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The concept of stigma damages—suits to recover for damage to a property's reputation—is a relatively new one, attorneys James M. Sabovich and Heather D. Hearne say in this Analysis & Perspective article.

While a property owner generally must show physical contamination to recover diminution damages, the authors say, many ''outlier'' trial courts have found actual contamination unnecessary.

The authors examine the history of diminution claims, as well as a new wave of diminution suits brought under more aggressive theories, and predict that the downturn in the real estate market will mean more such actions.

Diminished Property Value Claims in a Diminished Real Estate Market

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I. INTRODUCTION

Claims that some intruding condition has diminished the value of or stigmatized[1] real property have been around as long as property ownership and a means for resolving disputes of neighbors have co-existed. What is thought of as the modern environmental diminution suit, in which the offending condition is a contaminant often undetectable to the human senses and causing not harm to the property but theo-

[1] The term diminution is sometimes used to denote a decrease in value caused by actual contamination of a property while stigma is sometimes used to refer to a decrease in value caused by a property's association with contamination. Case law and articles generally use the terms interchangeably as will this article.

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retical health risk to the occupants, is more recent. They came of age in circumstances much like the country now finds itself in; the real estate crash that accompanied the savings and loan crash of 1989.

One would expect this from the legal history and economic dynamics. Legally, the mid-1980s saw the growth of stigma damages claims in eminent domain cases, which, due to Fifth Amendment concerns, tend to be more liberal towards claimants with private actions. Economically, the real estate crashes inevitably create a large pool of potential plaintiffs with diminished property values and set a mood in which real estate can be seen as stigmatized. Throughout the 1990s, courts have struggled with the fairness implications of permitting recovery based on amorphous and fickle market perceptions.

History seems to be in the early stages of repeating itself with the current market crash. Diminution suits are becoming increasingly common and increasingly aggressive in the relief sought relative to the evidence of harm offered. Since the posting of judicial Gatekeepers by *Daubert* in 1993, judicial scrutiny has arguably been the most potent check on speculative toxic tort cases. But because of evidentiary rules created for eminent domain cases, it is proving less of a deterrent in diminution suits of the current crash. If this proves a trend and the most speculative of diminution claims are able to reach juries, more factually defensible but legally risqué theories of diminution liability, such as that contamination deprived the plaintiff of the opportunity to sell in a high market, may prove unnecessary.

II. HISTORY AND THEORIES OF DIMINUTION CLAIMS

A. Theories and Origins of Diminution in Property Value

Courts have long recognized claims brought to recover the diminished value of property that has been harmed in some way.[2] Typically property damages were measured by the lesser of either the cost to repair or the loss in value as a result of the damage. Intuitively, this made sense when both the market and the way it values a particular type of damage to chattel is stable over time.

As property values continued to rise steeply in the 1980s, a new breed was born.[3] While for most Americans, real property has always been their largest and most valuable asset, a growing contingency recognized the potential profits of real estate investment. This ''buy and flip'' gamble that newly purchased property will appreciate quickly enough to recover the costs and yield a profit relies heavily on an upward market trend. But often times investors do not have the liquidity to withstand the costs of weathering a market downturn, as demonstrated with the recent housing market crash and record-breaking numbers of foreclosures nationwide.

This investment approach to property was likely one stimulus behind the emergence of stigma damages. Once limited to property that had suffered actual injury, courts have been increasingly asked to award money for damage to a property's reputation, even absent any physical injury. Thus in the last two decades, the concept of stigma damages, previously only applied to claims for defamation or other harm to a person's reputation, has been urged as applying to the injured reputation of real property.[4]

Today, stigma damage claims are popping up across the country,[5] representing the market's supposed environmental xenophobia.[6] As discussed below, this movement seems to have taken hold in the 1990s, particularly in the context of stigma caused by nearby environmental contamination.[7]

B. Limitations on Diminution Damages

As a form of damages, diminution in property value has been singled out for a rather large number of restrictions that generally limit its availability to only a subset of those with property damage claims. These are: (1) physical contamination requirements, (2) the restricted availability of diminution damages when contamination is below regulatory levels, and (3) the rule that plaintiffs may only obtain the lesser of the cost of repair or the loss of market value. The first two are successive hurdles a plaintiff must overcome to be eligible for diminution damages while the third restricts the amount of damages. All are means of limiting windfalls when a harm as intangible and subjective as loss of market value is alleged.

i. No Diminution Without Property Damage Contamination: The Rule of Contact

As a general rule, physical contamination of plaintiffs' property is a prerequisite to recovering diminution damages. While some jurisdictions and occasional outlier trial courts allow owners of uncontaminated property to recover for the perceived ''stigma'' of being near contamination, they are the exception. Even then, they place restrictions on the recovery of stigma damages that disqualify most proximate landowners from claiming them.

