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NORTON ROSE FULBRIGHT

Nuisance cases against energy companies in Texas, Pennsylvania, and other areas with significant or developing oil and gas exploration

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For over a century, courts and commentators have openly expressed their frustration with the amorphous doctrine of nuisance. It has been ridiculed as a "'wilderness' of law,"[1] an "impenetrable jungle,"[2] and a "mongrel" doctrine.[3] Professor Seavey, reporter for the First Restatement of Torts, noted that nuisance doctrine sometimes appeared to be a "mystery, smothered in verbiage."[4] Dean Prosser, reporter for the Second Restatement of Torts, candidly called it "a sort of legal garbage can."[5] Half a century later, Justice Blackmun searched "in vain . . . for anything resembling a principle in the common law of nuisance."[6]

In Texas, Pennsylvania, and other jurisdictions with significant oil and gas development, things have fared no better. At the turn of the twentieth century, the Texas Supreme Court concluded that nuisance must turn on whether a defendant's use is "reasonable," but it could not "furnish a more definite rule."[7] In the 1970s, the Court frankly stated that "[t]here is a general agreement that [nuisance] is incapable of any exact or comprehensive definition, and we shall attempt none

[1] Horace Wood, The Law of Nuisances iii (3d ed. 1893).

[2] William L. Prosser, The Law of Torts 592 (3d ed. 1964).

[3] F.H. Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 480 (1949).

[4] Warren A. Seavey, *Nuisance, Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 984 (1952) (internal quotations and citation omitted); *see* Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVT'L AFF. L. REV. 89, 89 (1998) (summarizing Seavey's critiques).

[5] William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942) [hereinafter *Nuisance Without Fault*]; *see* Halper, *supra* note 4, at 89 (summarizing Prosser's critiques).

[6] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting).

[7] *Gulf, Colo. & Santa Fe Ry. Co. v. Oakes*, 58 S.W. 999, 1001 (Tex. 1900).

here."[8] In the early 2000s, the Court noted that numerous Texas nuisance cases were completely irreconcilable because they were decided without a standard of reference.[9]

Likewise in Pennsylvania, the amalgam of conduct that juries have determined fall under nuisance law illustrate its breadth (or overbreadth) as a cause of action.[10]

Energy companies increasingly have been the target of nuisance suits alleging that drilling operations were a nuisance to nearby residents.[11] But saying something is a nuisance case, as

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[8] *Wales Trucking Co. v. Stallcup*, 474 S.W.2d 184, 186 (Tex. 1971).

[9] *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 274-75 (Tex. 2004) [hereinafter *Schneider*], holding modified on other grounds, *Gilbert Wheeler Inc. v. Enbridge Pipelines (E. Tex.), L.P.*, 449 S.W.3d 474 (Tex. 2014).

[10] *See, e.g.*, *Twp. of Bedminster v. Vargo Dragway, Inc.*, 253 A.2d 659, 663 (Pa. 1969) (excessive noise from racetrack in residential area); *Harford Penn-Cann Serv., Inc. v. Zymblosky*, 549 A.2d 208, 209-10 (Pa. Super Ct. 1988) (dust from truck stop was sufficient to constitute private nuisance where health problems to employees resulted); *Fairview Twp. v Schaefer*, 562 A.2d 989, 992 (Pa. Commw. Ct. 1989) (nuisance to keep a tiger in a residential area even though the owner had an exotic wildlife permit), app. den. 574 A.2d 73 (Pa. 1989).

[11] Some cases are pending in the trial court. *See Gardiner v. Crosstex N. Tex. Pipeline, L.P.* (Tex. Dist. Ct. Denton Cnty. May 8, 2008) (remanded for new trial on June 24, 2016); *Lipsky v. Range Res. Corp.*, No. CV-11-0798 (Tex. Dist. Ct. Parker Cnty. June 20, 2011) (remanded to trial court after appeal to the Texas Supreme Court, 460 S.W.3d 579); *Dueling v. Devon Energy Corp.*, No. 12-0843 (Tex. Dist. Ct. Parker Cnty. July 3, 2012) (removed to federal court and pending in the Northern District of Texas as No. 4:14-cv-325-Y); *Murray v. EOG Res., Inc.*, DC-15-008865 (Tex. Dist. Ct. Dallas Cnty. Aug. 5, 2015) (transferred to Tarrant Cnty. on Apr. 13, 2016 and pending as No. 342-284983-16).

Others are pending in various stages of appeal. *See Ely v. Cabot Oil & Gas Corp.*, No. 3:09-02284-JEJ-MCC (M.D. Pa. Nov. 9, 2011) (motion for new trial granted by trial court); *Dow v. Atmos Energy Corp.*, No. 2011-30097-211 (Tex. Dist. Ct., Denton Cnty., Feb. 28, 2011) (consolidated and pending in the Texas Supreme Court); *Town of DISH v. Atmos Energy Corp.*, No. 2011-40096-362 (Tex. Dist. Ct. Denton Cnty., Feb. 28, 2011) (same); *Sciscoe v. Atmos Energy Corp.*, No. 2011-70084-431 (Tex. Dist. Ct., Denton Cnty., Feb 28, 2011) (same). A great many others have been dismissed, often pursuant to a settlement agreement. *See Scoma v. Chesapeake Energy Corp.*, No. 2010-00292 (Tex. Dist. Ct. Johnson Cnty. June 1, 2010) (removed to federal court as No. 3:10-cv-01385-N before dismissal); *Ruggiero v. Aruba Petroleum, Inc.*, No. CV-10-10-801 (Tex. Dist. Ct. Wise Cnty. Oct. 18, 2010); *Knoll v. Gulftex Operating, Inc.*, No. 2010-10345-16 (Tex. Dist. Ct. Denton Cnty. Oct. 22, 2010); *Heinkel-Wolfe v. Williams Prod. Co., LLC*, No. 2010-40355-362 (Tex. Dist. Ct. Denton Cnty. Nov. 3, 2010); *Sizelove v. Williams Prod. Co.*, No. 2010-50355-367 (Tex. Dist. Ct. Denton Cnty. Nov. 3, 2010); *Mitchell v. EnCana Oil & Gas*, No. 3:10-cv-02555 (N.D. Tex. Dec. 15, 2010); *Smith v. Devon Energy Prod. Co., L.P.*, No. 3:11-cv-00196-B (N.D. Tex. Jan. 31, 2011) (transferred to the Eastern District of Texas as No. 4:11-cv-00104-RAS-DDB and dismissed on plaintiffs' motion); *Harris v. Devon Energy Prod., L.P.,* 4:10-CV-00708-MHS-AM (E.D. Tex. Apr. 8, 2011) (dismissed with prejudice by 500 F. App'x 267, 269 (5th Cir. 2012)); *Mann v. Chesapeake Operating, Inc.*, No 2011-008274-3 (Tex. Cnty. Ct. Tarrant Cnty. Nov. 8, 2011); *Gutierrez v. Chesapeake Operating, Inc.*, No 2011-008274-3 (Tex. Cnty. Ct. Tarrant Cnty. Nov. 10, 2011); *Beck v. ConocoPhillips Co.*, No. 2011-484 (Tex. Dist. Ct. Panola Cnty. Dec. 1, 2011); *Strong v. ConocoPhillips Co.*, No. 2011-487 (Tex. Dist. Ct. Panola Cnty. Dec. 2, 2011); *Finn v. EOG Res.*, No. C2013-00343 (Tex. Dist. Ct., Johnson Cnty., July 30, 2013); *Alexander v. Eagleridge Operating, LLC*, No. 14-01430-393 (Tex. Dist. Ct. Denton Cnty. Feb. 28, 2014) (nonsuited without prejudice); *Roth v. Cabot Oil & Gas Corp.*, No. 3:12-cv-00989-JEJ-MCC (M.D. Pa. May 14, 2012) (claims for inconvenience and discomfort dismissed on Jan. 30, 2013;

