Environmental Stigma Damages: Speculative Damages in Environmental Tort Cases

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INTRODUCTION

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.[1] The recoveries are predicated upon the public's negative perceptions about, and unsubstantiated fears of, contaminated property.[2] Unfortunately, by allowing plaintiffs to recover for damages based upon conjecture and speculation, these courts have defied fundamental principles of common law.

Stigma, in the environmental context, may be broadly defined as the negative perceptions associated with property that is contaminated, that was once contaminated or that lies in proximity to contaminated or previously contaminated property. Stigma represents a loss in value apart from the cost of curing the con-

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1. *See generally,* Andrew N. Davis & Santo Longo, *Stigma Damages in Environmental Cases: Developing Issues and Implications for Industrial and Commercial Real Estate Transactions,* 25 Envtl. L. Rptr. 10345 (July 1995) (providing an overview of stigma damages and developing caselaw pertaining to stigma damages).

2. *See* Alvin L. Arnold and Marshall E. Tracht, *Environment: Fear of Future Contamination Not Compensable,* 24 REAL EST. L. REP. 5, 6 (Oct. 1994); *see also,* Howard Ross Cabot, *Post-Remediation 'Stigma' Damages Hinge on Hard Evidence of Residual Risk,* 8 INSIDE LITIG. 27-30 (Oct. 1994).

tamination itself,[3] and it can be based upon actual or perceived risks or fear, such as "possible public liability," "fear of additional health hazards" and "simple fear of the unknown."[4] Additionally, stigma is based upon perceptions about risks and liabilities associated with owning, or holding property interests in, contaminated property. The perceptions on which society bases the stigma need not be reasonable or substantiated.

Proponents of stigma damages contend that once property is contaminated, it becomes stigmatized by public perceptions about the contamination's effects on health and the environment. Stigma advocates also contend that even if the property is subsequently remediated, it will still continue to have a stigma because of the past contamination;[5] once seriously contaminated, they contend, property can almost never reclaim a marketable uncontaminated status.[6]

It is this author's position that stigma damages should not be recognized as a basis of recovery because stigma damages are based solely upon public perceptions —perceptions which can change at any given moment. However, where courts are inclined to award stigma damages despite their speculative nature, stigma damages should never be awarded prior to a plaintiff realizing an actual harm from the stigma.

This Article discusses and explores the ramifications of awarding stigma damages to property owners whose property has been contaminated or is juxtaposed to contaminated property. This discussion is divided into five Parts. Part I provides an overview of various environmental laws and introduces risks associated with having ownership or a property interest in contaminated property. Part II provides an introduction to stigma damages and discusses the evolution of traditional common law theories of recovery for real property damage into causes of action for environmental stigma. Part III discusses and analyzes case law relating to stigma damages to contaminated properties. Finally, Part IV discusses policy considerations for determining whether stigma damages are justified. This Article concludes that stigma

3. Peter J. Patchin, *Contaminated Properties—Stigma Revisited*, 59 APPRAISAL J.167 (1991). "Stigma" has been defined as a "mark" or "brand." WEBSTER'S NEW INTERNATIONAL DICTIONARY 2243 (3d ed. 1981).

4. Patchin, *supra* note 3, at 167.

5. Remediated for purposes of this discussion means "cleaned up," i.e. contaminants are removed from the property.

6. *See* Peter J. Patchin, *Valuation of Contaminated Properties*, 56 APPRAISAL J. 7 (1988).

damages should not be recognized as a basis of recovery because they are inherently speculative in nature.

I.
RISKS ASSOCIATED WITH CONTAMINATED PROPERTY

In discussing environmental stigma damages, it is important to have a general understanding of the nature of the liability scheme associated with environmental laws that regulate sources of pollution. The purpose of this overview is to depict the potential liability associated with contamination. Leaking underground storage tank systems, chemical spills and hazardous waste dumping result in widespread contamination to properties throughout the United States. Consequently, a vast amount of litigation has arisen over environmental liability.

Historically, no one fully understood the potential environmental and health risks associated with leaking underground storage tanks, chemical spills or hazardous waste dumping. As a result, virtually no laws regulated such acts. If an underground storage tank had a leak, the tank owner merely followed the industry standard of replacing the tank without removing or treating the soil or groundwater into which the contaminants migrated. Additionally, underground storage tank owners did not have to register the tanks; they could install or remove the tanks without accountability. It was not unusual for business owners to close down "shop" and move to other locations without removing the underground storage tanks or cleaning up the chemicals that they had previously spilled or dumped onto the property.

Today, there is virtually no way to account for the vast number of underground storage tanks that remain in the ground, the number of properties onto which chemicals and solvents were spilled and the number of sites where hazardous wastes were legally disposed under old law. One study suggests that it would exceed $41 billion and take more than 30 years to clean up just the contamination associated with underground storage tanks.[7]

The Love Canal and other similar incidents exposed the country to the effect hazardous waste disposal could have on the environment.[8] These occurrences prompted the passage of the

7. Karen J. Nardi, *Underground Storage Tanks*, 13 ENVTL. L. HANDBOOK 76 (Apr. 1995), (quoting Environmental Information, Ltd. *The Underground Storage Tank Market: Its Current Status and Future Challenges*, 3 (1992)).

8. *See generally* Warren Freeman, HAZARDOUS WASTE LIABILITY, (1992).

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), which made owners of contaminated property strictly liable for the costs of remediating the property.[9] Under CERCLA, the Environmental Protection Agency ("EPA") imposes liability for mere ownership of contaminated property, regardless of whether the owners caused, contributed or even knew of the contamination.[10] The fact that CERCLA imposes liability regardless of fault is significant in environmental stigma cases because prospective purchasers may not want to assume the risk of having to perform future environmental clean-up. Other acts, such as the Clean Air Act ("CAA"),[11] the Clean Water Act ("CWA"),[12] the Resource Conservation and Recovery Act ("RCRA") and the Toxic Substances Control Act ("TSCA")[13] were also adopted as a result of the perceived dangers of chemicals to human health and the environment. Each of these acts placed restrictions on how property could be used, how a business could be run, and the extent of contaminants that any business operation could generate.

The majority of environmental stigma cases result from violations of the CWA. The CWA regulates contaminants introduced into the soil and groundwater. State laws, patterned after federal laws, also regulate pollution.[14] Each state adopts clean-up standards, characterized by numerical limits, which serve as guidelines for designing remediation systems and for determining when the property is considered clean for regulatory purposes. Once a responsible party reduces contaminant levels below the numerical limits, property is considered clean and the party can obtain case closure.[15] Obtaining closure does not necessarily mean that all the contaminants were removed from the property. Rather, obtaining closure merely signifies that the remediation satisfies state clean-up standards, which generally require something less than the removal of all contaminants.

9. Vincent D'Elia and Catherine M. Ward, *The Valuation of Contaminated Property*, 111 BANKING L. J. 350 (1994).

10. *Id.*

11. 42 U.S.C. § 7401 (1994).

12. 33 U.S.C. § 1251 (1994).

13. 7 U.S.C. § 136 (1994).

14. D'Elia & Ward, *supra* note 9, at 350-51.

15. The closure letter from the governing environmental authority generally notifies the responsible party(ies) that they are closing their file on the case; however, the department expressly reserves the right to reopen a case in the event subsequent contamination is discovered or the laws become more stringent. .

As stated previously, because the liability structure of various environmental laws makes property owners strictly liable for cleaning up the contaminants on their property, a mere ownership interest in contaminated property subjects the property owner to liability;[16] the property owner need not cause or contribute to the contamination. It is from this back-drop, coupled with both the publicity given to toxic waste sites and public perceptions of the health and environmental risks associated with exposure to chemicals and wastes, that the concept of stigma damages has surfaced. Because the liability scheme subjects financial institutions to liability for clean-up costs when property is used as collateral to secure a loan, financial institutions should require an environmental assessment of the property serving as collateral prior to granting the loan.[17] Depending upon the results of the assessment, a potential buyer may or may not purchase the home, or a lending institution may or may not fund the loan. As is evident from this discussion, there exist definite drawbacks and risks associated with owning contaminated property. The following section discusses common law theories of recovery that are advanced in environmental contamination litigation and elaborates on the concept of stigma damages.

II.
INTRODUCTION TO STIGMA DAMAGES AND OVERVIEW OF COMMON LAW REMEDIES

Common law has long recognized causes of action allowing plaintiffs to recover for actual contamination under theories of trespass, nuisance, and negligence.[18] Strict liability and regulatory causes of action also exist under both state and federal statutory laws.[19] Courts are awarding stigma damages in addition to

16. *See generally* Michael J. Brady & Thomas H. Clarke, Jr., *Liability and Obligations of an Owner of Contaminated Land,* For the Defense 22, 24-25 (Aug. 1995).

17. James J. Gettel, *Recent Developments in Lender Liability For Environmental Contamination,* 65 WIS. LAW. 27, 28-29 (Nov. 1992) (overview of recent cases involving lender liability).

18. *See* Davis v. Sun Refining & Marketing Co., 671 N.E. 2d 1049 (Ohio Ct. App. 1996) (court found that owners can use common law causes of action to secure cleanup of their property and to recover cleanup costs associated with contamination from underground storage tanks).

19. *See* Tom Kuhnle, Note, *The Rebirth of Common Law Actions for Addressing Hazardous Waste Contamination,* 15 STAN. ENVTL. L.J. 187, 191 (1996) (noting that although CERCLA and other statutory causes of action exist, plaintiffs have been relatively more successful advancing claims for property contamination under common law tort theories).

such other relief. In short, the controversy surrounding stigma damages stems from its definition. By definition, stigma is based upon perceptions. Thus, stigma damages are not damages for actual physical contamination; instead, environmental stigma damages are damages for negative perceptions associated with the contamination. This distinction is crucial because damages for actual contamination may often be confused with damages from stigma. Specifically, stigma damages are predicated upon what third parties think about the property, regardless of whether their thoughts are reasonable or factual. Because perceptions change, and in some instances are difficult, if not impossible, to verify, stigma damages can be problematic.

The concept of stigma damage is not new. Stigma damages are in many respects comparable to damages associated with a common law cause of action for "defamation." Defamation is an invasion of a person's interest in reputation and good name.[20] It is a "relational interest," as it involves the opinions that others in the community have, or may have, about a particular individual.[21] Whereas defamation concerns damage to an individual's reputation,[22] stigma concerns damage to the "reputation" of real property. In a defamation cause of action, something derogatory and insulting has been communicated about the plaintiff that tends to harm the plaintiff's reputation. Similarly, with stigma, something derogatory has been communicated about property, thereby creating negative public perceptions of the property at issue.

Reputational damage to individuals can detrimentally affect their personal lives by adversely changing the way they are viewed and valued by society. Likewise, damage to real property can detrimentally affect the way property is viewed and valued by society. However, these two types of damage awards differ distinctly. In a defamation cause of action, the court charges the defendant for publishing the derogatory information that caused the detrimental effect. Conversely, with stigma, while the de-

20. W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 111, at 771 (5th ed. 1984) [hereinafter PROSSER].

21. *Id.*

22. In a defamation cause of action, the defendant has communicated something derogatory and insulting about the plaintiff which tends to harm the plaintiff's reputation. "It is communication which tends to injure 'reputation' in the popular sense, to diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." *Id.* at 773.

fendant may be charged with contaminating the property, the media most often publishes the derogatory information that causes the detrimental effect. In fact, the plaintiffs themselves can communicate the derogatory information and still receive compensation for the detrimental effect of the information published. Moreover, whereas defamation of an individual can directly affect the individual's acceptance by society and the individual's well-being, environmental stigma primarily affects the economic value of property. Consequently, the basis of damages are arguably distinguishable and thus invoke different public policy considerations.[23]

One could argue that stigma damages are analogous to medical monitoring damages and should therefore be allowed. A body of toxic tort cases exists that allow plaintiffs to recover medical monitoring damages before actually realizing any harm.[24] Medical monitoring damages are awarded to plaintiffs who have not actually manifested a harm from exposure to toxic substances, but who have established that their exposure to a toxic substance has subjected them to an increased risk of contracting a particular disease or illness in the future.[25] In toxic tort cases, one may not know whether he has been exposed to a toxic substance until he is notified of such exposure or he starts to have symptoms suggesting exposure. In fact, it may take years before symptoms or illnesses from exposure to toxic substances become apparent. The manifestation period depends to a large degree on the nature and type of toxin to which the individual has been exposed, as well as on the extent and duration of the exposure. Thus, although toxic tort plaintiffs may not have realized a harm from exposure, they fear that they will, in fact, contract a derivative disease or illness. Consequently, such plaintiffs seek compensation to pay for the costs of medical monitoring, which can detect the development of an injury at its earliest stage should such an

23. Defamation concerns human rights whereas environmental stigma concerns property rights. The distinction is better illustrated when viewed in conjunction with our system of justice. In civil cases, plaintiffs are not entitled to the same due process protections as in criminal cases. The courts afford more protection to a criminal defendants as compared with civil defendants. In criminal cases we are protecting human rights, whereas in civil cases we are concerned with property rights.

24. *See generally* Susan L. Martin & Jonathan D. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?,* 20 COLUM. J. ENVTL. L. 121 (1995) (discussing medical monitoring causes of action and the laws in different states concerning recovery for medical monitoring damages).

25. *See generally* Allan Kanner, *Medical Monitoring Remedies,* A.L.I. (June 1993).

injury occur.[26] Courts have awarded medical monitoring damages to plaintiffs who have established that they have been exposed, even though such plaintiffs have not experienced any physical symptoms from the exposure.[27] Because of the latent nature of environmental contamination and because damages are based upon fear of the unknown, stigma damages can be analogized to medical monitoring damages.

Because public policy considerations for awarding medical monitoring damages before the manifestation of an actual harm are not applicable to environmental stigma damages, an extension of the medical monitoring doctrine is not warranted. Unlike toxic exposure cases, where the injury increases with time, in environmental contamination cases, the contamination often decreases over time as chemicals biodegrade. Thus, unlike situations which give rise to medical monitoring damages where plaintiffs tend to worsen over time, in environmental stigma cases, property actually improves over time. Additionally, and more fundamentally, medical monitoring damages are appropriate because they protect human life. Environmental stigma damages, on the other hand, primarily affect property damage. Thus, medical monitoring damages are clearly distinguishable from stigma damages and do not provide support for awarding stigma damages prior to the manifestation of a harm.

