full knowledge of contamination on the part of the purchase constitute[s] consent to the contamination.").

[12] Beck Dev. Co., 44 Cal App. 4th at 1216.

[13] Id.

[14] 1993 U.S. Dist. LEXIS 20905 (E.D. Cal., May 18, 1993).

[15] Id. at *17-18 (citing Prosser and Keeton on the Law of Torts, W. Page Keeton Ed., 5th ed. 1984, § 88B, 635 n. 17); see also Newhall Land & Farming Co. v. Superior Court of Fresno Cnty., 19 Cal. App. 4th 334, 344 (1993) (plaintiff's knowledge of existing contamination was relevant because the contamination could be "factored into the terms of the purchase.").