the Texas Supreme Court recently noted, "does not tell you much."[12] A variety of things have generated nuisance allegations against energy companies, such as bright lights on drilling rigs, vibrations from drilling, odor from condensate tanks, exhaust fumes from trucks, dust from construction, and noise from compressor stations.[13] Some cases allege personal injury; others

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final judgment signed Dec. 12, 2013); *Whiteman v. Chesapeake Appalachia, LLC*, No. 5:11-cv-00031-FPS (N.D. W. Va. Feb. 23, 2011) (originally filed in Circuit Court of Wetzel Cnty., W. Va., Dec. 23, 2010) (stipulation to dismissal of claims including nuisance); *Andre v. EXCO Res., Inc.*, No. 5:11-cv-00610-TS-MLH (W.D. La. Apr. 15, 2011) (class action settlement); *Ginardi v. Frontier Gas Servs., LLC*, No. 4:11-cv-0420-BRW (E.D. Ark. May 17, 2011) (dismissed pursuant to settlement following denial of class certification); *Tucker v. Sw. Energy Co.*, No. 1:11-cv-0044-DPM, consolidated with *Berry v. Sw. Energy Co.*, No. 1:11-cv-0045-DPM (E.D. Ark. May 17, 2011) (settled and dismissed with prejudice Aug. 29, 2012); *Scoggin v. Cudd Pumping Servs., Inc.*, No. 4:11-cv-00678-JMM (E.D. Ark. Sept. 12, 2011) (stipulation of voluntary dismissal without prejudice filed on June 10, 2013); *Smith v. Sw. Energy Co.*, No. 4:12-cv-00423 (E.D. Ark. July 11, 2012) (dismissed for lack of subject matter jurisdiction on May 13, 2013); *Pruitt v. Sw. Energy Co.*, No. 4:12-cv-00690 (E.D. Ark. Nov. 2, 2012) (same, on May 14, 2013); *Scoggin v. Sw. Energy Co.*, No. 4:12-cv-763 (E.D. Ark. Dec. 7, 2012) (dismissed without prejudice on May 23, 2013).

A few have reached final judgment. *See Marsden v. Titan Operating, LLC*, No. CV-11-0842 (Tex. Dist. Ct. Parker Cnty. July 27, 2011) ($18,000 judgment; reversed and take-nothing judgment rendered on appeal, 2015 WL 5727573); *Crowder v. Chesapeake Operating, Inc.*, No. 2011-008169-3 (Tex. Cnty. Ct. Tarrant Cnty. Nov. 9, 2011) ($20,000 award, vacated pursuant to settlement agreement after appeal); *Anglim v. Chesapeake Operating, Inc.*, No. 2011-008256-1 (Tex. Cnty. Ct. Tarrant Cnty. Nov. 9, 2011) (defense verdict, vacated pursuant to settlement agreement after appeal); *Parr v. Aruba Petroleum, Inc.*, No. 2011-01650-E (Tex. Cnty. Ct. Dallas Cnty. Mar. 18, 2011) ($2.9m judgment; reversed and take-nothing judgment rendered on appeal, 2017 WL 462340); *Cerny v. Marathon Oil Corp.*, No. 13-05-00118-CVK (Tex. Dist. Ct. Karnes Cnty. May 21, 2013) (summary judgment in favor of defendants affirmed on appeal, 480 S.W.3d 612).

[Disclosure: Mr. Mazzone and Mr. Stewart are counsel for Aruba Petroleum in the *Parr* case, Mr. Mazzone was counsel for Aruba in the *Ruggiero* case, and Haynes & Boone is counsel for Enbridge in the case consolidated from the *Dow*, *Town of DISH*, and *Sciscoe* cases. Mr. Dillard and Ms. Brogdon are counsel for EOG Resources in the *Murray* case and for Cabot Oil & Gas in the *Ely* case. Ms. Brogdon was also counsel for EOG Resources in the *Finn* case and for Cabot Oil & Gas in the *Roth* case.]

[12] *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, No. 15-0049, 2016 WL 3483165, at *1 (Tex. June 24, 2016) [hereinafter *Crosstex*].