A. *What Causes Stigma?*

This section begins with a discussion of the concept of stigma damages, including the notion of "risk," and its applicability to

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26. In *Ayers v. Township of Jackson,* in ruling in favor of medical monitoring damages the court stated:

> It is not the reasonable probability of whether plaintiffs will suffer cancer in the future that should determine whether medical surveillance is necessary. Rather, it is whether it is necessary, based on medical judgment, that a plaintiff who has been exposed to known carcinogens at various levels should undergo annual medical testing in order to properly diagnose the warning signs of the development of the disease. If it is necessary, then the probability of the need for that medical surveillance is cognizable as part of the plaintiffs' claim. If plaintiffs are deprived of any necessary diagnostic services in the future because they have no source of funds available to pay for the testing, the consequences may result in serious, if not fatal illness. Public policy thus supports a conclusion that if such illness could be prevented by surveillance, then the tortfeasor should bear the costs.

461 A.2d 184, 190 (N.J. Super. Ct. Law Div. 1983) (citation omitted).

27. *See generally* Robert N. Weiner, Nothing to Fear?: Phobia Litigation in the 1990's, Presentation at the American Bar Association national compendium, Fear of Disease & Medical Monitoring (Aug. 7, 1995) (on file with author); Allan Kanner, *Medical Monitoring: State and Federal Perspectives,* 2 TUL. ENVTL. L.J. 1 (1989).

stigma claims. After the initial discussion, this section elaborates on the idea of risk and analyzes the risk associated with stigma damage claims. The section concludes with a theoretical argument defining the contours for extending the stigma doctrine.

The major premise of stigma damages is that they are based on public "perceptions." These perceptions may be unsubstantiated and even unreasonable. Perceptions are generally formed as a result of publicity given to particular incidents. Because publicity creates perceptions, publicity shapes perceptions of risk. The media are a leading determinant in the public's perceptions of risk.[28] Studies have shown that media coverage of a risk is well correlated to public perceptions of that risk.[29] Because the public is generally uneducated about the real risks associated with particular contaminants, the public can be influenced easily and persuaded by unobjective and biased[30] sources, including the media. Because the media generally broadcasts only "big" stories, the most egregious cases of contamination and exposure to contaminants are often the ones reported.[31] As a result, public perceptions are often rooted in fear as opposed to reality. Regardless of whether the perceptions are rooted in fact or in fear, recent surveys suggest that perceptions can and actually do influence behavior.[32] Accordingly, one who contaminates property can be found liable for stigma damages, irrespective of whether the contamination actually harms the property or exposes individuals to increased health risks.[33] A well-recognized perception of harm may be sufficient to recover stigma damages.[34]

It has been stated that:

> [t]he truth of the matter is that perception is reality when it comes to the fair market value of property. If people think that their

28. Frank B. Cross, *The Public Role in Risk Control*, 24 ENVTL. L., 887, 905 (1994).

29. *Id.* Cross cites a survey (D. Krewski et al, *Risk Perception in a Decision Making Context*, 5 J. ENVTL. SCI. HEALTH 175, 184 (1987)) in which 64 percent of the individuals surveyed relied primarily on television, radio, and print media for risk coverage.

30. According to Cross, the "media has [sic] a general structural bias in favor of exaggerating dangers so as to grab the attention of their audience." Cross, *supra* note 31, at 907.

31. *Id.* at 906.

32. *See generally id.* at 906-12.

33. *See* DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454, 461 (Ohio Ct. App. 1991).

34. *See In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 796-98 (3rd. Cir. 1994).

> property is worth less, it is. If people think that the property is worth less because of wrongful acts performed by the defendant, then the defendant is liable for that diminution in value.[35]

Unfortunately, a particular defendant's fate can depend largely on the twist that the media puts on a story; liability may have very little to do with what the defendant actually did. If the media predicts gloom and doom, and the listening public, who are often buyers, believes the perception, the media arguably has created a stigma, no matter how far removed or outright wrong the information is in reality. Conversely, if a chemical spill occurs and the media topically mentions or omits the story, then generally no stigma is created. In short, a defendant's liability for stigma damages depends solely upon what the public perceives, no matter how inaccurate or unreasonable the perceptions. By contrast, "[e]ven tort plaintiffs claiming damages for their own emotional distress must show that their fears [are] reasonable."[36]

A tremendous gap exists between factual accounts of risk and public perceptions of risk. Public perceptions of risk can vary widely from the probabilistic scientific estimates of risk.[37] In actuality, public perceptions of risk "may be condemned as inaccurate, irrational, or even ignorant."[38] A study on media coverage of risk focused on the number of paragraphs in media articles that discussed risk, both positive and negative.[39] The study concluded that articles commonly asserted a risk or reported the presence of a risky substance, but less commonly stated that the presence of a risk was uncertain or that risky substances were not present.[40] Moreover, the study concluded that it was fairly uncommon for an article to deny risk or presence of risky sub-

35. Brief for Respondent at 9, Bixby Ranch Co. v. Spectrol Elecs. Corp., No. BC052566 (Cal. Super. Ct. Mar. 24, 1995). Desario v. Industrial Excess Landfill, Inc., Respondent's Brief, Appeal from Judgment by the Honorable Edward M. Ross, Judge of the Los Angeles Super. Ct. 9 (March 24, 1995).

36. Howard Ross Cabot, *Post Remediation "Stigma" Damages*, FOR THE DEFENSE 22, 23 (May 1995).

37. Cross, *supra* note 28, at 892.

38. *Id.* (citing Paul Slovic, *Perceived Risk: Trust and the Politics of Nuclear Waste*, 254 SCIENCE 1603, 1603 (1991)).

39. Cross, *supra* note 28, at 906-07 (citing, Peter M. Sandman et al. ENVTL. RISK AND THE PRESS: AN EXPLORATORY ASSESSMENT 11-12 (1987)).

40. *Id.* Sandman's study found that 10% of the paragraphs discussing risk actually asserted a risk, whereas only 3.2% of those paragraphs denied a risk. Likewise, whereas 10.2% of the paragraphs reported the presence of a risky substance, only 2.3% reported that a risky substance was not present. *Id.* at 906 n.65.

stances.[41] Because such articles influence public perception, public perception of risk can be far-removed from the actual risks. Thus, recognizing a cause of action to compensate a plaintiff for risk can be detrimental.

Stigma is measured by risks that the public perceives. Unfortunately, the education of the group or individual forming the perception may determine whether a risk exists.[42] The more educated one is regarding environmental matters, the more accurate the perceived risk. For example, a person who is knowledgeable about leaks from underground storage tanks knows that he cannot contract cancer merely by the presence of the contaminant in the ground. He must, at a minimum, eat the soil or drink from a source supplied by the groundwater. Also, the more educated individual will know how to negotiate terms that can offset the risks. For example, an individual worried about having to undertake a costly clean-up can negotiate an indemnity or require that an escrow be established for a fixed number of years in the event that the property requires subsequent remediation. This strategy can significantly reduce the risk of having to personally fund future remediation. Conversely, uneducated individuals are more likely to have their perception shaped by the media.

Studies performed on risks reveal that public perceptions often are at odds with reality.[43] Therefore, assessing damages to a particular defendant based on public perceptions of risk can have dire consequences. A jury can find a defendant who has not actually harmed a plaintiff liable based upon inaccurate or misguided perceptions. A study surveyed the League of Women Voters and several college students to compare human perceptions with reality.[44] The study revealed that even educated individuals' perceptions of risk differed tremendously from actual risks. For instance, both groups believed that nuclear power comprised the single most risky activity or technology when compared with motor vehicle accidents, smoking, handguns and aviation.[45] In actuality, nuclear power is the least risky activity listed.

41. *Id.*
42. *Id.* at 899-900.
43. *Id.*
44. *Id.* at 893.
45. *Id.* at 894.

Thus, overall, a glaring difference between perceived risks and actual risks existed.[46]

Another study showed that people grossly misjudged the risks associated with common diseases. For instance, when asked how many people per year died from influenza (common flu), a majority of the participants believed that four out of every one thousand people who contracted the flu died from it. In actuality, only .01 per thousand actually die from the disease.[47]

Additionally, stigma can be short-lived. In several studies done on stigma, a direct correlation existed between media coverage and the presence and duration of a stigma. One study on the effect of landfill contamination on nearby residential property values showed that the diminution in value to the neighboring residential land was directly correlated with the extent and degree of publicity. The stigma gradually diminished over time as the publicity diminished.[48] In that study, media coverage was heavy for about a year. As coverage decreased, the property values increased, illustrating the fundamental problem with stigma damages. Because perceptions fluctuate and are subject to abrupt changes, they provide no reliable measure of damages. A property can have a diminished property value one month only to completely recover the lost value in the next month. Stigma damages are "simply too remote in the causal chain, too inherently speculative and too uncertain of measurement to permit recovery."[49] Consequently, if stigma damages are to be awarded at all, they should be awarded only after a plaintiff has actually suffered financially from the stigma. Awarding a plaintiff damages for stigma before a plaintiff actually suffers a financial harm from the stigma can result in a windfall and even a double recovery to a plaintiff who has not realized, and perhaps never will realize, an actual harm from the stigma.

Introduction of the concept of stigma damages to the bench significantly increases the potential liability of those who are responsible for causing the contamination.[50] Before stigma damages were introduced, real property damages were limited to the common law damages of cost to repair or diminution in value to

46. *Id.*.

47. *Id.*.

48. *See* Kenneth T. Wise & Johannes P. Pfeifenberger, *The Enigma of Stigma: The Case of the Industrial Excess Landfill*, Toxics L. Rep. (BNA) 1440 (May 18, 1994).

49. Cabot, *supra* note 2, at 29.

50. *See generally* Brady & Clarke, *supra* note 16.

the property. Both historically and currently, businesses and individuals whose properties are contaminated can bring actions to compel the responsible parties to clean up the contamination, to compensate them for out-of-pocket expenses associated with the contamination, and to reimburse them for attorneys' fees. In some cases, plaintiffs can even recover for personal injuries and illnesses caused by exposure to particular contaminants.

Common law imposes a different measure of damages depending on whether the real property is temporarily or permanently damaged. Damage to real property is measured by either the cost of repair or the diminution in value.[51] At common law, if the damage is temporary or abatable, the measure of damage is the cost of repair.[52] Conversely, if the damage is permanent, the measure of damage is the diminution in value to the property that was caused by the damage. Damages for permanent injury are only awarded when the property has suffered such significant harm that the property cannot be repaired.[53] Diminution in property value is measured by the differential fair market values of the property immediately before and after the injury. Some states employ the "lesser of" rule: one can only recover the "lesser of"[54] the cost of repair or the diminution in value.[55] Al-

51. *See generally* PROSSER, *supra* note 20, § 89, at 637-40; ROGER A. CUNNINGHAM, ET. AL., THE LAW OF PROPERTY § 1.3 at 7-11 (2d ed. 1993).

52. *Id.*

53. "Under Pennsylvania law, damages for permanent harm are reserved for cases in which the property has suffered such significant harm that it cannot possibly be remediated." *In re* Paoli Railroad Yard PCB Litigation, 811 F. Supp. 1071, 1074 (E.D. Pa. 1992).

54. Although the "lesser of" rule is the general rule, an exception to this rule is where there is a contractual provision specifically addressing the measure of damage. In *Mailman's Steam Carpet Cleaning Corp. v. C. Lizotte,* a breach of contract case, the court allowed the plaintiff to recover the costs of repair even though it was greater than the diminution in value. 616 N.E.2d 85 (Mass. 1993). The express terms of the contract required the defendant to return the property to its original condition upon expiration of the lease. Upon expiration of the lease, the defendant argued that Massachusetts law only imposed liability for the lesser of the cost of repair and the diminution in value of the property. Because the diminution in value was less, the defendant argued that in accordance with the lesser of rule, the diminution of value was the proper measure of damage. The *Mailman* court rejected this argument and applied a "test of reasonableness" to determine whether repair of the property, in lieu of diminution in value, was fair and reasonable. *Id.* at 88. The court stated that the cost of cleaning up the property, was "not disproportionate relative to the diminution in value of the property." *Id.* The fair market value of the property at the time of trial was $125,000. The projected cleanup, plus expenditures, totaled $225,000. In light of the contract, in applying the test of reasonableness, the court found it was reasonable to find the defendant liable for the cost of repair. *Id.* at 88-89.

lowing recovery for both the cost of repair and the diminution of value is viewed at common law as "double recovery," which is prohibited.[56]

Stigma proponents advocate extending the common law rule to recognize stigma as a legally compensable damage that compensates plaintiffs for the diminution in value to their properties resulting from the increased risks of owning or leasing contaminated property.[57] These advocates argue that the common law damage remedy of either the cost of repair or the diminution in value does not always fully compensate an injured party for damages associated with the contamination. They assert that the proper measure of damage should be the cost of repair *plus* the post-repair diminution in property value resulting from the stigma that remains after repair.[58] These advocates further argue that stigma and negative perceptions about contaminated property are permanent because they relate either to property that was once contaminated but is now remediated, or to property that was remediated but which contains residual contaminants. Their position is that once property has been contaminated, the property has a permanent stigma because current technologies can never remove all contaminants from the soil or groundwater. Therefore, they draw the conclusion that environmental stigma is of a permanent, not temporary, nature.

According to common law, however, a plaintiff can only recover for the diminution in value when the property damage is permanent. Stigma plaintiffs nonetheless seek both the costs of repair and the diminution in value. Because stigma damages are based wholly on underlying perceptions, permanent stigma by implication would only seem to attach to property that is permanently stigmatized. Unless it can be shown that perceptions about contaminated property never change, arguably the stigma cannot be of a permanent nature. Because perceptions constantly change, opponents of stigma damages argue that stigma is temporary in nature. Thus, the cost of repair, not the diminution in property value, is the proper measure of damages.

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55. Cabot, *supra* note 2, at 27.

56. Bradley, R. Hogin, *Post-Cleanup Stigma Claims: The Latest Front in the War Over Hazardous Waste Cost Recovery*, Toxics L. Rep. (BNA) 918, 918-19 (Jan. 25, 1995).

