

Chapter 15: Conclusions and New Directions for Polluters and Pollutees

by Robert A. Simons and Robert Shields

I. Introduction

The real estate part of the book began in Chapter 2 with a review of the economics behind private real estate transactions, including the requirements for asserting a causal relationship between pollution and property values, the basics of microeconomic behavior and consumption, including the role of information, and the similarity of consumer behavior across markets. The chapter covered capitalization theory, and recognized pollution as a negative externality.

Chapter 3 dealt with theory underlying the effect of environmental contamination on property values. The real estate bundle of rights was described, including the rights to control, use, enjoy, and dispose of real property and its surface and non-surface components. The topics of financing in real estate, covering debt, leverage, loan-to-value, and debt service coverage issues were addressed. We recognized that a loss is inevitable once contamination has occurred and several ways a reduction in property value loss can be recognized, including reduced use and enjoyment, shrinking of the market, and various forms of realized and unrealized capital losses. Several factors or conditions that affect the nature, duration, and severity of losses stemming from contamination, based on remediation, land use types, stigma, nuisance, etc., were presented and tied to real estate contamination outcomes. The most important factor is information, and disclosing contamination to a prospective buyer.

Chapter 4, coauthored with Jesse Saginor, was a large literature review of the empirical peer-reviewed evidence of contamination and its effects on property values. The review went through about 80 articles for 20 different types of contamination and disamenity. These proximity influences are organized into groups: contaminated subject properties (asbestos, toxic mold, and fuel oil); linear nuisances (high voltage overhead transmission lines, pipelines, railroad tracks, and large roads); big point sources with jobs (nuclear generating plants, smelters, polychlorinated biphenyl manufacture);

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large facilities that have little or no employment (Superfund sites and landfills); air pollution (general and animal feedlots); groundwater pollution (general and petroleum-related contamination); and urban disamenities (shopping centers, airports, and sex offenders). Results for each type of contamination and disamenity were summarized. Each article has been individually reviewed.

Chapter 5 was a meta-analysis of the effect of contamination on residential property values. The literature review of 58 of the articles in the previous chapter was distilled into a data set of 228 observations that contains information about each study's dollar property value loss (the dependent variable), with the independent variables being distance from the source, type of contamination, information, urban or rural environment, local and national market conditions, information about the contaminative event, remediation, study type, and several other variables. Regression analysis was used to determine the effect of contamination variables on percentage change in value, and the statistical models explain up to 79% of the variation in property value diminution. Several geographic, contamination type, information, and contextual variables are statistically significant. This facilitates generalizations to be made between case studies throughout the United States. A related analysis to this work has been peer-reviewed and was published in the *Journal of Real Estate Research* in 2006.

Chapter 6, written by Ron Throupe, John Kilpatrick, Bill Mundy, and Will Spiess of Mundy Associates (now Greenfield Advisors), covers appraisal and contaminated property. They addressed the three approaches to value for unimpaired property (market, cost, and income capitalization) and provided a background to the valuation of impaired property. They covered fundamental theoretical issues and valuation methodology employed by appraisers for contaminated property. The methodologies include matched pairs, control areas, case studies and national comparables, survey research, hedonic regression analysis, and depreciation analysis.

Chapter 7 set forth activities undertaken by the real estate expert witness in litigation cases, including studies, discovery, looking at the other side's evidence, and testimony, for both the class certification and merits stages of litigation. The chapter features a detailed description of essential activities to be undertaken, as well as primary techniques (those that can form the basis for an opinion concerning property value losses such as real estate trends analysis, contingent valuation, and regression analysis) and corroborative techniques (those that support the notion of a loss, but do not directly quantify the dollar amount or percent, including transaction rates analysis, sales/list price ratio, and financability analysis). The chapter closed with a discussion of discovery and testimony, such as motions to exclude the expert's testimony, reviewing the other side's experts' reports, and testimony, negotiations, and the role of defense specialists. This is the last chapter in the real estate part of the book.