The law governing diminution damages in environmental cases has grown principally from that of nui-

[2] See, e.g. *Berger v. Smith,* 160 N.C. 205 (1912) (rejecting plaintiff's claim that a saw mill, if built, would cause injury to his property and depreciate its value and holding that injunctive relief was inappropriate as there was only speculative proof of any possible injury if the sawmill was built. The court noted that if plaintiff's conjectures were realized, he had a legal remedy.)

[3] Andrew Nelson, *'Home sales level off'; prices haven't,* The Patriot Ledger 330 (March 29, 2000); *Taking Sides: Ready for a walk on the supply side?*, Investment News 10 (Aug. 7, 2000) (noting that Congress raised taxes in 1986 to head off speculative real estate investment).

[4] E. Jean Johnson, *Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases,* 15 UCLA J. Envtl. L. & Pol'y 185, 190 (1996/1997)

[5] *McKinney v. Christiana Cmty Builders,* 229 Cal. App. 3d 611 (1991); *O'Neal v. Dept. of the Army,* 852 F. Supp. 327 (M.D. Pa. 1994); *In re Paoli R.R. Yard PCB Litig.,* 811 F. Supp. 1071 (E.D. Pa. 1992); *Martin et al. v. Foster Wheeler Energy Corp.,* No. 06-878, 2007 U.S. Dist. LEXIS 92021 (2007).

[6] Jennifer Young, *Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty*, 52 S.C. L. Rev. 409, 423 (Winter 2001).

[7] *See, e.g.,* E. Jean Johnson, *supra* note r at 185 (''Courts across the United States are recognizing a new cause of action that allows property owners to recover the diminution in property values resulting from environmental stigma that accompanies the contamination of their properties.'').

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sance. The causes of action of negligence, negligence per se, ultra-hazardous activity, and emotional distress typically pled for personal injury in toxic tort cannot support diminution claims.[8] Trespass allows diminution in value as a measure of damages, but with its requirement of ''physical invasion,''[9] it is not applicable when property has not been contaminated.[10]

That leaves nuisance. It is within this most ''impenetrable jungle in the entire law''[11] that environmental diminution case law developed and such allegations decided. A nuisance is ''[a]nything which is injurious to health . . . indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.''[12] To prove a private cause of action of nuisance, a plaintiff must show ''interference with the plaintiff's use and enjoyment of [his] property'' that ''caused the plaintiff to suffer 'substantial actual damage.' ''[13] The causal conduct must be culpable[14] and must not have been done ''under the express authority of a statute.''[15]

Nuisance can be continuing or permanent with the statute of limitations and availability remedies dependent on the classification. Continuing nuisance offers a forgiving statute of limitation that continuously resets with each commission of the nuisance.[16] But the cost is a lesser remedy: Since ''[r]ecovery is limited . . . to actual injury suffered prior to commencement of each action,'' the loss of value that plaintiff will realize upon some future sale is not recoverable.[17]

California, like the majority of jurisdictions, will not find a permanent nuisance that could permit diminution in value damages absent at least some physical contamination of plaintiffs' property.[18] At the middle of the 1990s real estate downturn this issue was in considerable doubt.[19] The power-line eminent domain cases of the 1980s had held public perception of risk from power lines to be an appropriate consideration in determining the value of the property interest taken.[20] This is of course far different from the question of permanent nuisance: With the exercise of eminent domain there is no question that plaintiffs' property interest has been permanently taken, whereas with permanent nuisance that is precisely what must be proven.[21] Further, eminent domain cases are necessarily more claimant-friendly because of their Fifth Amendment implications.[22] Still, the eminent domain cases left in their wake the notion that public perception of an environmental risk, even if wrongheaded, could be considered when determining the decrease in market value caused by the condemnation.

If paranoia over the omnipresent power lines that had criss-crossed the country for decades was compensable, then one would believe that fear of less familiar ''toxic substances'' must be even more so. In 1991, a published decision of the Ohio Court of Appeals so held. *DeSario* affirmed the certification of a diminution claim of a class numbering over 1500 properties around a landfill even though many of the properties would not be contaminated.[23] Its justification? ''[T]o recover damages under a private nuisance theory, the plaintiffs need not show a physical intrusion onto their land[; it] may be premised on the public's perception of contamination irrespective of actual land contamination.''[24]

Contemporary courts in other states were highly critical of the notion, observing that under its perceptions rule logic ''a claim of nuisance in fact could be based on unfounded fears regarding persons with AIDS moving into a neighborhood . . . merely because the fears experienced by third parties would cause a decline in property values.''[25] Two years later the Third Circuit seemed to join *DeSario* with its *In re Paoli R.R. Yard PCB Liti-*

