

## The Scarlet Letter Of Self-Stigmatized Property

*Law360, New York (October 23, 2014, 10:29 AM ET) --*

Communities with ongoing environmental remediation often have two diametric dynamics. The first is community activism, often with citizen groups to galvanize and publicize opinion on perceived — and often exaggerated — dangers of contamination. Seemingly as often as night follows day, lawsuits claiming properties are stigmatized by contamination will soon follow. The second is the central tenet of tort law that defendants may only be held to answer for injuries they caused and not for the plaintiff's contribution to them. Hence the tension: How is the law to treat the property damage of plaintiffs who stigmatize their own property through public and vocal claims of harmful contamination?

The issue has received little published judicial attention. But the restrictive manner in which courts have treated stigma damages generally indicates that self-inflicted stigma damages are not recoverable. Drawing on a body of established precedent in the analogous field of defamation reinforces the conclusion that self-stigma damages are likely not recoverable.



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There is little controversy in the proposition that tortious physical damage to real property is generally recoverable by the owner, whether under nuisance, trespass, negligence or various other theories. Stigma damages are something different in that they are more akin to a reputational damage to property. They rely not so much on allegations that a property is physically damaged and therefore must be repaired or has decreased value, but that the relevant market views the property as having diminished value due to the defendant's action.

Thus, stigma damages have gradually emerged in the judicial ether between traditional damage to stone, earth and improvements and damage to market value, as might be alleged in securities matters or professional defamation. Stigma damages claims have been received by courts with some trepidation. Courts have, with some exceptions, required physical contamination of the plaintiff's land before allowing a claim for stigma damages, and require that the contamination constitute a permanent, nonabatable nuisance. In some outlier cases, stigma damages were held to be recoverable even if based on irrational or unfounded fears. During this time, courts have yet to coalesce on a single rationale for allowing — or disallowing — such damages.

Commentators have noted the likely uptick in stigma damages claims during times of depressed housing prices.[1] With damages easily shown in the form of lowered property values, plaintiffs can attempt to characterize such losses as caused by a tort defendant. However, the existing doctrine has not yet accounted for situations in which a plaintiff, despite a flat or rising housing market, impairs others' perceptions of her own property by publicizing adverse conditions potentially impacting the property.

That a tort plaintiff could attempt to sue after being hoist with his own petard is not a new issue. In the analogous context of defamation, a plaintiff generally cannot recover damages for falsehoods that he transmits to others.[2] A limited exception to that rule exists in several jurisdictions for cases of compelled self-defamation. Typically that occurs when a party is fired based on a falsely stated reason, and is then forced to repeat that false reason for termination to future prospective employers.

Despite the appeal of providing a remedy for such falsely accused employees, in declining to recognize a cause of action, courts have noted that "[t]he calculation of damages for self-defamation [would] be unpredictable and entirely within the control of the discharged employee." [3] Additionally, recognizing self-defamation "creates a perverse incentive for a plaintiff not to mitigate damages" and "discharged employees will inevitably feel compelled to describe negative performance evaluations as reckless or false." [4]

The moral hazard wrought in self-defamation claims is equally present in the context of self-inflicted stigma damages. Arguably, a foreseeable result of vociferous and public claims of dangerous contamination is a depression, perhaps temporarily, of property values. After all, what rational purchaser would pay market rate for a house the owner has rhetorically or physically hung a skull and crossbones on?

That effect can be magnified from prelitigation and litigation dynamics. Playing up the extent of and dangers from contamination can make for more effective plaintiff recruitment, but can result in an exaggerated lay perception of risk. And it is not uncommon for significant toxic tort matters to include dedicated communication efforts.

The result may be a self-fulfilling prophecy in the real estate market, in which perceptions of contamination trump reality. It may be possible to drive down market values for properties despite minimal, relatively innocuous contamination. To the extent that homeowners or their lawyers engage in such tactics for the purpose of driving down prices, and driving up recoverable damages, it is a two-edged sword. If successful in their lawsuit, it will obviously increase the recovery, and attendant contingency fees. However, if their theory fails, a plaintiff could be left with his self-stigmatized property, at least until the stigma wears off.

Courts' caution toward stigma theories suggests that damage a plaintiff does to the perceived value of his property is probably not recoverable. All of the hazards of self-defamation are present, with the added concern that real estate is unique and markets for it are at times fickle. There is, of course, a real distinction between plaintiffs engaged in a publicity campaign meant to portray their home or community as toxic, and garden-variety disclosures attendant to some duty.

As in the case of self-defamation, compelled self-disclosure cases could provide a narrow exception to the rule that such damages are nonrecoverable. In situations where a homeowner who is selling property discloses a potentially hazardous condition to comply with disclosure requirements, policy considerations may suggest that disclosure not be regarded as self-stigmatization. Absent such circumstances, it seems unlikely that claims for stigma damages will be viable if a defendant can show they are self-inflicted.

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[1] Sabovich and Hearne, Diminished Property Value Claims in a Diminished Real Estate Market (2009, Toxics Law Reporter).

[2] Restatement (Second) of Torts § 577 (1977).

[3] White v. Blue Cross & Blue Shield of Massachusetts Inc., 442 Mass. 64, 70-71 (2004).

[4] Id.

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