[13] *See Gardiner*, *supra* note 11 (noise from compressor station); *Ruggiero*, *supra* note 11 ("[N]oxious fumes, vapors, odors, waste, and hazardous materials" from gas operations); *Dow*, *Town of DISH*, and *Sciscoe, supra* note 11 (noise, lights, odors, and chemical particulates emanating from compressor stations and dehydrators); *Parr*, *supra* note 11 (sounds, lights, and smells from the drilling of gas wells, the production of gas, and the storage of condensate); *Mann*, *Crowder*, *Anglim*, and *Gutierrez*, *supra* note 11 (noises from operations and vehicles and "substances" releases into the air from gas wells); *Dueling*, *supra* note 11 ("[E]xcessive noise, truck traffic, lights, and noise from the drilling and gas well operations and burn off"); *Marsden*, *supra* note 11 (noise, odor, and dust from compressor station, truck traffic, and truck pump); *Cerny*, *supra* note 11 (traffic, dust, noise, odors and chemical emissions from oilfield operations); *Alexander*, *supra* note 11 (air emissions and loud and constant noises from drilling and operation of wells); *Knoll*, *supra* note 11 (odors, contaminated water, headaches, and nosebleeds from well and compressor station); *Heinkel-Wolfe*, *supra* note 11 (water and air contamination from nearby drilling operations); *Sizelove*, *supra* note 11 (personal injuries from drilling operations and compressor stations); *Hallowich v. Range Res. Corp.*, No. 2010-3954 (Pa. Ct. Com. Pl. May 27, 2010) (groundwater contamination and truck traffic associated with natural gas drilling); *Armstrong v. Chesapeake*

allege only property damage. Some claim intentional behavior; some claim negligent behavior; others only claim that the condition was out-of-place with its surroundings. Given the muddled state of nuisance law, this article first outlines the history of nuisance law to give context to the present confusion. With that historical context in mind, it then discusses modern private nuisance in Texas and Pennsylvania, with reference to other jurisdictions having significant oil and gas development—what it is, what it is not, and a host of issues surrounding recent nuisance cases.

I. History

Nuisance law is ancient. Its roots go back to at least the early thirteenth century.[14] So too does the confusion surrounding the term.[15] The term "nuisance" means only "hurt, annoyance, or

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Appalachia, LLC, No. 10-cv-000690 (Pa. Ct. Com. Pl. Oct. 27, 2010) (groundwater contamination from natural gas drilling); *Hagy v. Equitable Prod. Co.*, No. 10-c-164 (Jackson Cnty. Cir. Ct. Oct. 26, 2010), removed to S.D. W. Va., No. 2:10-cv-01372 on Dec. 10, 2010) (groundwater contamination from natural gas drilling causing neurological symptoms); *Bidlack v. Chesapeake Appalachia, LLC*, No 3:11-cv-00129-ARC (M.D. Pa. Jan. 19, 2011) (groundwater contamination from natural gas drilling, fear of future illness); *Otis v. Chesapeake Appalachia LLC*, No. 3:11-cv-00115-ARC (M.D. Pa. Jan. 18, 2011) (same); *Kamuck v. Shell Energy Holdings HP, LLC,* No. 4:11-cv-01425-MCC (M.D. Pa. Aug. 3, 2011) (groundwater and surface contamination from hydraulic fracturing, increased traffic, noise, and dust); *Teel v. Chesapeake Appalachia*, No. 5:11-cv-00005-FPS (N.D. W. Va. Jan. 6, 2011) (foul smell, soil contamination from natural gas drilling, damage to grass, trees, plants); *Whiteman v. Chesapeake Appalachia, LLC*, No. 5:11-cv-00031-FPS (N.D. W. Va. Feb. 23, 2011) (soil contamination and groundwater contamination from natural gas drilling); *Baker v. Anshutz Exploration Corp*., No. 6:11-cv-06119 (W.D.N.Y. Mar. 9, 2011) (groundwater and soil contamination from natural gas drilling, loss of use of land, fear of developing cancer); *Strudley v. Antero Res. Corp.*, No. 2011-cv-2218 (Denver Cnty. Mar. 23, 2011) (air and groundwater contamination from natural gas drilling, loss of quality of life, loss of use and value of property); *Beckman v. EXCO Res., Inc.*, No. 5:11-cv-00617-TS-MLH (W.D. La. Apr. 18, 2011) (groundwater contamination and loss from property market value "stigma" from natural gas drilling); *Andre v. EXCO Res., Inc.*, No. 5:11-cv-00610-TS-MLH (W.D. La. Apr. 15, 2011) (same); *Ginardi v. Frontier Gas Servs., LLC*, No. 4:11-cv-0420-BRW (E.D. Ark. May 17, 2011) (air, soil, and groundwater contamination from compressor and transmission stations); *Berry v. Sw. Energy Co.*, No. 1:11-cv-0045-DPM (E.D. Ark. May 17, 2011) (groundwater, soil, and air contamination from natural gas drilling); *Scoggin v. Cudd Pumping Servs.*, No. 4:11-cv-00678-JMM (E.D. Ark. Sept. 12, 2011) (air contamination from hydraulic fracturing).

There have also been numerous nuisance cases alleging groundwater contamination caused by various drilling-related activities. *See Scoma*, *Mitchell*, *Smith*, *Harris*, *Lipsky*, *Beck*, *Strong*, *Murray*, *Ely*, and *Roth*, *supra* note 11; ; *Hallowich, Armstrong, Hagy, Bidlack, Otis, Kamuck, Baker, Strudley, Beckman, Andre, Ginardi, Berry*, and *Scoggin*, *supra* this note. In several cases, plaintiffs claimed that drilling caused increased seismicity, which in turn caused structural damage to their property. *Finn*, *supra* note 11.

[14] C.H.S. FIFOOT, HISTORY & SOURCES OF THE COMMON LAW: TORT & CONTRACT 7 (1949) (tracing the roots of nuisance doctrine and noting that by "the early years of the thirteenth century cases of nuisance were not uncommon; but there had been no attempt at generalization"); FOWLER V. HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, HARPER, JAMES & GRAY ON TORTS § 1.23, at 90–91 [hereinafter HARPER] ("The recognition of nuisance as tort goes back at least to the thirteenth century . . . .").

[15] Professor Winfield, for example, began his history of nuisance as a tort by stating that "[i]t would clear the ground if we could start with a definition of nuisance, but it has been truly said that it is not a term

inconvenience."[16] In its infancy, it described "interferences to servitudes" (such as easements) "or other rights to the free use of land."[17] Early nuisance cases were brought under the old writ system and provided civil relief for invasions not covered by a writ of trespass; that is, invasions of property that did not directly cross the property's boundary.[18]

Nuisance therefore originally connoted a connection to property, but from the outset it was unclear if nuisance dealt with property rights, personal rights, or both.[19] This vagueness plagued early definitions in much the same way as it plagues modern ones.[20] To the extent nuisance had any discrete historical meaning, it denoted an infringement of the use and enjoyment of property—much like private nuisance today.[21]

The term, however, became even more unbound through "a series of historical accidents."[22] The first of these is the parallel development of a "catch-all low-grade criminal offense" also called "nuisance"—now generally referred to as public nuisance, to distinguish it from private nuisance.[23] By the mid-thirteenth century, this broad offense included "obstructed highways, lotteries, unlicensed stage-plays, and a host of other rag ends of the law" which involved

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capable of exact definition, and, considering its historical origin, we should be astonished if it were." P..H. Winfield, *Nuisance as a Tort*, 4 CAMB. L.J. 189, 189 (1931).

