CHAPTER 14

The Theory of Nuisance as an Impediment to Mining Operations

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Synopsis

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§ 14.01. Introduction.

Since the dawn of English common law, there has been a cause of action designed to prohibit or redress unreasonable interference with the use and enjoyment of property rights. Property law has traditionally embraced the principle that landowners are entitled to the free use and enjoyment of their property, subject to such restrictions as may be imposed for the common good. However, nearly every property use restricts or interferes to some extent with the occupation and quiet enjoyment of adjoining property or the convenience of adjoining landowners. In some instances, the interfering use may also provide benefits to neighbors or to the community. This clash of competing property interests, and of reciprocal costs and benefits, is inherent in organized society. Nuisance law emerged as one of the earliest means to resolve these conflicts between competing interests and to allocate the costs and burdens associated with them.

Nuisance is properly viewed as a field of tort liability, rather than a particular type of tortious conduct. The term "nuisance" derives from the French nuisant, which means hurtful, injurious, or prejudicial and has become a legal catchword encompassing a broad range of rights and remedies. The essence of private nuisance is unreasonable or substantial injury or interference with the use and enjoyment of plaintiff's land as a result of some act or use conducted on defendant's land. Whereas common law trespass generally requires a physical invasion as an element of the cause of action, nuisance does not; in practice, courts often intertwine principles of trespass, private nuisance, and negligence.

As nuisance law developed, it expanded to include actions for interference with public rights, such as obstruction of a public highway, by plaintiffs suffering "special injury." Now referred to as public nuisance, this cause of action is essentially an action for personal injury arising from interference with a public right, as opposed to an action for injury to private lands or property interests. The two fundamentally different wrongs -- interference with use and enjoyment of land ("private nuisance") and special injury from interference with a public right ("public nuisance") -- came under the common umbrella of nuisance law.
Use of the term nuisance to refer to both has resulted in the development of rules that, with minor differences, apply equally to both causes of action.

Mining operations can be difficult neighbors, regardless of efforts to ameliorate their effects upon adjoining landowners. As social values or priorities have changed to reflect increased appreciation for the environment and its preservation, concepts of the reasonableness of land use have also changed. Nuisance actions, grounded in a balancing of competing interests, are influenced by social values, economic effects, and changing circumstances, particularly residential development occasioned by an expanding population. As a result, nuisance actions are enjoying a certain resurgence, fueled in part by an environmental plaintiffs' bar that encourages nuisance actions as an adjunct to the citizens' suits and private actions authorized under the myriad regulatory schemes applicable to the modern coal industry.


A public nuisance is an unreasonable interference with a right common to the general public. Examples include such activities or conditions as obstruction of or damage to highways, maintenance of a house of prostitution, distribution of obscene material, air or water pollution, deteriorated buildings, noise, unlicensed sale of alcoholic beverages, and disorderly conduct. All are typically defined by statute as constituting public nuisances. The defining requirement for public nuisance is that the conduct must affect an interest that is truly public; an interference with a private right, even if common to a very large number of people, does not amount to public nuisance.

Under early English common law, a public nuisance was a crime, subject to prosecution and abatement by the Crown, and a private citizen had no standing to bring the action. However, the English courts eventually created an exception to permit a private cause of action for personal injury arising from a public nuisance, but only if the defendant's conduct resulted in special damage or inconvenience to the plaintiff different from that endured by the public at large. These principles survive under modern theories of public nuisance.

An action to abate or enjoin a public nuisance is primarily the function of government or the governmental agency with jurisdiction over the activity involved or the public right or interest being threatened. Private citizens can bring an action to abate or recover damages for a public nuisance in two instances -- (1) where authorized by statute to sue as a representative of the general public or the affected class or (2) where they have suffered damages from the activity "different in kind" from that suffered by the general public. The requirement that a private plaintiff demonstrate damages different in kind (as opposed to different in degree) to maintain a public nuisance action has been the source of much controversy and criticism by legal commentators. The rationale for the special injury rule was to prevent a multiplicity of lawsuits seeking to represent the public to remedy a single wrong against the public interest; however, by requiring the private plaintiff to establish an injury different in kind from the general public, the rule created a private attorney general whose interest was, by definition, different from the interests of the public whose rights the private plaintiff sought to represent.

In an era of environmental activism, the special injury standing rule prohibited or limited public nuisance actions by environmental groups. As a result, environmental interests persuaded Congress to include provisions for citizen suits as part of the major environmental legislation of the 1970's and 1980's, including the Surface Mine Control and Reclamation Act (SMCRA), the federal Water Pollution Control Act (Clean Water Act or CWA), the federal Clean Air Act (Clean Air Act or CAA), the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response,
Compensation, and Liability Act (CERCLA). Citizen suit provisions were specifically designed to address the limitations of common law public nuisance actions by environmental groups, primarily standing, and to facilitate a private attorney general approach to enforcement of environmental laws. The practical result of the citizen suit provisions is that private actions are specifically authorized by federal legislation (and their state counterparts) and provide standing to address most mining related activities or property uses that traditionally constitute a public nuisance, at least where the plaintiff seeks only abatement or compliance.