[8] Recovery through negligence and strict liability theories is precluded by the economic loss rule. It holds that ''[i]n a strict liability or negligence case, the compensable injury must be physical harm to persons or property, not mere economic loss,'' *Zamora v. Shell Oil Co.*, 55 Cal. App. 4th 204, 210 (1997), and thus forecloses recovery when damage to the property is solely a loss of value. Neither can they be recovered under the rubric of emotional distress. *Branch v. Homefed Bank*, 6 Cal. App. 4th 793, 801 (1992) (in strict liability and negligence claims ''consequential injury resulting from economic loss in terms of emotional distress is not compensable.''); *Yu v. Signet Bank*, 69 Cal. App. 4th 1377, 1397 (1999).

[9] *Capogeannis v. Superior Court*, 12 Cal. App. 4th 668, 674 (1993) (internal citation omitted). The invasion must be physical and cannot be based on intangibles that do not physically damage the property. *Wilson v. Interlake Steel Co.*, 32 Cal. 3d 229, 233 (1982) (''actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion . . . .'').

[10] This is true even where the intangible makes the property ''unsafe and uninhabitable,'' because that is ''a risk of *personal* harm to its occupants, which is manifestly different from damage to the property itself.'' *San Diego Gas & Elec. Co. v. Superior Court,* 13 Cal. 4th 893, 936-37 (1996).

[11] William Prosser, *The Law of Torts*, 4th ed., page 571.

[12] Cal. Civ. Code § 3479

[13] *San Diego Gas & Elec. Co. v. Superior Court,* 13 Cal. 4th 893, 937-38 (1996).

[14] *Lussier v. San Lorenzo Valley Water Dist.*, 206 Cal. App. 3d 92 (1988).

[15] California Civil Code § 3482.

[16] *Guttinger v. Calaveras Cement Co.*, 160 Cal. App. 2d 460, 462 (1958) (''[e]very repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred.'').

[17] *Santa Fe Partnership v. ARCO Products Co.*, 46 Cal. App. 4th 967, 976 (1996); *Gehr v. Baker Hughes Oil Field Operations Inc.*, 165 Cal. App. 4th 660, 663 (2008).

[18] *Santa Fe Partnership*, 46 Cal. App. 4th at 984 (''[C]ourts have uniformly rejected claims of stigma damages absent evidence the plaintiff's own property suffered physical injury from the contamination.'').

[19] Alex Geisinger, *Nothing but Fear Itself: A Social- Psychological Model of Stigma Harm and Its Legal Implications*, 76 Neb. L. Rev. 452, 457 (1997) (noting that ''[t]he number of cases in which individuals seek recovery for damages due to their property's proximity to a contaminated environmental site continues to rise [and] [i]t is extremely unlikely that this trend will moderate any time in the near future as courts continue to embrace new precedent allowing recovery in such instances.'').

[20] See *San Diego Gas & Elec. Co. v. Daley*, 205 Cal. App. 3d 1334, 1347-50 (1988).

[21] *San Diego Gas & Electric Co.,* 13 Cal. 4th at 942-43 (distinguishing *Daley* ''because [t]here was no issue as to whether or not the utility had 'taken' the easement.'').

[22] *United States v. 68.94 Acres of Land*, 918 F.2d 389, 397 (3d Cir. Del. 1990).

[23] *DeSario v. Industrial Excess Landfill Inc.*, 68 Ohio App. 3d 117, 129 (1991).

[24] *Id.*

[25] *Adkins v. Thomas Solvent Co.,* 440 Mich. 293, 316 (Mich. 1992).

gation opinion.[26] While partly a residual contamination case in that some PCB contamination existed post remediation, *Paoli* cited the power line imminent domain cases for the proposition that nuisance law permitted diminution damages for the ''continuing stigma of living on property which once contained significant amounts of PCBs.''[27]

Finally, in the closely watched trial of *Bixby Ranch Company v. Spectrol Ranch*, a 1993 California jury clairvoyantly found that stigma of prior contamination would make a property in the industrial heart of Los Angeles worth $826,000 less upon the completion of remediation in 1996.[28] Although the case settled on appeal and left behind no published opinion, it nonetheless received significant attention and comment.[29]

Since then the law has become more settled. The only published opinion directly holding that perception of contamination could trump the reality of no contamination was over-ruled in 1995.[30] The *Paoli* decision's prediction that the Pennsylvania law would allow stigma damages based on public fear proved wrong,[31] and subsequent California decisions show that *Bixby Ranch's* prospects on appeal were poor.[32]

The case law, however, remains littered with outlier trial court decisions suggesting actual contamination to be unessential to diminution claims. *Lewis v. GE*, for example, said in 1999 that ''[a]lthough decisions have gone in various directions regarding common-law nuisance claims for diminution in property value caused by nearby contamination, the stronger strand of jurisprudence favors recognizing such claims.''[33] Its ''stronger strand'' was weaved of an incorrect intermediate New York opinion[34] that had overlooked that diminished property value damages are never awarded in continuing nuisances cases like the one before it, and a Michigan case that held the opposite of the *Lewis* Court's holding.[35] The *Lewis* Court reiterated its holding in 2003,[36] this time bolstering its citation with the overruled *DeSario* case.