[16] 3 William Blackstone, Commentaries *216.

[17] W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 86, at 617 (5th ed. 1984) [hereinafter PROSSER & KEETON]; *see* FIFOOT, *supra* note 14, at 3-11.

[18] FIFOOT, *supra* note 14, at 7; PROSSER & KEETON § 86, at 617.

[19] Winfield, *supra* note 15, at 189–90 (noting this confusion likely began with the thirteenth century writings of Henry de Bracton); *see also* FIFOOT, *supra* note 14, at 3 (stating that nuisance was "concerned more or less intimately with incidents of property" but cautioning that a "student of legal history [should] take constant care not to apply to mediaeval conditions the current categories of tort, contract, and property.").

[20] Winfield, *supra* note 15, at 190 (1931) ("The best that Blackstone could do with it was 'anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another,' but even then he made more to say in another chapter entitled 'Of Disturbance' about matters, some of which are now regarded as nuisances."). More modern definitions have also attempted to straddle the line between property rights and personal rights. *See Crosstex* at *5 ("[T]he Court's early opinions" showed that a defendant "could be liable for harming a wide variety of the plaintiff's interests by, for example, harming the plaintiffs' health, offending the plaintiffs' 'senses,' or interfering with the plaintiffs' enjoyment of, or operation of a business on, their land."); THOMAS COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT (1880) (relegating nuisance to a late chapter for a discussion separate from wrongs affecting personal security or invasions of property); *cf. Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (noting the "vague and indeterminate" nature of nuisance concepts).

[21] Winfield, *supra* note 15, at 189-90.

[22] PROSSER & KEETON § 86, at 617.

[23] *Id.* § 87, at 617.

infringements of "public rights."[24] Put simply, the offense of public nuisance had nothing in common with private nuisance, except that both concern "annoyance or inconvenience."[25]

This might have been little more than a historical oddity if public nuisance remained strictly a criminal offense with no civil remedy. But that did not happen. By the sixteenth century, courts had recognized that an individual who suffered damage different than the rest of the public had a civil remedy for damages caused by the nuisance.[26] Adding to the confusion, public nuisances can also sometimes be both public and private nuisances.[27] The classic example is a brothel that is a public nuisance that may also interfere with the use and enjoyment of a neighbor's land in such a way as to also constitute a private nuisance.[28]

A second historical accident is that the term "nuisance" began to be used to refer to different legal concepts. Among other things, courts used nuisance to mean (1) a discrete cause of action, (2) the defendant's conduct or activity, and (3) the harm caused by the defendant's conduct or activity.[29] This loose usage partially may have stemmed from the loose definition itself.[30]

But changes in the English legal system also may have played a part in the varied usage of the term "nuisance." In its earliest form, a plaintiff could only bring a nuisance action through one of the specialized common law writs.[31] By the late fourteenth century, however, English law had recognized an action for "trespass on the case" which covered a variety of indirect harms.[32] For reasons mainly of convenience and strategy, trespass on the case entirely superseded the old writs that lawyers had used to bring nuisance cases.[33] Trespass on the case, however, was a sort of catch-all action. It covered a variety of "indirect" legal harms, such as fraud and

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[24] *Id*. (quoting Newark, *supra* note 3, at 482).

[25] Nuisance Without Fault at 411.

[26] PROSSER & KEETON § 87, at 618; BLACKSTONE, *supra* note 16, at *219–20 ("Yet this rule [of criminal liability] admits of one exception, where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance, in which case he shall have a private satisfaction.").

[27] PROSSER & KEETON § 87, at 618.

[28] RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (1979).

[29] *See id.*; *see also Crosstex* at *6.

[30] *See* Winfield, *supra* note 15, at 189–90. "Nuisance" has also been used in conjunction with the attractive-nuisance doctrine which deals with dangerous conditions that may lure children to trespass. *See, e.g.*, *Nuisance Without Fault* at 410. Attractive-nuisance is a concept entirely separate from private nuisance and public nuisance. *See id.*

[31] Winfield, *supra* note 15, at 190–92 (discussing the assize of nuisance, the action *quod permittat prosternere*, and the writ of trespass); *see also* BLACKSTONE, *supra* note 16, at *220-222.

[32] *See* Winfield, *supra* note 15, at 191–92.

[33] Winfield, *supra* note 15, at 191–92 (discussing the various factors which led to trespass on the case becoming the "sole Common Law action" for nuisance); *see also* PROSSER & KEETON § 87, at 617.

defamation—not just nuisance.[34] As a result of this shift away from the specialized nuisance writs, nuisance may have lost some of its character as a discrete form of action.[35]

Much later, history provided a third twist. From the thirteenth century to the mid-nineteenth century, the common law forms of action—such as trespass on the case and the various writs of trespass—determined the necessary elements of a case and the defenses and remedies available.[36] For a plaintiff, "choosing the wrong form of action was fatal to the case"—the plaintiff's case would be dismissed "even if facts were shown that would entitle recovery in another form."[37] Facing criticism that such formalism was unjust, jurisdictions across the county largely abandoned the common law forms of action and the writ system in the latter half of the nineteenth century.[38]

The initial shift away from the writ system was largely procedural, however. Under the new, more liberal pleading rules, a plaintiff was not required to specify the form of action, but the plaintiff still had to plead facts that constituted a cause of action that was recognized under the old system.[39] In other words, the rules of substantive law did not change—"[i]n determining what facts were necessary to state a cause of action, courts referred back to the common law writs."[40]

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[34] *See* Edwin E. Bryant, The Law of Pleading Under the Codes of Civil Procedure 7 (2d ed. 1899); 1 Am. Jur. 2d *Actions* § 23 (1994).

