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Trespass by Pollution: Remedy by Mandatory Injunction

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INTRODUCTION

A psychiatrist was asked "how many psychiatrists does it take to change a light bulb?" He replied, "just one, but the light bulb has to really want to change." Successful environmental pollution damages litigation is not only about recovering for the damage caused by the pollution, but also making the polluter want to change. Since most damages litigation is unable to totally repair the damage done and is at best substituting money for what is often an unquantifiable harm, merely recovering money may not provide a sufficient incentive to avoid future pollution. Even an injunction that prevents further pollution does not repair past pollution. In addition, damages for pollution and an injunction against future pollution are not always effective as deterrents to future pollution activities and may merely represent reasonable costs of doing business.

Nowhere is the dilemma created by the lack of an effective deterrent to prevent future pollution more evident than in the area of environmental nuisances. Businesses that cause pollution and, as result, produce a nuisance to their neighbors are usually sued for the nuisance they have caused. Recoverable damages are usually capped at the total value of the adjacent land. Often that is a small price to

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pay for avoiding the purchase of expensive pollution control equipment and is treated as the cost of doing business.

This article explores an alternative remedy which, where the nuisance is accompanied by a trespass, can substantially alter the incentives to avoid the pollution in the first place. Because trespass remedies include removal of the trespass and because removal of a trespass caused by pollution to groundwater or soil can be extremely expensive, the viable threat of a mandatory injunction requiring clean up of the pollution can serve as a powerful incentive to avoid polluting in the first instance. The relevant legal principles are discussed and the law of a number of states is explored to illustrate the variations in the principles involved as they are applied in individual cases.

I. GENERAL PRINCIPLES

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
> (b) remains on the land, or
> (c) fails to remove from the land a thing which he is under a duty to remove.
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> Causing entry of a thing. The actor, without himself entering the land, may invade another's interest in its exclusive possession by throwing, propelling, or placing a thing either on or beneath the surface of the land or in the air space above it. Thus, in the absence of the possessor's consent or other privilege to do so, it is an actionable trespass to throw rubbish on another's land, even though he himself uses it as a dump heap, or to fire projectiles or to fly an advertising kite or balloon through the air above it, even though no harm is done to the land or to the possessor's enjoyment of it. In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial

> certainty result in the entry of the foreign matter. Thus one who so piles sand close to his boundary that by force of gravity alone it slides down onto his neighbor's land, or who so builds an embankment that during ordinary rainfalls the dirt from it is washed upon adjacent lands, becomes a trespasser on the other's land.[1]

Injunction is among the remedies available in the case of a trespass.[2] Whether an injunction is appropriate, for either a trespass or a nuisance, depends upon a number of factors:

> The appropriateness of the remedy of injunction against a tort depends upon a comparative appraisal of all of the factors in the case, including the following primary factors:
>
> (a) the nature of the interest to be protected,
> (b) the relative adequacy to the plaintiff of injunction and of other remedies,
> (c) any unreasonable delay by the plaintiff in bringing suit,
> (d) any related misconduct on the part of the plaintiff,
> (e) the relative hardship likely to result to defendant if an injunction is granted and to plaintiff if it is denied,
> (f) the interests of third persons and of the public, and
> (g) the practicability of framing and enforcing the order or judgment.[3]

Although frequently treated as interchangeable, there are significant differences between a claim for trespass and a claim for nuisance:

> Trespass distinguished. A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it. A nuisance is an interference with the interest in the private use and enjoyment of the land, and does not

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1. RESTATEMENT (SECOND) OF TORTS § 158 cmt. i (1965).
2. RESTATEMENT (SECOND) OF TORTS ch. 48 (1979).
3. RESTATEMENT (SECOND) OF TORTS § 936(1) (1979).

> require interference with the possession. A trespass was remediable at common law by an action of trespass; the private nuisance was remediable by an action on the case. Trespass and private nuisance are alike in that each is a field of tort liability rather than a single type of tortious conduct. In each, liability may arise from an intentional or an unintentional invasion. For an intentional trespass, there is liability without harm; for a private nuisance, there is no liability without significant harm. In trespass an intentional invasion of the plaintiff's possession is of itself a tort, and liability follows unless the defendant can show a privilege. In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.[4]

Among the important differences between trespass and nuisance is the requirement that the nuisance must cause "significant harm" before it is actionable,[5] and the harm caused by the nuisance must outweigh the utility of the conduct which causes the harm.[6] Since neither of these are requirements for trespass, it is not only easier to prove a trespass but the relief obtained may be less constrained by having to engage in a precise balancing of the interests of the trespasser against those of the plaintiff. For example, the plaintiff will often obtain an injunction by showing that the property at issue is uniquely important, such as the family residence.[7]

The legal preference for the rights of the person who has been subjected to a trespass over the rights of someone who has suffered a nuisance finds its roots in the common law difference between the rights of property owners and the rights of others:

> Personal interests and property interests. During the nineteenth century the rule was generally declared that equity intervened only to protect property interests, and so

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4. RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (1979) (internal cross-reference omitted).

5. RESTATEMENT (SECOND) OF TORTS § 821F (1979).

6. RESTATEMENT (SECOND) OF TORTS § 826 (1979).

7. *Cf.*, Heninger v. Dunn, 162 Cal. Rptr. 104, 107 (1980).

> an injunction would not issue to prevent a violation of a mere personal interest. In the early part of the current century, however, this limitation on the scope of injunctive relief was strongly repudiated by textwriters and substantially undermined in the courts by the common practice of finding tenuous "property interests" to justify the issuance of injunctions in situations in which the real purpose and result was to protect personal interests. In recent decades, the trend toward express abandonment of the property-right restriction has become stronger, and courts have commonly held that injunctions are to be granted to protect personal rights on the same basis as to protect property rights.[8]

As the note observes, the gap between personal interests and property interests has been closing but in the area of pollution which creates a trespass, and the same pollution which creates a nuisance, the differences that remain, as noted above, are substantial. Not only is a trespass automatically actionable and no actual harm is required to be proven, but the law has generally approved relief from a trespass in the form of a total removal of the trespass while a nuisance need only be abated to the point where it no longer represents an "interference with the use and enjoyment" of the property. This latter concept is often used to defend a partial clean up of pollution on land not owned by the polluter because, it is argued, the remaining pollution does not create a substantial risk of personal injury.

II. GENERAL PRINCIPLES APPLIED

The difference in the available remedy for nuisance and for trespass is illustrated by the following example:

> Big Chemical operates its plant adjacent to the home of Nice Family. Every morning a "snack wagon" comes on the property of Big Chemical to provide coffee and food to the employees during their 10 a.m. break. The only place on the property where this can occur is immediately

8. RESTATEMENT (SECOND) OF TORTS § 937 cmt. a (1979).

adjacent to the property of Nice Family. This creates a certain amount of noise from the people who gather at the "snack wagon" during their 30 minute break. In addition, wrappers and other trash from the food and drink are routinely dropped on the ground and blow on to the property of Nice Family. Nice Family wants to enjoin the coffee break to stop the noise and the trash from coming on their property and to force removal of the trash on their property.

A suit in nuisance will not fully succeed because on balance the benefits to the employees of Big Chemical outweighs the inconvenience to Nice Family and the noise caused by the coffee break is not unreasonable. The diminution of Nice Family's property value due to the trash will cap their damages if it is too expensive to remove all the trash. An injunction against further trash blowing on to their property will be granted.

However, a suit to require Big Chemical to remove all of the coffee break trash from Nice Family's property and prevent any further trash from coming on their property will certainly succeed. Big Chemical will not be allowed to leave some of the trash on Nice Family's property on the theory that a little trash is really not that annoying or that a little trash does not create any substantial risk of injury to the family.

Similarly, if the trespass were caused by chemical wastes entering Nice Family's property, such as lead or cadmium, Big Chemical could be required, under the law of trespass, to remove all of the lead and cadmium, not merely to remove it to the point where the risk of injury from exposure was below some "health-based" clean up standard established by EPA under federal pollution laws.[9] As noted

9. A separate issue, not explored here, is the difference between a permanent and a temporary trespass. The difference between temporary and permanent damages is "whether the act producing the injury is productive of all of the damage which can result from the injury, and no further damage can ensue, or whether the injury is intermittent and occasional, or the cause thereof capable of being

> above, there are still several tests that must be met to obtain the injunction requiring a total clean up, but those tests are more easily met where the underlying cause of action is trespass, rather than nuisance.