The poorly defined nature of nuisance law and the stigma damages cases of the late 1980s means that decisions such as *Lewis*, while certainly on the fringe, can be found.[37]

ii. No Diminution From *de Minimus* Contamination

Where contamination on plaintiffs' property did not exceed regulatory levels or has been remediated to that which poses only an insignificant risk from a regulatory standpoint, diminution damages are often not available.

The rule is followed in California. In *Carson Harbor Vill., Ltd. v. Unocal Corp.*,[38] the court applied California law to dismiss plaintiffs' permanent nuisance claim based on lead contamination when ''[t]he [Regional Water Quality Control Board] issued a clean closure report . . . which stated that all appropriate remedial measures had been taken [and] Carson Harbor has not presented admissible evidence that a sufficient degree of contamination presently remains at the site that it constitutes a permanent nuisance . . . .'' Similarly, the United States District Court in *In re Burbank Envtl. Litig*.[39] applied California law to a community exposure case to dismiss plaintiffs' permanent nuisance claims when they could not show contamination above ''EPA abatement levels'' and the ''allege[d] demolition and remediation activity [that] caused dust and debris to come onto their property . . . are abatable.''[40]

Elsewhere, the results have been mixed. Indiana, for example, ''permits recovery of 'stigma damages' for losses in the fair market value of property after [full] remediation of environmental contamination.''[41] While it restricts claims by allowing them to be brought only after remediation is completed, it holds that that same restriction resets the statute of limitations.[42]

iii. The Rule of Lesser Remedies

If a plaintiff can prove a permanent nuisance, the damages are his choice of decreased value or restoration costs, provided the one chosen is not out of proportion to the other.[43] To borrow the Restatement's example, a plaintiff cannot recover high repair costs from a defendant who ''created large pits upon the comparatively worthless land.''

The rule's function of preventing windfalls was recently demonstrated in *Allgood v. GMC*.[44] In that PCB case, an agency-supervised cleanup was already under-

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[26] *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

[27] *Id*. at 797.

[28] E. Jean Johnson, *supra* note 3 at 208.

[29] *Id*.; Elliott Jones, *Bixby Ranch; Some Observations on Plaintiffs Expert's Appraisal of Post Clean-Up Stigma*, Envtl. Rep. (BNA), Dec. 16, 1994; Albert Cohen, *Bad Lands*, Los Angeles Lawyer (Jan. and Feb. 1995); James R. Arnold, *Valuation of Contaminated Property*, ALI-ABA SC18 (Sept. 1997).

[30] *Ramirez v. Akzo Nobel Coatings*, 153 Ohio App. 3d 115, 120 (2003) (''[W]e find that any precedential value of *Desario* was superceded by the Ohio Supreme Court's subsequent [1995] decision in *Chance*. Therefore, this court finds that stigma damages are not available in the state of Ohio.'').

[31] *Golen v. Union Corp*., 718 A.2d 298, 300 (1998) (''After careful consideration, we conclude that private nuisance only recognizes injuries that require physical presence on the property in order to be perceived.''

[32] *Lewis v. G.E.*, 37 F. Supp. 2d 55, 61 (D. Mass. 1999).

[33] *Id.*

[34] The Court cited *Scheg v. Agway*, 645 N.Y.S.2d 687, 688 (N.Y. App. Div. 1996) as finding that complaint stated a cause of action for nuisance where plaintiffs alleged that ''the value of their property was diminished as a result of its proximity to a landfill.''

[35] In *Adkins v. Thomas Solvent Co*., 440 Mich. 293, 487 N.W.2d 715, 721 (Mich. 1992), the Michigan Supreme Court reserved a Court of Appeal's order that had held ''a physical intrusion or physical effect is not required to sustain a claim for nuisance.''

[36] *Lewis v. GE*, 254 F. Supp. 2d 205, 218 (D. Mass. 2003).

[37] *See e.g., Nashua Corp. v. Norton Co*., No. 90-CV-1351 (RSP/RWS), 1997 U.S. Dist. LEXIS 5173 (N.D.N.Y. Apr. 15, 1997) (stigma damages for contamination that remain after property has been remediated).

[38] *Carson Harbor Vill. Ltd. v. Unocal Corp*., 287 F. Supp. 2d 1118, 1203-04 (C.D. Cal. 2003).