57. James A. Chalmers and Scott A. Roehr, *Issues in the Valuation of Contaminated Property*, 61 APPRAISAL J. 28 (1993).

58. Cabot, *supra* note 2, at 27.

There are also legal ramifications associated with alleging a harm to be permanent as opposed to temporary. The major consequence of asserting that a harm is permanent is the applicability of the statute of limitations. Depending upon the state, the statute of limitations for damage to property can range from two to five years. For example, in Pennsylvania, a cause of action begins to accrue at either the time the contamination occurred, or at the time of discovery unless the plaintiff could have reasonably discovered the contamination, in which case the time of reasonable discovery is the event triggering the statute of limitations.[59]

This common law rule of cost of repair or diminution in value is problematic in the environmental field because regulatory and statutory laws typically mandate the type of clean-up. A responsible party may not have the option of choosing between the cost of repair and the diminution in value. If contamination is discovered, the controlling environmental authority can force the responsible party to undertake the clean-up. If the responsible party does not perform the clean-up in accordance with the directive from the controlling environmental authority, both civil and criminal sanctions may be imposed against the responsible party. However, once a regulatory agency is involved, the option of compensating a landowner for the diminution in value in lieu of clean-up is no longer available. As a result, in a civil case where a party seeks indemnity for cleaning up contamination caused by another, courts have generally allowed plaintiffs to recover the cost of repair, even if this cost measure exceeds the diminution in the property's value. In states that have switched to risk-based clean-up standards, which require no active remediation, the common law rule may be more workable. Moreover, if the case is only civil in nature and no environmental authority is involved, the common law measure of damage may be appropriate.

59. *See, e.g.*, Gerald A. McHugh, Jr., *The Statute of Limitations and the Discovery Rule: Variation on the Theme of Fairness*, 64 PA. B. ASS'N. Q. 197 (1993) (discussion on the extension of the statute of limitations and the discovery doctrine, including latent injuries.); *see also*, Note, *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983) (advocating the adoption of the discovery rule for toxic tort victims).

B. *Common Law Recovery Theories*

Plaintiffs have advanced several theories of recovery in environmental stigma cases. The four most frequently alleged theories are trespass, nuisance, negligence and strict liability. Because a strict liability cause of action is largely dependent upon the specific state statutory laws, only the trespass, nuisance and negligence theories of stigma damages will be discussed.[60] This section provides a brief overview of the common law recovery theories as applicable to stigma damages.

1. *Trespass*

Under common law, any interference with a party's possessory interest in land constitutes a trespass. A trespass can be found whenever a defendant enters the land or, through some force that defendants put into motion, causes something to enter the land of another.[61] Accordingly, if a party releases on his property contaminants that migrate onto a neighboring property, the neighboring property owner has an action in trespass. Thus, when soil or groundwater contamination physically enters the neighboring property, a cause of action in trespass may lie. However, when no physical entry to the property occurs, as when property owners claim stigma damages because of the proximity of their property to the contaminated property, a cause of action in trespass should not lie because no entry upon the land occurred. Using a defamation analogy, a defamation cause of action "is personal to the plaintiff, and cannot be founded on the defamation of another."[62] Just as a defamation claim is personal to the plaintiff, stigma damages are personal to the owner of the contaminated property. Applying this analogy to stigma damages suggests that property owners whose property has not been physically contaminated should not be allowed to base suit upon the contamination of a neighboring property, which eliminates this class of stigma plaintiffs.

In *Grant v. Du Pont De Nemours and Co.*,[63] a federal court interpreting North Carolina law stated that North Carolina law

60. Most states have adopted the *Restatement (Second) of Torts*, resulting in more commonality among the decisions.

61. PROSSER, *supra* note 20, § 13, at 67-69; RESTATEMENT (SECOND) OF TORTS § 158 (1965).

62. *Id.* § 111, at 778.

63. Grant v. Du Pont de Nemours and Co., No 4:91-CV-55-H, 1995 U.S. Dist. LEXIS 15345 (E.D.N.C. July 14, 1995).

required a plaintiff's land to be "physically touched" before an action for trespass would lie.[64] The court stated that smokes, vapors or other airborne gases did not give rise to an action in trespass unless such particles invaded something other than the air over the plaintiff's land.[65] In effect, the court said that an action would lie only where an airborne substance, such as dust, actually came to rest on a plaintiff's property.

2. *Nuisance*

A "private" nuisance can be defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[66] By definition, then, a plaintiff does not have to show a physical invasion in order to claim nuisance. Rather, he need only show an invasion by the defendant that interferes with the private use and enjoyment of his land. However, a plaintiff must prove two additional elements in order to recover under a nuisance theory. The invasion must be "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities."[67] Accordingly, a property owner whose property has been contaminated may have a cause of action based upon a nuisance theory.[68] Because nuisance is a nontrespassory invasion, which, by definition, does not require an actual physical invasion, a plaintiff could seemingly bring a cause of action under a nuisance theory to recover the diminution in property value allegedly caused by stigma, even if the property was not physically invaded (*i.e.* the property is in proximity to the contaminated property). An overwhelming majority of courts, however, have held that diminution in value alone, without some kind of actual physical invasion, does not support a nuisance cause of action. The courts do not necessarily require that there be a trespass (*i.e.*, unlawful entry), but appear

64. *Id.* at *14.

65. *Id.*

66. RESTATEMENT (SECOND) OF TORTS, § 821D (1979). Note that a "private nuisance" is different from a "public nuisance," which is defined as "an unreasonable interference with a right common to the general public." RESTATEMENT (SECOND) OF TORTS, § 821B (1979).

67. *Id.* at § 822.

68. *But see* Alvin L. Arnold, *Nuisance: Unfounded Public Perception No Basis for Damages*, 22 REAL EST. L. REP. 4 (1993).

to require at a minimum that there be a physical invasion of the property.[69]

In *Adkins v. Thomas Solvent Co.*,[70] landowners living in close proximity to contaminated property claimed that the defendants' improper handling and storage of toxic chemicals and hazardous waste caused groundwater contamination, which they feared would migrate onto their properties. The trial court granted summary judgment for the defendants because the plaintiffs' properties had not been physically touched. The Michigan Court of Appeals reversed the summary judgment, holding that no physical invasion was necessary to support a nuisance cause of action. The Michigan Supreme Court subsequently reversed the appellate ruling, stating that plaintiffs could not recover under a nuisance theory for diminution in property value where the contamination did not touch the plaintiffs' land.[71] The Michigan Supreme Court also held that liability under a nuisance theory could not be predicated upon the plaintiffs' unfounded fears.[72] Specifically, the court stated:

> [W]e do not agree with the dissent's suggestion that wholly unfounded fears of third parties regarding the conduct of a lawful business satisfy the requirement for a legally cognizable injury as long as property values decline. Indeed we would think it not only "odd" . . . but anachronistic that a claim of nuisance in fact could be based on unfounded fears regarding persons with AIDS moving into a neighborhood, the establishment of otherwise lawful group homes for the disabled, or unrelated persons living together, merely because the fears experienced by third parties would cause a decline in property values.[73]

As discussed earlier in this article, unlike trespass, a nuisance cause of action does not require a physical touching. Nonetheless, the Michigan Supreme Court held that where the contamination from the defendant's property did not and would not reach the plaintiffs' property, no action in nuisance would lie. It is important to note that while the Michigan Supreme Court held that a physical intrusion onto the plaintiffs' property had to occur to constitute a nuisance, this holding was seemingly limited to its

69. This distinction makes a difference when the contamination was not the result of an unlawful entry. It can apply to cases where defendants were rightfully on the property at the time when the contamination was placed on the property.

70. 487 N.W.2d 715 (Mich. 1992).

71. *See id.* at 727.

72. *Id.* at 726.

73. *Id* (citations omitted).

facts. In addressing the court of appeals holding, the Michigan Supreme Court stated:

> The Court of Appeals focused upon the lack of any physical intrusion onto plaintiffs' land, stressing that an interference with the use and enjoyment of land need not involve a physical or tangible intrusion. We do not disagree with this rule of law. Nevertheless, we conclude that the trial court properly found that the plaintiffs failed to trace any significant interference with the use and enjoyment of land to an action of the defendants.[74]

The court seems to require that there be more than a passive nuisance. Accordingly, if no actual physical invasion occurred, but defendants' act resulted in a substantial or unreasonable interference with the plaintiffs' use and enjoyment of land, an action in nuisance would apparently lie.

Another court stated, " . . . diminution of property value is an appropriate measure of damages—the 'effect'—where some interference with plaintiff's land—the 'cause'— takes place."[75] Thus, as a general rule, a property owner cannot base a nuisance cause of action solely upon the diminution in property value allegedly caused by stigma.[76] One court, however, recognized a nuisance cause of action predicated solely upon the diminution in property value resulting from stigma, although the plaintiff did not suffer any physical invasion to his property.[77] Some courts require the interference with the owner's use and enjoyment to be substantial and unreasonable, beyond mere depreciation of property value, to support a claim for nuisance.[78]

3. *Negligence*

Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable

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74. *Adkins*, 487 N.W. 2d at 721 (citation omitted).

75. Twitty v. State, 354 S.E.2d 296, 304 (N.C. App. 1987):

> A reduction in market value, standing alone, does not constitute an "actual interference with or disturbance of" plaintiffs' use and enjoyment of their property. *Long* requires an actual interference (the cause) substantial enough to reduce the market value of the plaintiffs' property (the effect). Plaintiffs here have proved the effect—a material diminution in value—but not the cause.

76. Vander Laan v. Marathon Oil Company, No. 1:89-CV-867, 1993 U.S. Dist. LEXIS 13041, at *26 (W.D. Mich. Aug. 18, 1993) (citing Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 722 (Mich. 1992). *See also*, Adams v. Star Enter., 51 F.3d 417, 423-25 (4th Cir. 1995).

77. DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454, 461 (Ohio Ct. App. 1991).

78. Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 722 (Mich. 1992).

risk of harm."[79] For a plaintiff to recover stigma damages under a negligence theory, he must establish that the defendant owed him a duty, that the defendant breached that duty, and that the breach was the proximate cause of the plaintiff's damages.[80] In environmental stigma cases, "proximate cause" can be problematic. "A possessor of land is subject to liability for physical harm to others outside of his land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of physical harm to them under the same conditions as though the activity were carried on at a neutral place."[81] Accordingly, where there is no "physical harm," there arguably can be no liability because there is no duty. Thus, a plaintiff whose property has not been physically invaded may have a difficult time showing that the defendant breached a duty owed to the plaintiff.

Stigma damages are caused by the public's perception, not by the actual contamination, because the contamination itself may pose no real risk at all. Arguably, the damage to plaintiffs is not the actual contamination of their property, but rather, the result of the public's fear of contamination. If the public did not fear the contamination of the plaintiff's property, there would be no stigma. Thus, it is the public's fear, and not the contamination that is the cause of plaintiff's damages. The "proximate cause" is therefore the stigma, not the actual contamination. Public perception may be viewed as a new and intervening cause, which arises after the negligence of the defendant. Consequently, public perception breaks any causal connection between the defendant's action and the plaintiff's harm.[82] As established in the landmark case of *Palsgraf v. Long Island R. Co.*, it is only when the intervening cause is foreseeable that a party will be held liable for the resulting act. [83]

In *Adkins v. Thomas Solvent Co.*, the court stated that diminution in property value caused by the negligent public is *damnum absque injuria*, or a loss without an injury in the legal sense.[84] Proximate cause is that which in natural and continuous sequence, unbroken by an intervening act, produces injury and

79. RESTATEMENT (SECOND) OF TORTS § 282 (1965).
80. *See generally* PROSSER, *supra* note 20, § 30, at 164-68.
81. RESTATEMENT (SECOND) OF TORTS § 371 (1965).
82. *See* Prosser, *supra* note 20, § 44, at 301-19; RESTATEMENT (SECOND) OF TORTS § 441 (1965).
83. 162 N.E. 99, 101 (N.Y. 1928).
84. 487 N.W. 2d 715, 725 (Mich. 1992).

without which the result would not have happened.[85] Arguably, when damages are premised on third party perceptions, the continuous sequence is broken, because perceptions of the act, not the act itself, create the proximate cause of the harm. A case can be made that the intervention by third parties destroys the causal connection required to sustain a negligence claim.[86] On the other hand, a plaintiff can argue that the intervening act, the public's reaction, was foreseeable. Thus, because the defendant was responsible for the act that brought about the foreseeable public reaction, he should not escape liability for the resulting stigma damages.

C. *Valuing Contaminated Properties*

Measuring the impact of stigma is more complicated than measuring the impact of the contamination.[87] For a plaintiff to recover for stigma upon a nuisance, trespass or negligence theory, the plaintiff must prove damages. While the law does not require precision, it does require that a plaintiff establish damages with at least a reasonable degree of certainty. The *Restatement (Second) of Torts* states:

> One to whom another has tortiously caused harm is entitled to compensatory damages for the harm if, but only if, he establishes by proof the extent of the harm and the amount of money representing adequate compensation with as much certainty as the nature of the tort and circumstances permit.[88]

Accordingly, a plaintiff must at a minimum put forth some credible evidence as to his damages, including the stigma loss. A plaintiff should have to establish when the loss occurred, what property was affected, whether the effect varied over time and whether the effect varied with distance from the site.[89] While the evidence need not be exact, it must be based upon more than mere speculation. When a plaintiff has not yet realized a harm at the time stigma damages are to be awarded, the measure of damages can be very speculative in nature.

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85. PROSSER, *supra* note 20, § 42, at 272-80.

86. *See* Cabot, *supra* note 2, at 28.

87. *See* Kenneth T. Wise & Susan J. Guthrie, *Correct Estimation of Stigma Damages: Avoiding the Pitfalls,* 7 Mealey's Litig. Rep.: Toxic Property Damage 1 (Sept. 29, 1995).

88. RESTATEMENT (SECOND) OF TORTS § 912 (1979).

89. *See* Wise & Guthrie, *supra* note 87, at 2-3.

Value depends upon the extent of contamination, the way in which contamination is perceived or evaluated, the remediation and indemnification responses to the contamination, the effect of these factors on utility, and the marketability and the appropriate standard of value.[90] Real property appraisers value property using one of three methods: (1) comparable sales analysis; (2) income analysis; and (3) cost analysis.[91] If performed correctly, these methods provide essentially the same property value. The comparable sales or market method approach compares the sales of similarly-situated properties within the same geographically located market.[92] An appraiser takes arms-length sales transactions and compares the value received after making adjustments for differing features or components. For this method to be effective, there must be a reasonable number of similarly-situated property sales with which the contaminated properties can be compared. The sales are then adjusted to reflect the difference in features and components between the actual property and the compared property to derive the estimated value of the property.[93] The market or comparable sales method is considered by some to be ineffective in cases of environmental damage, primarily because it is extremely rare that two properties in the same geographical area will be invaded with the same contaminant and to the same degree. As a result, there is no way to get a true comparison or to make an accurate assessment of the property's value.

The income approach compares the net income for income-producing properties by discounting the expected cash flow from a property to net present value. As a given market develops information for the comparable sales approach, the information can also be used with the income approach to compare net incomes of properties like apartments, shopping centers, and office facilities.[94] Yet, like the comparable sales approach, the income method may be ineffective: not enough income-producing properties may exist in a given geographical region to forecast an accurate representation of the net present value. For example,

90. James A. Chalmers & Scott A. Roehr, *Issues in the Valuation of Contaminated Property,* 61 APPRAISAL J. 28 (Jan. 1993).

