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Limitations Considerations

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Toxic-tort claims often arise from chemical releases or contamination and are thus combined with environmental claims, typically involving property damages and cleanup costs. The Texas limitations period associated with the most commonly asserted toxic-tort claims — negligence, nuisance and trespass — is two years.

Determining when the claims arose and whether the discovery rule can be applied successfully are frequently counsel's key concerns with these tort claims. When toxic-tort claims are combined with environmental claims, the limitations considerations become significantly more complex, meriting careful study. Moreover, the interplay between damages recoverable under these different claims and their distinct limitations aspects can be important.

- *Characterizing the claim.* One critical distinction is that the accrual date for claims of damages to property depends on whether the injury is *permanent* or *temporary*. Permanent injury claims accrue when the injury first occurs or is discovered, and they must be brought within two years. Temporary injury claims accrue anew upon each subsequent injury, and the plaintiff can recover all damages from the two years prior to date of suit. An injury is considered "permanent" if it can be presumed to continue indefinitely and is regularly occurring. In contrast, an injury is "temporary" if it is of limited duration and can be described as occasional or intermittent.

A critical component of this calculation is determining the certainty of future injuries. For example, if an injury has only happened a few isolated times and is unlikely to continue for the foreseeable future, that injury would likely be considered "temporary." Conversely, if the injury occurs frequently and is likely to continue at such a frequency that a jury can come to a reasonably certain

conclusion about the injury's impact on future land values, that injury is "permanent."

In *Schneider National Carriers Inc., et al. v. Bates, et al.* (2004), the Texas Supreme Court found that dirt and soot emitting from a facility was a "permanent" injury. And in *R.R. Yalmanachili v. Mousa* (2010), Houston's 14th Court of Appeals found damage from severe rain runoff to be a "permanent" injury despite the fact that rain, by its nature, is sporadic and unpredictable.

The consequence is that, under particular circumstances, it may behoove a plaintiff to paint an injury as "temporary" to avoid limitations problems. Of course, the benefit on the limitations issue can be outweighed by the restricted damages allowed: If the injury is "permanent," the plaintiff may recover the lost market value of the impacted land; if temporary, the plaintiff can only recover for repairs and lost rents.

- *Statutory considerations.* The situation is further complicated if a plaintiff proffers statutory environmental claims. For example, the Texas Solid Waste Disposal Act, which allows recovery of cleanup costs, is silent with regard to a limitations period for a private cost-recovery action. Thus, the four-year default limitations period probably applies. The discovery rule may toll accrual of a claim under the act if the injury is inherently undiscoverable and objectively verifiable. However, Texas law is clear that the action accrues and the statute of limitations begins to run only upon discovery

of the first actionable injury and *not* on the date when the extent of the damages to the land are fully ascertainable.

A federal Superfund claim, on the other hand, has two limitation periods depending on whether the action is remedial or