[39] *In re Burbank Litigation,* 42 F. Supp. 2d 976, 984-85 (C.D. Cal. 1998).

[40] *In re Burbank Envtl. Litig*., 42 F. Supp. 2d 976, 984-85 (1998); *see also* Rose *v. Union Oil Co*., Case No. C97-3808 FMS, 1999 U.S. Dist. LEXIS 967 (N.D. Cal. Jan. 29, 1999) (granting summary judgment on plaintiffs' nuisance cause of action when imperceptible petroleum contamination when agency indicated remediation not required).

[41] *Pflanz v. Foster*, 888 N.E.2d 756, 759-60 (Ind. 2008).

[42] *Id.*

[43] Restatement 2d of Torts, § 929.

[44] *Allgood v. GMC*, Case No. 1:02-cv-1077, 2006 U.S. Dist. LEXIS 70764 (S.D. Ind. Sept. 18, 2006).

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way. But plaintiffs alleged that ''the removal action and its clean-up standards will not be sufficient to remediate and compensate plaintiffs for their losses caused by contamination of their lands . . . ,'' and sought $78 million (20 times the value of their properties) for a ''hypothetical cleanup going well beyond the government agencies demands for 1.8 ppm in the soil''[45] even though there was no threat to human health. The cleanup was to be ''hypothetical because plaintiffs do not actually want to be obligated to clean up their property. . . . They simply want GM to pay them the costs to carry out such a clean-up.''[46] Noting that this ''would merely transfer huge sums of money to a few plaintiffs'' without any offsetting benefit to the environment, the Court granted summary judgment.[47] However, one outlier court awarded hypothetical restoration costs nine times the property's value.[48]

C. Ups and Downs of the Real Estate Market and Tort Law's Response

Since claims of diminution damages necessarily depend on the performance of real estate as an asset generally, it is useful to briefly review its track record and current status.

As an asset, real estate has often cycled between periods of being coveted and shunned. The Great Depression saw home values fall by 10.5 percent at their worst in 1932[49] and take about a decade to recover that loss.[50] While a national decline of that scale is only now reoccurring, substantial regional declines occurred during the late 1980s/early 1990s.[51]

Throughout most of the 1980s, newspaper headlines remarked on a housing boom that boasted high prices and low inventory.[52] But by the end of the decade, housing prices had taken a serious plunge.[53] During what has come to be known as the most recent real estate drop prior to the present, prices fell by more than 10 percent in New York and more than 20 percent in Los Angeles.[54]

About the same time, mortgage lending banks collapsed across the country. Between 1986 and 1995, ''over 1,000 banks with total assets of over $500 billion failed. By 1999, the Crisis cost $153 billion, with taxpayers footing the bill for $124 billion, and the S&L industry paying the rest.''[55] This taxpayer-funded government bailout seems eerily familiar today, causing some commentators to speculate that mortgage giveaways during the savings and loan crisis may have created a ''moral hazard'' and encouraged lenders to make similar higher risk loans over the last few years.[56]

Following the historical line of market downturns, experts are predicting record deflation this year with an average of 12.6 percent nationwide[57] with prices down 18.2 percent from November 2007 and down 25 percent from their mid-2006 peak.[58] Already approximately 3.4 million homes have been foreclosed across the country, and the total is expected to be nearly double that by 2012.[59]

As one would expect, environmental diminution damage cases have not expressly addressed these market ups and downs: Environmental diminution damage plaintiffs are understandably more interested in excluding such discussion as it is a potential alternative cause of their alleged injury.[60] But other types of tort cases have, and generally do not allow diminution losses that the plaintiff admits were caused by market declines to be shifted to tortfeasors. In *Safeco Insurance Company v. J & D. Painting*,[61] a defendant contractor negligently caused a fire in the insured's home. Repairs were done, but the real estate crash of 1989 occurred during the five months it took to complete them. Plaintiffs sought ''$300,000 [for the] general decline in market value for such houses in that area.''[62] The Court balked. Legally, the negligent fire starting ''was merely the condition or occasion for the market decline to affect appellant's house,'' not the proximate cause of the injury.[63]

From a public policy perspective, the Court viewed recovery as a windfall. ''A person in appellant's predicament has lost an opportunity to sell in a high market, but the opportunity may present itself again. Most people sell houses in order to buy other houses, and the

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[45] *Id.* at *6-7.

[46] *Id.*

[47] *Id.* at **66, 77.

[48] *Felton Oil Co. v. Gee*, 357 Ark. 421, 182 S.W.3d 72, 79 (Ark. 2004).

[49] *House Prices Through the Floor,* The Economist (May 29, 2008) *available at* http://www.economist.com/displayStory.cfm?story_id=11465476.