Several legal principles have emerged from the cases holding that the appropriate remedy for a trespass is removal of the trespass:[10]

1. Some courts focus on the long-standing recognition of the absolute rights which the owner of land possesses, which rights cannot be compromised by a neighbor's trespass:

> It is the general rule in this Commonwealth that the owner of land is entitled to a mandatory injunction to require the removal of buildings and structures that have been unlawfully placed upon his land, and the

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remedied, removed or abated. In the former case the damages are permanent and in the latter case the damages are temporary." Riddle v. Baltimore & O.R. Co., 73 S.E.2d 793, 803 (W.Va. 1952).

That distinction can be extremely important both for statute of limitations purposes and for the measure of damages. If the trespass is permanent, an injunction requiring removal is impossible. Only a temporary trespass, i.e. one that can be removed, would qualify for a total removal remedy. See Cook v. Rockwell Int'l Corp., 358 F. Supp. 2d 1003 (D. Colo. 2004), for a thorough discussion of these issues. That decision, relying on Colorado law and general common law principles, finds that a trespass cannot be deemed "permanent" unless two conditions are met: "I hold the alleged presence of plutonium from Rocky Flats on plaintiffs' and class members' properties constitutes a continuing tort under Colorado law because, like the contamination at issue in *Hoery*, it allegedly remains on the property and, even if it will remain there indefinitely, is not a permanent tort because it does not serve a socially beneficial purpose." *Id.* at 1013 (citing Hoery v. United States, 64 P.3d 214, 223 (Colo. 2003) ('continued contamination does not benefit the development of our state' and 'no sound public policy support[s] the classification of contamination from the release of toxic chemicals as a permanent property invasion.')). Implicitly the court finds that any pollution left on the property is contrary to the public interest and thus, it can be argued, the balancing test applicable to injunctive relief favors the party seeking a full clean up of their property so long as clean up is possible.

10. The reasoning discussed here applies to one landowner's claim against another landowner. It may not apply where the claim is by a subsequent landowner against a prior landowner to remove all pollution from the land. *Cf.* Kennedy Building Assocs. v. Viacom, 375 F.3d 731, 741-42 (8th Cir. 2004).

> fact that the plaintiff has suffered little or no damage on account of the offending buildings or structures, or that the wrongdoer was acting in good faith, or that the cost of removing the building or structure will be greatly disproportionate to the benefit to the plaintiff resulting from their removal is ordinarily no bar to the granting of injunctive relief. . . . A continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass.[11]

2. Other courts focus on the consequences that would follow if the remedy to which a plaintiff would be entitled is limited to the full value of the property. If the remedy were so limited, then the innocent party would not be restored to the position they held before the trespass and would be forced to accept changes to the property or pay for additional restoration out of their own pocket. "First, recovery of tort damages is not invariably limited by the value of damaged property. The courts have recognized that recovery in excess of such value may be necessary to restore the plaintiff to the position it occupied prior to a defendant's wrongdoing."[12]

3. Some courts have focused on the continuing nature of the trespass which cannot be remedied until the trespass is removed. Any remedy that does not require removal of the trespass essentially sanctions the trespass.

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11. Sheppard Envelope Co. v. Arcade Malleable Iron Co., 138 N.E.2d 777, 782-83 (Mass. 1956) (internal citations omitted).

12. AIU Ins. Co. v. Superior Court, 799 P.2d 1253, 1273 (Cal. 1990) (citing *Heninger*, 162 Cal. Rptr. at 107 (permitting recovery of reasonable repair costs in excess of value of damaged property, when plaintiff has personal reason for making repairs); Dandoy v. Oswald Bros. Paving Co., 298 P. 1030, 1031 (1931) ("To hold that appellant is without a remedy merely because the value of land has not been diminished, would be to decide that by wrongful act of another, an owner of land may be compelled to accept a change in the physical condition of his property, or else perform the work of restoration at his own expense. This would be a denial of the principle that there is no wrong without a remedy."); RESTATEMENT (SECOND) OF TORTS § 929 (1979)).

> Plaintiffs have asserted that defendants' acts constitute a continuing trespass and have created a nuisance. The trespass, according to the plaintiffs, results from the placement of contaminated fill on their property in violation of a license allowing the deposit of clean fill, continues as long as the fill remains on the property, and may not be remedied except through a mandatory injunction requiring defendants to remove the fill. As discussed below, our courts have held that a continuing trespass may justify an award of equitable relief in the form of a mandatory injunction.[13]

In *Village of Wilsonville v. SCA Services, Inc.*, the Illinois Supreme Court ordered an entire toxic waste site, deemed adequately safe by the EPA, although some residual risk remained, be exhumed and moved to a new location.[14] It adopted the following language of *Fink v. Board of Trustees*:

> While, as a general proposition, an injunction will be granted only to restrain an actual, existing nuisance, a court of equity may enjoin a threatened or anticipated nuisance, where it clearly appears that a nuisance will necessarily result from the contemplated act or thing which it is sought to enjoin. This is particularly true where the proof shows that the apprehension of material injury is well grounded upon a state of facts from which it appears that the danger is real and immediate. While care should be used in granting injunctions to avoid prospective injuries, there is no requirement that the court must wait until the injury occurs before granting relief.[15]

This was a nuisance case where the court acknowledged that balancing was required but still believed the risks to the community were too great to allow the nuisance to continue.

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13. Gordon v. Nat'l Rail Passenger Corp., 1997 WL 298320 (Del. Ch.) at *7.
14. 426 N.E.2d 824, 836 (Ill. 1981).
15. Id. (citing Fink v. Board of Trustees, 218 N.E.2d 240, 244 (Ill. 1966)).

An important *caveat* is that courts have not been uniformly amenable to the trespass/nuisance distinction and may, if the facts are not compelling, deny relief either by denying there is a trespass (not a sufficiently substantial invasion to qualify) or engaging in the kind of balancing of interests that occur under nuisance law. To avoid this pitfall it is essential to (1) rely on historical precedents in the common law as well as the Restatement, and (2) make policy arguments about the right of the landowner to be free from the wastes of its neighbors and how allowing the trespass to continue is essentially sanctioning a private condemnation. A mere glancing reference to some trespass law will not be enough to make the case sufficiently persuasive, particularly where the opposition will be considerable.

Another problem that can arise with an injunction remedy for trespass is the possible conflict with an EPA ordered clean up.[16] However, even in that case the court recognized that for preemption to apply there must be a clear conflict between the injunction sought for total clean up, and the order of partial clean up from the EPA such that compliance with both is not possible albeit the court's application of the doctrine to the case appeared to ignore the requirement.[17] Significantly, under RCRA and CERCLA, both of which are applying common law doctrines of liability for clean up, there is no defense that the cost of clean up exceeds the value of the land to be cleaned.

Despite these principles, there are some courts, discussed below, that have been reluctant to allow an injured party to require a removal that costs more than the value of the property upon which the trespass has occurred. In such a case the court is in effect endorsing the taking of property owned by one private party for the use as a waste storage facility by another private power. Such a concept seems inherently indefensible. Even the government cannot take property by condemnation solely for the benefit of another private party.[18] Thus, merely compensating the plaintiff for the continued presence on her property of pollution that emanated from defendant, should

16. *See, e.g.*, Cavallo v. Texaco, 100 F.3d 1150, 1155-56 (4th Cir. 1996).

17. *Id.* at 1155.

18. *See* Kelo v. City of New London, 545 U.S. 469, 477 (2005) ("it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation").

not be allowed and a mandatory injunction should be available to compel defendant to remove the pollution from plaintiff's property. The concept of trespass is not new to toxic tort litigation and appears in most claims. However, it is the unique trespass remedies that may significantly alter the outcome of such litigation. Perhaps no defendant will ever spend $250,000 to totally remove all of its pollution from a $20,000 residence, but it is unlikely the plaintiff in such a case will have to settle for a "market value" buyout and some moving expenses as compensation for property damage.

III. STATES ALLOWING INJUNCTION TO REMOVE TRESPASS

Several states have adopted, in one form or another, the concept that a trespass remedy of removal of the trespass can apply even if the cost of removal substantially exceeds the value of the property and even if the property owner has not suffered any substantial quantifiable damages. Importantly, the courts give much greater weight to this line of reasoning when the property involved has some special significance to the plaintiff such as being the plaintiff's residence or having some historical importance to the plaintiff. If the land upon which the trespass is occurring is commercial land or private land being rented to third parties, the courts are less likely to order a remedy that substantially exceeds the value of the property. The following cases illustrate, in particular fact situations, how the courts have applied these concepts.