In the judicial arena, standing requirements were liberalized in Sierra Club v. Morton, where the Supreme Court held that the Sierra Club could challenge an administrative action as the representative of its members so long as the members had suffered injury in fact. The Sierra Club argued that it had standing based on its special interest in preserving the wilderness; however, the Court refused to recognize a naked interest in the subject matter or a generalized concern about the challenged activity as sufficient to confer standing. Instead, it held that a federal plaintiff was required to show that it has suffered actual injury to have standing, rejecting any requirement for special injury. The Sierra Club v. Morton injury in fact test has found limited application in state public nuisance cases where a private plaintiff seeks only equitable relief (abatement of the nuisance) and, thus far, has found no acceptance where damages are sought. However, it has nearly abolished standing restrictions for citizen suits based on federal environmental legislation that address many of the public nuisance issues faced by the coal industry.

The enactment of federal environmental legislation raised the issue of whether common law nuisance actions were preempted. Federal preemption of state law is dependent on congressional intent, either express or implied. None of the major environmental acts explicitly preempt common law actions; therefore, the issue is whether state law was inconsistent with the purposes of those acts. In a series of cases decided by the Supreme Court, it was held that common law nuisance actions to abate water pollution are not preempted by the Clean Water Act. In Illinois v. City of Milwaukee, Illinois sought leave to file an original jurisdiction action, alleging that pollution from inadequately treated sewage and other sources dumped into Lake Michigan by Milwaukee and other Wisconsin cities constituted a public nuisance. The Court declined to accept jurisdiction because the action was not between two states but held that the action arose under the laws of the United States for federal question jurisdiction purposes. Here, the Court recognized for the first time a federal common law nuisance cause of action that preempted state common law public nuisance because of the interstate character of the dispute and the need to avoid conflicting resolutions of issues arising in connection with the pollution of navigable waters.

Shortly thereafter, the Clean Water Act was significantly amended and expanded. In the district court, Milwaukee argued unsuccessfully that the 1972 amendments preempted the federal common law of nuisance. The district court held that the dumping of sewage by the Wisconsin cities threatened both the drinking water supply and the recreational use of the lake and created a public nuisance. It ordered the elimination of raw sewage overflows and imposed more stringent effluent limitations on the sewage treatment plants that were required by their National Pollution Discharge Elimination System (NPDES) permits.

On appeal, the Seventh Circuit affirmed the district court on the preemption issue, but held that courts should be guided by the policies and principles of the Clean Water Act in applying the federal common law of nuisance to fashion a remedy in water pollution cases. It modified the injunction to comply with statutory effluent limitations, but retained the timetable established by the district court for the elimination of raw sewage overflows. On return to the Supreme Court, that Court held that the 1972 Amendments to the Clean Water Act preempted federal common law nuisance suits relating to water pollution. Although the
Act contained a savings clause for state actions, the Court found that the extensive regulatory scheme for the control and elimination of interstate water pollution had so completely occupied the field that there remained no basis for a federal court to impose more stringent requirements based on federal common law. The Supreme Court reserved the question of whether state common law nuisance actions were also preempted.\(^{(39)}\)

On remand, the Seventh Circuit held that state common law nuisance actions were also preempted, relying heavily upon the Supreme Court's holding in *Illinois v. City of Milwaukee* that state common law nuisance actions were preempted by federal common law, at least with regard to pollution of interstate waters.\(^{(40)}\) The Supreme Court declined to review the case for the third time.

A few years later the Supreme Court addressed the issue in *International Paper Co. v. Ouellette*.\(^{(41)}\) In *Ouellette*, Vermont landowners on Lake Champlain's north shore filed a class action suit in Vermont state court alleging that discharges into the lake from International Paper's south shore plant in New York state constituted a private nuisance. After removal to federal court, International Paper moved to dismiss on the grounds that state common law nuisance claims had been preempted. The district court denied the motion.\(^{(42)}\) After the Second Circuit affirmed, the Supreme Court granted *certiorari* and held that a private nuisance suit could be maintained in federal court in the plaintiff's state against an out-of-state defendant but that the nuisance law of the source state must be applied.\(^{(43)}\)

The Court determined that the Clean Water Act's savings clause evidenced congressional intent to preserve some state causes of action with respect to water pollution. However, it held that the application of Vermont law had been preempted because, if affected states were permitted to impose separate discharge standards on a single point source, it would undermine the Clean Water Act's permit system and effluent limitations and would interfere with the purposes of the legislation.\(^{(44)}\) The rationale in *Ouellette* is equally applicable to nuisance actions involving other environmental legislation\(^{(45)}\) but there are no reported decisions specifically addressing the preemptive effect of SMCRA.