[50] David C. Wheelock, *The Federal Response to Home Mortgage Distress: Lessons from the Great Depression,* Federal Reserve Bank of St. Louis Review 133, 135 (May/June, Part 1 2008), *available at* http://research.stlouisfed.org/publications/review/08/05/Wheelock.pdf.

[51] Federal Deposit Insurance Company, *U.S. Home Prices: Does Bust Always Follow Boom*? (Feb. 10, 2005) (revised April 8, 2005) *available at* http://www.fdic.gov/bank/analytical/fyi/2005/021005fyi.html#foot.

[52] Marin Real Estate Bubble, *Of Bubbles Past: A Chronological Listing of News Headlines from the Last Housing Bubble* (Sept. 30, 2005) *available at* http://marinrealestatebubble.blogspot.com/2005/09/of-bubbles-past-chronological-listing.html. *See e.g.,* Dick Turpin, *High-End Home Sales Push Up Median Price,* Los Angeles Times, pt. 8, pg. 1 (March 15, 1987).

[53] Marin Real Estate Bubble, *Of Bubbles Past: A Chronological Listing of News Headlines from the Last Housing Bubble* (Sept. 30, 2005) *available at* http://marinrealestatebubble.blogspot.com/2005/09/of-bubbles-past-chronological-listing.html. *See e.g.,* Alisa Samuels, *Home Sales in Southland Plunge in '89,* Los Angeles Times, pt. D, pg. 2 (Feb. 8, 1990).

[54] Motoko Rich, *Slippery Devil, That Real Estate 'Bubble',* New York Times (Oct. 23, 2005) (citing National Association of Realtors) *available at* http://www.nytimes.com/2005/10/23/weekinreview/23leonhardt.html.

[55] Kimberly Amadeo, *Savings and Loan Crisis, available at* http://useconomy.about.com/od/grossdomesticproduct/p/89_Bank_Crisis.htm.

[56] Eric Weiner, *Subprime Bailout: Good Idea or 'Moral Hazard?',* NPR (Nov. 29, 2007) *available at* http://www.npr.org/templates/story/story.php?storyId=16734629.

[57] Housing Predictor, *Record Deflation Forecast in 2009* (Jan. 26, 2009) *available at* www.housingpredictor.com/prices.html.

[58] Kelly Evans, Home Prices, Sentiment Keep Sliding, Wall St. J. (Jan. 27, 2009).

[59] *Id.*

[60] *See, e.g.,* E. Jean Johnson, *supra* note 4 at 185 (discussing trial court's exclusion of market condition evidence at plaintiffs' request).

[61] *Safeco Ins. Co. v. J & D Painting*, 17 Cal. App. 4th 1199 (1993).

[62] *Id.* at 1202.

[63] *Id.* at 1204.

values of those other houses are often subject to the same market forces.''

In *First Federal Saving & Loan v. Charter Appraisal Company*, the Connecticut Supreme Court rebuffed the efforts of another victim of the 1989 crash to shift market losses to a tortfeasor.[64] There, defendant had negligently over-appraised a house for plaintiff bank as part of a mortgage the bank was purchasing. By the time the mortgagee had defaulted and was foreclosed upon, the real estate market had declined by 28 percent.[65]

While conceding that the inflated appraisal could be a ''but for'' cause of the mortgage being made, the Court nonetheless refused to award the bank the loss caused by the general market decline.[66] Describing proximate cause as whether ''the defendant was under a duty to protect the plaintiff against the event which did in fact occur,''[67] the Court found it was lacking because ''[t]he appraiser's duty to the bank did not extend to protecting it from a loss due to a decline in market values under the circumstances of this case.''[68]

While courts have not allowed a plaintiff to recover losses caused by a general market decline from defendants as diminution damages, it is unrealistic to believe that general market declines are unrelated to diminution damages claims. Historically, the rise of diminution cases in the early 1990s, discussed above, coincides with the general real estate decline of 1989 to 1996. As discussed below, a review of case reports suggests that the current real estate collapse has seen an uptick in diminution allegations.

While the observation is anecdotal, that widespread loss of real estate equity would cause an increase in claims seeking to recover diminution damages from third parties makes sense in terms of an increased plaintiff pool and increased receptiveness of the public to those claims.

At their core, claims of stigma and diminution are ones of perception; the attraction of the plaintiff and market to land. Plaintiff, the market and finder of fact, must see the property as blighted and undesirable for such claims to be brought and have any chance of success. This is of course less likely in a rising real estate market. In the aggregate, homeowners netting double digit appreciation annually are unlikely to feel too aggrieved.