A. Alaska

Alaskan courts rely heavily on the Restatement of Torts, §929(a) and American Jurisprudence on Damages to determine the amount of damages to award or the necessity of a mandatory injunction. To find the amount of restoration damages, the court allows a plaintiff who has been injured by an invasion of his land to "elect as damages either the loss in value or the cost of restoration which has been or may be reasonably incurred."[19] In its determination, the court follows that "[a]s a general rule, only where damages are temporary is restoration an appropriate measure."[20] The granting of restoration

19. *See* RESTATEMENT (SECOND) OF TORTS §929 (1979).

20. *See* G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379, 1386 (Alaska 1974). Plaintiff owned a greenhouse on a river. *Id.* at 1381.

costs further requires that the plaintiff have no adequate remedy at law.[21] In cases of permanent damages, the court adheres to 22 Am.Jur.2d, Damages, which holds:

> In case of an injury of a permanent nature to real property, the proper measure of damages is the diminution in the market value of the property by reason of that injury, or in other words, the difference between the value of the land before the injury and its value after the injury.[22]

When considering an injunction, the court adheres to the Restatement (Second) of Torts §941, which holds: "[t]he relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied, is one of the factors to be considered in determining the appropriateness of injunction against tort."[23]

The court will also consider the particular facts of each case, including "the defendant's state of mind and the relative hardship to the parties if removal is compelled or refused."[24] In this regard, the burden is on the defendant to prove that it "acted in good faith

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Defendant diverted the river, resulting in the deposit of silt along the land of plaintiff. *Id.* During the diversion project, there were numerous trespasses onto plaintiff's land by earthmoving equipment that caused extensive damage to trees and ground cover. *Id.* The court held that plaintiffs were entitled to an injunction against further pollution, a mandatory injunction requiring correction of past silt pollution, and damages for the destruction of ground vegetation and trees, and for business interruptions and future clean up operations. *Id.* at 1382. Plaintiff had paid $4,000 per acre for his land, and was awarded $12,550 for restoring the 10,560 square feet that had been damaged, equating to $50,000 per acre. *Id.* at 1387. The award was upheld because defendant failed to show the award was clearly erroneous. *Id.*

21. *G & A Contractors*, 517 P.2d at 1385.

22. *Id.* at 1386 n.9 (citing 22 AM.JUR.2D §§134, 135 (1965)).

23. RESTATEMENT (SECOND) OF TORTS §941 (1979).

24. Ostrem v. Alyeska Pipeline Serv. Co., 648 P.2d 986, 989 (Alaska 1982). Plaintiff sold an easement across his property to defendant, providing that all electrical and communications lines were underground. *Id.* at 988. Defendant built a valve control facility above ground in violation of the easement. *Id.* Plaintiff sought injunctive relief but was only granted damages. *Id.* The Supreme Court of Alaska remanded the case because the lower court failed to consider the state of mind of defendant in its decision to deny injunctive relief. *Id.* at 989.

and . . . the cost or practicability of removing the [trespass] is wholly out of proportion to the extent of the trespass."[25] In the event that a defendant cannot prove these elements, the court will be willing to grant injunctive relief.

B. Arkansas

Arkansas has a firm public policy in favor of remediation and restoration.[26] The State has established the Arkansas Department of Environmental Quality that oversees air, water, solid waste, hazardous waste, storage tanks, and mining regulatory programs within the state.[27] The ADEQ also manages several trust funds that are used to help repay remediation costs depending on the type of pollution.[28]

The Supreme Court of Arkansas allows for the consideration of the personal value of a property, not just the monetary value to society at large. Arkansas courts recognize that limiting recovery to the value of the property cannot be the sole guideline because the value of a property can differ depending on the use of the land, the aesthetics, or the personal value the land holds for the landowner. Arkansas allows a court to use its discretion in determining damages differently depending on the specifics of the case, and has considered both a "cost of replacement" rule and a "difference in value of the land"

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25. *Id.* at 989.

26. *See* Felton Oil Co., L.L.C. v. Gee, 182 S.W.3d 72, 80 (Ark. 2004). The oil company that owned a Conoco station that had been leaking diesel fuel into neighboring property was required to remediate the land pursuant to Arkansas' public policy. *See id.* at 74. Plaintiffs argued that the land had personal use for them: they lived there and frequently had visitors. *Id.* at 80. As a result of the leak, the land's value decreased $20,500 from $31,500 to $11,000, but the jury awarded restoration costs of $180,000. *Id.* The court held that "[they could not] say these damages, which were approximately nine times the diminished fair market value, were "grossly" disproportionate...[b]ecause of the property's personal nature." *Id.*

27. ADEQ - Arkansas Department of Environmental Quality, http://www.adeq.state.ar.us/ (last visited Apr. 18, 2010).

28. Curiously, while the state is firm on requiring remediation, the state fights to limit the amount of recovery for remediation to the diminution in value of the property to be cleaned when the claim is against the state trust fund. When personal value arguments are presented, the state finds itself on the losing side of the battle.

rule.[29] That court also found, in *dicta* that the determination of damages or the likelihood of injunctive relief is not necessarily limited to the difference in fair market value of the land immediately before and immediately after the occurrence[30] and may consider "replacement value, cost of future treatment, aesthetic value, or benefit"[31] of a damaged portion of property.

The Supreme Court of Arkansas holds in instances of pollution in particular that damages should be measured by "the reasonable expense of necessary repairs to any property which was damaged."[32] Specifically for temporary damages to real property, the court holds that "the measure of damages is the cost of restoring the property to the same condition that it was in prior to the injury."[33] It is important to note that this condition must conform to the landowner's perception of the condition, and should include the personal value attached. Arkansas courts have cited to the Restatement (Second) of Torts §929, which comments:

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29. *See* Worthington v. Roberts, 803 S.W.2d 906, 909 (Ark. 1991). In *Worthington*, a property owner brought action against a crop duster who negligently sprayed some ornamental fruit trees that subsequently died. *Id.* at 907-08. The landowners testified that they had purchased the land specifically because of the trees. *Id.* at 907. The court affirmed the award of reasonable restoration costs. *Id.* at 910.

30. *Worthington*, 803 S.W.2d at 910.

31. *Id.* at 909.

32. *See* Ark. Model Instruction §2224 (2009).

33. *See* State v. Diamond Lakes Oil Co., 66 S.W.3d 613, 618 (Ark. 2002). In this case, a landowner sued a gas station for trespass by gasoline contamination on her property. *Id.* at 613. This case is unique in that it encounters overlapping regulation from the Arkansas Petroleum Storage Tank Trust Fund that affords reimbursement costs for state government mandated site cleanup. *See id.* at 615. Defendant was required to clean up a Citgo gas station site at a cost exceeding $260,000 despite the land being appraised at $52,400. *See id.* at 618-19. When applying for reimbursement from the fund, the Arkansas Department of Environmental Quality refused defendant's request because the clean up was much more expensive than the market value of the property. *Id.* at 615-16. Defendant was awarded $200,000 in damages and the court cited that "ADEQ's evidence about the fair market value of the property was irrelevant to what it would cost to restore the property to its former condition", an ironic outcome considering that ADEQ ordered the remediation in the first place only to have to pay significantly more than the value of the land itself in reimbursement costs. *Id.* at 618.

> If . . . the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, *unless there is a reason personal to the owner for restoring the original condition,* damages are measured only by the difference between the value of the land before and after the harm. . . . On the other hand, if a building such as a homestead is used for a purpose personal to the owner, the damages ordinarily include an amount for repairs, *even though this might be greater than the entire value of the building.*[34]

The court has supported this testament to the point of issuing restoration costs amounting to nine times the fair market value.[35] It is clear that for maximum recovery and hope for mandatory injunction in Arkansas, it is important to establish that repayment of the fair market value of a property will not make the landowner whole. Personal use including family enjoyment, sentimental value, and visually pleasing elements can all help establish the "true" value of a property.

C. California

California courts hold that an individual landowner's right to absolute control over his property should reign supreme over subsequent hardship that may result from requiring a trespassor to remove a trespass. When deciding whether to rule in favor of a plaintiff requesting an injunction, the courts universally rely on comment "b" of §941 of the Restatement of Torts, which points out that in such cases, "the defendant is the wrongdoer and it is his actions that have caused the situation. This is a factor that should be weighed against him."[36] California also recognizes that the trier of

34. *See* RESTATEMENT (SECOND) OF TORTS §929 (1979) (emphasis added).