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Chapter 8 begins the legal part of the book and it specifically covers the toxic tort litigation process. The authors are attorneys Gary Mason and Nicholas Migliaccio, from the Mason Law Firm in Washington, D.C., and Dennis Reich and Michael Howell from Reich & Binstock in Houston, Texas. This chapter covered pre-litigation analysis, with causes of action, potential defendants, merits of claims, likely recovery, and mass action and class action lawsuits. Class certification issues such as numerosity, commonality, typicality, adequacy, superiority, and predominance were addressed. They also covered discovery, the usefulness of expert witnesses and different types of scientific evidence, and why cases settle rather than go to trial. This chapter closed with a case study.

Chapter 9 was written by attorney Jay Pendergrass of the Environmental Law Institute in Washington, D.C. The chapter begins with pre-National Environmental Policy Act litigation, then moves on to issues considered in common law versus those set forth in statutory law. Major legislative acts that pertain to toxic tort cases, including the Comprehensive Environmental Response, Compensation, and Liability Act, with its liability clauses, and the Resource Conservation and Recovery Act (RCRA), with its legislation covering management of chemical stores and regulation of leaking underground storage tanks (LUSTs). The subsequent laws included the Oil Pollution Act, and state brownfield laws and related legislation covering developer and lender liability protection. The chapter closes with a discussion of third-party liability.

Chapter 10 was written by Robert Simons, Abdellaziz el Jaouhari, and Saginor. It contains legal research on the outcomes of toxic tort verdicts and settlement cases in the United States in the past 10 years. The sample was obtained from MEALEYS (a Lexis-Nexis company). From a sample of about 250 toxic tort cases with property damages, detailed information was obtained on almost 80 cases. The chapter provides results on financial outcomes per plaintiff, including legal expenses, gross and net damages awarded, sorted by type of contamination.

Chapter 11 presents toxic torts from the plaintiffs counsel's perspective. This chapter was written by attorney Alan Runyan, a principal in the South Carolina firm of Speights & Runyan. The chapter covers case selection, causes of action and venue, discovery, selecting an environmental expert witness, consideration of property damages versus personal injury, and political issues. The chapter concludes with an asbestos case study and a case study of class action LUSTs litigation, featuring discovery abuses.

Chapter 12 presents toxic torts from the defense counsel's perspective. This chapter was written by attorney Geoffrey Barnes, a Partner with Squire, Sanders & Dempsey, in Cleveland, Ohio. Barnes addressed defending a toxic tort lawsuit, and strategies used by defense counsel to bolster their position. The overriding principle is the concept of forcing the plaintiffs to absorb pain, e.g., financial expense, during the process of litigating the case.

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Avoiding setting precedents for other cases and minimizing firm losses are also addressed. This chapter concludes the purely legal section of the book.

The third section of the book contains a synthesis of the academic and legal outcomes, and of the adequacy of litigation for a small number of plaintiffs or plaintiffs with damage amounts too small to be economically feasible for lawyers to pursue as a business decision. Chapter 13 compared the results of peer-reviewed studies with the results of the legal research. The gross-to-gross and net-to-gross financial recovery ratios for plaintiffs are generated and compared to theory and peer-reviewed literature. The main conclusion is that the case outcome data, even after controlling for punitive damages, exhibit a very large amount of variation. The only tentative conclusions that can be drawn are that on a per-plaintiff basis, the median gross verdict amount (before legal and expert expenses) generally exceeds the losses suggested by the peer-reviewed literature, while the median gross settlement amount is less than what the empirical literature would expect.