The scope of preemption of nuisance actions by comprehensive legislative efforts is still evolving. For the moment, private nuisance actions based upon the law of the source state are still available to plaintiffs. The effect upon public nuisance actions is even more uncertain. The regulatory requirements of state primacy programs effectively establish state policies and guidelines for permissible standards of activity within the scope of the regulated conduct and presumably address the public interest.\(^{(46)}\)

As nuisance law doctrines developed, courts recognized that the same activity could constitute both a public nuisance and a private nuisance and permitted private plaintiffs to pursue an action for damage to their property interests, regardless of whether the offending activity also interfered with public rights.\(^{(47)}\) The special injury standing requirement and the effect of statutory regulation of a given activity remain a part of public nuisance law but have lost much of their importance due to citizen suit provisions. These provisions have expressly permitted private plaintiffs to pursue actions to enforce compliance with environmental legislation without regard to special injury standing limitations, with violations of the statute being used to define the offending activity as a nuisance *per se*. For most practicing attorneys, public nuisance actions have become primarily an adjunct cause of action to citizen suits and private nuisance actions.

**§ 14.03. Private Nuisance.**

A private nuisance is an unreasonable interference with another's interest in the private use and enjoyment of land.\(^{(48)}\) At early common law, the rule of *sic utere tuo ut alienum non laedas* (so use your own as not to injure that of another) provided for strict liability in nuisance for any interference with property use.\(^{(49)}\)
However, with industrialization and population growth, the rule of *sic utere tuo* represented a substantial impediment to economic development. A manufacturer or railroad that interfered with adjacent landowners' use and enjoyment of their property -- by generating noise, vibrations, dust, smoke, or fumes -- was subject to substantial liability for damages and even to abatement by injunction. The pressures of industrialization and population growth resulted in the revision of nuisance law to accommodate the inherent tension between the right of beneficial use of one's own property and the right against interference by others' use of their property, both viewed as natural rights incident to property at early common law.

Traditional nuisance doctrine accorded priority to the right against interference. To accommodate economic development and the realities of an industrial society, courts began to restrict the zone of absolute protection against interference and to emphasize the property owner's right to beneficial use. This evolved into the doctrine of reasonable use, which imposed nuisance liability only if a defendant's conduct or use was unreasonable under all of the circumstances. Circumstances to be considered include the reasonableness of the damage or interference suffered by plaintiff, the locality where the conduct occurred and the social utility of defendant's use. Reasonableness of the interference or harm was tested by the "ordinary plaintiff" standard; if defendant's activities would not have caused substantial discomfort to an ordinary person, there was no liability to a plaintiff who happened to be peculiarly susceptible or sensitive. This reasonable use standard resulted in a defendant-oriented test for nuisance liability that reflected the needs of an expanding industrial society, at the cost of protection of a property owner's right to quiet enjoyment of land.

Current principles of nuisance law were clarified and reshaped by the *Restatement of Torts*. The *Restatement* eliminated much of the confusion then surrounding nuisance law by defining private nuisance as a tort based on the nature of the interest invaded rather than the nature of the conduct giving rise to liability. Nuisance was expanded to encompass all claims arising from "a non-trespassory invasion of another's interest in the use and enjoyment of land." The invasion giving rise to liability can be either "intentional and unreasonable" or "unintentional and otherwise actionable under the rules governing liability for negligent or reckless conduct or for abnormally dangerous conditions or activities." With regard to intentional invasions, liability for private nuisance arises from the nature of the interest invaded, not from the nature of defendant's conduct. The act of the defendant is defined as the tort of private nuisance when viewed in the context of the interest invaded, i.e., plaintiff's property rights, but as the tort of negligence, for example, when viewed from the context of the actor's conduct. Thus, defendant's conduct can constitute two separate torts, which are to be identified, not distinguished.

It was in the area of intentional invasions, which include most nuisance cases, that the *Restatement* effected a fundamental change in nuisance law. It adopted what is now known as the "balance of utilities" test to determine whether an invasion is unreasonable. The balance of utilities test employs a utilitarian analysis to determine the reasonableness of the invasion, weighing the harm to the plaintiff against the interests of society as a whole. This was a radical departure from the traditional natural rights doctrine of property. The factors considered relevant to determining the gravity of the plaintiff's harm and the utility of the defendant's conduct include the nature and extent of harm to the plaintiff, the social value of the interest invaded, the defendant's motives, the suitability of the conduct to the locality, and the cost or feasibility of prevention or avoidance.