The market desperate for real estate is less likely to care about hypothetical stigma, and a jury, likely to include many who have been priced out of the windfall in real estate, may feel more jealous than sympathetic towards a plaintiff claiming decreased appreciation. The weight of those sentiments could be expected to reverse in down markets such as this one.

All property owners, including potential jurors and plaintiffs have suffered loss of equity, often bringing the property below its purchased value. Potential plaintiffs are thus aggrieved. One might expect that potential jurors, having suffered market losses themselves, are more sympathetic, and the claim that property is stigmatized, more credible than in up markets.

[64] *First Fed. S&L Ass'n v. Charter Appraisal Co.*, 247 Conn. 597, 602 (Conn. 1999).

[65] *Id.*

[66] *Id.* at 607.

[67] *Id.* at 605, n. 7.

[68] *Id.* at 609.

III. DIMINUTION CLAIMS IN THE CURRENT CRASH

The legacy of the diminution damage litigation of the prior real estate crash is that such damages are restricted, but the application of those restrictions inconsistent. This has left maneuvering room for new generation of diminution suits that seem to have been ushered in by the current real estate crash.[69] This has included aggressive theories that either seek to bypass the rule of contact or to reach a jury with ipse dixit diminution damage theories.

At the highest court level Indiana has officially created a cause of action for post-remediation stigma damages,[70] the bounds of which remain to be seen. If broadly applied, it potentially gives a cause of action to anyone with property near any area where a response or removal action is undertaken, which is of course a massive group.

More common have been trial court decisions addressing diminution. Some chip away at the rule of contact. *Gates v. Rohm & Haas Co.*,[71] for example, purported to recognize the rule of contact,[72] but sidestepped it by holding that ''the physical presence of vinyl chloride in the air, even if undetectable, constitutes a physical injury to the property for purposes of common law property damage claims.''[73] Needless to say, if phantom contamination is evidence of physical injury to property, then physical injury to property would be a near meaningless restriction.

Other cases allow dubious claims of causation to reach a jury with an end-run around the Gatekeeper. Judicial scrutiny of expert opinions is undoubtedly one of the principal checks on the causative theories offered in toxic torts.[74] Ordinarily, toxic tort plaintiffs claiming questionable causal connections between some expo-

[69] *Lewis v. Kinder Morgan Southeast Terminals LLC*, Case No. 2:07cv48KS-MTP, 2008 U.S. Dist. LEXIS 61060 (S.D. Miss. Aug. 6, 2008) (deny summary judgment in post remediation stigma case based on landowner's opinion evidence of value); *Abicht v. Republic Services Inc*., Ohio Ct. C.P., No. 2008 CT 10 0741, Oct. 8, 2008) (suit seeking diminution damages based on odors); *Gates v. Rohm & Haas Co.*, Case No. 06-1746, 2008 U.S. Dist. LEXIS 58036, *12 (E.D. Pa. 2008) (diminution suit where contamination undetectable); *Gehr v. Baker Hughes Oil Field Operations Inc.*, Cal. Ct. App., No. B201195 (July 30, 2008) (seeking to recover stigma damages by arguing inability to refinance due to nuisance); *Abrams v. Ciba Specialty Chems. Corp*., Case No. 03-0566, 2008 U.S. Dist. LEXIS 68897 (S.D. Ala. Sept. 10, 2008) (271 plaintiff suit alleging diminution in property value from proximity to DDT contamination); *Tonneson v. Sunoco Inc*., 2008 WL 2324112 (S.D.N.Y. June 6, 2008) (excluding diminution damages expert under *Daubert*); *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, S.D.N.Y., No. 00-1898, MDL 1358 (June 6, 2008); *Isaiah Evans, et al. v. Walter Industries Inc., et al.*, No. 05-1017, N.D. Ala.; 2008 U.S. Dist. LEXIS 89801 (Sept. 24, 2008) (class action alleging diminution in value with classes to be determined by proximity to defendants' foundry).

[70] *Pflanz v. Foster*, 888 N.E.2d 756, 759-60 (Ind. 2008).

[71] *Gates v. Rohm & Haas Co.*, Case No. 06-1746, 2008 U.S. Dist. LEXIS 58036, at *12 (E.D. Pa. 2008).

[72] *Id.* at *8.

[73] *Id.* at *12.

[74] *Rider v. Sandoz Pharm. Corp*., 295 F.3d 1194, 1197 (11th Cir. 2002) (*Daubert* decision stating, ''[t]oxic tort cases, such as this one, are won or lost on the strength of the scientific evidence presented to prove causation.'').