91. Michael Elliot-Jones, *Valuation of Post-Cleanup Property: The Economic Basis for Stigma Damages,* Toxics L. Rep. (BNA) 944, 944 (Jan. 25, 1995).

92. *See* D'Elia &. Ward, *supra* note 9, at 361.

93. *See generally* Peter J. Patchin, *Contaminated Properties and the Sales Comparison Approach,* 62 APPRAISAL J. 402 (1994).

94. Elliot-Jones, *supra* note 91, at 944.

there may only be one specific type of business in a particular geographical area and the business may not be generating income at all because the contaminated property is not being operated. Consequently, there may be no basis for comparison.

The cost or replacement method places a value on the land by adding the sales price of comparable parcels to the depreciated cost of replacing any structure or improvement that exists on the property.[95] Publications are used to obtain reference costs, which are compiled to determine the total cost to build the type of structure in question. Land and other costs are included to estimate the cost of duplicating the property being appraised.[96] This method has proved to be ineffective when valuing contaminated property because it is generally the land and not the structure that is at issue.[97]

Approaches to measuring stigma vary according to the analyst's background and the availability of market data. The best results occur when substantial information is available to perform a study. When information is not readily available, an analyst is more likely to create data through surveys. Surveys generally provide less accurate information because they are based, in part, upon subjective judgments.[98] In general, none of the traditional methods is effective for measuring stigma damages. More innovative and controversial methods are being established. To date, however, no proven method exists for measuring stigma damages. Appraisers are, therefore, resorting to the somewhat controversial "contingent valuation method" which poses hypothetical questions to market participants by use of formal surveys.[99]

III.
STIGMA CASES

Whereas most courts that awarded stigma damages required the plaintiffs to demonstrate that the contamination actually physically invaded their properties, at least one court based recovery solely on the juxtaposition of the plaintiffs' uncontami-

95. *Id.*
96. *Id.*
97. *See* D'Elia & Ward, *supra* note 9, at 362.
98. *See* Wise & Guthrie, *supra* note 87, at 4.
99. Cabot, *supra* note 2, at 29.

nated property to neighboring contaminated property.[100] Moreover, in *Bixby Ranch Company v. Spectrol Electronics Corporation, et al.*, a judge asked the jury to forecast the diminution in value to the plaintiff's property.[101] Although the case was litigated in 1993, the property would not be fully remediated until 1996. The judge acknowledged that forecasting the 1996 damages was a "crapshoot," full of "imponderables."[102] Nonetheless, the judge allowed the jury to compute the damages. The jury apparently reached into a hat and came up with a figure of $826,000. In so doing, the jury predicted that environmental stigma would reduce the 1996 fair market value of the plaintiff's property by $826,000.

Cases involving environmental stigma damages generally involve properties falling into three categories: (1) properties that were contaminated and subsequently remediated; (2) properties that are contaminated, but that will be remediated in the future; and (3) properties that have never been contaminated, but that are in proximity to contaminated property.[103] For properties that were previously contaminated, but now remediated, stigma damages are less speculative, especially when a suit has been brought after the harm has been fully realized.[104] The second group, properties that are contaminated, but that will be remediated at some future date, is more problematic. It is in this area that one can begin to recognize and appreciate problems inherent in projecting stigma damages. If the property is currently contaminated, then one can measure, to some degree, the value of the property before and after the contamination. It may even be possible to determine a stigma value.

But when property is slated for remediation, projecting a stigma value after clean-up may be more difficult. First, what, if any, remediation will be required? If remediation is, in fact, required, the next step is to evaluate the proposed remediation to

100. DeSario v. Industrial Excess Landfill, Inc., 587 N.E.2d 454, 461 (Ohio Ct. App. 1991) (holding that a class action nuisance suit "may be premised on the public's perception of contamination irrespective of actual land contamination").

101. Appellant's Opening Brief at 7, Bixby Ranch Co. v. Spectrol Elecs. Corp. (Cal. Ct. App.) (No. B082296), (quoting Record at 1056).

102. Appellants' Opening Brief at 5-6, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Ct. App.) (No. B082296) (quoting Record at 349, 427).

103. As a general rule, once contamination is discovered, the governing environmental agency will generally require clean-up if the contamination is above the state action level.

104. "Fully realized" for the purpose of this discussion means quantifiable damages caused by the defendant's actions.

determine both its effectiveness and the likelihood and extent to which it will clean up the property. Many states have gone to risk-based clean-up standards. In those states, if contamination does not pose a threat to human health or to the environment, no clean-up is required. This has the effect of decreasing the risks associated with purchasing contaminated or previously contaminated property because property owners in risk-based corrective action states do not have to be overly concerned about being required to undertake a costly clean-up.

Although there are concerns associated with awarding stigma damages to any of these groups, the most problematic of these three groups is the last: property that has never been contaminated, but that is in proximity to contaminated property. Plaintiffs in this group argue that their properties are permanently stigmatized because the properties are located near contaminated properties. In essence, their claims are based upon damage by association, which is not legally recognized. For plaintiffs in this group to recover under a diminution in value theory, their argument must be that public perception is universal and permanent. However, if one cannot predict what individual perceptions will be from day to day, it will be difficult, if not impossible, to predict what human perceptions will be from year to year.

Opponents of stigma damages argue that stigma attached to property that has not been contaminated, but that is located in proximity to contaminated property, should not be compensable because the polluter has not violated any legally recognized law. Conversely, stigma proponents argue that the impact of stigma, regardless of whether the property was physically invaded can result in the same diminution in value. When people associate uncontaminated property with contaminated property and discount the property value because of the association, the property owner is arguably damaged by the discounting of his property's value. As discussed in *Adkins*,[105] however, the law does not recognize a cause of action for damages attributable to a third party's negative perceptions. To illustrate, if an individual is falsely accused of prostitution, that person can bring an action for damages against the person responsible for the allegation. However, a person who associates with the accused cannot predicate action for damages upon the mere association with the accused. Although the individual against whom the allegation was

105. *See* 487 N.W.2d 715 (Mich. 1992).

directed can bring a cause of action against the wrongdoer, the law does not allow untargeted parents, sisters, brothers, neighbors, friends, or others to recover for the false accusation. No recovery is allowed even if one of these untargeted individuals actually suffered personal injury or was otherwise shunned as a result of the defamation. The law only provides a cause of action for those who were directly harmed by a tort or criminal act directed against them.

Case law applying to stigmatized properties that are not contaminated, but that are located near contaminated sites, is in a state of flux and will be discussed in greater detail later in this Article.

A. *Eminent Domain*

In the eminent domain arena, stigma damages are compensable even where the damages are based solely on diminution in value resulting from the public's unsubstantiated or unreasonable fear.[106] In eminent domain cases, private property is taken for a public use. Under the Takings Clause of the Fifth Amendment to the United States Constitution, public defendants must pay just compensation for a taking. In order to provide just compensation, the government must determine the complete diminution in value as of the time of the taking. It is important to note that even in takings cases, owners of surrounding properties are not compensated by the government for the objectionable activity occurring within, or for the object placed upon the neighboring property. Plaintiffs in several eminent domain cases have recovered stigma damages for the diminution in property value resulting from the public's fears of health risks attributable to electromagnetic radiation generated by power lines.[107] In *Criscoula v. Power Authority of the State of New York,* the New York Court of Appeals allowed a plaintiff to recover for the diminution in value to his property that resulted from the installation of

106. *See generally* Peggi A. Whitmore, *Property Owners in Condemnation Actions May Receive Compensation for Diminution in Value to Their Property Caused by Public Perception: City of Santa Fe v. Komis*, 24 N.M. L. REV. 535 (1994) (overview of takings amendment and case law supporting damages for stigma in eminent domain cases).

107. *See, e.g.*, San Diego Gas & Electric Co. v. Daley, 205 Cal. App. 3d 1334, 1347 (1988). *See also* Eric B. Rothenberg and Shari B. Potter, The Impact of Electromagnetic Fields ("EMF") on Property Values, Morgan, Lewis & Bockius White Paper (May 1994) (on file with author).

power lines on his property.[108] The New York Power Authority, pursuant to its Fifth Amendment takings authority, took 6.6 acres of the plaintiff's property to install a transmission line. The plaintiff claimed that the transmission line rendered his property worthless because the public's fear of electromagnetic field radiation[109] scared away potential purchasers. In reviewing the plaintiff's claim, the New York Supreme Court looked not to the reasonableness of the public's fear, but rather to the actual impact of the public's fear on the plaintiff's property value. The court only required that the plaintiff establish the existence of a "prevalent perception of danger emanating from the objectionable condition."[110] The plaintiff did not have to prove that the danger was real or even rationally based.

The majority rule in eminent domain cases provides "just compensation" for diminution in property value regardless of whether actual danger exists.[111] Although eminent domain cases are distinguishable from stigma cases, such cases merit discussion because the effect of perceptions of danger on property values parallels the effect of stigma on property values. In the majority of the eminent domain cases, the government is placing an objectionable item, or allowing an objectionable activity to take place, on the plaintiff's property. For example, many of the eminent domain cases involve the government's placement of electromagnetic fields on property, which the public perceives as dangerous or even life-threatening. Thus, the subject that forms the basis for the stigma is of a permanent nature, and will never disappear unless the objectionable object is removed. In contrast, contamination causing environmental damage cannot be seen, making detection of the contamination by the untrained eye highly improbable.

B. *Cases Involving Physical Property Damage*

In *Terra-Products Inc. v. Kraft General Foods, Inc.*,[112] an Indiana appellate court allowed a plaintiff to recover stigma damages for any diminution in value to his real property that remained after remediation was complete. Defendant Kraft sold a parcel of property to Terra-Products in 1975. Terra already owned the

108. 621 N.E.2d 1195, 1196-97 (N.Y. 1993).
109. Rothenberg & Potter, *supra* note 107.
110. *Id.* at 1 (discussing *Criscoula*).
111. Whitmore, *supra* note 106, at 536-38.
112. 653 N.E.2d 89 (Ind. App.1995).

adjacent parcel. In 1986, Kraft discovered contamination on the parcel of property that it had sold to Terra. Kraft assumed responsibility for remediating the property. During remediation, Kraft discovered that the contamination had migrated onto Terra's adjacent parcel. Kraft then assumed responsibility for the contamination on the adjacent parcel. Terra subsequently sold the two parcels at a public auction for less than their fair market value and then brought suit against Kraft to recover the diminution in value to the property caused by residual stigma. The court ruled that Terra could recover for any permanent diminution in value that Terra could prove at trial.[113]

By so holding, the court modified the common law rule of recovery for both diminution in value and cost of repair by finding that when the cost of repair did not return the property to its pre-contamination value, the plaintiff was entitled to the diminution in value remaining after the repairs, i.e., residual stigma damages. The court stated that if Terra could show that the remediation failed to restore the property to its pre-contamination value, Terra was entitled to recover damages for the permanent reduction in the post-remediation property value. Accordingly, the *Terra-Products* court found that the plaintiff was entitled to both the costs of repair and stigma damages.

In *Bixby Ranch Co. v. Spectrol Electronics Corp.*,[114] a California jury awarded a plaintiff $826,500 for the stigma[115] that would arguably remain after the property at issue was remediated. Plaintiff Bixby leased property, located in a highly industrial area of California, to Spectrol for a twenty-five year term. During the lease, Spectrol contaminated the property with solvents, which were used to clean equipment. The contamination did not pose a direct health or environmental risk. Upon termination of the lease, Spectrol agreed to undertake clean-up of the property and agreed to indemnify Bixby for remediation costs and for claims

113. *See id.* at 94.

114. Appellant's Opening Brief at 13, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Ct. App.) (No. B082296).

115. The plaintiff stated that "stigma refers to impacts on value stemming from the increased risk associated with that property and effect of this on marketability and financeability." Supplemental Trial Brief at 7, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Super. Ct.) (No. BC052566). It further stated "stigma does not refer exclusively to the difference between the value of an uncontaminated property and the value of an otherwise identical, but once contaminated, property that is fully remediated and indemnified," but is a much more general concept as it refers to "the discount, beyond direct cost, required to compensate investors or lenders for the risks associated with the property." *Id.* at 7-8.

brought by third parties as a result of the contamination. Nonetheless, Bixby brought suit to recover stigma damages. At the time of the 1993 trial, Spectrol was in the process of remediating the property; the projected completion date was for 1996.

Bixby brought suit alleging various common law theories.[116] Bixby also sought damages for the permanent, post-remediation diminution in value that Bixby claimed the property would sustain in 1996 as a result of residual stigma damages. Defendant Spectrol argued that, under California law, damages to real property were limited to either the cost of repair or to the diminution in value. Bixby argued, however, that where the cost of repair or diminution in value did not make a party whole, the injured party was entitled to such relief as would fully compensate the injured party for his injuries. Accordingly, Bixby argued that it was entitled to the cost of repair *plus* any diminution in value after repairs.[117]

During the 1993 trial, Mr. Cashman, an expert witness, testified about the pre-contamination and post-contamination value of the property, and about the stigma to the property that would remain after the clean-up was completed in 1996. Subsequently, Cashman's testimony was widely criticized. In an article, *Valuation of Post-Clean-up Property: The Economic Basis for Stigma Damages*,[118] the author criticized the methodology Cashman employed in determining damages. The major criticisms of Cashman were as follows:

1) Cashman compared only two sales to determine the potential stigma damages for the Bixby property.[119] But two sales do not make a market and, thus, did not provide a reliable measure of damages.
2) Cashman stated that not enough data were available on contaminated commercial property. However, a research firm found several hundred commercial properties in the area with existing or previously existing leaking underground storage tanks that could have been used to derive the data.

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116. *See* Complaint at 1, 4-15, Bixby Ranch Co.v. Spectrol Elecs. Corp., (Cal. Super. Ct.) (No. BC052566)

117. Bixby cited two California cases supporting its postion: *San Diego Gas & Electric v. Daley* (205 Cal. App. 3d 1334 (1988)), a Fifth Amendment takings case concerning perception of harm from high energy lines; and *Reed v. King* (145 Cal. App. 3d 361 (1983)). Brief for Respondent at 10-11, Bixby Ranch Co. v. Spectrol Elecs. Corp. (Cal. Ct. App.) (No. B082296) These cases, however, were not stigma cases.

118. Elliot-Jones, *supra* note 91, at 944, 945.

119. *See supra* text accompanying note 89 (discussion of methodology).