The primary criticism of the *Restatement's* quantitative balance of utilities test was that an activity with sufficient social value was absolutely immune from liability for interference with the use and enjoyment of nearby land. The practical effect was to permit a defendant to appropriate surrounding land to facilitate its use without compensation. Commentators argued that, instead of granting absolute immunity, the social utility of an activity should only provide a conditional privilege, protecting the continuation of the activity or
facility, but subject to liability for damages. In the *Restatement (Second) of Torts*, the balance of utilities test was qualified by a provision imposing liability for damages "if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation." However, the requirement of compensation for severe harm regardless of social utility or due care was limited by the further qualification that it applies only if the payment of damages would not put the defendant out of business. The net effect of the *Restatement (Second)*'s approach to nuisance liability is that a plaintiff who qualifies under the balance of utilities test is entitled to either damages or an injunction; but even a plaintiff who fails that test may be entitled to damages if the harm is serious or severe (unless the financial burden of compensation would result in cessation of the activity or business). This approach to nuisance liability, which ultimately emphasizes social utility and economic efficiency, constitutes the majority view.

The balancing approach to liability is illustrated by the well known environmental nuisance case of *Boomer v. Atlantic Cement Co.* In *Boomer*, seven plaintiffs who owned property near a large cement plant filed suit seeking an injunction to prohibit operation of the plant and damages, claiming that dust, smoke, and blasting vibrations from the plant interfered with the use and enjoyment of their land. At trial, the defendant established that it had installed the most efficient pollution control devices available, the plant represented a $45 million dollar investment, and it employed 300 workers. The trial court found that the plant constituted a temporary nuisance and awarded damages based on the rental value of plaintiffs' property. However, it refused to grant an injunction, primarily because of the plant's importance to the local economy.

On appeal, the New York Court of Appeals reversed, holding that the plant constituted a permanent nuisance and plaintiffs were entitled to damages measured by the decline in market value of their property caused by the nuisance. The court noted that, while injunctions were the traditional remedy once a nuisance had been established, the defendant was already using state-of-the-art pollution control equipment and the only means to abate the nuisance was to close the plant. Noting the disparity of the economic consequences of the nuisance and of the injunction, the court further held that an injunction should issue, but would be vacated upon payment by defendant of permanent damages; at that time, defendant would obtain a "servitude on the land" to continue operation of the plant (maintenance of the nuisance).

The concept of reasonableness as applied to activities alleged to constitute a nuisance is always affected by the location of the activity and the property invaded. Courts have long recognized that a plaintiff who acquires property or lives in an industrial section, or a mining area, can expect a certain amount of interference associated with those activities. Yet, the majority of courts have rejected "coming to the nuisance" as a complete defense; instead, it is only a factor to be considered in determining the reasonableness of the harm suffered by plaintiff. Nevertheless, insofar as the presence of the defendant's activity may be an important factor in determining the essential character of the area, a court is more likely to conclude that the locality was suitable to defendant's activity when the plaintiff arrived after the defendant had commenced operations.

The Supreme Court of Arizona addressed this issue in *Spur Industries, Inc. v. Del E. Webb Development Co.*, one of the more famous and controversial cases in nuisance law. Spur Industries operated a large cattle feedlot in an area that had been predominantly agricultural at the time the feedlot was built. Del E. Webb Development Co., a large real estate developer, acquired 20,000 acres of land in the vicinity and began to develop Sun City, a retirement community. By 1960, there were 450 to 500 houses in the development. Development continued but, in time, odors from the feedlot made lots in that portion of the development impossible to sell. At the time suit was filed, Spur was feeding nearly 30,000 head of cattle, which generated about 1,000,000 pounds of manure per day. In 1967, Webb filed suit alleging that the feedlot constituted a public nuisance because, notwithstanding good feedlot management and good
housekeeping practices, the flies and odors produced an annoying and unhealthy situation to the residents of Sun City. The trial court granted an injunction prohibiting operation of the feedlot.

On appeal, the Supreme Court of Arizona agreed that the feedlot constituted both a public nuisance and a private nuisance to the citizens of Sun City. It further held that Webb had standing to bring an action to abate a public nuisance and affirmed the judgment permanently enjoining operation of the feedlot, based primarily on health implications. However, the court reviewed "coming to the nuisance" cases and expressed the opinion that, if Webb was the only one affected, the court would have no hesitation in denying it any relief because it had purchased the property with full knowledge of the existence of the feedlot. It held that the permanent injunction was proper only because of the damage and health risk to the people who had purchased lots in Sun City from Webb. But then the Court went on to find that the only reason that Spur was forced to shut down was because Webb had developed the area and brought people to the nuisance, to the foreseeable detriment of Spur. Therefore, it required Webb to indemnify Spur for the cost of moving or shutting down the feedlot, remanding the case for a determination of Spur's damages as a result of the permanent injunction.

