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TABLE OF CONTENTS

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NUISANCE JOINS THE PJC

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ENVIRONMENTAL LAW PRACTITIONERS HAVE A SURPRISE in store this year. The State Bar of Texas Pattern Jury Charges Volume on General Negligence and Intentional Personal Torts will include a new chapter on Nuisance Actions. Nuisance Actions have formed an integral part of environmental litigation and common law nuisance has existed to protect landowners long before there were regulations and regulators like the Texas Department of Environmental Quality. *See Columbian Carbon Co. v Tholen,* 199 S.W.2d 825 (Tex. App.---Galveston 1947). In fact, some of the earliest environmental litigation of the United States can be found in reported decisions of the United States Supreme Court and involve disputes over pollution of the nation's air and water. *See Missouri v. Illinois,* 180 U.S. 208 (1901); *Georgia v. Tenn. Copper Co.,* 206 U.S. 230 (1907). Now, with the addition of Nuisance in the General Negligence Volume of the PJC, practitioners and courts will have the benefit of standardized jury instructions and helpful commentary to rely upon in the rapidly expanding area of environmental litigation.

Why Nuisance for Environmental Claims?

Nuisance law has been used for years to challenge and remedy pollution or other activities that interfere with the rights of occupants and landowners. The PJC defines a legally actionable nuisance as "a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to a person of ordinary sensibilities." *Barnes v. Mathis,* 353 S.W.3d 760, 763 (Tex. 2011) (per curiam). Nuisance actions come in two forms: private nuisance and public nuisance. In a private nuisance, the defendants conduct substantially interferes with the use or enjoyment of real property owned by an individual or small group of individuals. By contrast, in a public nuisance action the defendants conduct unreasonably interferes with a right common to the public at large by affecting the public health or public order. Most environmental litigation between private persons involves private nuisance actions.

Several aspects of the tort make it suited for environmental litigation. Intentional conduct is not necessarily required to find nuisance. Under Texas law, nuisance actions can result from intentional conduct, negligent conduct or conduct deemed abnormal or put of place in its surroundings. *City of Tyler v. Likes,* 962 S.W.2d 489, .503 (Tex 1997). *See also* new PJC 12.2 (cases collected in commentary). In fact, even lawful or legal conduct can, under certain circumstances, give rise to nuisance under Texas law. This can make it especially attractive to environmental practitioners. For example, a state issued permit for the injection of wastewater does not automatically insulate the operator from tort claims like nuisance. *See FPL Farming Ltd. v. Environmental Processing Systems, L.C.,* 351 S.W.3d 306, 310-11; 314 (Tex 2011). The mere existence of a valid permit is not sufficient to insulate a defendant because the nature and manner in which the operator conducts its approved activity may give rise to an action for nuisance. *See C.C. Carlton Industries, LTD. V. Blanchard,* 311 S.W.3d 664, 660 Tex. App.---Austin 2010). This aspect of Texas law allows the court to instruct the jury in an appropriate case: "You are further instructed that a nuisance, if it exists, is not excused by the fact that it arises from the conduct of an operation that is itself lawful or useful." *See* new PJC 12.2 at page 120. Depending on the facts, this instruction can clarify the scope and reach of the "permit defense."

Elements of Private Nuisance

Filing a nuisance claim may not be the appropriate remedy for all environmental problems. There are four required elements of a private nuisance claim: 1) plaintiff has an interest in the land; 2) the defendant interfered with or invaded plaintiffs interest by conduct that is negligent, intentional, or abnormal and out of place in its surroundings; 3) defendant's conduct resulted in a condition that substantially interferes with the plaintiff's use and enjoyment of the property; 4) and the nuisance caused injury to plaintiff. There is no definition of "abnormal and out of place" in any Texas Supreme Court decision. The other standards: "negligent, intentional, and unreasonable interference" are all defined in the new PJC instructions based on well-established Texas precedent which has been previously used in other PJC sections.

Elements of Public Nuisance

Public nuisance actions involve an unreasonable interference with the right common to the general public. The interference must also adversely affect all or a considerable part of the community. Here, the effect of statues may play a role. Statutorily prescribed conduct may determine the

reasonableness of a defendant's conduct. For example, the Texas Water Code determines whether unreasonable levels of contaminants are present in certain bodies of water. In addition, there are statutorily defined public nuisances and common nuisances that private citizens may sue to abate. *See* TEX. CIV. PRAC. & REM. CODE §§ 125.0015, 126.061-.063 (e.g. discharging a firearm in public, illegal gambling, prostitution). Because of this, the PJC suggests that practitioners consult other Texas statues like the Penal Code, Civil Practices and Remedies Code and Texas Health and Safety Code for provisions that may be applicable to the facts at issue.

Standing

In most cases, a city or state attorney brings an action for public nuisance. A private citizen can bring such actions but must establish standing to do so. That involves alleging that the plaintiff has suffered harm different in kind from that suffered by the public at large. *Jamail v. Stoneledge Condominium Owners Ass'n*, 970 S.W.2d 673, 676 (Tex. App.–Austin 1998, no pet.). Standing is a matter of law for the court to determine, not a jury question. *See Douglas v Delp*, 987 S.W.2d 879, 882-83 (Tex. 1999) (courts may not address merits of case unless standing is present because it is part of the subject-matter jurisdiction); *see also American Electric Power Co. v Connecticut*, 131 S. Ct. 2527, 2534 (2011) (discussing Article III standing as a matter of law in nuisance cases).

