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Implications Of Recent Nuisance And Trespass Cases

By **Carlos Romo**


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Law360, New York (July 12, 2017, 1:04 PM EDT) -- Property owners are increasingly turning to common law nuisance and trespass claims for suits against neighboring industrial activities. Why has there been an upsurge in these cases? This article examines recent state and federal cases highlighting various legal issues associated with nuisance and trespass claims.

On the one hand, courts are expanding the types of claims that can be brought as nuisance and trespass. At the same time, they are making it harder for industry to defeat common law claims at the earliest stages of litigation. Courts are whittling away traditional legal defenses such as statute of limitations and preemption. When cases do reach juries, the law on the proper scope of damages is undecided in some key jurisdictions. The resulting damage awards or injunctive relief can reach millions of dollars. As a result, common law claims are now easier to assert, harder to defend, and can result in unpredictable damage awards. The following highlights some legal and practical implications of this year's nuisance and trespass decisions.

Expansion of Subjective Nuisance and Modern Trespass Claims

The Texas Supreme Court wrote a comprehensive review of nuisance law in its 54-page 2016 opinion in Crosstex North Texas Pipeline v. Gardiner.[1] Crosstex involved noise from compressor engines supporting a natural gas pipeline in rural Texas. The Gardiners complained that the noise was a negligent nuisance. A jury agreed and concluded that their ranch's property value had declined $2 million as a result of the mobile-home-size compressor engines that allegedly sounded like "standing in the middle of an airport with jet airplanes taking off all around."[2]

On appeal in the Texas Supreme Court, the Crosstex opinion reaffirmed that nuisance is a legal injury based on the unreasonable invasion of another's interest in the private enjoyment of their property. But nuisance is a viable legal injury "only if the interference is 'substantial' and causes 'discomfort or annoyance' that is 'unreasonable.'" The court emphasized it is the "effects" that must be "unreasonable" to rise to the level of a nuisance and not the defendant's conduct. Of course, determining what effects are "unreasonable" to a property owner is highly subjective. Indeed, the Crosstex opinion explicitly states that determining whether an interference is substantial or unreasonable or "merely a 'trifle' or 'petty annoyance'" will "generally present questions of fact for the jury to decide" and it remanded the case for a new trial.[3] The Iowa Supreme Court in May 2017 similarly certified a class action nuisance claim on the basis that "lay testimony from members of the community" is the "typical method" of proving nuisance claims.[4]

Similarly, the "modern" trend in trespass is to expand the cause of action to include subsurface and airborne migration of particles under or over property. For example, in May 2017, the Eighth Circuit reversed a summary judgment from a case in Arkansas involving subsurface migration of oil and gas wastewater on the basis that "it seems likely" that "7.6 million barrels of waste, poured into an area capable of holding no more 1.1 million barrels, migrated 180 feet to cross the property line."[5] There was no conclusive evidence that waste had actually crossed under the plaintiff's property. Nevertheless, the court concluded this was a fact issue sufficient to send to the jury. The Supreme Court of South Carolina notes that states are beginning to allow these trespass claims in "reaction to

modern science's understanding of microscopic and atomic particles."[6] Notably, the Texas Supreme Court has expressly declined to address "whether deep subsurface wastewater migration is actionable as a common law trespass in Texas" on several occasions, most recently in a May 2017 decision.[7]

The Erosion of Legal Defenses to Environmental Torts

Even as courts allow new types of nuisance and trespass claims, they are making it harder for defendants to defeat these claims at the earliest stages of litigation. Highly regulated entities subject to comprehensive permitting programs like the federal Clean Air Act might have previously relied on obtaining a permit under a federal and state permitting regime and arguing that the permit preempts a common law nuisance or trespass claim. But several federal and state cases hold that the federal CAA does not preempt state common law remedies. Meanwhile, a series of Texas Supreme Court decisions from February to May 2017 provides important guidance for application of both preemption and statute of limitations defenses to nuisance and trespass claims.

Federal and State Preemption

Merrick v. Diageo and Bell v. Cheswick Generating Station are two U.S. courts of appeals decisions rejecting a federal preemption defense against a state common law nuisance or trespass action based on environmental violations.[8] Both cases involve the federal CAA and state nuisance and trespass claims.