Chapter 14 addressed the class action model, and how it is working with respect to providing justice for the lonely pollutee or for plaintiffs with valid claims but where the dollar amount is too modest to justify mounting a legal battle because of the cost of developing a winnable case. This chapter is coauthored with Saginor and attorney Robert Shields, from the Atlanta-based firm of Doffermyre, Shields, Canfield, Knowles & Devine. After a brief description of recent class action disputes, alternative dispute resolution models are examined, including mediation. The chapter then analyzes the effectiveness of a predictive model based on the meta-analysis, and introduces the BIG MATRIX, a loss lookup table derived largely from these findings. It provides an initial, preliminary measure of expected property losses, based loosely on predictive regression, but having more simple data input requirements, such as a do-it-yourself loss calculator. The error band of the BIG MATRIX is known to be plus or minus 10 percentage points, which is suitable for initial estimation of losses or negotiations but is not precise enough (at this time) for a stand-alone expert opinion. It is intended as a negotiation tool to try to settle cases out of court. Plusses and minuses of this approach are addressed.

II. General Observations

We recall that pollution is a negative externality, and that polluting firms in a capitalistic economy such as the United States will naturally attempt to avoid paying for off-site damages unless they are forced to by the government or by the court system. Thus, litigation and dispute resolution is a normal and expected way of resolving these disputes. As the Coase Theorem suggests, negotiating the damages to real property is a transaction cost, and internalizing the social costs (to others outside the firm) will eventually result in less of the good being produced, or that its production function will be

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changed to generate less pollution. However, this does not excuse the protracted, sometimes frustrating, unpredictable, and lengthy process. This is especially true for smaller cases where the economics of the case do not permit the plaintiff to attract legal representation willing to front the costs of developing a case on a percentage basis. One modest goal of this book has been to empower the smaller case plaintiff with knowledge and low-cost tools to pursue litigation with the polluter.

III. Policy Implications

How big of an economic effect does all this pollution have? Although there is no comprehensive accounting of polluted sites or litigated toxic tort cases, Simons estimated that there were up to 650,000 brownfield sites in the United States.¹ However, not all of these have off-site pollution, or off-site contamination has not yet been discovered. Polluters have an economic interest in not discovering off-site problems so it is not unusual that they avoid off-site testing. It is even not unusual for regulatory agencies, whether state or federal, to be less than diligent in looking for off-site contamination. The natural history of most Superfund sites is early reports that the contamination is limited, with an expansion of the recognition of the extent of the property damage with each new evaluation. Typically, it is years after a site is first investigated before the nature and extent of the contamination is fully characterized.

As a part of the estimate of brownfield sites, the national registers of pollution events (national priority list, LUSTs, some RCRA sites, but not small chemical users) contain at least 380,000 sites, of which over 275,000 are LUST sites. Unfortunately, this list is growing, and the recognition of off-site pollution is increasing. Of course, not all of these sites are in litigation, but as off-site contamination is discovered the likelihood of litigation is substantially greater.

For example, below is the estimate of the economic effects for a mix of 1,000 contamination events. This is assumed to be a mix of smaller, more localized LUST events with only a few affected properties per case, to large class action cases with 1,000 or more plaintiffs. Here are the following assumptions:

- Contamination is disclosed;
- Average of 50 properties per case;
- 90% residential properties;
- Average residential value of \$130,000, average commercial property value of \$250,000;

1. Robert A. Simons, *How Many Brownfield Sites Are There?*, 2 J. PUB. WORKS MGMT. & POL'Y 267-73 (1999) and ROBERT A. SIMONS, TURNING BROWNFIELDS INTO GREENBACKS 32-34 (Urban Land Inst. 1998).

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- Loss to property value of 20% for residential and 35% for commercial;
- Property value loss effects last five years;
- Property tax is on 1.5% of property value;
- Realty commissions of 6%;
- 10% of property owners sell or refinance each year at a loan-to-value ratio of .7; and
- Bank loan fees are 1.5% of the loan amount.

Then the following effects on the economy would be evident:

1. Loss in property value: \$1.6 billion.
2. Loss in property taxes paid: \$120 million.
3. Loss in realty commissions: \$29 million.
4. Dollar (\$) loss of loans not made: \$2.5 billion.
5. Bank fees not received: \$37 million.

The actual amounts are probably much higher because this is only for 1,000 cases.