35. *See Gee*, 182 S.W.3d 72 (Ark. 2004).

36. *See* Christensen v. Tucker, 250 P.2d 660, 665 (Cal. Ct. App. 1952). Plaintiff and defendants owned adjoining parcels of land. *Id.* at 660. Defendants constructed a cement wall along what they thought was the boundary line, but actually encroached on plaintiff's land for a total of 229 square feet. *Id.* at 661. Plaintiff brought action for a mandatory injunction to compel removal of the encroachments, damages for their maintenance, and damages for diversion of water onto plaintiff's land caused by encroachments. *Id.* at 660-61. The circuit court held that the encroached upon land had little value and that costs of removal would far

fact has discretion in deciding to deny or grant a mandatory injunction and can follow a balancing test to come to a decision.[37] This balancing test:

> Starts with the premise that defendant is a wrongdoer, and that plaintiff's property has been occupied. Thus, doubtful cases should be decided in favor of the plaintiff. In order to deny injunction, certain factors must be present: 1. Defendant must be innocent – the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant.[38]

There is a heavy burden on the defendant to prove that granting an injunction would result in an extremely disproportionate result. It is also the defendant's burden to prove that its actions resulting in the trespass were neither willful nor negligent.[39] California courts extend this doctrine to the extent that negligence can bar a defendant from

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exceed the value of the land and denied the request for mandatory injunction. *Id.* at 662-63. The court of appeals held that the trial court did not consider the potential for negligence on the part of defendants nor any possible contributory conduct on the part of plaintiff. *Id.* at 666. It further noted that the defendant did not have the boundary surveyed, and plaintiff had knowledge of the wall because it was built before plaintiff purchased the land. *Id.* The district court's holding was reversed for not being supported by the findings and a retrial was ordered on all issues in accordance with the balancing test established in this opinion. *Id.* at 667.

37. *Id.* at 665.

38. *Id.*

39. This shifts the typical pattern of the burden of proof, which usually requires that a plaintiff prove willful or negligent actions by a defendant.

invoking the balancing doctrine as a defense to the application for a mandatory injunction, stating "[i]t would appear that if a defendant is negligent, and such negligence is the sole proximate cause of the encroachment, such defendant should be barred from invoking the doctrine."[40]

If the court does exercise its discretion through the balancing doctrine, it still will not limit damages or the granting of an injunction to the diminution in market value of the property.[41] The California courts recognize the exceptions present in §929 of the Restatement (Second) of Torts that allow for the consideration of personal value of a property and note that the "overall principles by which the courts are to be guided are 'flexibility of approach and full compensation to the owner, within the overall limitation of reasonableness.'"[42] This reasonableness standard leaves the court broad discretion to consider all angles. Presumably, if a property has a substantial level of personal value to a property owner, the court is willing to order a mandatory injunction for the removal of a trespass. It is the court's responsibility to ensure that it fully considers the value of the property to the landowner, and if the landowner "ha[s] personal reasons for restoring their land to its original condition, and that such a restoration could be achieved at a cost that was not

40. *Christensen,* 250 P.2d at 666.

41. *See generally* Henninger v. Dunn, 162 Cal. Rptr. 104 (Cal. Ct. App. 1980). In *Henninger*, defendants bulldozed a road onto adjoining land owned by plaintiff. *Id.* at 104. The bulldozing killed or damaged 225 trees and destroyed much vegetative growth. *Id.* Plaintiffs sued even though the new road actually increased the market value of plaintiffs' property by $5000. *See id.* The trial court granted injunctive relief but denied damages because there was no depreciation of value of plaintiffs' property. *Id.* The court of appeals reversed on the grounds that plaintiffs' had personal reasons for wanting to restore the property and that such restoration could be done at a cost that was not unreasonable in relation to the damage inflicted and the value of the land prior to the trespass. *Id.* The *Henninger* case has further discussion of California Civil Code §3333 (1872) and §3346 (1957), which allow for double and treble damages that result from a willful or malicious trespass resulting in wrongful injury to timber, trees, or underwood. *Id.* at 110-11. This could be significant if the injunction requested and subsequent remediation costs do not greatly exceed the value of the property. When choosing between treble or double damages or an injunction that costs only slightly more than the value of the property in question, a trespassor would likely prefer the injunction.

42. *Id.* at 108 (citing Huber v. Serpico, 176 A.2d 805, 813 (N.J.Super. Ct. App. Div. 1962)).

unreasonable in relation to the damage inflicted and the value of the land prior to the trespass, the court should [exercise] its discretion to award such restoration costs."[43]

While the court's discretion and balancing test may limit a plaintiff's chances of being granted an injunction when the cost of the injunction would greatly outweigh the value of the property, California courts are willing to consider doing so in certain instances. Notably, "[i]f plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant."[44] California's standard is broad and puts substantial burden on the defendant at the outset of the case.

D. Louisiana

Louisiana courts are reluctant to issue injunctions and have not minced words when discussing the issuance of injunctions, holding "[t]raditionally, injunction has been held to be a harsh, drastic, and extraordinary remedy which should only issue where the petitioner is threatened with irreparable harm and has no adequate remedy at law."[45] In certain instances, however, the court favors injunctive relief, pursuant to paragraph 5, article 298 of the Louisiana Code of Practice, which provides that:

> [T]he injunction must be granted, and directed against the defendant . . . [w]hen the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had

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43. *Id.* at 109.

44. Posey v. Leavitt, 280 Cal. Rptr. 568, 575 (Cal. Dist. Ct. App. 1991). Plaintiff, owner of a condominium, brought action against another condominium owner for the removal of a deck extension that encroached the common area and obstructed plaintiff's view of the ocean, and for damages. *Id.* at 570. The trial court entered judgment in favor of defendants. *Id.* at 572. The court of appeals reversed, holding the *Christensen* test was not followed. *Id.* at 578. The case was remanded for the trial court to reconsider the injunction with the proper test. *Id.*

45. Kruger v. Garden Dist. Ass'n, 779 So. 2d 986, 991 (La. Ct. App. 2001). Plaintiffs, property owners in the Garden District, filed for injunctive relief against a special tax levied by the district association claiming it was unconstitutional. *Id.* at 988. The civil district court granted a preliminary injunction and declared the tax unconstitutional. *Id.* The court of appeals held plaintiffs did not allege a sufficient violation of a constitutional right or show irreparable injury and vacated the district court holding. *Id.* at 993.

> for more than one year, either of a real estate or of a real right, of which he claims either the ownership, the possession or the enjoyment.[46]

When seeking injunctive relief, it is essential for the plaintiff to prove that money damages would not adequately compensate him for damage done by a trespass on his property.[47] Upon a showing of irreparable injury, a plaintiff will be entitled to injunctive relief. "However, there is a narrow exception for the issuance of injunctive relief, absent irreparable injury, when a prohibitory statute is violated."[48]

Louisiana gives the courts broad discretion in determining the test of its choice for property disputes. Depending on the facts of the case, the courts can consider both replacement costs and the diminution in fair market value tests, and have gone so far as to deem both of these tests inappropriate, stating that "[t]he court must adopt an approach in each case that will do substantial justice between the parties."[49]

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46. *See* Churchill Farms v. Gaudet, 168 So. 123, 124 (La. 1936). Plaintiff owned 6,000 acres of land on which he hunted fur-bearing animals. *Id.* at 123. Defendants trespassed upon the property and deprived plaintiff of full enjoyment by trapping animals themselves and selling the pelts. *Id.* Plaintiff successfully showed that his deprivation of the profits derived from his ownership of the land would amount to an irreparable injury. *Id.* at 124. The court held that plaintiff was entitled to protect his possession by injunction to keep defendants off the property. *Id.*

47. *See* Brinker v. Junction City Wood Co., 744 So. 2d 657 (La. Ct. App. 1999). Plaintiffs sued to enjoin timber cutting on a property in which they owned an undivided interest. *Id.* at 659. On appeal, "the court noted that money damages would not adequately compensate a man who planned to use the trees for timber to repair his buildings in years to come and to supply his annual needs for wood or who prized the trees for their ornamental and sentimental values." *Id.* at 662. The trial court held the damages to be incalculable and issued a permanent injunction. *Id.* at 660. The court of appeals held that plaintiff had not shown irreparable injury and vacated the trial court order. *Id.* at 662. Upon rehearing, the court of appeals held there is an exception for violations of prohibitory statutes, such as here, where defendant violated LA. REV. STAT. ANN. § 3:4278.2 (2003). *Id.* at 663. Due to defendant's failure to comply with the statute, the trial court was within its discretion to grant a permanent injunction. *Id.*

48. *Id.* at 663.