The Spur Industries case had been both applauded and condemned. It is chiefly noteworthy because, while it applies the Restatement's balancing test to the determination of whether a nuisance existed, it deviates from the remedial structure by employing a novel "foreseeability" analysis to assess which remedy was appropriate. Although the holding in Spur Industries was specifically limited to its facts, it is interesting as an example of the flexibility that courts now exhibit in fashioning a remedy to redress nuisance appropriate to the circumstances. It also reflects the traditional balancing of equities incident to a determination of whether an injunction should be granted in any instance, which often get intermingled with the balance of utilities analysis in nuisance cases.

One of the most heavily litigated issues in nuisance disputes is whether the nuisance is temporary or permanent. The question arises primarily in the contexts of determining the applicable measure of damages and whether an action is barred by the statute of limitations.

Generally, the primary measure of damages for a temporary nuisance is the diminution in the value of the plaintiff's use during the continuation of the nuisance (i.e., the fair rental value), plus the cost of repair or mitigation and reimbursement for expenses. The measure of damages for a permanent nuisance is normally the diminution in the fair market value of the property caused by the nuisance. However, in some states, a plaintiff can also recover for personal injuries or damages, such as annoyance, discomfort, emotional distress, and impairment of health, proximately caused by the nuisance and, in a proper case, punitive damages. However, in Kentucky, a plaintiff cannot recover damages "for annoyance, discomfort, sickness, emotional distress, or similar claims for a private nuisance."

Application of the statute of limitations to nuisance actions has been particularly troublesome to courts and litigants. In Kentucky, both temporary and permanent nuisance claims are governed by a five year statute of limitations. However, the accrual of the cause of action is dependent upon the nature of the nuisance. If the nuisance is permanent, an action must be brought within five years of the date of completion of the structure or the creation of the condition that created the nuisance. If the structure is permanent, i.e., a factory or preparation plant, but some addition or alteration causes the nuisance, then the action accrues upon completion of the addition or alteration and must be brought within five years thereafter. It makes no difference that plaintiffs did not acquire their property until after the statute of limitations barred any nuisance claims to which the property might become subject. If the nuisance is temporary, the action must be commenced within five years of the date the injury occurred. Where the nuisance is continuing, but temporary, the plaintiff can bring the action more than five years after it began but can only recover for
damages sustained during the five years preceding the filing of the action. (84)

The determination of whether a nuisance is temporary or permanent has also caused difficulty. Ultimately it depends on the nature of the defendant's use or structure and whether its harmful effects can be abated by reasonably means. (85) Because an award of damages for permanent nuisance essentially confers on the defendant a license to continue the activity, courts tend to be reluctant to characterize nuisances as permanent. (86) It is generally held that a nuisance is temporary if it is intermittent and occasional or if the cause of the injury or its effects are capable of being remedied, removed, or abated. (87) Therefore, a temporary structure or use cannot constitute a permanent nuisance. Courts will assume that it can or will be abated at some future time. (88) The nuisance is permanent if the condition or activity causing injury is enduring and affects the property's value permanently. (89) Kentucky follows the somewhat unusual, but quite workable, rule, now codified, that a permanent structure or use constitutes a temporary nuisance if it can be changed, repaired, or remedied at reasonable expense to abate the nuisance. (90)

Liability for a nuisance is not limited to the person conducting the activity giving rise to the nuisance. (91) In the coal industry, coal lessors and companies employing independent contractors have been held liable for nuisances created by their lessees or contractors. (92)

In Green v. Asher Coal Mining Co., (93) the Kentucky Court of Appeals (then the highest court in the state) held that a land holding company that leased coal to others for development could be held liable for damages to adjoining property caused by conditions created by the strip mining operations of its lessee. The lessee operator had abandoned the mine without reclaiming the area. After a heavy rainfall, large quantities of loose dirt, rock, and coal were washed down the mountain, obstructing streams, causing flooding of plaintiff's land and depositing debris thereon. Although recognizing that a landlord is not normally liable for the negligent acts of its tenant, the court held that where the lessor expressly authorized the conduct or condition that caused the injury, or where it was foreseeable that the tenant would create the particular nuisance, the lessor would be liable. (94) The court also held that if the lease had terminated and the lessor had resumed possession of the property, failure to abate the nuisance created by his lessee would provide a separate basis for liability. (95)

In West v. National Mines Corp., (96) the West Virginia Supreme Court held that a coal company was liable to property owners for nuisance created by dust from a public road used by coal trucks to haul coal. National Mines employed four contract miners to mine its property. The coal was hauled to the preparation plant by independent truckers over an unpaved public road, six days a week, and often through the night. (97) The plaintiff's house adjoined the public road; dust created by the truck traffic was oppressive. West filed suit against National Mines and the four contract miners, alleging a nuisance and seeking an injunction requiring National either to cease hauling or to water the road to abate the dust. The trial court denied the injunction on the grounds that National Mines was not liable for the nuisance because none of its trucks or employees were directly involved in creating the nuisance and it was not liable for the acts of its independent contractors. It also held that the contract miners were not liable because the dust problems resulted from the use of a public road.