[35] This kind of usage problem arises in other areas of the law as well, so this ambiguity may not be a particular historical quirk of nuisance. *See, e.g.*, Robert L. Rabin, The Historical Development of the Fault Principle: A Reinterpretation, 15 GA. L. REV. 925, 932 (1981) (discussing ambiguity with regards to negligence).

[36] *See* Kenneth J. Vandevelde, A History of Prima Facie Tort: The Origins of a General Theory of Intentional Tort, 19 HOFSTRA L. REV. 447, 454 (1990).

[37] *Coastal Oil & Gas Corp. v. Garza Energy Trust*, 268 S.W.3d 1, 10 & n. 27 (Tex. 2008) [hereinafter *Coastal*] (quoting, in part, HARPER § 1.3, at 11).

[38] *Coastal* at 10 n.27 (quoting HARPER § 1.3, at 11); *see* Vandevelde, *supra* note 36, at 454-455. A few writs, such as the writ of certiorari, the writ of habeas corpus, and the writ of attachment, survived the transition with their names intact. For its part, Texas never recognized the common law forms of action. *Banton v. Wilson*, 4 Tex. 400, 406 (1849) ("All forms of action have been abolished in our system of jurisprudence, or rather they were never introduced."); *see Chevalier v. Rusk*, Dallam 611, 613 (Tex. 1844) (stating, before statehood, that "[u]nder our statutes, intended to simplify the rules of pleading, no distinctions as to forms of action are recognized").

[39] *See* Vandevelde, *supra* note 36, at 455; *Coastal* at 10 ("[U]nder our liberal pleading rules, unlike the common law, [plaintiff] was not required to specify which form [of action applied.").

[40] *See* Vandevelde, *supra* note 36, at 455 & n.58 ("'[T]he abolition of the common-law forms of pleading has not changed the rules of substantive law'" (quoting O.W. HOLMES, THE COMMON LAW 67 (M. Howe ed. 1963))); *Coastal* at 9-10 (rejecting argument that plaintiff lacked standing to sue for trespass because plaintiff had sufficiently pled an action for "trespass on the case")

The abolition of the common law forms of action, however, opened the door for courts and scholars to reimagine tort doctrine and to reorganize it around fault-based principles.[41] Parallel to the shift away from the writ system, negligence in the modern sense—a failure to exercise reasonable care—also entered the scene.[42] Although there is some disagreement among scholars, the majority view is that most torts—including nuisance—largely did not operate on fault-based principles prior to the advent of negligence.[43]

The shift to fault-based liability and its effect on nuisance (and other torts) is perhaps best exemplified by the treatises of the day. Early American torts treatises were generally organized around the age-old principle that "where there is a legal right, there is also a legal remedy."[44] For example, one 1880 torts treatise included chapters such as "Wrongs Affecting Personal Security," "Invasions of Rights in Real Property," and "Wrongs in Respect to Personal Property," and discussed the various causes of action—assault, false imprisonment, trespass, trespass to chattels, and so on—that remedied the invasions of those rights under those headings.[45] Consistent with the idea that torts did not operate based on fault, the treatise concluded that "the good or bad motive which influenced the action complained of is generally of no importance whatsoever."[46]

By the late 1880s, however, torts treatises began to take a different shape. Influenced by the writings of Oliver Wendell Holmes and other legal theorists, scholars began to organize their treatises around the notion that tort liability fell into three classes: intentional torts, negligence,

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[41] HARPER § 1.24, at 111 (arguing the "procrustean insistence on fault" in nuisance doctrine is misguided and "quite in keeping with the late-nineteenth-and early twentieth-century urge to reduce all tort liability to terms of fault")

[42] *See* Vandevelde, *supra* note 36, at 455 ("The conventional wisdom is that the emergence of modern negligence began with the 1850 decision in *Brown v. Kendall* by Chief Justice Lemuel Shaw of Massachusetts." (internal footnote omitted)).

[43] *See* Vandevelde, *supra* note 36, at 450 ("Until Holmes conceptualized American tort law, all of the classic intentional torts rested on strict liability."); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 29-30 & n.3 (1972) ("There is an orthodox view of the negligence concept to which I believe most legal scholars and historians would subscribe that runs as follows: Until the nineteenth century a man was liable for harm caused by his accidents whether or not he was at fault; he acted at his peril . . . [but] whether the period before the advent of the negligence standard is properly characterized as one of liability without fault remains, so far as I am aware, an unresolved historical puzzle."); *see also* HARPER § 1.24, at 111.

[44] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded"); *see also* BLACKSTONE, *supra* note 16, at *116 ("[S]ince all wrongs may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived."); *see also* Vandevelde, *supra* note 36, at 455-57 (also arguing that some early American tort treatises could hardly be called organized at all).

[45] COOLEY, *supra* note 20; *see* Vandevelde, *supra* note 36, at 455–57 (discuss early American tort treatises). This approach mirrored William Blackstone's organization in his Commentaries on the Laws of England, published in 1765. *See* Vandevelde, *supra* note 36, at 455–57.

[46] COOLEY, *supra* note 20, at 830.

and strict liability torts.[47] This fault-based liability system did not jettison the rights-and-remedies model, however; it supplemented it.[48] So, for example, an 1887 treatise still addressed rights-and-remedies such as "Personal Wrongs," "Wrongs to Person, Estate, and Property generally," and "Wrongs to Property."[49] But grafted on top of the rights-and-remedies model was a requirement of fault. "Personal Wrongs," such as assault, battery, and false imprisonment, were only actionable if they were intentional; "Wrongs to Person, Estate, and Property generally" were only actionable if the actor was negligent; and "Wrongs to Property," such as trespass to land or chattels, were strict liability torts.[50] For the first time treatises spoke of fault as a requirement—unless a tort was a strict liability tort, fault was now an explicit element. This is the basic model that survives to the present day.[51]

Troublesome as always, nuisance did not fit cleanly into the new fault-based approach. One early treatise lumped nuisance in with negligence.[52] Another placed nuisance under strict-liability torts.[53] By the time the First Restatement of Torts was published in 1939, the prevailing

[47] *See, e.g.*, F. POLLOCK, THE LAW OF TORTS (1887). This shift is readily apparent in Melville Bigelow's torts treatise. *See* MELVILLE BIGELOW, ELEMENTS OF THE LAW OF TORTS: FOR THE USE OF STUDENTS, v-vi (1894) (discussing the organizational changes from the 1878 edition to address fault-based liability).