49. *See* Turner v. S. Excavation, Inc., 322 So. 2d 326, 330. (La. Ct. App. 1975) (citing Loeblich v. Garnier, 113 So. 2d 95 (La. Ct. App. 1959). A landowner

To ensure that a plaintiff obtains the maximum desired relief, it is imperative that he offers evidence of intangible value of a property. The more irreplaceable value a piece of property holds, the more likely the court will be willing to grant injunctive relief.

E. Massachusetts

Massachusetts protects the rights of a landowner more broadly than any state that has been discussed thus far. Regardless of the value of the property in question, the cost of removal of a trespass, or the hardship placed on the defendant in removing the trespass:

> [I]t is the general rule . . . that the owner of land is entitled to a mandatory injunction to require the removal of [a trespass] that [has] been unlawfully placed upon his land, and the fact that the plaintiff has suffered little or no damage on account of the offending [trespass], or that the wrongdoer was acting in good faith, or that the cost of removing the [trespass] will be greatly disproportionate to the benefit to the plaintiff resulting from their removal is ordinarily no bar to the granting of injunctive relief.[50]

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brought action against an excavation company that bulldozed a lot, destroying fruit trees that had been planted by plaintiff's deceased husband and held sentimental and aesthetic value. *Id.* at 327-28. Plaintiffs were awarded $5,000 as damages for injury to the property, mental anguish, inconvenience, and invasion of and deprivation of plaintiff's rights of private ownership and enjoyment of property. *Id.* at 327. On appeal defendants argued that the diminution in market value would be the proper measurement. *Id.* at 328. The court of appeals acknowledged that sentimental value is usually not quantifiable but must be considered in a judgment and found no abuse of discretion in the trial court's award. *Id.* at 330.

50. Ferrone v. Rossi, 42 N.E.2d 564, 566 (Mass. 1942). Defendant built an awning over plaintiff's property line by two inches in the northern direction, four feet nine inches in the eastern direction, and nine inches in the southern direction of the structure. *Id.* at 565. The structure itself does not extend over the property line. *Id.* Defendant acted in good faith during construction and the land built over had little to no value for cultivation or other uses. *Id.* at 566. The Supreme Judicial Court of Massachusetts, Norfolk noted that "[t]he location of the existing wall could not be changed without destroying it, and the cost of relocation would be entirely out of proportion to the benefit if any, that would accrue to the plaintiff." *Id.* Plaintiff was entitled to its removal within a time to be fixed by the superior

Massachusetts courts further hold that "[a] continuing trespass wrongfully interferes with the legal rights of the owner, and in the usual case those rights cannot be adequately protected except by an injunction which will eliminate the trespass."[51]

Massachusetts law also allows for a removal of a trespass even if there is no harm resulting from a trespass.[52] In cases where a trespass increases the value of a property, the landowner still has the absolute right for that trespass's removal to have the land returned to its original condition if it was so desired.[53] In these cases, the court will weigh possible damages for the cost of restoration versus equitable relief and will choose that which is least expensive for the defendant. This allows the defendant to attempt removal of a trespass, which may be possible for less than the cost estimated by the court.

F. Michigan

Michigan relies on the judgment of the court to determine the best way to fully compensate a plaintiff.[54] The court's analysis begins by determining the "difference between the value of the freehold before the damage and the value of the freehold after the damage."[55] However, this valuation must include intangible value that the land has to the landowner. While the courts of Michigan recognize that

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court despite the land having little value and the expense of removal being disproportionate to the benefit to be gained. *Id.* at 567-68.

51. *Id.* at 566.

52. *See* Blood v. Cohen, 113 N.E.2d 448 (Mass. 1953). Plaintiff owned land that bordered defendant's property on two sides. *Id.* at 449. One of plaintiff's lots had no value except to abutting owners and was of no practical use to the owner of the other half of the property. *See id.* Defendant built an outdoor fireplace and a cement platform on an area of land worth $30. *Id.* The cost of restoring the land would have cost around $1,750. *Id.* The construction actually increased the value of plaintiff's property. *Id.* Plaintiff was granted a mandatory injunction for the removal of the fireplace, platform, and steps to restore the property to its original condition. *Id.*

53. *Id.* at 449.

54. *See* Thiele v. Detroit Edison Co., 458 N.W.2d 655 (Mich. Ct. App. 1990). Landowner brought a trespass action alleging that defendant cut down eight trees on landowner's property. *Id.* at 656. "The Court of Appeals held that the loss of aesthetic value, the actual monetary value of the trees lost, and the cost of their replacement constituted evidence of the diminution in the value of the freehold estate." *Id.* at 656. The case was remanded for a new trial. *Id.* at 657.

55. *Id.* at 657.

"there is no one fixed, inflexible rule for determining damages in cases. . .the courts should apply whatever approach is most appropriate to compensate the plaintiff for the losses incurred based on the facts of the individual case."[56] Thus, in cases where the plaintiff holds a certain part of a property to have added value, such as ornamental trees, the court takes that evidence into consideration.[57] The court further requires that "it is appropriate to consider the value of the [unique feature] to the contemplated or existing uses of the land, including the cost of replacement or restoration . . . [w]here . . . the property destroyed has a unique value of its own."[58] However, in doing so the measure of damages must not exceed the value of the property before the injury.[59] Ultimately, the court has final say, and fully and properly compensating a victim of trespass is paramount.

While Michigan does not go as far as Massachusetts in protecting the rights of the property owner, by requiring that all the intangible value of the land be included in determining whether the cost of removal exceeds the value of the property, Michigan does substantially improve the rights of the victims of a trespass over the normal nuisance case where the valuation of the land is limited to the

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56. *Id.*

57. *Id.*

58. Schankin v. Buskirk, 93 N.W.2d 293, 296 (Mich. 1958). Defendant cut down six large trees on plaintiff's lots. *Id.* at 295. The trial court jury held that the lots were worth $900 less after the cutting. *See id.* The damages were tripled to $2,700 pursuant to MICH. COMP. LAWS ANN. §692.451, which is no longer valid law. *Id.* at 294-95. The Supreme Court of Michigan found no error in the jury's determination of the damage and affirmed the holding. *Id.* at 297.

59. Kratze v. Independent Order of Oddfellows, 500 N.W.2d 115 (Mich. 1993). Plaintiff purchased land adjacent to land owned by defendant knowing defendant's structure encroached. *Id.* at 118. Plaintiff wanted to build apartment buildings on the property but was denied title insurance because of the encroachment. *Id.* The trial court ordered the removal of the encroachment as well as $797, 215.46 in damages. *Id.* The court of appeals affirmed. *Id.* The supreme court balanced the hardships and actions of both parties and held that the court of appeals should not have used the diminution in value to determine damages or cost of repairs. *See id.* at 122-23. Because the trespass is permanent, the correct measure of damages is the diminution in value of the property itself, found by subtracting the value of the property with the encroachment from the value of the property without it. *Id.* at 123. The supreme court reversed the order of removal of the encroachment and remanded the case to revalue the damages as that of the 1.2 foot strip of land encroached upon by the building. *Id.* at 122-23.

fair market value, which will not capture the special value of the land to the property owner.

Michigan also has specific remedies depending on the type of trespass. Michigan Compiled Law Annotated §600.2919 lays out provisions for a landowner who sustains damage to land and waste.[60] Of particular interest for this article, M.C.L.A. §600.2919-(3)(a) holds: "[t]he circuit court shall grant injunctions to stay and prevent threatened trespass when the remedies provided by subsection (1), above, are not fully adequate and in any case where the trespass is of a continuing nature."[61]

This statutory provision should provide for removal of a continuing trespass by pollution regardless of the cost of removal.

G. North Dakota

In its consideration of granting a mandatory injunction, North Dakota courts hold "[w]here preventive relief is not adequate to the situation a mandatory injunction for the performance of some act to restore the status quo may lie."[62] The court adheres to the American Jurisprudence on Injunctions, which holds:

> [I]t is now well settled that unless prohibited from so doing by some constitutional or statutory provision, a court of equity can, and in a proper case will, award mandatory as well as prohibitive injunctive relief. It may, by its mandate, compel the undoing of those acts that have been illegally

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60. MICH. COMP. LAWS ANN. §600.2919 (West 2000).