  TXLR ISSN 0887-7394

sure and harm must support the assertion with expert testimony,[75] and must be prepared to show that the expert's opinion is reliable under *Daubert* or its state equivalents.[76] But, as an outgrowth of the Fifth Amendment implications of eminent domain cases[77] landowners are permitted to offer opinion evidence as to the value of their property.[78]

Under this rule, dubious causal theories can sometimes defeat summary judgment. In *Fisher v. Ciba Specialty Chems. Corp.*,[79] lay landowners simply made up causative values that the Court relied on in denying summary judgment. One said her property was '' 'worthless since it was polluted by Defendants' chemicals,' '' but that she believes it '' 'would be worth approximately $ 200,000 if it were not contaminated.' ''[80] The court declined to subject the opinions to scrutiny because doing so would require of those offering the opinions ''a degree of rigor and real estate acumen[.]''[81] *Lewis v. Kinder Morgan Southeast Terminals LLC*[82] is similar. In *Lewis* plaintiff landowners claimed diminution damages from a one-time gasoline spill that was remediated to the point that the constituents were undetectable or orders of magnitude below agency levels.

Based on this the overseeing agency had issued closure, finding ''no threat of migration of product to surface water, shallow soils or groundwater.''[83] Defendants supplemented this with declarations of two appraisers, one local and one national, opining to no market decline. Plaintiffs responded with bare opinion of a decline in value from two landowners and one would-be buyer. While expressing skepticism and stating that it would require a foundation for the opinions before letting them reach a jury, the Court nonetheless found the showing enough to defeat summary judgment.[84]

Contrast this with the treatment plaintiffs' diminution expert received in *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig*.[85] Whereas the opinions of the *Lewis* and *Fisher* landowners survived on pure ipse dixit, the expert offered detailed compilations of market data, comparing the allegedly contaminated county with another and finding a 10 percent difference in appreciation.[86] In an exacting analysis, the Court took issue with the expert's evidence and opinions, faulting him for cherry-picking, not explaining inconsistent data, not detailing his methodology, and not following appraisal guidelines[87] and ultimately excluding his opinion.

This anomaly of allowing a lay witness to offer opinions where an expert would be prohibited from doing so could be especially significant to diminution claims in the current real estate downturn. Given the volatility in the market, how ineffective real estate appraisal methods were in predicting the current market crash, the general stigma that has attached to most all real estate (whether contaminated or not), and that the current crash can be offered as an alternative cause for a decline in value,[88] one would expect it to become more difficult to establish that there is a reasonable basis for an opinion that contamination caused plaintiffs' diminution in value. Were this to occur, an increase in the use of more factually defensible but legally risqué theories could be expected, such as the lost opportunity theory rejected in *Safeco*. However, if the causative opinions in diminution suits are to be essentially exempt from judicial scrutiny, there is no need for such theories.

IV. CONCLUSION

The prior decline in the real estate market saw increased attention paid to diminution damages, both in terms of suits brought and law made. The pattern appears to be repeating itself in the current decline with aggressive suits pressing the bounds of previous law. While it is too early to predict the legacy of this batch of suits, it seems a safe bet that diminution suits will be up as long as the market is down.

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[75] *Jones v. Ortho Pharmaceutical*, 163 Cal. App .3d 396, 401, 404 (1985).

[76] *See e.g., Lockheed Litigation Cases*, 115 Cal. App. 4th 558, 563-64 (2004) (matters relied upon must provide a reasonable basis for the expert's opinion).

[77] Cal. Evid. Code § 810; *United States v. 68.94 Acres of Land*, 918 F.2d 389, 397 (3d Cir. Del. 1990).

[78] Cal. Evid. Code § 813.

[79] *Fisher v. Ciba Specialty Chems. Corp.*, Case No. 03-0566-WS-B, 2007 U.S. Dist. LEXIS 76174, *10 (S.D. Ala. 2007).

[80] *Id.*

[81] *Id.* at **32-33.

[82] *Lewis v. Kinder Morgan Southeast Terminals LLC*, Case No. 2:07cv48KS-MTP, 2008 U.S. Dist. LEXIS 61060 (S.D. Miss. Aug. 6, 2008).

[83] *Lewis*, 2008 U.S. Dist. LEXIS 61060 at *4.

[84] *Id.* at **19-20 (''Suffice it to say that the plaintiffs have an uphill battle on the issue of damages for a diminution in value of the realty in question. . . . The plaintiffs will have to first satisfy the court that their valuation opinions have a sound and reasonable basis in fact and offer specific facts that translate into a reduced market value for the property.'').

[85] *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, MDL 1358, 2008 U.S. Dist. LEXIS 44216, at **10-11 (S.D.N.Y. June 4, 2008).

[86] *Id.* at **10-12.

[87] *Id.* at **11-15.

[88] In cases of personal injury allegations, the failure of an expert to convincingly rule out an alternative cause is often the end of the case. *Magistrini v. One Hour Martinizing Dry Cleaning*, 180 F. Supp. 2d 584, 610 (D.N.J. 2002).