[48] Holmes took the reorganization a step further, but his views were not universally accepted. In an 1873 article, Holmes proposed the three classes of tort liability. Vandevelde, *supra* note 36, at 457-62. By 1894, Holmes proposed jettisoning the distinction between intentional torts altogether. *Id.* at 473–76. Under this approach, the modern intentional torts—assault, battery, false imprisonment, and so on—would no longer be considered discrete causes of action and would be reorganized under a general theory of intentional tort that paralleled the general theory of negligence. *See id.* Modern courts and scholars refer to this idea as "prima facie tort." *See* RESTATEMENT (SECOND) OF TORTS § 870 & cmt. a (1979).

While the Restatement and some courts have adopted "soft" versions of prima facie tort, Texas has rejected this theory of liability entirely. *See id.*; Vandevelde, *supra* note 36, at 477–95; *A.G. Servs., Inc. v. Peat, Marwick, Mitchell & Co.*, 757 S.W.2d 503, 507 (Tex. App.—Houston [1st Dist.] 1988, writ denied) ("[T]he adoption of such a cause of action [for prima facie tort is] a matter of public policy and is within the province of the Legislature, not the courts"); *see Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 717 (Tex. 2001) (noting that misassociation and confusion surrounding tortious interference torts "may have been due to, and were certainly exacerbated by, the concept of a prima facie tort that was being advanced [in the late nineteenth and early twentieth century]").

[49] POLLOCK, *supra* note 47, at 5–6.

[50] *Id.* at 5–8.

[51] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 6, cmt. a (1979). The *Palsgraf* case is a notable example of a court discussing both rights-and-remedies and fault-based liability. *See Palsgraf v. Long Island R. Co.*, 162 N.E. 99, 99 (N.Y. 1928) (Cardozo, J.) ("Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. Proof of negligence in the air, so to speak, will not do.").

[52] POLLOCK, *supra* note 47, at 5–8.

[53] BIGELOW, *supra* note 47.

view was that, unlike other torts, nuisance could be an intentional, negligent, or strict liability tort.[54] This tripartite division of nuisance survives to the present day.[55]

In Texas, Pennsylvania, and elsewhere, these three historical concepts—the development of public nuisance, the varied usage of the term, and the development of fault-based liability—all contributed to the development of modern nuisance doctrine. Predictably, they also created much confusion along the way—confusion that persists today.

II. Modern private nuisance

Both Texas and Pennsylvania—as well as other jurisdictions in oil and gas producing states including Colorado, West Virginia, North Dakota, Ohio and New York—have adopted Sections 821 and 822 of the Restatement (Second) of Torts, outlining the elements of nuisance. While these elements remain part of the nuisance inquiry in those jurisdictions, the Texas Supreme Court concluded in a recent opinion that, "[g]iven the long and storied history of nuisance law, it is not surprising that the courts and parties in this case have struggled to articulate the elements of [the plaintiff's] nuisance claim."[56] The decision, *Crosstex North Texas Pipeline v. Gardiner*, provides some much-needed clarification for how the concept of nuisance will now be applied in Texas, and while not binding in other jurisdictions with significant energy development, may serve as guidance such jurisdictions. But while *Crosstex* is perhaps the Texas Supreme Court's most comprehensive discussion of private nuisance to date, it does not answer every question—nor could it—and it is not binding on courts outside of the state.

This section outlines the general elements of nuisance law under the Sections 821 and 822 of the Restatement (Second) of Torts, which have been adopted by Texas and Pennsylvania courts, and examines some common issues that arise in connection with nuisance claims. We then describe how *Crosstex* addresses the historical "accidents" that have created much of the confusion surrounding nuisance. Finally, this section considers a few defenses in the nuisance context.

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[54] *See* RESTATEMENT (FIRST) OF TORTS § 822 (1939).

[55] *See e.g.*, RESTATEMENT (SECOND) OF TORTS § 822 (1979). Professor Keeton advocated for limiting private nuisance to intentional private nuisance in order to limit confusion—negligent nuisance and strict liability nuisance would be handled as simple negligence cases and strict liability cases. *See Crosstex* at *14 ("When Keeton took over the commentary, however, he abandoned the three-category approach because 'the utilization of the same label ['nuisance'] to describe all these types of actionable conduct brings about much confusion regarding when the conduct is actionable and what the defenses to such conduct should be.'" (quoting PROSSER & KEETON § 87, at 623). The Texas Supreme Court rejected Keeton's approach in *Crosstex*. *Id.*

[56] *Crosstex* at *26. *See supra*, note 12, for the full case citation.

A. Elements of a private nuisance case

To establish a claim for private nuisance in Texas,[57] Pennsylvania, and other jurisdictions that have adopted Sections 821 and 822 of the Restatement (Second) of Torts, a plaintiff must prove that the conduct at issue "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] For claims governed by jurisdictions adopting this definition, plaintiffs must prove (1) standing; (2) legal injury; (3) tortious conduct; (4) causation; and (5) actual damages. Each of these elements is discussed briefly below.

1. Standing. The plaintiff must have a legally cognizable interest in the property.[59]

Because nuisance is related to property rights, sometimes there is a question as to whether those without legal title—such as tenants or a property owner's family members—have any right to complain of a nuisance. Generally, they do. At one time, a plaintiff only had standing if he was the landowner. Courts have since relaxed the standing requirement so that generally "any interest sufficient to be dignified as a property right will support the action."[60] The modern standing requirements, however, still exclude those such as employees, customers, and the like.

Comment a to Section 821E of the Restatement (Second) of Torts limits nuisance claims to those who have "property rights and privileges in respect to the use and enjoyment of the land affected," that is, "legally protected interests."[61] However, this does not necessarily require that those asserting a nuisance claim are property ***owners***: they merely must have a legal right associated with the property at issue.[62]

In Texas and Pennsylvania, a right to occupy the property—which tenants and a property owner's family members have—is sufficient to give a plaintiff standing. The type of standing held by a plaintiff does, however, affect the plaintiff's remedy. In other words, a plaintiff's right

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[57] Despite discussing numerous aspects of Texas nuisance law in *Crosstex*, the court did not lay out a list of elements applicable to all nuisance claims. Therefore, even after *Crosstex*, it appears as though the elements of nuisance laid out in Sections 821 and 822 of the Restatement (Second) of Torts still apply.