3) Cashman established his stigma estimates by making adjustments to data that did not characterize the relevant market.
4) Cashman did not consider other market factors, such as recession, increasingly stringent lending criteria, defense industry cutbacks, and other events that were occurring in California during the time. Arguably, the market value would have been down despite the existence of stigma.
5) Cashman grossly exaggerated the stigma value. His estimated diminution in value figure was 500 times more than the uncontaminated value, which shows the speculative nature of stigma damages.

Cashman's assessment of the diminution in value was based solely on blanket opinions; no reasoning or justification was given.[120] Bixby defended its expert's testimony by stating, "[t]he law is settled that, once it has been established that an expert is qualified to testify . . . the expert may give his opinion without stating his reasons."[121] Cashman claimed that samples of contaminated commercial property were rare, which prevented access to sufficient data to do a true comparison.[122] Acceptance of Cashman's testimony seems to contravene the requirement that damages be proven with some threshold of reliability.[123] Clearly, Bixby's expert did not reach the threshold specificity required. To arrive at a stigma value 500 times greater than the uncontaminated value seems sufficiently speculative to be outside the realm of compensation.

Opinion testimony without justifications or reasoning may be workable in other types of cases. But in cases involving stigma, where the entire concept of damages is founded upon mere speculation, damages should, at a minimum, be demonstrated to some degree of certainty and specificity. If courts are going to recognize subjective damages, such as stigma damages, public policy requires that expert opinion be supported by documentation. It is important to point out that Bixby's expert was testifying about damages that would exist a full three years after the date on which he was testifying. He was, in essence, predicting

120. For an overview of use of expert witnesses in environmental litigation, see generally Daniel Riesel, *Pre-Trial Discovery of Experts, Scientific Proof, and Examination of Experts in Environmental Litigation,* C127 A.L.I.-A.B.A. 209 (1995), *available in* LEXIS, 2NDARY Library, SSMEGA File.

121. Respondent's Brief at 18, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Ct. App.) (No. B082296).

122. *See* Elliot-Jones, *supra* note 96, at 945.

123. RESTATEMENT (SECOND) OF TORTS § 912 (1979).

the future. More precisely, he was predicting what the public's perceptions would be three years into the future.

The speculative nature of the evidence put forth at trial was best described by the Bixby judge who stated that it was:

> sheer unadulterated pure 24 carat speculation as to what the general public or the general nine acre parcel real estate buying public is going to think two and a half years down the road. It may be the government is going to tell us that toxic wastes are good for us.[124]

Nonetheless, despite the judge's referenced to the speculative nature of plaintiff's damages evidence as "sheer unadulterated pure 24 carat speculation"[125] and a "crapshoot,"[126] the judge allowed the testimony to go to the jury. The judge also instructed the jury to decide the extent of the projected 1996 damages based upon 1993 factors.[127] The judge stated that letting the jury decide the issue of future damages was analogous to letting the jury decide the issue of future medical damages for a child born with a birth defect.[128] Unfortunately, such an analogy is fundamentally flawed. A child born with a birth defect may have actually suffered a legally cognizable injury, whereas a plaintiff seeking stigma damages actually seeks damages based upon the "fear" of suffering a future injury.[129] The jury was determining damages from the stigma, not from contamination. The contamination was being remediated. The jury was asked to predict what the public perceptions would be three years into the future.

Significantly, the judge did not allow the defendant, Spectrol, to put forth any evidence to rebut the nature and extent, if any, of the stigma that might exist in 1996. The judge stated that, "we

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124. Appellants' Opening Brief at 6, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Ct. App.) (No. B082296) (quoting Record at 354).

125. *Id.*

126. *Id.* (quoting Record at 349).

127. The judge's instruction to the jury was as follows: "if you find the property has been stigmatized then Bixby is entitled to recover the difference between the fair market value of the property as of *this* date as if it had not been contaminated . . . and the fair market value as of *this* date if remediated." Appellant's Opening Brief at 7, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Ct. App.) (No. B082296) (quoting Record at 1056).

128. *Id.* at 6.

129. Bixby's counsel argued that Bixby sought damages for actual harm caused. Counsel described such harm as "the lasting stigma attributed to real estate that has been severely contaminated and which will never be 'clean.'" Plaintiff Supplemental Trial Brief at 2, Bixby Ranch Co. v. Spectrol Elecs. Corp. (Cal. Super. Ct.) (No. BC052566). Arguably, that fact that the property is allegedly permanently stigmatized (which has not been proven) does not necessarily mean that the plaintiff should be compensated for stigma. The plaintiff must prove stigma damages.

are not going to take into consideration inflation, deflation, changes in attitude, things of that nature."[130] This ruling was erroneous because the most effective way to combat the impact of stigma itself is to introduce evidence suggesting that the stigma, if existent at all, may wane by 1996.

The *Bixby* decision promotes bad law.[131] The *Bixby* court allowed the jury to decide 1996 damages based upon 1993 facts and data. Because of the nature of stigma damages, the extent of damages will change as perceptions change. Study after study has shown that stigma decreases over time and has, on occasion, completely abated.[132]

In *Putnam v. New York,*[133] a New York appellate court upheld a lower court ruling that property that was contaminated, but that was subsequently remediated, did not have a stigma. In *Putnam,* the plaintiff's property was contaminated when oil from a broken pipeline on adjoining property migrated onto the property. Although the contamination was remediated, the plaintiff alleged that the property was permanently stigmatized because the property had been contaminated. The plaintiff introduced evidence suggesting that the property was unmarketable because of the past contamination. But more important, the defendant introduced evidence showing that subsequent testing to the plaintiff's property revealed that all the contamination had been removed. This case is significant because the New York appellate court did not accept the premise that a stigma automatically attaches to previously contaminated property.[134]

Of the two cases discussed above (*Terra-Products* and *Bixby*) that allowed recovery for stigma damages, *Terra-Products* was the better reasoned ruling. In *Terra-Products*, the plaintiff had actually suffered a demonstrable injury from the stigma. Damages were based upon quantifiable data, which arguably sup-

130. Appellant's Opening Brief at 7, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Ct. App.) (No. B082296) (quoting Record at 356).

131. Because of the errors made by the trial court, *Bixby* should not be relied upon as authority for awarding stigma damages. Moreover, the methodology used by the *Bixby* experts has been the subject of intense criticism. It is important to note the distinction between *Bixby* and *Terra-Products.* Unlike the *Terra-Products* jury award which was based on damages which Terra-Products had actually sustained at the time of trial, the Bixby jury awarded damages in 1993, based upon what it felt the public perception would be in 1996.

132. *See* Wise & Pfeifenberger, *supra* note 49,at 1440.

133. 636 N.Y.S. 2d 473 (App. Div. 1996).

134. *See New York Claimant Failed to Prove Permanent Damage, Stigma,* 8 Mealey's Litig. Rep.: Toxic Prop. Damage 9 (Jan. 26, 1996).

ported the theory that stigma caused the injury and existed at the time of the injury.[135] On the other hand, in *Bixby*, a jury was asked to determine, in 1993, the stigma damage that would exist in 1996. The judge acknowledged that any guess as to the 1996 damages was a "crapshoot" full of "imponderables."[136] Yet, the judge allowed the question on damages to go to the jury. With the limited evidence available, the jury verdict could not have been based upon anything but mere speculation and conjecture. The judge would have been equally effective if he had given the jurors a crystal ball and asked them to predict the future.

C. *Cases Concerning Proximity To Contaminated Property*

Ohio law allows recovery for damages to real property that result from the reasonable fears of potential buyers. In an unpublished opinion, *DeSario v. Industrial Excess Landfill*,[137] an Ohio jury awarded $6.7 million in stigma damages to 1,713 plaintiffs for the diminution in value to their properties that resulted from the proximity of the properties to a toxic waste site.[138] Plaintiffs sued after discovering that toxic waste, disposed at a landfill by the defendants, had migrated offsite into the soil and groundwater. The incident received extensive press coverage, beginning in 1985 and peaking in late 1988. The plaintiffs advanced two theories of recovery for stigma: nuisance and negligence. They argued that the defendants were negligent in disposing waste at a facility that they knew was not permitted to handle the particular waste, that the defendants knew the waste was toxic and capable of contaminating the groundwater and that the defendants knew the waste was capable of causing severe health risks. It should be pointed out that the defendants did not own or operate the landfill, but merely disposed their waste there. This is significant because ownership goes to the element

135. *See supra* text accompanying notes 118-19.

136. Appellants' Opening Brief at 6, Bixby Ranch Co. v. Spectrol Elecs. Corp., (Cal. Ct. App.) (No. B082296) (quoting Record at 349, 427).

137. *See generally* Wise & Pfeifenberger, *supra* note 49, at 1435. *See also,* DeSario v. Industrial Excess Landfill, Inc., 587 N.E. 2d 454, 461 (Ohio App. 5 Dist. 1991) (holding that a class action nuisance suit "may be premised on the public's perception of contamination irrespective of actual land contamination.").

138. This was the second trial. In the first trial, the jury decided for the plaintiffs and awarded them $500,000. The plaintiffs moved for a new trial on the issue of damages, claiming that the meager $500,000 award was against the great weight of the evidence. The trial court granted a new trial on the issue of damages. *See Property Owners Awarded $6.7 Million; Stigma Verdict a First, Attorney Says,* Toxics L. Rep. (BNA) 754 (Dec. 14, 1994).

of "duty." As discussed earlier in this article,[139] to prevail on a negligence cause of action a plaintiff must prove that the defendant owned him a duty, that the defendant breached that duty and that the defendant's breach caused plaintiff's damages. Defendants cannot be held liable for damages to plaintiffs under a negligence theory unless the defendants owed some duty to the plaintiffs.

Plaintiffs introduced expert testimony that the landfill contained benzene, a known carcinogen, which could escape from the landfill into the airspace over the plaintiffs' properties, and thus expose the plaintiffs to increased health risks. Accordingly, plaintiffs argued that they had a reasonable fear of living within the reach of toxins, and that as a result of the massive publicity given to the landfill, their property values had diminished.

The court imposed the *Adkins* rule, which required plaintiffs to prove a reasonable probability existed that toxins would reach their properties and cause a substantial health risk.[140] In essence, the plaintiffs had to prove that their fears were reasonable. The plaintiffs used expert witnesses to establish that gases from the landfill could travel to the outer limits of each plaintiff's property. After extensive debate over the reasonableness of the plaintiff's fears, the court ruled that "reasonableness" was an issue of fact to be decided by the jury. The jury subsequently decided that the plaintiffs' fears were reasonable and thus, awarded the plaintiffs $6.7 million for realized and unrealized damages.[141] Whereas the realized damages compensated the plaintiffs for the diminution in value to their properties, the unrealized damages compensated them for any stigma damages that might occur in the future.

The *DeSario* decision is quite troubling because it allowed plaintiffs to predicate recovery solely upon their fears of future health risks and their fears of reduced future sales prices for their properties. No physical damage occurred to the plaintiffs' properties and no evidence suggested that the contamination would migrate onto their properties in the future. The ruling is very far-reaching because it defies fundamental principles of common law, and creates bad policy by allowing plaintiffs to recover damages based on their fear alone. First, unrealized dam-

139. *See generally*, discussion on negligence in Part II.

140. 487 N.W.2d 715 (Mich. 1992).

141. *Property Owners Awarded $6.7 Million; Stigma Verdict a First, Attorney Says,* Toxics L. Rep. (BNA) 754 (Dec. 14, 1994).

ages are too speculative and promote bad policy, because there are absolutely no objective criteria for determining the type of medical injury, if any, that the plaintiff will encounter, the extent (whether curable or life-threatening) of the medical injury or the duration of treatment needed for the medical injury. Thus, a plaintiff who is seriously injured as a result of such exposure may be under-compensated, whereas a plaintiff who does not contract injury receives a windfall.

One major problem with the *DeSario* decision is that the plaintiffs' properties were not contaminated. Plaintiffs' evidence suggested that it was possible for gases from the landfill to migrate into the air over their properties; however, the plaintiffs did not establish that gases actually migrated.[142] The expert witness did not perform any studies concerning the flight of released gases. The evidence comprised one speculation after another. The first speculation concerned the possibility that the plaintiffs' property would, in fact, become contaminated. The next speculation concerned the possibility that the plaintiffs would actually suffer increased health risk from exposure to the contaminants. Another speculation concerned the possibility that the plaintiffs would have problems marketing their properties because of the contamination, and speculatively would receive less for a sale.

Another major problem with the ruling is that the defendants were merely generators of waste. They did not own the landfill or control its operation. It is beyond reason to understand how the jury found for the plaintiffs on a negligence theory. As was discussed earlier, to prevail on a negligence cause of action, a plaintiff must prove that the defendants owed a duty, that the defendants breached that duty, and that the defendants' breach was the proximate cause of the plaintiff's damages. First, in light of both case law and the *Restatement (Second) of Torts*, one who merely brings waste to a facility for disposal apparently owes no duty to property owners living near the disposal facility. According to § 371 of the *Restatement (Second) of Torts*, a landowner may have a duty to those outside of his land. Specifically, § 371 states that "a possessor of land is liable to others outside of his land for physical harm to them caused by an activity carried on by the possessor of land that he realizes or should realize will involve an unreasonable risk of physical harm to them." In *DeSario,* not all of the defendants were landowners. Until

142. *See generally* Wise & Pfeifenberger, *supra* note 49.

DeSario, imposition of a duty was not extended to a generator unless the generator was the owner or operator of the facility.

It is not known how many, if any, of the *DeSario* plaintiffs actually suffered any harm from the stigma. A study conducted by Charles Cartee revealed that the negative impact on residential properties located near landfills only affected properties within half a mile of the landfill.[143] If the study is correct, not even one-fourth of the *DeSario* plaintiffs will actually realize a harm. More significantly, a study performed specifically on Industrial Excess Landfill supports the proposition that stigma damages should not be awarded until an actual harm is realized.[144] After the *DeSario* decision in 1992, a study comprised of more than 2000 properties located near Industrial Excess Landfill compiled data to determine whether an adverse effect actually occurred, and, if so, the date on which the adverse effect occurred and whether the magnitude of the adverse effect changed over time and distance.[145] The study indicated that during the period within which intense news coverage existed, a ten percent decline in market value occurred. But as news coverage waned, the properties declined in value more slowly. Within four years, properties located more than half of a mile from the landfill had fully recovered in value.[146] Moreover, based upon the data, values of homes within a half mile of the landfill were projected to fully recover within an additional two years.[147] As the Cartee study demonstrates, awarding stigma damages before the harm allegedly caused by the stigma is actually realized allows plaintiffs, as in the *DeSario* case, to realize a windfall based upon "what ifs." There is no doubt that some of the property owners whose property had fully recovered in four years still live in their homes. They can now sell their property for its full market value. Thus, the money they received for the alleged diminution in value and as compensation for future risk is a windfall to the detriment of the defendants.