In private nuisance actions, anyone whose property interests were invaded may bring an action. This includes owners, renters, and easement owners. *See Schneider National Carriers, Inc. v Bates*, 147 S.W.3d 264, at 268 n.2 (Tex. 2004) (tenants at the time of injury maintains standing). A current owner may seek damages and a past owner can sue for property damage if the injury occurred while the plaintiff owned the land. *See Vann v. Bowie Sewerage Co.*, 90 S.W.2d 561, 562-63 (Tex. 1936); *Lay v Aetna Insurance Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.–Austin 1980, writ ref'd n.r.e.).

Classification Permanent or Temporary

Nuisances can be either permanent or temporary. Classification affects recoverable damages and when claims accrue for limitations purposes. *Schneider National Carriers, Inc. v Bates*, 147 S.W.3d 264, 275 (Tex 2004). A nuisance is permanent if it involves activity that will continue indefinitely and results in an injury that is constant and continuous. A nuisance is temporary if it is occasional, intermittent, or recurrent such that it is uncertain that any future injury will occur or that it will occur only at long intervals. *See* PJC 12.4. If the nature of a nuisance is in dispute, categorizing the nuisance as permanent or temporary is a question for the jury. *Schneider National Carriers, Inc. v Bates*, 147 S.W.3d at 286 (Tex. 2004).

Damages

In a temporary nuisance action, a plaintiff may recover only for lost use and enjoyment that has already accrued. *Schneider National Carriers, Inc. v Bates*, 147 S.W.3d at 276 (Tex. 2004). Future damages for a temporary nuisance are simply not recoverable. *Id.* If a nuisance is permanent, the owner may recover for lost market value, a figure that reflects all losses from the injury. The two claims are mutually exclusive and a landowner may not recover damages for both permanent and temporary nuisance in the same action. *Id.*

The Supreme Court of Texas has cautioned that a decrease in value does not necessarily indicate a nuisance and an increase in value does not mean the absence of nuisance.

Loss of market value or diminution in value is a figure that reflects all property damages, including lost rents expected in the future. *Id.* Jurors make a reasonable estimate of the long-term impact of a nuisance based on competent evidence. *Schneider National Carriers, Inc.*, 147 S.W.3d at 277. Fluctuations of value are not dispositive and can be misleading. The Supreme Court of Texas has cautioned that a decrease in value does not necessarily indicate a nuisance and an increase in value does not mean the absence of nuisance. *Id.*

Repair costs can be an element of damages, but cost of repairs cannot be obtained for the same damage when market value is already assessed or included. *See C.C. Carlton Industries, Ltd. V Blanchard*, 311 S.W.3d 654, 662-63 (Tex. App.–Austin 2010, pet. denied). If not subsumed, repair costs should be assessed via separate jury question specific to each property damaged. While Texas law does not generally permit double recovery for loss of market value and cost of repairs, a dual recovery of diminished value and cost of repairs is allowed if the issue is submitted to the jury and if the evidence shows that the property will suffer a reduction in market value once repairs have been completed. *See Ludt v McCollum*, 762 S.W.2d 575, 576 (Tex. 1988) (per curiam); *Royce Homes v Humphrey*, 244 S.W.3d 570, 575-76 (Tex. App.–Beaumont 2008, pet. denied.)

Although many nuisance actions are based on property damage, a plaintiff may also recover personal injury damages

caused by a nuisance. *See Schneider National Carriers, Inc.*, 147 S.W.3d at 268 n.2. However, mental anguish damages are not recoverable in nuisance actions based on negligence. *See City of Tyler v Likes*, 962 S.W.2d 489, 503-04 (Tex. 1997). Finally, if the defendant is a governmental entity, intentional conduct by the defendant is a pre-requisite in order to recover damages. *City of San Antonio v Pollock*, 284 S.W.3d 809, 820-21 (Tex. 2009).

Notably, proximate causation is a required element of any damage award. PJC 12.5 contains the following definition: The nuisance "proximately caused" [Plaintiffs] damages if the condition created by [Defendant] was a substantial factor in bringing about the damages and without which condition such damages would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the damages might reasonable result therefrom."

Conclusion

Nuisance is well suited for and can be used to litigate environmental related disputes. Texas practitioners now have the benefit of PJC Chapter 12, an entire chapter now devoted to nuisance.[1] The jury instructions and commentary provide guidance on the elements and recoverable damages for this tort. Nuisance actions have been used by property owners to challenge day and night construction activities giving rise to unreasonable noise, vibration, pounding and excessive use of bright lights, pollution caused by operations on a turkey farm, and pollution caused from the operation of an industrial plant. *See C.C Carlton Industries, L.T.D. v Blanchard*, 311 S.W.3d 654 (Tex. App.–Austin 2010) (construction activities); *Lacy Feed Company v. Parrish*, 517 S.W.2d 845 (Tex. App.–Waco 1975) (turkey farm pollution); *Columbian Carbon Co. v. Tholen*, 199 S.W.2d 825 (Tex App.–Galveston 1947) (industrial plant).

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[1] Another PJC chapter will also soon be dedicated to trespass actions, in the 2016 edition. Such a chapter which may further assist practitioners in environmental litigation.