61. *Id.* Subsection (1) requires treble damages for the removal or injury to trees, stone, or grass without permission. If the removal or injury is done by a defendant who thought the land was his own or is used to repair a public road or bridge, defendant is only liable for single damages.

62. Viestenz v. Arthur Tp., 54 N.W.2d 572, 574 (N.D. 1952). Defendants, constructing public highways adjacent to plaintiff's property, built embankments that caused flooding on plaintiff's land. *Id.* at 573. The supreme court held that the board of supervisors failed to consider the effect on the natural flow of water in violation of NDRC 1943, which gave the board authority to build roads, highways, and bridges. *See id.* at 575-78. The court further held that plaintiff suffered irreparable harm, had no adequate remedy at law, and was entitled to mandatory injunction. *Id.* at 580. The court noted that citizens must show special injury to be granted injunctive relief. *Id.* at 574.

> done, as well as it may, by its prohibitive powers, restrain the doing of illegal acts.[63]

North Dakota courts are strong proponents for the balancing of equities in cases involving trespass. While the courts do hold that "[a] mandatory injunction is a proper remedy to invoke against an adjoining landowner to compel him to remove an encroachment," they also take into consideration the weight the ruling will have on the defendant.[64] In doing so, the courts consider the intent, or lack thereof, of the defendant. If the trespass is the result of an innocent mistake, the court is less likely to grant an injunction.[65] However, North Dakota courts are unique in that they do not strictly limit a plaintiff to a remedy at law when it is available, holding "[t]he fact that the plaintiff may have a remedy at law by an action for damages does not prevent equity from assuming jurisdiction if the equitable remedy is better adapted to render more perfect and complete justice than the remedy at law."[66]

H. Virginia

Virginia courts hold injunctions to be extraordinary remedies and rely on the discretion of the deciding court to consider "the nature and circumstances of a particular case."[67] In doing so, the court

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63. *Id.* at 574.

64. Graven v. Backus, 163 N.W.2d 320, 322 (N.D. 1968). Defendant built an encroaching wall that extended three inches onto the plaintiff's property for the length of 49.35 feet. *Id.* at 324. The valuation of the land was around $9, while the cost to remove the wall was $5,300. *Id.* at 326. The court was not willing to extend a mandatory injunction because the encroachment resulted from an innocent mistake. *Id.*

65. *Id.* at 326.

66. *Id.* at 322.

67. Levisa Coal Co. v. Consol. Coal Co., 662 S.E.2d 44, 53 (Va. 2008). The owner of a solid mineral estate subject to a long-term mining lease sought injunction against a third party coal company to prevent it from using the mine which had been used as a wastewater storage pit. *Id.* at 45. The circuit court read the lease contract and determined that defendant had the right to store its excess water in the mine. *Id.* at 49. The Supreme Court of Virginia reread the contract and determined defendant did not have the right, finding that plaintiff had proper standing to seek injunctive relief, and reversing the circuit court. *Id.* at 52. The case was remanded for further consideration of plaintiff's injuries and possible lack of remedy at law. *Id. See also* Fancher v. Fagella, 650 S.E.2d 519, 522 (Va. 2007).

considers the nature of the trespass, the loss that would be sustained by each party in granting the injunction, and the affect on the public at large.[68] When considering the nature of the trespass, the court is much more likely to grant an injunction to eliminate a continuing trespass. The burden of proof to grant an injunction for a continuing trespass is lower compared to an individual trespass. The courts provide that "a continuing trespass may be enjoined even though each individual act of trespass is in itself trivial, or the damage is trifling, nominal or insubstantial, and despite the fact that no single trespass causes irreparable injury."[69] This could be particularly useful depending on the classification of a trespass involving pollution.

When balancing the equities between the parties, the court holds that if "the loss entailed upon [the trespasser] would be excessively out of proportion to the injury suffered by [the owner], or a serious detriment to the public, a court of equity might very properly . . . deny the injunction, and leave the parties to settle their differences in a court of law."[70] However, there are two specific instances in which

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In *Fancher*, parties owned adjoining townhouses. *Id.* at 520. Plaintiff's property was lower in elevation, protected by a masonry retaining wall to support the grade separation. *Id.* Plaintiff brought suit for a sweet gum tree on defendant's property that allegedly created a noxious nuisance, damaged the retaining wall with its roots, and caused blockage of plaintiff's sewer pipes. *Id.* The tree also grew over plaintiff's roof and deposited leaves and debris on his roof. *Id.* After a lengthy discussion of several different state tests for nuisance created by vegetation, the Supreme Court of Virginia revised the Virginia test and held that encroaching trees and plants are not nuisances just because they cause shade, drop leaves, flowers, or fruit, or just because they encroach adjoining property above or below ground, but may be if they cause actual harm or possess the danger of actual harm. *Id.* at 522. The case was remanded for further consideration of possible injunctive relief using this new standard. *Id.* at 523.

68. *Levisa,* 662 S.E.2d at 53.

69. Boerner v. McCallister, 89 S.E.2d 23, 25 (Va. 1955). Plaintiff alleged that defendant continuously trespassed upon his land to fish in a river that ran through it. *Id.* at 24. The court recognized that the multiplicity of individual trespasses invoked a special area of equity law. *Id.* at 25. The circuit court granted a permanent injunction. *Id.* The supreme court of appeals affirmed the ruling. *Id.* at 28.

70. Clayborn v. Camilla Red Ash Coal Co., 105 S.E. 117, 122 (Va. 1920). Plaintiff owned a tract of land adjacent to defendant who had a mining contract. *Id.* at 117. The contract held the company could mine all coal from the land, at which point the land reverted back to plaintiff. *Id.* After mining one part of the tract, defendant built a haulway tunnel against which plaintiff protested. *Id.* at 118.

the plaintiff will be entitled to an injunction. First, "[u]nless the plaintiff can demonstrate that the property it seeks to protect has some personal value of sentiment or other intangible quality that cannot be restored to him at law" then an injunction will not be proper.[71] Second, if the plaintiff can show that "monetary damages would otherwise not make him whole" an injunction will be proper.[72] In either case, the court "will give due weight to the adverse effect of the injunction being granted on the defendant."[73] Ultimately, in Virginia, a plaintiff who wants an injunction will best be served by submitting evidence of intangible value of a property to convince the court that their remedy at law simply will not suffice.

I. Washington

Washington courts place the burden on the trespasser to prove their actions meet a series of elements in order to avoid an injunction. If the elements cannot be met, the court is willing to grant an injunction. When considering encroaching structures, the court has held that a mandatory injunction:

> [C]an be withheld as oppressive when . . . it appears that: (1) The encroacher did not simply take a calculated risk, act i[n] bad faith, or negligently, willfully or indifferently locate the encroaching structure; (2) the damage to the landowner was slight and the benefit of removal equally small; (3) there was ample remaining room for a structure

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Plaintiff brought suit for injunctive relief and was denied by the initial decree. *Id.* at 117. The Supreme Court of Appeals of Virginia held the use of the tunnel created an unlawful burden upon plaintiff and granted an injunction restraining defendant from using the tunnel for any purposes other than mining that specific tract. *See* 122-23.

71. *Levisa*, 662 S.E.2d at 54; *see also* Langford v. Taylor, 39 S.E. 223 (Va. 1901). In *Langford*, the court compelled specific performance of a contract to sell 12 barrels of whisky. *Id.* at 224. The plaintiff paid in full and the defendants did not deliver the goods. *Id.* The court was not willing to require specific performance because the plaintiff still had a remedy available at law. *Id.*

72. *See* Moore v. Steelman, 80 Va. 331 (1885). Partners disputed the ownership of a large amount of wood. *See id.* at 332-34. The court denied the injunction because the plaintiff was unable to prove that monetary damages would not make him whole. *See id.* at 339-40.

73. *Levisa*, 662 S.E.2d at 54.

> suitable for the area and no real limitation on the property's future use; (4) it is impractical to move the structure as built; and (5) there is an enormous disparity in resulting hardships.[74]

These elements could be helpful in a case involving trespass by pollution, notably element one that requires that the defendant did not act negligently, willfully, or indifferently. In the event that a polluter acts negligently, for example by failing to maintain underground tanks, a landowner will have the right to a mandatory injunction.

The court elaborates on this burden, holding "in that the relief granted by the denial of the injunction affected by the owner's possessory rights . . . and is exceptional relief for the exceptional case, we . . . require . . . that the evidence of the elements listed above be clearly and convincingly proven by the encroacher."[75] This clear establishment of a burden on the encroacher should and would likely extend to cases of trespass involving pollution.

