MEALEY'S™
Pollution Liability Report

Strategizing Legal Defenses In Vapor Intrusion Lawsuits

by
Robert Berg, Esq.

Michelman & Robinson, LLP
San Francisco, California

A commentary article reprinted from the January 2015 issue of Mealey's Pollution Liability Report

LexisNexis®

Commentary

Strategizing Legal Defenses In Vapor Intrusion Lawsuits

By
Robert Berg, Esq.

[Editor's Note: Robert Berg is a partner in the San Francisco office of Michelman & Robinson, LLP. He represents clients in large, complex disputes involving coverage issues. He also has extensive experience with contractual commercial litigation and toxic torts, and handles matters involving the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); maritime law; and the Employee Retirement Income Security Act (ERISA). Any commentary or opinions do not reflect the opinions of Michelman & Robinson, LLP or Mealey Publications. *Copyright © 2015 by Robert Berg.]*

A few years ago, there was an uptick in litigation involving mold infestation and damage claims related to the use of Chinese drywall. Today, the environmental phenomenon causing a rash of lawsuits is vapor intrusion. Vapor intrusion happens when soil and groundwater that contain pollutants permeate buildings. This generally occurs when properties are located down gradient from old gas stations (that emit benzene) or from dry cleaners (that emit PCE). The contaminants and toxic fumes rise up, affecting neighboring properties. This article will address some basic defense strategies in response to the increasing volume of these kinds of cases.

Property Damage

With respect to common law causes of action, the California Supreme Court has stated that, in vapor intrusion cases, the plaintiff must be able to prove actual property damage. See, *Aas v. Superior Court*, 12 Cal. 4th 627, 646 (2000). Further, courts around the country have held that the mere presence of a contaminant, without actual damage, does not constitute property damage or injury. See, *In Re MTBE Product Liability Cases* 475 F. Supp. 2d 286, 293 (S.D.N.Y. 2007). The mere presence of contaminants does not qualify; there must be physical injury to property or to persons. See, *San Francisco Unified School District v. WR Grace & Company* 37 Cal. App.4th 1318, 1327 (1995); *California Department of Toxic Substance Control v. Payless Cleaners* W.L. 258 - 626 (C.D. Cal. 2007). Moreover, the cost of abatement, by itself, does not constitute property damage, and there must be actual appreciable harm to property. *County of Santa Clara v. Arco* 137 Cal. App.4th 282, 320 (2006).

As these cases continue to multiply, we can anticipate that the laws may be interpreted differently in the near future. For now, however, the no property damage argument frequently presents a very effective defense.

Statute of Limitations

Noteworthy, the statute of limitations in this context is particularly complex. Since typically the statute of limitations does not begin to run until all of the elements of a cause of action have occurred, one could argue there is no real need for a statute of limitations defense unless and until there has been appreciable property damage. Thus, if the plaintiff is unable to show appreciable property damage, the statute of limitations never begins to run, and the defense is moot. Hence, if all of the elements of the cause of action (including damage) fail to materialize, the statute never begins to run, (because the tort was never completed) and the claim is not actionable. See, *County of Santa Clara v. Atlantic Mutual Company* 137 Cal. App. 4th 292 (2006).

The fundamental issue is: When is an individual or business considered to be on notice of damage, in the event that damage actually occurred? Counsel will always need to consider the triggering of events that start the statute of limitations to run. Currently, the two most common types of vapor intrusion cases are benzene and PCE. The former typically occurs near a gas station, while the latter arises close to dry cleaning facilities. If an owner witnesses testing near his or her property, is that sufficient notice to require the individual to perform additional testing for vapor intrusion on the property? This question has not yet been answered, but it certainly seems like a reasonable requirement in this modern age of accessible information. Of course, as noted earlier, there is no need for a statute of limitations defense if there has been no completed tort. Moreover, the mere presence of toxic chemicals near the owner's property does not necessarily constitute property damage (or automatically necessitate the need for testing).

The obvious exception to the typical statute of limitations defense is an allegation of continuing nuisance. The plaintiffs in contamination cases often seek significant damages. However, significant future damages only are available in California in a case of permanent nuisance. Unlike continuing nuisance, permanent nuisance does carry with it an effective three-year statute of limitations. Thus, even if Plaintiff alleges continuing nuisance, the case may actually be one of permanent nuisance. An effective defense can occur by asking for plaintiff to provide a statement of damages. If this statement includes large future damages, the plaintiff really has alleged permanent nuisance. In that case, if the nuisance started more than three years before suit was filed, there is an effective statute of limitations defense. See *Gehr v. Baker Hughes Oil Field Operations, Inc*. 165 Cal. App. 4th 660, 665 (2008); and *Beck Development v. Southern Pacific Transportation Company* 44 Cal. App. 4th 1160, 1216 (1986).

CERCLA

Vapor intrusion cases may also contain causes of action based under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Here, only statutorily qualifying entities may be defendants. Pursuant to 42 USC 9607 (A) (3), these statutory defendants must be owners (current or past), operators, transporters, or arrangers. The first three categories are fairly self-explanatory. Arrangers, however, has become a catch-all category used by many plaintiff attorneys to describe any number of defendants from whom they seek damages. Recent case law, however, has limited the scope of arranger liability to refer only to those that have been involved in "intentional steps and planned for the dispersal" of toxic waste. See *Team Enterprises v. Western Investment Real Estate Company* 647 F.3d 901, 907 (Ninth Circuit 2011). Thus, a defendant cannot be liable unless he or she intends for the product, or its conduct, to be directly involved in the disposal of toxic waste. Id. Also, a defendant cannot be an arranger unless he or she had actual control of, and disposal of, the toxic chemical. Id. at 910; *US v. Iron Mountain Mines, Inc*. 831 F.Supp.1432, 1451 (E.D.Cal. 1985). These elements must be present and have been very consistently applied.

Consultants/Experts

Unfortunately, in many cases there may not be a decisive legal defense. Most vapor intrusion cases will need to be thoroughly factually evaluated, taking into consideration the many variables that will definitely impact a defendant's liability. It is always a best practice to retain a consultant who will determine the source(s) of vapor intrusion, and evaluate the potential exposure to a client. Source evaluations will include reviews of existing data, regional hydrogeology, nearby known and potential contaminant sources, and property use history. Also, whether vapor intrusion is, or could become, a significant risk will depend on the type of soil, depth to ground water, source compound concentrations in soil and groundwater, type and condition of the building foundation, and nature of the source compound. The evaluation may also include analysis of soil gas, sub-slab or crawl space air, and indoor and outdoor air to determine levels of volatile toxic compounds (such as benzene and PCE). Sampling techniques for soil gas and air are highly sensitive. If they are performed incorrectly, or contrary to the constantly evolving guidelines, the sampling will result in indefensible data. Choosing a consultant who has ample soil gas/air sampling experience, and is committed to keeping up to date with vapor sampling regulations, is key to

ensuring that vapor intrusion assessments will hold up in a court of law.

Takeaways

Due to the aforementioned reasons, vapor intrusion is a complex, and sometimes murky, area of the law. Each case requires thorough vetting before a legal defense can be established. Becoming knowledgeable in all facets of vapor intrusion, as well as becoming well versed in the various legal defenses (including being cognizant of the frequent limitations of the statute of limitations), will help ensure you limit your potential exposure. And don't forget to reach out to a consultant who specializes in vapor intrusions as an additional best practice. ■

MEALEY'S: POLLUTION LIABILITY REPORT
edited by Shane Dilworth
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1528-5383