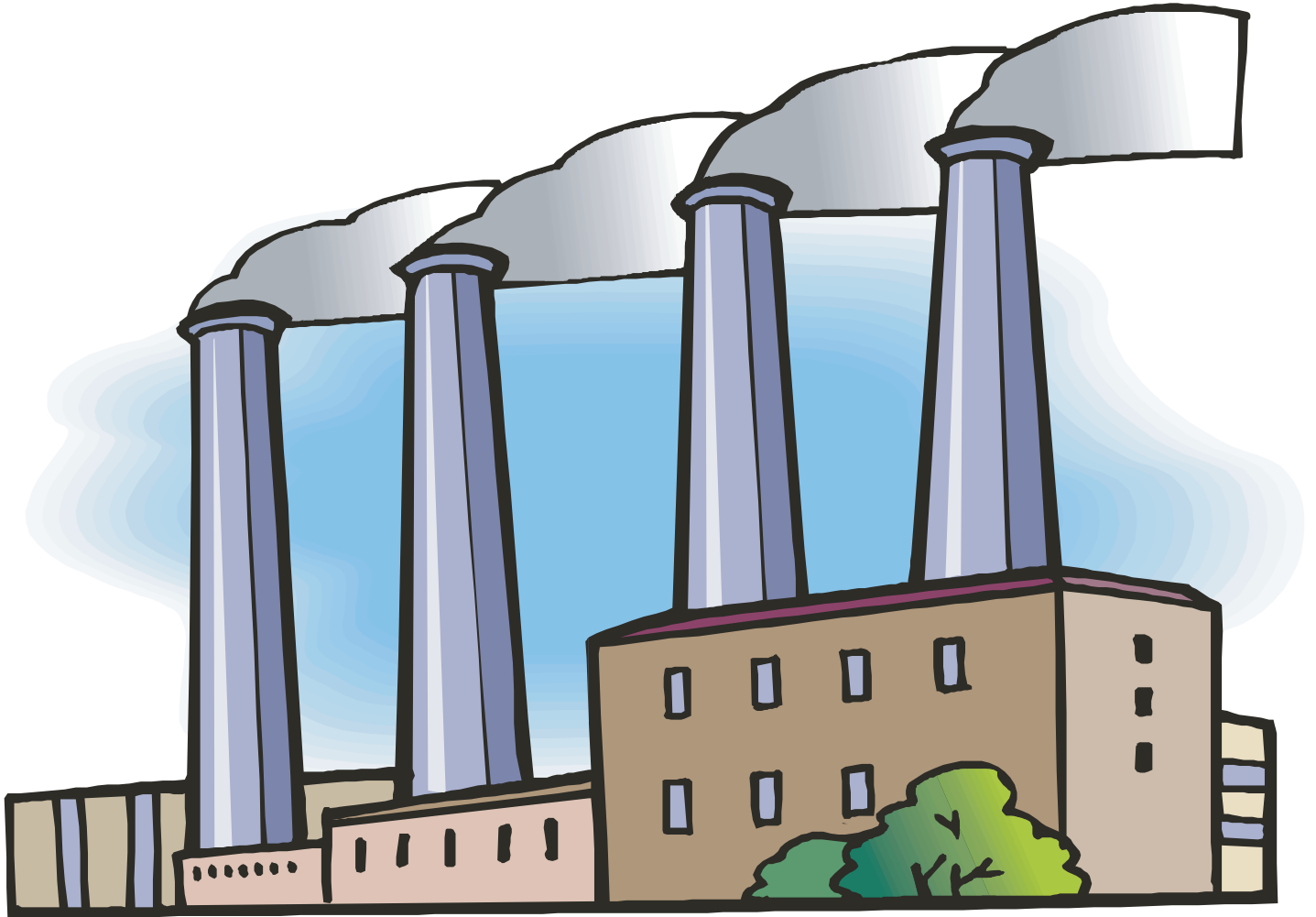
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removal in nature. “Although cases on this issue tend to be highly fact-specific, certain principles emerge . . . removal actions generally are immediate or interim responses, and remedial actions are permanent responses,” the 5th U.S. Circuit Court of Appeals wrote in *Geraghty and Miller Inc. v. Conoco Inc.* (2000). Under 42 U.S.C. §9613(g) (2) (A), a cost-recovery claim based upon a removal action must be filed within three years after “completion” of this removal action. Under 42 U.S.C. §9613(g) (2) (B), for a remedial action, a claim must be brought “within 6 years after initiation of on-site construction of the remedial action.”

An example may help illustrate these points. Imagine a plume of historic contamination that migrated onto a plaintiff’s property and caused exposures to vapors as well as cleanup costs when excavation for a building expansion begins. But, it turns out that building occupants had smelled odd odors for several years, especially in the underground garage. The defense likely will assert limitations against the personal-injury claims — two years, with the theory that the plaintiff should have known about possible exposure due to the historic odors.

The plaintiff also is likely to pursue damages for lost value — a two-year limitations period would apply, although if that looks problematic, he can argue intermittent “temporary” damages due

to water table fluctuations. But, the plaintiff has not yet completed the study or clean-up work, so he adds Solid Waste Disposal Act (SWDA) and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) claims. These claims add security for the clean-up cost recovery, per the triggers mentioned above.

The major battles will be over the discovery rule issues on the personal-injury and SWDA claims, the temporary or permanent nature of the property damages, and whether the work performed is removal or remedial under CERCLA. The savvy plaintiff can affect the outcome of the limitations battles by the timing and type of work done, while the savvy defendant must carefully develop the factual record to win the limitations fight. For example, deposition testimony of the plaintiff’s employees and contractors can establish a lot about historic odors — if they were consistently noticed for more than four years, the property damage and SWDA claims, as well as the personal-injury claims, can be time-barred.

To successfully argue their case at trial, plaintiffs and defense counsel must strategically consider all relevant limitations periods, as well as the damages allowed under the tort and statutory schemes, when shaping the claims and early discovery for these combined toxic-tort and environmental cases. 