[58] RESTATEMENT (SECOND) OF TORTS § 822 (1979); *see also Washak v. Moffat*, 109 A.2d 310, 314 (Pa. 1954).

[59] The Court did not expressly address standing in *Crosstex*, but the decision appeared to implicitly recognize standing as an element. *See generally Crosstex* (discussing "plaintiffs' property" numerous times). Many other decisions in Texas, Pennsylvania, and other jurisdictions recognize standing as an element. *See infra* notes 60-63, and accompanying text.

[60] PROSSER & KEETON § 86, at 617.

[61] RESTATEMENT (SECOND) OF TORTS § 821E, cmt. a (1979).

[62] *Id*.

determines the remedy. So while mere occupants of property may have standing to seek damages for personal injury, they generally cannot seek to recover permanent property damages.[63] However, there is some authority for the proposition that a mere occupant may, in certain circumstances, recover property damages without legal title.[64]

2. **Legal injury.** A plaintiff must show ***substantial*** interference of the use and enjoyment of property that caused ***unreasonable*** discomfort or annoyance to the plaintiff.[65]

There are not clearly delineated bounds on the types of interferences that may constitute a nuisance—"virtually any disturbance of the enjoyment of property may amount to a nuisance."[66] The interference may be physical damage to property, economic harm to property's market value, harm to the plaintiff's health, or psychological harm to the plaintiff's peace of mind in the use and enjoyment of their property.[67]

To constitute a nuisance under Texas law, however, the interference must be "substantial" and cause "unreasonable" discomfort and annoyance.[68] These conditions distinguish "nuisances" from "the petty annoyances and disturbances of everyday life."[69] However, unless the underlying facts are undisputed or reasonable minds cannot differ, these distinctions are

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[63] *See, e.g.*, *id*.; *id*. at cmt. b (the Restatement provision on nuisance "does not state the rules applicable in determining when a person's rights and privileges in respect to land constitute property rights and privileges" for purposes of standing in a nuisance suit, deferring instead to property law for that determination); *In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1480 (E.D. Pa. 1993) ("I hold that the only plaintiffs who have a sufficient interest in property to bring a private nuisance claim are [tenants], as they all leased space which was allegedly the subject of the private nuisance."); *Auchard v. Tenn. Valley Auth.*, No. 3:09-CV-54, 2011 U.S. Dist. LEXIS 30407, at *13 (E.D. Tenn. Mar. 22, 2011) (rejecting application of Section 821E and finding that "because [adult child who lived with parent landowners] has no property interest in the Chandler Lane tract and because her sole claim is a private nuisance claim for loss and enjoyment of the property, she has no standing to assert such a claim and [defendant] is entitled to summary judgment as a matter of law); *Hot Rod Hill Motor Park v. Triolo*, 293 S.W.3d 788, 790-91(Tex. App.—Waco 2009, pet. denied) (applying Section 821E and holding that adult child, who listed parents' address as his address and stayed there with some regularity but did not pay bills or taxes on the property, lacked standing to bring a private nuisance claim).

[64] *See New v. Khojal*, No. 04-98-00768-CV, 1999 WL 675448, at *3, *7 (Tex. App.—San Antonio, Aug. 31, 1999, no pet.) (standing for property damages claim where man lived in deceased mother's home for over a decade, paid for taxes and repairs, and believed himself to be the owner of the house after his mother died).

[65] *See Crosstex*. at *7–8.

[66] *Crosstex* at *8.

[67] *Id.*

[68] *Id*. at *7.

[69] *Id.*; *see also Kamuck v. Shell Energy Holdings GP*, No. 4:11-CV-1425, 2012 WL 1463594 (M.D. Pa., Mar. 19, 2012) (holding that while level of intrusion is typically a fact issue, plaintiff could identify only increased truck traffic and Pennsylvania courts have concluded traffic is too trivial to present a nuisance claim).

generally questions of fact—"the practical judgment of an intelligent jury" must decide "[t]he point at which an odor moves from unpleasant to insufferable or when noise grows from annoying to intolerable."[70]

Likewise in Pennsylvania, in order to constitute the legal cause of an invasion of an interest in property, plaintiffs must show that a defendant's conduct was a substantial factor in causing the harm to such interest.[71] Additionally, the harm alleged must be "significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose."[72] "Significant harm" is defined as "harm of importance" which, for private nuisance, must involve "real and appreciable invasion with the plaintiff's use or enjoyment of his land."[73] The harm suffered by a private nuisance plaintiff must be more than mere fear of harm or unease with a defendant's actions.[74] Additionally, the inability to sell land is not a private nuisance.[75]

While legal injury issues are generally questions of fact, the Texas Supreme Court clarified two important legal points in *Crosstex*: (1) the focus is on the unreasonableness of the interference's effect on plaintiff's comfort or contentment and not on defendant's conduct; and (2) the determination must be based on an objective standard of persons of ordinary sensibilities and not on the subjective response of any particular plaintiff.[76] In short, to show a legal injury of nuisance, a plaintiff need not prove the defendant's conduct was unreasonable, but he cannot rely on his own particular sensitivities.

[70] *Crosstex* at *20 (quoting *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012)).

[71] *Diess v. Pa. Dep't of Transp.*, 935 A.2d 895, 906-907 (Pa. Commw. Ct. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 433 (1979)).

[72] *Kembel v. Schlegel*, 478 A.2d 11, 14-15 (Pa. Super. Ct. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 821F (1977)).

[73] RESTATEMENT (SECOND) OF TORTS § 821F, cmt. c (1977).

[74] *Id*.; *Simmons v. Pacor, Inc.*, 674 A.2d 232, 236-239 (Pa. 1996) (damages for fear of injury or disease are not recoverable absent a physical manifestation of the injury or disease); *Wier's Appeal*, 74 Pa. 230 (Pa. 1873) (plaintiffs must establish private nuisance by clear and satisfactory proof of actually existing danger).

[75] *Golen v. Union Corp., U.C.O.-M.B.A., Inc.*, 718 A.2d 298, 299 (Pa. Super. Ct. 1998) (holding that inability to sell property was, by itself, insufficient to establish private nuisance because if court were to grant request for compensation, liability would attach any time property owner engaged in activity that ostensibly reduced surrounding property values).