On appeal, the supreme court reversed, holding that unreasonable, negligent or unlawful use of a public road that interferes with the use and enjoyment of property abutting the road constitutes a private nuisance. (98) The court also held that National Mines was liable for the nuisance created by its independent contractors when the contractor was engaged in an activity authorized by it and the principal knew or should have known that the contractor's operations would create a nuisance. The court noted that it was not clear whether the truckers were independent contractors for National Mines at all. However, it held that National Mines
was a vertically integrated mining concern, had a "community of interest" in the activity creating the nuisance, and was, therefore, liable for any injury or interference resulting therefrom.

§ 14.04. Conclusion.

Although public nuisance law has not experienced the expansion predicted by environmental law commentators as an adjunct to citizens' suits, courts have demonstrated a willingness to expand concepts of private nuisance to provide a remedy for landowners, particularly residential landowners, who suffer inconveniences attributable to industrial expansion and mining. The balance of utilities test promulgated by the Restatement, and adopted by a clear majority of the eastern coal-producing states, is inherently site and circumstance specific, making the outcome of nuisance disputes often difficult to predict. However, the clear trend of recent nuisance decisions is to broaden nuisance liability to provide compensation to landowners inconvenienced by mining, industrial, or commercial uses. Conversely, there appears to be a growing reluctance to enjoin legitimate business operations that demonstrate good faith efforts to ameliorate the adverse impacts of their activities. The present uncertainty of result, coupled with courts' willingness to impose nuisance liability on landowners for nuisances arising from the activities of their lessees and on principals for the activities of their independent contractors, has increased the need for mining companies to anticipate and manage the potential nuisance liability attributable to their operations.


2. G. Calabresi & A.D. Malamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," 85 Harv. L. Rev. 1089 (1972). Zoning laws and land use restrictions are the most common expressions of governmentally imposed restrictions on land use. However, virtually all states declare certain uses of property to be unlawful, regardless of location, e.g., use for prostitution, gambling, unlicensed liquor sales, drug transactions, and other activities.

3. For example, a coal mining complex, which may be a source of noise, dust, and traffic, also provides jobs and an economic base for the affected community.


5. Prosser & Keeton at § 87; Restatement (Second) of Torts § 821A (Introductory Note) (1977).


There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all people and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for analysis of a problem; the defendant's interference with the plaintiff's interests in characterized as a "nuisance," and there is nothing more to be said.

W. Prosser & P. Keeton § 86, at 616.

7. For example, fugitive dust created by coal truck traffic or from the operation of a preparation plant may physically invade adjoining property, possibly supporting an action for trespass for specific instances of dust migration. However, the landowner's real complaint is the use or activity creating the dust and is more appropriately redressed in a nuisance action.

9. 1. Restatement (Second) of Torts § 821B (1977), which provides:

(1) A public nuisance is an unreasonable interference with a right common to the general public.

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience; or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.


11. 3. See Lewin at 298 n. 6.

12. 4. W. Holdsworth, A History of English Law 424 (1926). Blackstone stated that an action would lie for public or common nuisance only "where a private person suffers some extraordinary damage, beyond the rest of the King's subjects." W. Blackstone, Commentaries 220 (1768). See Restatement (Second) of Torts § 821B (1977).


14. 6. See, e.g., Hancock v. Terry Elkhorn Mining Co., Inc., 503 S.W.2d 710 (Ky. 1973) (action to enjoin hauling of overweight loads on state secondary highway and to require repair of highway by coal company).


16. It has been said that the citizen suit provisions are a tacit recognition by Congress that the executive branch often lacks either the resources or the will to prosecute polluters. See M. Tolbert, "The Public as Plaintiff: Public Nuisance and Federal Citizen Suits in the Exxon Valdez Litigation," 14 Harv. Envtl. L. Rev. 511, 522 (1990); B. Boyer & E. Meidinger, "Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws," 34 Buffalo L. Rev. 833, 835-44 (1985).


19. The Sierra Club sought an injunction to restrain federal officials from approving development of a ski resort in the Mineral King Valley of the Sequoia National Park on the grounds that it would adversely affect the aesthetics and ecology of the area. Accordingly, the Sierra Club's complaint was dismissed. However, the district court permitted it to file an amended complaint in accordance with the Supreme Court's opinion and to proceed with the action. Sierra Club v. Morton, 348 F. Supp. 219 (N.D. Cal. 1972).


22. 25. This limitation is consistent the Restatement (Second) of Torts § 821C(1) (1977), which retains the requirement for special injury (different in kind) to permit standing to maintain a public nuisance action for damages, but appears to contemplate more liberalized standing requirements for actions seeking only abatement. See Restatement (Second) of Torts § 821C(2)(c) and cmt. j (1977).