In Cheswick, the plaintiffs filed a class action complaint against a coal-fired power plant complaining of ash and contaminants settling on their property. The dust from the plant created a sooty film on neighboring properties requiring constant cleaning. The district court granted the defendant power plant's motion to dismiss, concluding that the CAA preempted all of the plaintiffs' state law tort claims. However, the Third Circuit reversed on the basis that a "savings clause" in the CAA preserved the ability of states "to impose higher standards on their own sources of pollution, and that state tort law is a permissible way of doing so."[9]

The Sixth Circuit in Merrick largely adopted the Third Circuit's reasoning in Cheswick and held that the plaintiffs' nuisance and trespass claims against a whiskey distillery based on the deposit of a black sooty substance ("whiskey fungus" caused by fugitive ethanol emissions) were not preempted. Significantly, in both Cheswick and Merrick, the state tort claims were based on violations of air permits and the physical deposit of sooty substances on neighboring properties. Facilities in compliance with their air permits and emitting air particles merely migrating above a neighboring property would have a stronger preemption argument.

State preemption or displacement of state common law remedies is still a defense for state nuisance and trespass claims based on air emissions. The concept of "displacement" was addressed in the U.S. Supreme Court case of AEP v. Connecticut.[10] In AEP, the Supreme Court concluded that the federal CAA and expertise of the U.S. Environmental Protection Agency "displace" federal common law claims seeking the abatement of emissions. The corollary at the state level would be that state statutory schemes implemented by state expert agencies displace state common law claims. The Texas Supreme Court preserved this defense in its May 2017 Town of DISH v. Atmos Energy when it overturned a court of appeals decision rejecting a similar argument.[11] But in deciding the case on limitations grounds, the court failed to reach displacement under state law.[12]

Statute of Limitations

The 2017 DISH case clarified the evidence required for plaintiffs to show when a nuisance becomes unreasonable for statute of limitations purposes. The case involved noise, light and air emissions from a compressor station facility constructed by five different entities over a period of four years. Neighbors complained about noise and odor issues dating back to 2006 but didn't bring their claims until 2011. The property owners claimed that only after a natural gas metering station was added in 2009 did the cumulative noise and odors create a nuisance. Their only support for this theory was their own affidavit testimony claiming the noise and odors worsened in 2009 after the last facility was constructed. A Texas court of appeals concluded that the "synergistic effect" from multiple operations can revive claims otherwise barred by limitations against some operators and held the precise accrual date was a fact issue only a jury could decide.[13] The court of appeals also found

that migratory air particles solely above a property could constitute a trespass and that no mental anguish damages were available for any nuisance. All the parties appealed.

The Texas Supreme Court reversed the court of appeals on limitations grounds. In doing so, it clarified a previous Texas Supreme Court decision holding that "[t]he point at which an odor moves from unpleasant to insufferable or when noise grows from annoying to intolerable 'might be difficult to ascertain, but the practical judgment of an intelligent jury [is] equal to the task.'"[14] The plaintiffs heavily relied on that holding to suggest that any allegation that a nuisance worsens, and thus revives a claim, should go to a jury as a fact issue. But the court noted that "[i]f that were the rule, a plaintiff's bare, subjective assertions could always set the accrual date" and confirmed that "an accrual date must be based on objective evidence, not bare, subjective attestations."[15] This decision preserving a limitations defense must be balanced with the February 2017 Texas Supreme Court oil and gas case ExxonMobil v. Lazy R Ranch that allowed a nuisance claim (with substantial damages in the form of injunctive relief) when defendants could not prove that historical contamination from oil and gas operations occurred solely outside the limitations period.[16]

Unpredictability of Damages and Injunctive Relief

In deciding cases on limitations, the DISH and Lazy R cases failed to reach two key nuisance damages issues raised in the briefs before the court. In DISH, the plaintiffs argued that they should be able to receive damages for the personal discomfort and annoyance suffered in addition to diminution in property value. Defendants argued damages for diminution in property value necessarily account for discomfort and annoyance in nuisance claims and that damages for discomfort would result in an impermissible double recovery.[17] In Crosstex, the Texas Supreme Court suggested in a footnote that annoyance and discomfort damages may be available in Texas.[18] However, the issue has never been specifically decided. The damages awarded in a nuisance case Aruba Petroleum v. Parr, which was controversial for its jury award of $2.65 million in damages for past and future pain and suffering and mental anguish, was reversed in February 2017 by a Texas court of appeals.[19] The jury's damages award in Parr added to the uncertainty and unpredictability over damage awards for nuisance claims. However, because the court of appeals reversed the finding that Aruba Petroleum caused an "intentional" nuisance, the court failed to reach the scope of damages for a nuisance.

In the Lazy R decision, the Texas Supreme Court left open another critical issue on damages for nuisance when it did not review a district court order allowing injunctive relief allegedly costing $6 million to remediate groundwater on 1.2 acres of property that was valued at $50 an acre.[20] Industry argued that injunctive relief cannot be used as an end-run around the economic feasibility rule, which limits damages grossly disproportionate to the value of the property. But the court declined to reach the issue because it was not properly presented to the trial court.