IV. STATES DENYING INJUNCTION TO REMOVE TRESPASS

Some states do not accept the proposition that trespass claims are entitled to more comprehensive injunctive relief than nuisance claims. Most of these states, as the following discussion demonstrates, merely rely on the concept that the cost of the remedy cannot be greater than the value of the damage done. However, in those states, it may still be possible that a plaintiff who owns property with a special significance and value, not readily quantified by traditional appraisal methods, can obtain injunctive relief to remove the trespass. In such a case, the court would have to find that the

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74. Arnold v. Melani, 449 P.2d 800, 802-06 (Wash. 1968). Defendants had built an encroaching house, while plaintiffs had built an encroaching fence. *Id.* at 802. The fence extended 8.4 feet onto the land of the defendants. *Id.* The home extended 3.28 feet over the property line on to the plaintiffs' lot. *Id.* Both parties did surveys of the property boundaries. *Id.* The trial court accepted the survey done by defendant's surveyor, but denied defendant's request for mandatory injunction, instead granting an easement to plaintiff because the cost of removal would far exceed the total value of defendant's property. *Id.* The Supreme Court of Washington affirmed the holding but limited the easement to the area covered by the encroachments. *Id.* at 806.

75. *Id.* at 806.

special value of the property warranted a remedy that restored the property to its original condition even though the cost of such a remedy exceeds the appraised value of the property. In addition, the plaintiff in such states could focus on the remedy by seeking a mandatory injunction without regard to the cost of injunction in an attempt to avoid the issue of comparative costs. The use of experts to testify about the special significance of the property may help deflect the court from a focus on mere economic costs by focusing on values other than economic costs or by converting the intangible costs into substantial economic costs, an approach increasingly used for a more balanced "cost-benefit" analysis of state and federal regulations.

A. Ohio

Ohio courts are very cautious about granting injunctions. Courts have held that "[t]he right to an injunction must be clear and the proof thereof clear and convincing, and the right established by the strength of plaintiffs' own case rather than by any weakness of that of his adversary."[76] The state considers this benchmark fixed and has not shown itself liable to waiver under varying circumstances.

The state has encountered sentimental value arguments in trespass cases and rejected them outright.[77] In both *White* and *Oberhaus*, the court ruled that "an injunction will not be granted where damage is trifling, fanciful, sentimental or a mere inconvenience, and that the

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76. *See* White v. Long, 231 N.E.2d 337 (Ohio Ct. App. 1967). Plaintiff sought to enjoin the continued operation of a sewage disposal plant that was discharging fluid upstream from plaintiff's property. *Id.* at 338. Plaintiff alleged that the stream turned "grayish or milky in color; that there was an odor about it objectionable to them . . . they found dead crawfish" and their livestock would not drink the water. *Id.* at 339. The court ruled in favor of defendants, holding plaintiff failed to sustain its burden of proof. *Id.* The court further explained that it must take exceptional care when granting injunctions that would suspend the operation of an important public work. *Id.*

77. *See id.*; *see also* Oberhaus v. Alexander, 274 N.E.2d 771 (Ohio Ct. App. 1971). In *Oberhaus*, plaintiff sought to enjoin further development of a neighboring county airport and to receive damages for the loss of value to their property. *Id.* at 771. Plaintiffs argued that while the airport was not finished and open yet, the finished airport would create a danger to them. *Id.* at 772. The court held that "although a continuing trespass is a basis for injunctive relief, it is not sufficient to have merely a speculative, anticipated trespass." *Id.* The court ruled that plaintiffs failed to meet their burden of proof to show a right to "the extraordinary remedy of injunction" and held for defendant. *Id.*

invasion of a private right without actual and palpable injury does not stir the conscience of the court so that injunction will lie."[78] The court equates sentimental value with trifle and fancy, giving it negligible monetary value.

B. New York

New York courts have long held in cases of trespass that "when the reasonable cost of repairing the injury, or the cost of restoring the land to its former condition is less than the diminution in the market value of the whole property by reason of the injury, the costs of restoration is the proper measure of damages. . .but when the cost of restoring is more than such diminution, the latter is usually the true measure of damages."[79] In such cases, the court requires a plaintiff to show only one valuation of damages, then shifting the burden to the defendant to prove the other if he wishes to refute the purported value.[80]

In addition to the state's adherence to the "lower of the two costs" damage reward, New York Jurisprudence §86 specifically rejects the use of sentimental value when determining the value or loss of value in a damaged property, stating:

> Although the damages recoverable for the loss of personal property having no market value is sometimes measured by

78. *Oberhaus,* 274 N.E.2d at 772 (quoting *White*, 231 N.E.2d at 340).

79. *See* Hartshorn v. Chaddock, 31 N.E. 997 (N.Y. 1892). Plaintiff sued for damages done to his property by a diverted stream. *Id.* at 997. Plaintiff offered evidence to prove the cost of restoring the land. *Id.* at 998. Neither party presented evidence regarding the diminution in value of the property. *Id.* The court ruled that because defendant did not bring such evidence, he waived the right to the argument and must pay the cost of restoration. *Id.* at 999.

80. *See* Jenkins v. Etlinger, 432 N.E.2d 589 (N.Y. 1982). Plaintiffs brought suit to recover costs for removing silt from a pond that sat between adjoining properties. *Id.* at 590. Defendant purchased landfill for part of a landscaping project, some of which flowed into the pond, discoloring the water and preventing its use for a summer. *Id.* Plaintiffs offered evidence of the cost of removal of the landfill from the pond. *Id.* Defendants argued that plaintiff offered no evidence of the diminution in value of the property. *Id.* The court ruled that after a plaintiff shows one valuation of damages, "the burden falls upon the defendant to prove that a lesser amount than that claimed by plaintiff will sufficiently compensate for the loss." *Id.* at 591. Because plaintiffs met their burden, the award for removal costs was upheld. *Id.*

> the value of the property to its owner, merely sentimental or fanciful values which the owner himself or herself attaches to the property should not be considered. The jury may properly consider the probability, practicability, or difficulty of replacement, as well as the cost of the article, but not its sentimental value to the owner. Thus, recovery has been denied for damage to photographs having a purely sentimental value to the owner. However, where sentiment is shared by others, so that it affects the value of the property, sentiment is compensated.[81]

Such guidelines, make it unlikely New York courts would grant remediation costs in excess of the value of the property.

C. Kentucky

Kentucky courts also limit recovery to the lesser of two values between diminution in value and restoration costs.[82] The Supreme Court of Kentucky has held that "a plaintiff seeking restoration cost damages in an injury-to-property case need not introduce evidence of a diminution in the fair market value of the property case in order to state a prima facie case."[83] The court relies on the classification of the injury, be it permanent or temporary, holding that if "the cost to restore the property to substantially its original state exceeds the amount by which the injury decreased the property's value" it will be deemed a permanent injury and the proper damage value will be the diminution in value, but "if the injury to the property is temporary, the cost to return it to its original state" is the proper measure.[84] The court limits itself in granting restoration costs, holding that "[r]easonable restoration costs are an available remedy only in 'temporary' injury cases where the property may be restored to its

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81. 36 N.Y. JUR. 2D *Damages* §86 (2009).

82. *See* Ellison v. R & B Contracting, Inc., 32 S.W.3d 66 (Ky. 2000). Defendant, R & B Contracting, Inc., was doing subcontractor work for Lawrence Construction and Leasing Inc. on a project to reconstruct Kentucky Highway 17, including excavation work and disposal of waste materials. *Id.* at 68. Plaintiffs owned property facing the highway. *Id.* Plaintiffs brought suit alleging that R & B Contracting trespassed by storing heavy equipment and depositing debris on plaintiffs' property without consent. *Id.*

83. *Id.* at 74.

84. *Id.* at 69.

original state at a cost less than the amount by which the market value of the property decreased as a result of the trespass."[85] In doing so, the court rules out restoration costs for permanent injuries as a result of trespass. Finally, the court outright rejects any grant of restoration costs that exceed the diminution in value, let alone the value of the property overall, holding "in no case, of course, may the amount of recovery exceed the diminution in market value" elaborating that "if the costs of restoration exceed the diminution in value they are presumptively unreasonable."[86]

Kentucky courts have rejected consideration of sentimental value when determining damages. The court has held that "[p]urely sentimental matters have no place in an inquiry of this sort" and that "the only standard of legal compensation is the diminution in the fair market value of the property."[87]

D. Pennsylvania

Pennsylvania is more explicit in its explanation of damages the court will grant in a trespass case. The Superior Court of Pennsylvania holds that in trespass cases, "the measure of damages is the cost of remedying the injury, unless such cost exceeds the value of the property injured, in which case the value of the property

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85. *Id.* at 70.