23. See, e.g., California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) (state law preempted when Congress evidenced intent to occupy field or when state law actually conflicts with federal law); Chevron USA, Inc. v. Hammond, 726 F.2d 483 (9th Cir. 1984), cert. denied, 471 U.S. 1140 (1985) (congressional intent is "touchstone" of federal preemption).


25. Id. at 103.


28. Id. at 164. Compliance with statutory effluent limitations or permit provisions was not recognized as a defense to a federal nuisance suit; departure from the standards of the Act in fashioning a remedy was, but only for compelling reasons.

30. 33 U.S.C. § 1365(e).


40. 32. City of Milwaukee v. Illinois, 731 F.2d 403 (7th Cir. 1984), cert. denied, 469 U.S. 1196 (1985). After reviewing the Clean Water Act's savings clause, the Court determined that Congress did not intend to preserve state common law nuisance suits for water pollution abatement because these suits would result in "chaotic confrontation between sovereign states." Id. at 414.


43. 35. Ouellette, 479 U.S. at 497-98. The Court also noted that, to the extent that a source state's conflict of law rules would require application of the affected state's substantive law to the nuisance action, those conflicts of law rules were also preempted. The source state's common law nuisance laws and standards are the only matters not preempted by the federal legislation.

44. 36. Id. at 492-98. The Court found that compliance with the nuisance laws of the source state was consistent with the structure of the Act because the states are permitted to enact more stringent effluent limitations than those imposed by the Clean Water Act. 33 U.S.C. §§ 1342(b)-(c) & 1371. The Court found that more stringent requirements by the source state could be established either by direct regulation or by application of the doctrine of nuisance.


46. 38. People v. New Penn Mines, Inc., 212 Cal. App. 2d 667 (Cal Int. App. Ct. 1963) (public nuisance action to abate toxic run-off from settling ponds and waste dumps preempted by state water pollution control legislation); Commonwealth v. Glen Alden Corp., 210 A.2d 256 (Pa. 1965) (public nuisance action to remove or extinguish burning coal refuse held preempted by state Air Pollution Control Act). But see, Brookhaven v. American Rendering, Inc., 256 A.2d 626 (Pa. 1969), holding that a specific savings clause incorporated in the legislation would prevent preemption of a common law nuisance action. See also, J.D. Lawlor, Annotation, Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665 (1974), indicating that a number of jurisdictions hold that common law actions are not preempted unless specifically provided, even in absence of savings clause.

47. 39. See, e.g., City of Monticello v. Rankin, 521 S.W.2d 79 (Ky. 1975) (odors from sewage disposal plant); Hancock v. Terry Elkhorn Mining Co., Inc., 503 S.W.2d 710 (Ky. 1973) (overweight coal trucks). In earlier times, courts tended to construe an activity as either a public nuisance or a private nuisance, but not as both. If defined as a public nuisance, a plaintiff unable to demonstrate standing was precluded from asserting a private nuisance action. This limitation has been eliminated for all practical purposes.


49. 2. See Lewin at 244.

50. 3. M. Horwitz, The Transformation of American Law, 1790-1860 74-76 (1977). Strict liability principles of early nuisance law were evaded by evolution of the doctrine of "statutory justification," which exempted mills, railroads, and other enterprises operated under franchise from the government from the reach of common law nuisance. These activities were deemed exempt from nuisance injunctions by virtue of their statutory authority to operate. Courts further held that they could not be held liable for damages in the absence of negligence.
51. 4. See Lewin at 251.

52. 5. Id.

53. 6. Id. at 257-58.

54. 7. Restatement of Torts (1939).


56. 9. Restatement of Torts § 822 (1939); Restatement (Second) of Torts § 821D (1977).

57. 10. Restatement (Second) of Torts § 822 (1977) provides:

One is subject to liability for private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

58. 11. See Restatement (Second) of Torts § 822, cmts. b & c (1977).

59. 12. Restatement (Second) of Torts § 825, cmt. c (1977), explains:

To be "intentional," an invasion of another's interest in the use and enjoyment of land, or of the public right, need not be inspired by malice or ill will on the actor's part toward the other. An invasion so inspired is intentional, but so is an invasion that the actor knowingly causes in the pursuit of a laudable enterprise without any desire to cause harm. It is the knowledge that the actor has at the time he acts or fails to act that determines whether the invasion resulting from his conduct is intentional or unintentional. . . . He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct.

See Curry Coal Co. v. M.C. Arnoni Co., 266 A.2d 678 (Pa. 1970) (continued dumping of sludge into landfill after notification that sludge was infiltrating underlying coal mine held intentional).

60. 13. Restatement (Second) of Torts § 826 (1977), which provides as follows:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.


62. 15. See Lewin at 264.


65. 18. Restatement (Second) of Torts § 826(b) (1977).

66. 19. A majority of the major eastern coal producing states have expressly adopted the Restatement (Second) formulation of

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant, and

(a) the particular use or enjoyment interfered with is well suited to the character of the locality; and

(b) the actor's conduct is unsuited to the character of that locality.