The scope of nuisance damages will depend on the jurisdiction. North Carolina limits nuisance damages when they are more than the value of the property.[21] Other jurisdictions like Colorado may allow for mental anguish and personal damages in addition to diminution in property value, particularly when claims are based on physical discomfort and not merely emotional distress.[22]

Practical Implications

There are several legal and practical takeaways from recent decisions on nuisance and trespass for environmental claims. In particular, it is increasingly difficult to dismiss nuisance and trespass claims via traditional legal affirmative defenses. While the DISH decision held that subjective attestations alone will not be sufficient to revive time-barred claims, nuisance is customarily proven up with lay testimony. And the fact-dependent nature of many common law claims means a jury trial (with the prospect of an uncertain and unpredictable damage award) may be easier to reach.

Compliance with permits issued under comprehensive statutory and regulatory frameworks will also not necessarily work as a shield to common law claims. Cases rejecting preemption in nuisance and trespass claims did not directly address whether compliance with a permit would change the result. But an industrial facility cannot assume that meeting permit requirements is enough to avoid common law claims.

Good community relations and being a good neighbor are key. Communicating with neighbors,

educating them about operations, and working to abate nuisance conditions may help avoid litigation. But if court cannot be avoided, records showing a history of complaints, the compliant status of operations, or the oversight of an expert state agency can also help establish a limitations or state preemption defense.

Finally, the siting of industrial facilities is more important than ever. Companies must always carefully evaluate whether facilities will comply with all applicable federal, state and local statutory and regulatory requirements. However, as important, companies should consider whether their operations could unnecessarily expose a facility to common law claims. For instance, the siting of a disposal well for oil and gas wastes should not assume that waste will be constrained to property lines below the surface and should be sized appropriately. Similarly, the location of an emissions source should account for the potential deposit of particulate matter on neighboring properties.

Several 2017 cases provide critical insight into litigating nuisance and trespass claims. But they also leave open key undecided legal questions for future cases and appeals to resolve.

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DISCLOSURE: Romo represented Atmos Energy in the DISH case and the Texas Oil & Gas Association in the Lazy R Ranch case at the Texas Supreme Court.

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[1] 505 S.W.3d 580 (2016).

[2] Id. at 590 n.2.

[3] Id. at 595, 609.

[4] Freeman v. Grain Processing Corp., 895 N.W.2d 105, 124 (Iowa May 12, 2017).

[5] Hill v. Southwestern Energy Co., 858 F.3d 481, 488 (8th Cir. May 22, 2017)

[6] Babb v. Lee County Landfill, 747 S.E.2d 468, 477 (S.C. 2013).

[7] Envtl. Process. Sys. V. FPL Farming Ltd., 457 S.W.3d 414 (Tex. 2015); Lightning Oil Co. v. Anadarko E&P Onshore LLC, 15-0910 (Tex. May 19, 2017).

[8] Merrick v. Diageo Americas Supply Inc., 805 F.3d 685 (6th Cir. 2015); Bell v. Cheswick Generating Station, 734 F.3d 188, 190–91 (3d Cir. 2013), cert. denied 134 S.Ct. 2696 (2014).

[9] Bell, 734 F.3d at 198.

[10] Am. Elec. Power Co. v. Conn., 564 U.S. 410 (2011).

[11] Town of DISH v. Atmos et al., No. 15-0613 (Tex. May 19, 2017) ("DISH").

[12] But see Forest Oil v. El Rucio Land & Cattle Company, No. 14-0979 (Tex. April 28, 2017). In Forest Oil, another oil and gas trespass case from the Texas Supreme Court decided in 2017, the court rejected a defendant's claim that an environmental contamination case was subject to the primary or exclusive jurisdiction of the Railroad Commission, the state agency regulating a cleanup. The opinion preserved a $23 million damages award against the company.

[13] DISH at Slip Op. 3.

[14] Natural Gas Pipeline Co. of America v. Justiss, 397 S.W.3d 150, 155 (Tex. 2012).

[15] Dish at Slip Op. 14.

[16] ExxonMobil Corp. v. Lazy R Ranch, No. 15-0270 (Tex. Feb. 24, 2017), Slip Op. at 9.

[17] See Babb, 747 S.E.2d at 475.

[18] Crosstex, 505 S.W.3d at 610 n.21.

[19] Aruba Petroleum v. Parr, No. 05-14-01285 (Tex. App.—Dallas Feb. 1, 2017, no pet.).

[20] Lazy R Ranch at Slip Op. 12.

[21] BSK Enterprises Inc. v. Beroth Oil Co., 783 S.E.2d 236, 249 (N.C. App. 2016 rev. denied).

[22] See, e.g., Hendricks v. Allied Waste Transp. Inc., 282 P.3d 520, 525 (Colo. App. 2012).

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