143. Charles R. Cartee, "*A Review of Sanitary Landfill Impacts on Property Values*," REAL EST. APPRAISER & ANALYST 43, 44 (1989); *see also* Arthur C. Nelson, John Genereux, & Michelle Genereux, *Price Effects of Landfills on House Values*, 68 LAND ECON. 359-65 (Nov. 1992; *see also* Janet E. Kohlhase, *The Impact of Toxic Waste Sites on Housing Values*, 30 J. URBAN ECON. 1 (Apr. 17, 1989).

144. *See generally* Wise & Pfeifenberger, *supra* note 49.

145. *Id.* at 1436.

146. *Id.* at 1435.

147. *Id.*

Because perceptions are not constant,[148] any projection, no matter how scientific the method, can only be speculative.

In *Grant v. Du Pont de Nemours and Co.*, nine plaintiffs whose property adjoined contaminated property brought an action against the owner of the property for diminution in value under strict liability, negligence, trespass and nuisance theories.[149] None of the plaintiffs' properties had actually been physically affected. As to the trespass cause of action, the court found that venting chemicals into the atmosphere was a trivial invasion and not actionable.[150] An actual invasion of something other than the air over the plaintiffs' land was required.[151] The court opined that the law required that the land be "physically touched" before an action for trespass would lie.[152] Finally, as to the nuisance cause of action, the court found that a non-trespassory invasion under a nuisance theory required a substantial invasion in that the nuisance must "affect the health, comfort or property of those who live near."[153] Thus, diminution in property value alone did not give rise to an action for nuisance.[154] The court stated, however, that nuisance *per se* or *nuisance accidens* would satisfy the substantial invasion requirement.[155] The court summarily dismissed plaintiffs' negligence cause of action because plaintiffs could not prove damages, duty, breach or causation.[156] The court stated that because the plaintiffs' property was not physically affected, the plaintiffs could not satisfy their burden of proof.

In re Paoli Railroad Yard PCB Litigation,[157] the Third Circuit Court of Appeals applied Pennsylvania law and reversed a trial court's summary judgment ruling in favor of the defendants. The trial court had ruled that absent permanent physical damage, plaintiffs had no recognizable cause of action under a nuisance

148. *Id.* at 1440 (stating "[s]tigma does have the potential to affect properties that are not physically damaged. However, there is a legitimate question as to the persistence of any effect. Careful scrutiny must be applied in any case to determine whether stigma is a phenomenon that can stand the test of time.").

149. No. 4-91-CV-55-H, 1995 U.S. Dist. LEXIS 15345 (E.D.N.C. July 14, 1995).

150. *Id.* at *11.

151. *Id.* at *13.

152. *Id.*

153. *Id.* at *16 (quoting Watts v. Pama Mfg. Co., 124 S.E.2d 809, 814 (N.C. 1962)).

154. *Id.* at *17.

155. Grant v. Du Pont de Nemours and Co., No. 4-91-CV-55-H, 1995 U.S. Dist. LEXIS 15345, at *15-*19 (E.D.N.C. July 14, 1995).

156. *Id.* at *21-*22.

157. 35 F.3d 717 (3d Cir. 1994).

theory, and any decrease in the market value caused by the stigma was not compensable under Pennsylvania law.[158] In reversing the trial court's ruling, the Third Circuit stated that where the defendants cause a physical injury to the plaintiffs' property and the cost of repair does not restore the value of the property to its original value, the plaintiffs may recover damages for diminution in value without showing that the injury to their property is permanent.[159]

In *Paoli*, the defendants operated a railroad yard. As part of the ongoing activities at the railroad yard, PCBs and other chemicals were occasionally spilled onto the ground. The plaintiffs, who lived near the Paoli Railroad yard, brought suit after learning that PCBs spilled at the railroad yard had migrated onto their property through the soil and groundwater. The National Institute for Occupational Safety and Health stated that the site had the worst PCB problem ever reported.[160] The trial court stated that repair cost, not diminution in value, was the proper measure of damages, and that only when the damage was permanent would diminution in value be the proper measure of damages.[161]

The appellate court stated that Pennsylvania law would allow the recovery of damages for diminution in value where the defendants caused physical injury to the plaintiffs' property, repair alone would not restore the plaintiffs' property to its prior condition and the plaintiffs would be subjected to continued risks. In rendering its decision, the appellate court referred to other Pennsylvania cases, *Wade v. S.J. Groves & Sons Co.*, and *In Appeal of Giesler*, in support of its holding.[162] Quoting *Wade,* the court stated that "an appropriate measure of damages is generally defined as what is necessary to compensate fully the plaintiff."[163] In *Wade,* the defendant modified a natural gully on his property, thereby changing the drainage pattern on the plaintiff's property and causing periodic flooding to the plaintiff's property.[164] After repairs to the gully, a slight risk of ongoing floods on plaintiff's property remained. The *Wade* court found that diminution in value was the proper measure of damages, because permanent

158. *Id.* at 795.
159. *Id.* at 798.
160. *Id.* at 734.
161. *Id.* at 795.
162. *Id.* at 796-98.
163. *In re* Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 797 (3d Cir. 1994) (referring to Wade v. S. J. Groves & Sons Co., 464 A.2d 901, 912 (Pa. Super. Ct. 1981).
164. Wade v. S. J. Groves & Sons Co., 464 A.2d 901 (Pa. Super. Ct. 1981).

injury was meant to apply whenever repair costs would be an inappropriate measure of damages.[165] In *Giesler*, a takings case, the government ran a power line across the plaintiff's property.[166] The court held that just compensation for the land taken included the full diminution in value to the remaining property. The court stated that the "apprehension of injuries to person or property by the presence of power lines on the property may be taken into consideration insofar as the line affects the market value of the land."[167] The court also stated that the plaintiff's or public's perception that caused the diminution in value did not have to be reasonable. Based upon *Wade* and *Giesler*, the Third Circuit found that an injury to plaintiff's property did not have to be physical to recover the diminution in value to the property. The court hinted that permanent stigma would suffice.[168] It is important to note that *Wade* was not based upon stigma, but was instead based upon the permanency of the injury to the plaintiff's property.[169]

Wade and *Giesler* are both distinguishable from *Paoli* on their facts. In *Wade*, the construction of the natural gully on the defendant's property created a permanent physical injury to the plaintiff's property because the plaintiff's property was subject to periodic flooding. Likewise, in *Giesler*, the electromagnetic field was a permanent structure placed upon the plaintiff's property and thus, the court reasoned as long as the structure was permanently fixed to the land, the injury would remain. Conversely, in *Paoli*, the court focused on the permanency of the injury to the property[170] and drew the conclusion that because the property, in

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165. *Id.* at 912.

166. Appeal of Giesler, 622 A.2d 408 (Pa. Cmwlth. 1993).

167. *Id.* at 411-412 (quoting United States v. Easements and Right-of-Way, 249 F. Supp. 747, 750 (W.D. Ky. 1965)).

168. The Third Circuit commented:

> While the requirement of permanent damage *to property* seems on its face to require permanent physical damage, plaintiffs convincingly argue that the stigma associated with the prior presence of PCB's on their land constitutes permanent, irremediable damage to property under Pennsylvania case law such that they can recover for the diminution of value of their land.

In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717, 796 (3d Cir. 1994).

169. *See Wade*, 424 A.2d at 910-12.

170. In support of its justification that the damage to the property was permanent, the court stated:

> First, EPA itself estimates that its cleanup will lower cancer risk only to 1 in 100,000, which is ten times higher than its normal remedial goal of lowering risk to 1 in 1,000,000. Second, . . . the EPA plan will not be effective in eliminating groundwater contamination, exposure through the air, and the continuing release

its view, was permanently contaminated, there would be a permanent stigma.

The *Paoli* court's ruling, as it applies to overruling the district court's summary judgment dismissal of the plaintiff's claim, appears to be the correct ruling. However, equating permanent "property damage" with a "permanent stigma" is misguided. Property contamination does not necessarily indicate a stigma associated with the property.[171] Stigma damages are awarded as compensation for stigma, not for actual contamination.[172] Therefore, it is not the damage to the property that must be permanent; instead, it is the stigma associated with the contamination that must in fact be permanent. This distinction is crucial. Although permanent damage may be used to support the permanency of the stigma, it should not be dispositive; the permanency of the contamination does not necessarily support the permanency of the stigma.

The *Paoli* court hinted that the mere fact that property has been contaminated can result in a permanent stigma even if the property was subsequently remediated. While this argument may be true, it is contrary to public policy. Any time a property has been invaded with a contaminant, the property owner would arguably have an action for stigma. Considering the vast number of underground storage tanks and industrial facilities in the United States, potentially thousands, perhaps millions, of property owners could bring suit to recover for stigma that might disappear before plaintiffs see the inside of a courtroom.

In *Golen Partnership v. Union Corp.*,[173] another unreported Pennsylvania case, a trial court ruled that there could be no recovery for diminution in value resulting from stigma damages unless some harm to the property apart from the alleged diminution of value occurred. In *Golen,* the plaintiff's land was not contami-

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> of sediments from the Yard. . . . As we see it, the EPA's own normal practice of cleaning up property to the point where the risk is 1 in 1,000,000 creates a genuine issue of material fact as to whether a cancer risk of 1 in 100,000 constitutes permanent damage.

Id. at 795-96.

171. *See* Phillips, *infra* note 204, at 1.

172. Plaintiffs can be compensated for the contamination under common law theories of recovery, i.e., nuisance, trespass and negligence.

173. *Stigma Damages Require that Contamination Spreads from Neighboring Property, Court Rules*, 26 Envtl. Rep. 1128 (BNA) (Oct. 27, 1995)[hereinafter *Stigma Damages*]; *see also, Superior Court Refuses to Review Ruling that Proximity to Superfund Site Without Contamination is not Actionable,* Pa. J. Envtl. Litig. 12 (Jan. 1996).

nated, but was located adjacent to contaminated property. The plaintiff sued to recover stigma damages attributable to contamination on adjoining property, which devalued its property. The *Golen* court stated, "it is well settled in Pennsylvania that there can be no recovery for economic loss such as diminution in value absent physical injury or some harm to the property apart from the alleged abstract question of devaluation."[174] The court distinguished its decision from *Centolanza v. Lehigh Valley Dairies, Inc.*,[175] in which the Pennsylvania Supreme Court allowed recovery for both repair costs and the diminution in value to real property. The court distinguished *Centolanza* on grounds that the plaintiff's property in *Golen* had in fact been contaminated. Additionally, the court pointed out that the *Centrolanza* court found a cause of action under the Storage Tank and Spill Prevention Act,[176] for clean-up costs associated with anticipated oil contamination and for the diminution in value to property that was contaminated by fuel oil and waste water discharged onto the plaintiff's property from an adjacent property.[177] This cause of action was not available to *Golen.*

Although the law is not completely settled in Pennsylvania, given the direction of the case law, Pennsylvania courts appear to be recognizing the concept of stigma damages for properties actually invaded. Moreover, the Third Circuit, looking at *Paoli,* implied that it would entertain an argument predicating diminution in value of damages upon the permanency of the stigma as opposed to actual physical damages.

In *Adams v. Star Enterprise*, landowners brought suit against Star Enterprise under nuisance and negligence theories to recover for stigma damages.[178] In *Adams*, an oil spill occurred on the defendant's property, the exposure to which allegedly subjected the plaintiffs to increased health risks. The plaintiffs alleged both that the oil spill constituted a nuisance by interfering with the use and enjoyment of their land, and that their property value decreased from the accompanying stigma. The trial court found that Virginia law would not extend nuisance recovery to diminution in property value resulting from public attitudes to-

174. *Stigma Damages, supra* note 173 (quoting Golen Partnership v. Union Corp., Pa Ct. Comm. Pls., 1st Dist., No. 00305, Sept. 11, 1995).

175. 658 A.2d 336 (Pa. Super. Ct. 1995).

176. PA. STAT. ANN. tit. 35, § 6021.101 (West 1993).

177. *See Stigma Damages, supra* note 173.

178. 851 F. Supp. 770 (E.D. Va. 1994), *aff'd,* 51 F.3d 417 (4th Cir. 1995).

ward the property, because negative publicity or stigma resulting from unfounded fear about the danger near the property does not constitute a significant interference with the use and enjoyment of land.[179] Accordingly, the trial court ruled that an action in nuisance would not lie without an actual intrusion onto the landowner's property. Additionally, the court found that the nuisance of which the defendants complained was temporary in nature, and that the plaintiffs were seeking diminution in value, a measure of damage available only for permanent injuries.[180] Further, the trial court dismissed the negligence claim because it found that public attitudes, not the contamination, were the proximate cause of the plaintiffs' injuries.[181] The appellate court, affirming the trial court's ruling after applying Virginia law, held that a plaintiff could not recover for a nuisance that was neither visible from, nor otherwise capable of physical detection within, the plaintiff's property.[182] As to the negligence theory, the appellate court cited the *Restatement (Second) of Torts*[183] and ruled that the harm of which the defendants complained was pecuniary in nature, and was not compensable unless a direct physical invasion occurred. Accordingly, plaintiffs could not recover under a negligence theory unless they demonstrated that the oil actually physically encroached onto their property.

Thus, for a plaintiff to prevail under a nuisance cause of action, Virginia law required that the defendants' act significantly interfere with the plaintiffs' use and enjoyment of their land. Unfortunately, it is not clear from the court's ruling what exactly constitutes a "significant interference." However, the court did state that it would not base a cause of action on unfounded fears. The court left open the issue of damages when the fears were founded but a physical invasion did not, in fact, occur.

In *Leaf River Forest Products, Inc. v. Ferguson,* the Mississippi Supreme Court ruled that there could be no nuisance unless substances or odors actually physically invaded the plaintiffs' prop-

179. 851 F. Supp. at 774.
180. *Id.*
181. *Id.*
182. Adams v. Star Enter., 51 F.3d 417, 423 (4th Cir. 1995).
183. RESTATEMENT (SECOND) OF TORTS § 766C (1979):

> One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently (a) causing a third person not to perform a contract with the other, or (b) interfering with the other's performance of his contract or making the performance more expensive or burdensome, or (c) interfering with the other's acquiring a contractual relation with a third person.

erty.[184] In *Leaf River,* property owners brought suit against Leaf River Paper Mill ("Mill") after learning that toxic substances had been discharged from the Mill into the Leaf and Pascagoula rivers. Eleven property owners originally sued the Mill. By the time of trial, however, only three property owners remained. The plaintiffs based their complaints upon negligence, strict liability, nuisance and trespass theories.[185] The plaintiffs lived along the Pascagoula River from which they caught catfish. Their properties were approximately 125 miles down river from the Mill.[186] The plaintiffs feared that they would contract cancer from eating contaminated catfish. They also feared that toxins from the Mill had contaminated their well water. In fact, their property was actually contaminated as a result of occasional river flooding. The plaintiffs refused, however, to have their blood tested, and did not have their well water or land tested to determine whether their water or lands had been invaded by toxins from the Mill. They also claimed that their property was worthless because of accompanying public stigma.