There is also a substantial economic impact from litigation-related expenses. There is no comprehensive list or even a reliable estimate of the number of property damage lawsuits related to pollution, but if one assumes that only one-third of the property damage estimated above results in litigation, the expense of litigation would be substantial. Attorneys fees and expenses in such cases, particularly if one includes those incurred by both sides, are likely to be in excess of 50% of the property loss. Thus, the litigation expenses from the estimated property losses above are likely to exceed \$250 million. We suspect that the actual litigation expenses for property damage pollution cases substantially exceed that figure.

IV. Recommendations for Potential Plaintiffs

If you are faced with a pollution problem, and you believe something bad has happened to your property, these are the things you should consider:

1. Don't be passive. Your rights may have been violated, and you are probably entitled to compensation and/or other relief if you have been damaged;
2. Become familiar with the type of contamination that may be present on your property;
3. Become familiar with the types of real estate loss that may be involved;
4. Become familiar with any health risks involved;
5. Find out if others are affected. Talk to your neighbors. If you can be combined into a class or mass action, the chances of getting the attention of the polluter are increased greatly;
6. Find out the disclosure requirements in your state;
7. Consult an attorney and let him or her know the situation;

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8. Develop an initial preliminary estimate of your property damages by using the BIG MATRIX in Chapter 14;
9. Consider whether alternative paths to dispute resolution is appropriate; and
10. Get advice and discuss next steps to get back to where you need to be. You may contact Robert Simons for property damages advice at www.rasimons.com. Consult an experienced attorney for other matters.

V. Recommendations for Attorneys

The following are general recommendations for attorneys who are asked to represent injured property owners:

Before agreeing to take the case, thoroughly investigate and evaluate the claims. Many attorneys who are inexperienced in toxic litigation assume that such cases are potential gold mines. In truth, such cases can just as easily be a door to bankruptcy, as the book and movie *A Civil Action*² demonstrated. The cases can be extremely expensive and the potential recovery may not justify the expense or the risk.

1. Unless you are experienced in toxic tort litigation, consider consulting with or bringing in an attorney or law firm that specializes in such cases. Experienced associate counsel could help avoid mistakenly taking a case that is not economically viable—to the detriment of both counsel and the clients—or could possibly help increase the value of the case by knowing how to develop it economically.
2. Employ a property damage expert early so that he or she can assist in developing the necessary data to evaluate the case.
3. If the case does not justify investing extensive time and expenses, explore the possibility of handling the case in a more limited and economic fashion.
4. Finally, there is no reason not to approach the defendant about the possibility of early alternative dispute resolution.

Similarly, listed below are some recommendations for defense counsel in such cases:

Consider an early resolution of the cases, including using alternative dispute resolution. Generally, major toxic tort property damages cases increase in settlement value with the passage of time. There are numerous examples of major toxic tort cases that could have been settled early at a small fraction of what ultimately was paid, but defendants and their counsel too often assume that the use

2. See JONATHAN HARR, *A CIVIL ACTION* (1996) and *A CIVIL ACTION* (Touchstone Pictures 1999).

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of their economic power will overwhelm the plaintiffs. In fact, an early resolution benefits all parties.

1. Work with the regulatory agencies to seek an early resolution of remediation. Doing battle with the regulators helps the plaintiffs. Sometimes it is not possible later to resolve the regulatory issues without also resolving the private lawsuits, and thus the economic power of the regulatory process can result in larger payments to private parties.

2. Similarly, it is a better strategy to work with the effected community to deal with the problem before lawsuits get filed, than to stone-wall and deny any responsibility. It is a rare defendant who recognizes that cooperation can avoid claims.

3. Finally, employ independent objective expert assistance instead of seeking “hired guns” who will automatically support the defendant’s denials. A true expert will make the task of working with the regulators and the community much easier, and potentially avoid lawsuits.

VI. Conclusion

Thus, our overall conclusion is quite simple. Pollution is a noticeable drag on the economy. Things have got to get settled faster in the future than in the past. Polluters: come clean!