86. Burkshire Terrace, Inc. v. Schroerlucke, 467 S.W.2d 770, 772 (Ky. 1971). Plaintiffs brought suit against a subdivision for damages allegedly resulting from water flowing from the subdivision. *Id.* at 771. Plaintiffs based their claim on the subdivision's changing of the natural flow of the water. *See id.* The court determined the fair diminution in value to be $16,000. *Id.* at 772. Plaintiffs said they could fix the land for $12,000, $12,000 was awarded. *Id.*

87. *See* City of Lexington v. Chenault, 152 S.W. 939, 941 (Ky. 1913). Plaintiff brought suit after the city lowered the grade of a street bordering her property, causing a retaining wall to collapse. *Id.* Plaintiff had three witnesses, over defendant's objections, testify how much they thought the property had been damaged without mention of fair market value before or after the event. *Id.* The court of appeals (then the highest court in the state) ruled that this was in error and reversed plaintiff's reward of $1,500. *Id.* See also Morgan v. Hightower, 163 S.W.2d 21, 22 (Ky. Ct. App. 1942) in which plaintiff sued for damages after a man came into his house and committed suicide. Plaintiff alleged the event resulted in a diminution in value of his property because his home was "shunned by the public and its good name and fame ha[d] been destroyed." *Id.* The court held that "such an inquiry is more imaginary than real, or at most is but sentimental and is not a proper element of damage." *Id.*

becomes the measure of damages."[88] With such limiting holdings, Pennsylvania has definitively ruled against the possibility of recovery of any damages beyond the value of the property itself.

V. LITIGATION STRATEGY

One central feature of most of these adverse rulings is that plaintiff was seeking damages for past injury, to be measured by the cost of restoration. It is not certain the courts would reach the same result if the case involved the continued presence on the property of the trespassing material and plaintiff sought removal of the trespassing material from the property by way of a mandatory injunction and did not seek any monetary compensation as a result of the continued presence of trespassing material on the property. If the plaintiff frames one of the claim solely in terms of injunctive relief, where the cost of removal is far greater than the value of the land, and where the courts reject the proposition that a private landowner can be compelled to allow another private party to use her land for disposal of waste, it may force the defendant to consider reaching a settlement in which it pays plaintiff considerably more than the value of the land in order to continue to be allowed to have the trespassing material remain on the plaintiff's property. In such a case the plaintiff will probably want to insist that a condition of the settlement be that defendant take steps to prevent new trespassing.

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88. *See* Welliver v. Pennsylvania Canal Co., 23 Pa. Super. 79 (1903). Defendant operated a canal adjacent to plaintiff's property. *Id.* A break in the canal led to seepage onto plaintiff's property. *Id.* One issue was whether it was plaintiff's duty to take steps to prevent the seepage from further damaging her property. The court ruled that plaintiff need only exercise ordinary and prudent care in preventing continued injury. *Id.* The court opined that "it was not [plaintiff's] duty to construct a ditch which would cost more than the value of her land, because, as already intimated, she could recover no more than the value of her land in any event and was not bound to expend more in preventing the injury than she could recover from the defendant." *Id.* at 4; *see also* Herron v. Jones & Laughlin Co., Ltd., 23 Pa.Super. 226, (1903). Plaintiff sued for damage to his property allegedly caused by defendant's furnace. *Welliver*, 23 Pa. Super. at 4. Defendant used the furnace for ore blasting during the winter, leading to ore being thrown against plaintiff's house and lot. *Id.* When determining the diminution in value, the court recognized that "the measure of damage ... is the cost of restoration ... unless such cost should equal or exceed the value of the property, in which case the value is the correct measure of damages." *Id.*

One note of caution is warranted. Toxic pollution cases are inherently expensive, both in terms of time and economic resources. Careful screening of these cases is essential before claims are filed. As the previous discussion demonstrates, some states are much friendlier to the ideas advanced in this article than other states. If the case being considered is weak on some of the underlying issues – if identifying the source of the trespass will be difficult or there is an issue of some culpability of the plaintiffs in the problem (for instance groundwater pollution from TCE contamination where plaintiffs may have used TCE in their septic systems) – it may be prudent to not pursue the case, particularly if the state is also one where the law on trespass is considerably less favorable. From a factual perspective, the ideal case is one with the following elements:

1. there is no question about the source of the pollution;
2. the pollution is at a substantial level and, even though it may not be creating a health risk, it is substantially more than background levels;
3. the law is clear that the portion of the property that is contaminated is owned by the plaintiff – e.g. in western states groundwater is usually owned by the state and groundwater pollution is not considered a trespass on the property of the plaintiff;
4. the property is the plaintiff's residence and the plaintiff owned the property prior to the time the pollution entered the property;
5. the jurisdiction is one like Massachusetts that has a long history of acknowledging that property ownership includes the right to exclusive occupation of the property;
6. defendant is a private company engaged in a purely commercial endeavor and not a governmental or quasi-governmental entity engaged in some activity that is allegedly serving the general public (salt pollution from a storage area for road salt owned by the local government for public roadways would be a more difficult fact situation than a private company storing salt on its land for its own use);
7. finally, if the law is uncertain or even unfavorable, resist the temptation to press the legal theories

discussed here, where there is a weak fact pattern because, as the old adage goes, "bad facts make bad law" and focus on recovering damages under traditional nuisance law principles.

CONCLUSION

Where pollution has come onto plaintiff's property, the defendant should not be allowed to leave it on plaintiff's property merely because removal would be very expensive. Any other result would effectively allow a property owner to be compelled to allow the property to be used for a purpose not authorized by the owner.

The remedy of a full removal of the trespassing material from the plaintiff's property, if pressed effectively, can have a substantial impact on the decision-making process of companies whose activities are capable of causing trespasses. In the calculations that form the basis for business decisions – i.e. determine cost and sell at a price that recovers that cost plus a profit – externalities like pollution are often ignored because they are not immediate costs of the company, it is uncertain if they will ever become costs because not all pollution results in litigation, and often the costs of such a litigation are easy to predict and can be easily absorbed or covered by insurance. Thus, for example, a company that operates a combustion source from which particles are released and fall on adjacent land may not be inclined to order expensive pollution control equipment to eliminate all particle releases if the cost of addressing the pollution problem in subsequent litigation will be no more than the lost value of the adjacent land. In addition, those pollution damage costs will occur in the future or may not occur at all, and are likely to be substantially less than the cost of the pollution control equipment. However, if the cost that must be considered is difficult to calculate, but potentially substantial because it will require removal of all the pollution from the adjacent land, the company will have to consider that fact in deciding whether to buy the expensive pollution control equipment.

Another benefit of the total removal remedy in a trespass case is that the remedy, regardless of its cost, is of a type that most businesses abhor. If the remedy of an injunction against the defendant is granted, it will force the defendant, often under the supervision or oversight of the court, to actually conduct the removal. This forces the defendant to get into the pollution removal business

and to do it with the plaintiff and the court looking over its shoulder. Most companies find that being forced into a business they do not wish to be in and to do so with close supervision from "outsiders" is intolerable, and will go to great lengths to avoid such a situation.

Thus, like all environmental pollution litigation, a case for total removal of trespassing pollution helps to internalize an external cost. It has the added benefit of making the magnitude of that cost to the polluter less easy to calculate and the implementation of the remedy a task the polluter will find abhorrent. Because in the business world uncertainty of cost is much feared and outside supervision of business activities is even more feared, the uncertain costs of a total removal remedy, with its court and plaintiff supervision features, can help to encourage prevention, which is always preferable to even the most successful litigation. The existence of this remedy may also cause insurance companies to substantially increase rates to businesses whose activities have the potential for off-site pollution and who are seeking liability coverage. If all insurance companies were to police pollution-producing activities of potential insureds seeking general liability and pollution insurance coverage the way they have policed fire-causing activities of insureds seeking fire insurance, there would be a substantial reduction in the number of pollution events and the number of pollution law suits. Until that day, trespass by pollution, will remain a potent cause of action for those impacted by the pollution and hopefully, a mandatory injunction to remove the pollution from the plaintiff's property will become a substantial inducement to avoid all off-site pollution that can result in a trespass.