A jury found for *Leaf River* on the trespass claims. However, the jury found in favor of the plaintiffs on the nuisance and emotional distress claims, awarding them each $10,000 on nuisance claims, and awarding the entire group $3,000,000 in punitive damages. The Mississippi Supreme Court reversed the jury awards, holding that the evidence was insufficient to support a significant interference with the use and enjoyment of the plaintiffs' properties.[187] The court stated that mere stigma, supported only by tests showing contamination at least eighty river miles north of the alleged damage, was not sufficient evidence of compensable injury.[188] The court implied that it would entertain a cause of action for stigma if the defendant's act significantly interfered with the plaintiffs' use and enjoyment of their properties. The court provided no guidance as to what would constitute "significant interference." We can only surmise from the ruling that the plaintiffs' property must be some distance less than eighty miles from the contaminated property in order to recover.

184. 662 So. 2d 648, 650 (Miss. 1995).
185. *Id.* at 651.
186. *Id.*
187. *Id.* at 657.
188. *Id.* at 664.

In another Mississippi case, *Berry v. Armstrong Rubber Co.*,[189] the plaintiff sought stigma damages under trespass and nuisance theories against a tire manufacturer that dumped hazardous waste onto the tire manufacturer's property. The plaintiff claimed that the hazardous waste had migrated onto his property. The plaintiff could not, however, produce any evidence to support such a contention. The plaintiff's expert appraiser introduced evidence showing that stigma significantly reduced the value of the plaintiff's property. Nonetheless, the court ruled that the plaintiff could not recover under Mississippi law for stigma damages unless physical damage occurred to the property. The Fifth Circuit affirmed the trial court's summary dismissal of the plaintiff's claims, and in so doing, distinguished two cases cited by the plaintiff, *Phillips v. Davis Timber Co.*,[190] and *Bynum v. Mandel Industries, Inc.*[191] The Fifth Circuit stated that those cases involved actual physical damage to the plaintiffs' properties. Accordingly, a Mississippi court would likely allow stigma damages where a plaintiff's property is actually invaded.

In Michigan, a plaintiff cannot recover for stigma under a nuisance cause of action unless the defendant's act causes a "substantial injury" to the plaintiff's property that significantly and unreasonably interferes with the plaintiff's use and enjoyment of the property. In *Adkins v. Thomas Solvent Co.*,[192] landowners, who lived in proximity to contaminated property, claimed that the defendant's improper handling and storage of toxic chemicals and hazardous wastes caused groundwater contamination, which the landowners feared would migrate onto their properties. The court of appeals and the Michigan supreme court stated that to recover under a nuisance theory, the plaintiff's land need not be physically invaded, but the plaintiff must demonstrate that a significant interference with the use and enjoyment of his land occurred.[193] The district court pointed out that the crux of the plaintiff's complaint was that publicity about the groundwater contamination caused the diminution in the value to the prop-

189. 989 F.2d 822 (5th Cir. 1993).

190. 468 So. 2d 72 (Miss. 1985); the Mississippi Supreme Court held that a plaintiff could allege a cause of action in nuisance even if contaminants on his land did not reach dangerous levels. The distinguishing factor in *Phillips* was that the land was actually physically impacted.

191. 241 So. 2d 629, 633 (Miss. 1970) (In *Bynum*, as in *Phillips*, there was an actual physical impact to the plaintiff's property).

192. 487 N.W.2d 715 (Mich. 1992).

193. *Id.* at 721.

erty, and subsequently ruled that negative publicity resulting from unfounded fear did not constitute a significant interference with the use and enjoyment of land. Consequently, in Michigan, an unfounded fear does not support a cause of action in nuisance.[194]

In another Michigan case, *Vander Laan v. Marathon Oil Co.*,[195] the plaintiffs sued an oil company for stigma damages under various theories, including negligence, nuisance, and trespass. The plaintiffs based these theories upon the idea that the oil company allowed pollutants to contaminate plaintiffs' properties. The plaintiffs failed to introduce any evidence supporting their allegation that contamination had actually migrated onto their property. Citing *Adkins,* the court ruled that to recover under Michigan law, the nuisance had to be both substantial and unreasonable.[196] As for the diminution in value claim, the court, again citing *Adkins,* stated that:

> absent some showing of substantial interference with the use and enjoyment of property in the form of actual contamination or well-founded fear of future contamination, a nuisance claim based solely on property value depreciation caused by a defendant's contamination of property in the general area is not actionable.[197]

The court supported its ruling using a policy argument articulated by the *Adkins* court: if the large number of plaintiffs surrounding the numerous hazardous waste sites throughout the state were allowed to base recovery upon unfounded public fears, then the polluter's resources would be spent compensating persons without any cognizable harm at the expense of those who actually have suffered substantial and unreasonable interference with the use and enjoyment of their property.[198] It is significant that the court required a well-founded fear that the contamination would reach the plaintiff's property in order for the plaintiff to recover stigma damages. Such a requirement suggests that some form of invasion is required.

In summary, California, Pennsylvania, Mississippi, Michigan and Virginia courts have stated that they will not entertain an argument for stigma damages to property that has not been physically invaded. However, such courts will entertain an argument

194. *Id.* at 722-23.
195. No. 1:89-CV-867, 1993 U.S. Dist. LEXIS 13041 (W.D. Mich. Aug. 18, 1993).
196. *Id.* at *25.
197. *Id.* at *26.
198. *Id.*

for stigma damages where there either has been an actual physical invasion of the plaintiff's land or well-founded fears of future contamination exist. Of the cases discussed, only the *Bixby* and *Terra-Products* courts dealt with property that was actually invaded. In both cases, the courts allowed the plaintiffs to claim stigma damages. Ironically, both plaintiffs recovered stigma damages. This suggests that if property is physically contaminated, plaintiffs are more likely to recover stigma damages.

IV.
POLICY CONSIDERATIONS FOR DETERMINING WHETHER TO AWARD STIGMA DAMAGES

It is undisputed that perceptions of risk can affect the market value of property. As between an innocent property owner and a party responsible for contaminating the property, arguably the responsible party should shoulder the burdens of the risks which he creates. However, sound public policy requires that damages be proved with some minimal threshold of reliability. Policy considerations for and against allowing recovery for stigma damages prior to the realization of actual harm will be explored in detail in this section. Primary considerations which weigh in favor of allowing recovery for stigma damages are: (1) statutes of limitations; (2) the influence of stigma on property values; and (3) intervening factors which may arise while plaintiff waits for a harm to materialize.

Perhaps the most compelling argument against waiting to file a cause of action until a harm is actually realized is that the cause of action consequently may be time-barred.[199] Depending on the particular state, a cause of action for property damage must be brought within two to five years from the time when the tortious act occurred, or when the tortious act was discovered, or when

199. Under the current status of the law, a property owner may have no choice but to bring a cause of action before an injury has fully materialized or be barred from bringing such action by the applicable limitations period, thereby precluding a wronged plaintiff from a meaningful form of recovery. If states are going to recognize stigma damages as a basis of recovery, legislatures must get together and draft legislation which extends a cause of action for stigma claims, providing that an action can be brought within a specified period from the time when a harm from the stigma is realized. There should be absolutely no recovery unless a plaintiff can prove with a reasonable degree of certainty that he has actually been damaged by the stigma for which he has no other recourse under law.

one could have reasonably discovered the tortious act by exercising due diligence.[200]

Environmental contamination may result from leaking underground storage tanks, subsurface soil migration of contaminants from one property to another and by groundwater migration of contaminants. Even if a property owner knows that his property is presently contaminated and has an associated stigma, there is literally no way for him to know or predict whether or not the stigma will still exist at the time when the property is sold. If a cause of action is not brought within the applicable limitations period and the property is later sold at a loss as a result of stigma, the property owner may not be able to recover if the limitations period has passed. Consequently, current law requiring a property owner to wait until an actual harm from stigma is realized can in essence serve to bar a potential plaintiff's cause of action.

Another argument against waiting until a harm is fully realized is that if a plaintiff waits too long, he may have difficulty proving that the damages are the result of a stigma. Intervening factors such as market conditions and changes in community make-up would more likely arise during the waiting period. Consequently, a plaintiff could be faced with an insurmountable burden of proof. Additionally, if plaintiffs are forced to wait until they have actually realized damages as a result of a stigma, the responsible party may not be available when damages manifest. For example, the responsible party or entity may no longer be in business or may be insolvent.

A. *Why Stigma Damages Should Not Be Granted: An Argument Against Stigma Damages*

Perceptions, although often nothing more than unsubstantiated personal opinions, can affect the market value of property if the perceptions are shared by a significant number of the relevant population. When a plaintiff claims his property has a diminished value, he in essence says that he will not be able to get its fair market value when he sells it. If a plaintiff never attempts to sell his property, he has suffered no damage. Likewise, if he

200. *See generally* William B. Johnson, *Application of Statute of Limitations in Private Tort Actions Based on Injury To Persons or Property Caused by Underground Flow of Contaminants*, 11 A.L.R. 438 (1993), *available in* LEXIS, ALR Library, A.L.R. 5th File; James R. MacAyeal, *The Discovery Rule and The Continuing Violation Doctrine As Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, VA. ENVTL. L.J. (Summer 1996).

sells his property at the fair market value, he has suffered no damage. By recovering stigma damages before realizing a harm, a plaintiff avoids the burden of proof that he would otherwise have to satisfy to recover for the stigma.[201] The mere fact that property is contaminated does not necessarily mean that it is stigmatized.[202]

To prevail on a stigma claim for future damages before the harm is realized, a plaintiff must merely put forth evidence of the existence and degree of the stigma. If a plaintiff were required to put forth evidence proving damage, his task would not be as easy. To prove a claim that his property is worth less on the market, a plaintiff must show each of the following: (1) that the property had a stigma; (2) that the stigma was present at the time of sales attempts; (3) that potential purchasers were aware of the stigma; and (4) that the stigma was a proximate cause of the plaintiff's inability to sell his property at fair market value or at all.[203]

The first element the plaintiff must establish is that there is in fact a stigma attached to the specific property. As exemplified by the following excerpt from the Appraisal Institute, the fact that a property is contaminated does not establish that a stigma exists.

> As more case studies and case law on the impacts of environmental problems develop, it is increasingly recognized that stigma does not apply in many instances. In some cases diminution in value is short term or non-existent, and stigma is not a factor in the equation. Contrary to preconceived ideas, a diminution in value is not necessarily present even when there is a known environmental problem or a remediation plan under consideration or in place.[204]

Accordingly, the mere fact that a property is contaminated does not in and of itself prove that the property is stigmatized. A study conducted by Foster Associates researched the impact of contamination on the amount people were willing to pay to rent

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201. Gregor I. McGregor, *Some Practical Suggestions for Valuing Contaminated Real Estate,* 22 MASS. LAWS. WKLY. 1244 (1994).

202. Albert R. Wilson, *The Environmental Opinion: Basis for an Impaired Value Opinion*, 62 APPRAISAL J. 410, 410(1994).

203. While the absence or presence of contamination is readily ascertainable, proximate cause presents a much more difficult task. Included within such a showing is evidence that the potential purchasers were aware of the stigma and that the inability to sell the property or reduction in sales price was not related to some new and intervening cause such as market factors.

204. Beverley S. Phillips, et al., *Environmental Issues and Diminution of Value: A Case Study*, 6 ENVTL. WATCH (Winter 1994).

apartments in close proximity to contaminated property.[205] The researcher gathered information for all apartments within ten kilometers of the contaminated facilities and matched the sites using various attributes, including the type of facility, equipment, conditions of property and amenities offered. The study indicated that an apartment's proximity to a hazardous waste facility had virtually no impact on the rent received. The researcher was able to predict with more than 95 percent certainty that there was no relationship between rents received and the proximity of the toxic waste site.[206] In the above referenced study, Foster Associates discusses other studies they had undertaken which measured purchases of property where they found similar results. The studies indicated that toxic sites had little, if any, impact on surrounding property values. The studies also revealed that even in the highly publicized environmental incidents, such as Times Beach and Love Canal, residents were reluctant to move away from their homes, even after being given warnings by the Environmental Protection Agency to evacuate.[207] This begs the question that if value is determined by the public's willingness to pay for and desire to occupy property, should not these reluctant homeowners be part of the public—should not their perceptions count? These homeowners' reluctance to move should be considered in determining whether there is in fact wide spread stigma. Arguably, if residents knowingly choose to stay in an area that is perceived to be contaminated, this may be evidence to support the position that contamination of an area does not necessarily mean a stigma exists, and can even suggest that stigma is irrelevant.

The next burden a plaintiff must overcome is demonstrating that his inability to sell his property, or selling his property at a loss, was proximately caused by the stigma. Because there are various market factors that may impact the movement of property, a plaintiff would have to prove that it is the stigma, and not other market conditions or factors, that impacted the marketability of the property sale. If interest rates increase, property sales decrease. Likewise, many other factors have a direct correlation

205. Michael Elliot-Jones, *Rents and Proximity to Toxic Sites,* Topics in Environmental Economics (Foster Associates, S.F., Cal.) (1991).

206. *Id.*

207. *Id.*

to the sale of property.[208] Allowing a plaintiff to bring suit before a harm is realized significantly handicaps the defendant's ability to put forth evidence discounting the merits of plaintiff accusations, *i.e.*, putting forth concrete market statistics showing that other factors, and not the stigma, influenced the marketability of the property. The jury is allowed to presume the plaintiff will not be able to sell his property or be able to recover fair market value because of the stigma, when in fact the stigma may not even exist at the time of sale.