68. 21. Restatement (Second) of Torts § 831 (1977) provides:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant, and

(a) the particular use or enjoyment interfered with is well suited to the character of the locality; and

(b) the actor's conduct is unsuited to the character of that locality.

See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926), where Justice Sutherland observed, "Nuisance may be merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard."


70. 23. Restatement (Second) of Torts §§ 827(d), 828(b), 831 (1977). See e.g., Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146 (Ky. 1965).


73. 26. The court held that Webb suffered special injury as a result of the loss of sales caused by odors from the feedlot.


As in the case of any other tort, the plaintiff may recover his damages in an action at law. In such an action the principal elements of damages are the value attached to the use or enjoyment of which he has been deprived, or -- which often amounts to a measure of the same thing -- the loss of the rental or use value of the property for the duration of a temporary nuisance . . . and in addition the value of any personal discomfort or inconvenience which the plaintiff has suffered, or of any injury to health or other personal injury sustained by the plaintiff, or by members of his family so far as they affect his own enjoyment of the premises, as well as any reasonable expenses which he has incurred on account of the nuisance.


81. 34. Lynn Mining Co., Inc. v. Kelly, 394 S.W.2d 755 (Ky. 1965); Kentucky W. Va. Gas Co. v. Matny, 279 S.W.2d 805 (Ky. 1955).

82. 35. Louisville Ref. Co. v. Mudd, 339 S.W.2d 181 (Ky. 1960).

83. 36. Louisville & Jefferson Co. Air Bd. v. Porter, 397 S.W.2d 146 (Ky. 1965); Louisville Ref. Co. v. Mudd, 339 S.W.2d 181 (Ky. 1960).

84. 37. Lynn Mining Co., Inc. v. Kelly, 394 S.W.2d 755 (Ky. 1965); Hawkins v. Wallace, 384 S.W.2d 507 (Ky. 1964).


86. 39. See, e.g., Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970); McCabe v. City of Parkersburg, 79 S.E.2d 87, 93 (W. Va. 1953) ("In all cases of doubt respecting the permanency of the injury inflicted by a nuisance, the courts are inclined to favor the right to bring successive actions.").


88. 41. Lynn Mining Co., Inc. v. Kelly, 394 S.W.2d 755 (Ky. 1965).


(1) A permanent nuisance shall be any private nuisance that:

(a) Cannot be corrected or abated at reasonable expense to the owner; and

(b) Is relatively enduring and not likely to be abated voluntarily or by court order.

(2) A permanent nuisance shall exist if and only if a defendant's use of property causes unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the fair market value of the claimant's property to be materially reduced.

91. 44. Restatement (Second) of Torts § 838 (1977) provides:

A possessor of land upon which a third person carries on an activity that causes a nuisance is subject to liability for the nuisance if it is otherwise actionable, and

(a) the possessor knows or has reason to know that the activity is being carried on and that it is causing or will an unreasonable risk of causing the nuisance, and

(b) he consents to the activity or fails to exercise reasonable care to prevent the nuisance.


93. 46. 377 S.W.2d 68 (Ky. 1964).

94. 47. The court said,

We are limiting our decision to the particular facts alleged in plaintiffs' complaint. We are not deciding that a landowner is necessarily liable for the acts of the lessee who engages in strip mining. However, we cannot close our eyes to the fact that an operation of this nature is obviously disruptive and destructive of substantial surface areas. While the landowner may consent to having his own land practically destroyed, he may not knowingly expose neighboring lands to injury likely to ensue therefrom and claim immunity from wrongdoing by virtue of a lease. He must act with reasonable prudence, and proof relating to the nature of the operation, the topography of the land, and the likelihood of injury may support a finding of liability.

Id. at 73.

95. 48. See Restatement (Second) of Torts § 839 (1977).


97. 50. The opinion does not report whether the truckers were employed by National Mines or by the contract miners.

98. 51. Accord, Shannon v. Missouri Valley Limestone Co., 122 N.W.2d 278 (Iowa 1963); Hancock v. Terry Elkhorn Mining Co., 503 S.W.2d 710 (Ky. 1973); Wales Trucking Co. v. Stallcup, 474 S.W.2d 184 (Tex. 1971). Contra, Jacobson v. Crown Zellerbach Corp., 539 P.2d 641, 644 (Ore. 1975) ("public policy dictates that no cause of action lies against an individual member of the public who uses the public way for travel in conformance with the rules laid down therefor."); Blumenthal v. City of Cheyenne, 186 P.2d 556, 572 (Wyo. 1947) ("so far as . . . the consequences complained of flow naturally and normally from the conduct of the traffic under proper authority, in a reasonable manner and with due regard for the rights of others, one who conceives he has been injured can have no redress.").