Not only must the plaintiff sell his property, he must sell it during the time when the property is actually stigmatized. Since stigma can be short lived and is generally worse immediately after an occurrence or after major publicity,[209] if a plaintiff waits any time after the initial outbreak to sell his property, the stigma may no longer be present, and if so, perhaps to a much lesser degree. One author stated, "[s]tigma does have the potential to affect properties. However, there is a legitimate question as to the persistence of any effect. Careful scrutiny must be applied in any case to determine whether stigma is a phenomenon that can stand the test of time."[210] Accordingly, while it may be difficult to market environmentally impaired properties, contaminated properties are being sold with increasing frequency as the market becomes more familiar with soil and groundwater contamination.[211] We can infer from this that purchasers either do not know about the stigma, discount the risks associated with the stigma or just do not care about the stigma. Some purchasers are not concerned about the condition of the property as long as they receive an indemnity from the "polluter." For example, if a potential purchaser runs the same type of business, he may be less concerned about previous uses of the property. Transactions involving the disposition of oil refineries, oil terminals, and tank farms when the transaction is on a "within industry" basis are examples of situations where risks may not significantly concern the buyer.[212]

Finally, the plaintiff will have to show that a purchaser discounted the price because of the stigma. Because people look at

208. Surely one facing a poor market such as Houston, Texas in the late 1980's, should not be allowed to argue stigma as the sole proximate cause of harm.

209. *See generally* Cross, *supra* note 28.

210. Phillips, *supra* note 204.

211. Peter J. Patchin, *Contaminated Properties and the Sales Comparison Approach*, 62 APPRAISAL J. 402, 402 (1994).

212. Bill Mundy, *Stigma and Value*, 60 APPRAISAL J. 7, 12 (1992).

several factors when deciding whether a particular piece of property fits their needs, they may not weigh stigma as heavily as other factors. If all of the other needs are met, a potential purchaser may agree to pay top dollar to get the piece of property.

As demonstrated by the aforementioned, by entertaining stigma damages prematurely, a jury can just assume what a plaintiff would have otherwise had to prove: the plaintiff will sell his property; the stigma will exist at the time of sale; plaintiff will sell his property at less than its fair market value; the purchaser will know about the stigma; and the purchaser will discount the property because of it.

B. *Bank Financing*

Plaintiffs routinely assert in stigma litigation that potential buyers may not be able to obtain financing because of stigma associated with the property.[213] This whole theory is misguided. Banks generally do not deny loans based upon perceptions of contamination, but based upon actual contamination. Moreover, our present tort system provides causes of action for damages resulting from the actual contamination. If a property owner is denied a loan because of the contamination, it can be factored into his damages which result from the underlying tort. Stigma is essentially irrelevant. Even if banks did deny loans based upon stigma, such risks should not be recognized prior to a plaintiff actually being denied a loan.

Numerous studies show that lenders will in fact loan on contaminated property, and some lenders even prefer contaminated properties that have undergone clean-up over property that they know nothing about. A survey conducted by Hansford/Healy Companies measured perception of financial lending institutions and revealed that contamination did not have a substantial impact on the bank's interest in lending on a specific property.[214] Fifty-seven institutions took part in the survey, which included representatives from the twenty-five largest banks in the country, the fifteen largest banks in California and the five largest foreign banks in the United States. Several individuals from the larger companies were interviewed. The survey revealed that forty-one percent of the participants believed that groundwater contamina-

213. *See, e.g., New York Claimant Failed to Prove Permanent Damage, Stigma*, 8 MEALEY'S LITIG. REP. 9 (Jan. 26, 1996).

214. *See generally* Patricia R. Healy and John J. Healy, Jr., *Lenders' Perspectives on Environmental Issues*, 60 APPRAISAL J. 394 (1992).

tion was the greatest concern.[215] Most significant is that the study revealed that more than eighty-four percent of the banks stated that they would lend money on property that was once contaminated, but remediated.[216] Additionally, another study found that "lenders preferred a remediated industrial property that had undergone thorough environmental scrutiny to other sites that had not been tested and approved."[217] Accordingly, chances are that a plaintiff will be able to obtain a loan, especially in cases where the polluter has cleaned up or is in the process of cleaning up the property. Moreover, where the polluter agrees to indemnify the plaintiff for future claims by third parties, banks are even more willing to advance a loan.

Although studies reveal that banks will finance property that has been previously contaminated, when plaintiffs raise these arguments prior to actually having sought a loan, it places the defendant at a disadvantage. It is not likely that a defendant will be able to show that a bank will lend money in the future, and a plaintiff will not have to show that he could not get a loan. Because a minority of banks will not fund loans on previously contaminated properties, the plaintiff can bring in a representative from one of the minority banks and establish a *prima facie* case. If the plaintiff had to wait until the harm was realized, then he would have to first show that he actually had a loan denied and that it was denied because of the stigma. If a plaintiff were to bring an action before the harm is realized, a jury could assume that the purchaser will try to finance a loan and will finance it through a bank that will deny the loan based upon the stigma.

C. *Risk of Being Required to Perform Future Clean-up*

Property owners seeking compensation for environmental stigma allege they are subject to future liability if they are required to perform a clean-up.[218] On the surface this argument seems plausible; however, a careful examination of the practical application of environmental laws and procedures suggests such allegations should not support awarding environmental stigma

215. *Id.* at 395 (interviewees were asked to choose among five different concerns).

216. *Id.* at 396.

217. Cabot, *supra* note 2, at 28-29, (referencing James A Chalmers & Jeffre B. Beatty, *Valuation of Property Affected by Contamination or Hazard*, ENVIRONMENTAL RISK MANAGEMENT: A DESK REFERENCE (2d ed. 1994)).

218. *See* Elliot-Jones, *supra* note 91, at 944.

damages. Again, plaintiffs focus on the actual harm from the contamination, not the stigma.

The current owner[219] is held responsible because it is his property and the law presumes that he performed due diligence[220] at the time of acquiring the property and therefore knew of the contamination or allowed his tenant to engage in the activity that caused the contamination. The operator at the time of the release can also be named because he is wholly or partially responsible for the problem that exists. Regulatory agencies do not care which one of the responsible parties undertake the clean-up, only that the clean-up be undertaken. Generally, the "polluter" will perform the clean-up because of some contractual obligation to the owner. However, if the owner is forced to respond, he can generally recover his expenses plus attorney's fees under various statutory regulations, some of which allow the responding party to recover treble damages from the non-complying responsible party. In situations where there is a contract, the property owner can recover through civil litigation for breach of contract. Thus, but for statute of limitations concerns, a plaintiff has several remedies if he waits until a subsequent clean-up is actually required.

For years, states were requiring property owners and polluters to clean up property for the sake of cleaning it up.[221] In many cases, there was no threat to human health or to the environment, but a property owner had to make sure that the contaminant level on his property was in compliance with arbitrary numerical standards developed by governmental agencies. Today, states are moving away from cleaning up property for the sake of cleaning it up and are moving towards environmental risk-based clean-up standards.[222] Risk-based standards are im-

219. *See* Patricia G. Copeland, *Ownership of Contaminated Property Raises Estate Planning Concerns,* 81 J. TAX. 50 (July 1994) (discussing other liabilities of owners of contaminated properties).

220. *See* Stephen L . Kass and Michael B. Gerrard, *Real Estate Brokers' Duty to Disclose Contamination,* N.Y.L.J. (June 24, 1994).

221. *See generally* Robert Simons, *How Clean is Clean?,* 62 APPRAISAL J. 424 (1994).

222. In 1995, the American Society of Testing and Materials ("ASTM") established standards for risk-based corrective action ("RBCA"). The standards were developed by a multi-disciplinary technical committee, consisting of members from the United States Environmental Protection Agency ("EPA"), state agencies, and representatives from the consulting, banking and insurance industry. Curtis C. Stanley & Paul C. Johnson, *Top Ten Misconceptions of Risk-Based Corrective Action,* 7 Underground Storage Tank Guide 6 (Apr. 1995). For a critical analysis of risk-based assessments, see Victor B. Flatt, *Should the Circle be Unbroken?: A Review of the*

posed based upon the threat of risk to the environment and to public health. As more states move towards risk-based standards, the likelihood the property owner will be required to undertake massive clean-up is further reduced.

A study conducted by Foster Associates of site remediation reopenings by the California Regional Water Quality Control Board revealed that only one in 1,000 cases were ever reopened.[223] Accordingly, the chance of a property owner being required to undertake a subsequent clean-up is minimal. Moreover, the only incentive for adopting more stringent regulations is to allow additional protection from exposure to a chemical that poses a more detrimental hazard than originally recognized. Present standards are based on toxicology results. Because toxicologists purposely err on the side of safety, the standards are already stringent and indiscriminately inclusive; consequently, it is unlikely that the standards will be raised to even more stringent standards or that scientists will discover something more detrimental than otherwise analyzed.[224] It is more probable that standards will be lowered given the movement towards risk-based corrective action. The fact that clean-up will not likely be required weakens plaintiffs' argument, as the chance that a property owner will be required to conduct additional clean-up is practically non-existent.

Even assuming the remote possibility that a property owner is required to perform a subsequent clean-up, public policy and the interest of justice for both the plaintiff and defendant would be better served if the plaintiff was not allowed to pursue damages until he or she was directed to perform a clean-up. First, the chance that a clean-up will be required is extremely remote; therefore any damages awarded will likely result in a windfall to the plaintiff. Second, because of the change in environmental laws and the unique nature of each piece of property, there is no basis other than mere speculation as to the amount of money that should be awarded for a potential clean-up. This could be devastating to the plaintiff if too little is awarded, and a miscarriage of justice to the defendant if any amount is awarded and no subsequent clean-up is required. Third, because there are no conditions attached to spending money awarded pursuant to a jury

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Honorable Stephen Breyer's Breaking the Vicious Circle: Toward Effective Risk Regulation, 24 ENVTL. L. 1707 (1994).

223. Elliot-Jones, *supra* note 91, at 945.

224. *Id.* at 944.

verdict, there is no guarantee that the property owner will still have the money in the remote event a clean-up is required. Fourth, because current owners and operators at the time of a release are generally named joint responsible parties,[225] they can be required to incur the expense of a subsequent clean-up without the benefit of the settlement, if clean-up is required.

Conversely, because damages awarded to the plaintiff do not have to be used to pay for a subsequent clean-up, if a prevailing plaintiff spends the damages that were awarded, and a subsequent clean-up is in fact required, the polluter will be named as a responsible party despite the earlier verdict for the same damages. Because the overwhelming majority of state laws and regulations make both the current owner and operator at the time of the release jointly and severally liable for the clean-up, chances are that a polluter will likely have to pay for the clean-up again. Although the polluter may have settled the matter through litigation, the state does not recognize private contracts or agreements to which the state is not a party, and will invariably still hold the polluter responsible despite the contract or verdict. The polluter may have a private cause of action against the property owner, but it has no bearing on the state's directive for the polluter to remediate the property. Consequently, the polluter will likely have to pay twice for the same damage. Furthermore, that private cause of action may be meaningless if the owner is then judgment proof.

Finally, if a subsequent clean-up is required after a plaintiff sells the property, the new property owner (because the statutes make the current owner and polluter liable) can be left to pay for a clean-up for which the plaintiff was compensated. For instance, if after receiving a jury award the property owner sells the property, nothing requires the owner to turn over the money to the new owner in the event future clean-up is required. In essence, a property owner can recover money under the theory that it may have to expend money for future clean-up and totally walk away, leaving the new property owner and the polluter, who has already paid a hefty verdict, left with the clean-up. It is clearly unfair, unjust and against public policy to allow such practice.

To further illustrate the ramifications of awarding stigma damages prematurely, look again at the *Bixby*[226] case. In that case,

225. 42 U.S.C. § 9607 (1994).

226. *See Verdicts and Settlements*, 8 Toxics L. Rep. (BNA) 955 (Jan. 26, 1994).

the jury awarded Bixby $826,500 in 1993 for the projected diminution in value of the Bixby ranch in 1996. If in 1996 when the property is remediated and time has lapsed there is no longer a stigma, Bixby will be able to sell his property at full value or at an even higher price, despite receiving the $826,500 damage award. Thus, *Bixby* may receive double recovery. Next, assume that in 1996 the property still has a stigma, but Bixby sells the property for only $100,000 less than he could have gotten without the stigma. Again, Bixby realizes a windfall. And finally, if Bixby does not sell his property or ever plan to sell his property, he has thus been compensated for damages that he never realized.

An argument may be made that the opposite is equally true, Bixby may not have been awarded enough and could eventually suffer a greater loss. This too could be true, and goes to demonstrate that stigma damages are of such a nature that they can pose a detriment to both the plaintiff and the defendant. There should be some reasonable degree of certainty and not just a "crapshoot" as to damages.

Public policy recommends that if damages are to be awarded, despite their speculative nature, such damages should not be awarded until an injury from the stigma is realized. Some of the reasons for waiting for an injury include: (1) the extremely remote possibility that a property owner will be required to clean up under a higher standard; (2) the likelihood that a polluter will have to pay twice; or (3) the likelihood that a subsequent purchaser may have to undertake the clean-up by virtue of title as "owner."

In sum, awarding stigma damages is analogous to embarking upon a slippery slope. How long will it be before the stigma theory is advanced to cover buildings by virtue of the types of businesses that are lawfully operated on adjacent or surrounding properties? Shall we allow people to sue for stigma damages every time the value of their properties decreases because of the operations of a legally, but objectionably, conducted neighboring business? For example, should property owners be allowed to sue when an AIDS or group home moves into the neighborhood and property values suddenly decline? Moreover, should property owners be able to recover stigma damages from owners of landfills, hazardous waste disposal facilities, and hazardous waste treatment, storage and disposal facilities, to which negative perceptions attach by the sheer nature of the business? Further, and

even more basic, should homeowners be allowed to sue for stigma damage when an apartment complex is located next door, arguably reducing the value of their properties? The answer must be no. Otherwise, people would be prevented from operating legitimate businesses by virtue of what other people thought, no matter how absolutely wrong or misguided those thoughts might be.

CONCLUSION

Policy justifications exist for allowing causes of action for stigma damages. Although some states are moving towards risk-based clean-ups, some banks are willing to make loans on contaminated properties, and stigma is sometimes short-lived, there are other states that have not adopted risk-based clean-ups, other banks that will not fund loans for contaminated properties, and other instances where stigma is not short-lived. In sum, there are definite risks associated with owning contaminated property.

Nonetheless, our system of justice requires that damages be proven with a reasonable degree of certainty. The sheer nature of stigma damages takes away that reasonable degree of certainty. Because there is no proven method to accurately gauge perceptions, stigma damages are inherently speculative in nature. Unlike an individual who has experienced an actual physical injury of a permanent nature and is compensated for future risk associated with that injury, a stigma plaintiff may not even suffer an injury, let alone a permanent injury. Stigma, unlike other injuries, may be here today and gone tomorrow.

As this discussion illustrates, stigma damages are simply too speculative in nature to be recognized as a basis for recovery. When one weighs the burdens of allowing recovery for stigma damages against the benefits of keeping in line with the spirit and intent of the American tort system which requires that damages be proven with a reasonable degree of certainty, the burdens far outweigh the benefits.