[76] *Crosstex* at *8; *see also Kembel*, 478 A.2d at 14-15.

3. **Tortious conduct.** The plaintiff must prove that the defendant intentionally, negligently, or through an abnormally dangerous activity interfered with the plaintiff's use and enjoyment.[77]

The proper standards for culpable conduct—whether a nuisance is intentional, negligent, or subject to strict liability—have been at issue in a number of recent cases. *Crosstex* clarifies these standards in Texas, though it leaves unanswered questions as to strict liability nuisance. Strict liability nuisance may be a less viable claim in Pennsylvania courts given recent decisions finding that certain oil and gas activities are not subject to strict liability. Notably, some instructions in the Texas and Pennsylvania Pattern Jury charges on nuisance are now questionable in light of *Crosstex* and other case law.

To prove intentional nuisance, a plaintiff must establish that the defendant intentionally caused the interference, not just that the defendant intentionally engaged in the conduct that caused the interference.[78] Intent includes not only a desire to create an interference, but also knowledge that the interference is substantially certain to result.[79] Intent does not entail an inquiry into whether the defendant's conduct is unreasonable.[80] It is the condition created by the interference, *i.e.*, the effects of the conduct, rather than the defendant's conduct that must be unreasonable.[81]

Negligent nuisance operates on ordinary negligence principles.[82] To establish negligence, a plaintiff must show the existence of a legal duty, a breach of that duty, and damages proximately caused by it.[83] To establish breach, a plaintiff must show that the defendant did or failed to do what a person of ordinary prudence in the same circumstances would have done or not done, that is, a failure to take precautions against a risk apparent to a reasonable man, *e.g.*, to repair or abate a condition under his control.[84]

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[77] *See Crosstex* at *12–19; *see also* RESTATEMENT (SECOND) OF TORTS § 821E (1979).

[78] *Crosstex* at *16-17; RESTATEMENT (SECOND) OF TORTS § 821E & cmt. a thereto (1979).

[79] *Crosstex* at *16-17; *McQuiliken v. A & R Dev't Corp.*, 576 F. Supp. 1023, 1030-31 (E.D. Pa. 1983). For example, in *Aruba Petroleum, Inc. v. Parr*, No. 05-14-01285-CV, 2017 WL 462340, at *7 (Tex. App.—Dallas Feb. 1, 2017, no pet. h.), the court said that "the Parrs have not cited any evidence that Aruba knew who . . . made these complaints [about Aruba's conduct] or that they were specific to the Parrs or their property."

[80] *Id.*; *McQuiliken*, 576 F. Supp. at 1031.

[81] *Id.*; *McQuiliken*, 576 F. Supp. at 1031.

[82] *Crosstex* at *17-18; *Kleinknecht v. Gettysburg Coll*, 989 F.2d 1360, 1366 (3d Cir. 1993) (applying Pa. law).

[83] *Crosstex* at *17-18 (but also noting that, in addition to the ordinary negligence elements, there is a "unique element, which derives from the nature of the legal injury on which the plaintiff bases the claim, [of] the burden to prove that the defendant's negligent conduct caused a nuisance, which in turn resulted in the plaintiff's damages."); *Kleinknecht*, 989 F.2d at 1366.

[84] *Crosstex* at *17-18; *Kleinknecht*, 989 F.2d at 1366.

For culpability based on abnormal or out-of-place conduct, *i.e.*, *Rylands v. Fletcher* strict liability, the underpinnings are based on the notion that the defendant engaged in activity exposing others to a risk of harm from an accidental invasion under circumstances that justify allocating loss from such risk to the defendant even though the defendant acted with reasonable care.[85] In other words, the focus is on the nature of the risk rather than on the nature of the interference—"the mere fact that the defendant's use of its land is 'abnormal and out of place in its surroundings' will not support a claim for nuisance; instead, in the absence of evidence that the defendant intentionally or negligently caused the nuisance, the abnormal and out-of-place conduct must be abnormally 'dangerous' conduct that creates a high degree of risk of serious injury."[86]

Additionally, some instructions in the Texas and Pennsylvania Pattern Jury Charges are questionable in light of *Crosstex* and other case law. The Texas Pattern Jury Charge on intentional nuisance states that "intentionally" includes that the defendant "acted with intent with respect to the nature of his conduct."[87] As noted above, *Crosstex* explicitly rejects this definition of intent.[88] The Pennsylvania Pattern Jury Charge on "inherently dangerous [instrumentality/material/substance" does not include any statement regarding "abnormally 'dangerous' conduct."[89] As noted above, Pennsylvania requires such conduct to impose strict liability nuisance.[90]

Importantly, a Pennsylvania federal court recently held that hydraulic fracturing and associated natural gas drilling operations are not "abnormally dangerous" or "ultra-hazardous" activities

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[85] *Crosstex* at *18-19; *Kembel*, 478 A.2d at 14-15.

[86] *Crosstex* at *19, *26 (taking issue with the court of appeals' holding that the plaintiffs should have been allowed a trial amendment for an "abnormal and out of place" nuisance claim—there was no evidence in the record that the compressor station had engaged in the type of abnormally dangerous or ultra-hazardous conduct that would support such a cause of action); *Kembel v. Schlegel*, 478 A.2d at 14-15.

[87] Tex. PJC 12.2A ("'Intentionally' means that *Don Davis* acted with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it was the conscious objective and desire to engage in the conduct or the result.").

[88] *Crosstex* at *16-17; *see also Likes*, 962 S.W.2d at 503 (characterizing an intentional nuisance as a nuisance "inflicted by conduct which is intended to cause harm"); *City of Princeton v. Abbott*, 792 S.W.2d 161, 166 (Tex. App.—Dallas 1990, writ denied) ("An invasion is intentional if (1) the actor acts for the purpose of causing it, or (2) the actor knows that it is resulting or is substantially certain to result from his conduct."); *see also Aruba Petroleum, Inc. v. Parr*, No. 05-14-01285-CV, 2017 WL 462340, at *7 (Tex. App.—Dallas Feb. 1, 2017, no pet. h.) ("Evidence that [the defendant] intentionally engaged in the conduct that caused the interference is not sufficient to establish an intentional nuisance." (internal quotation marks omitted)).

[89] *See* Penn. PJC 13.90 ("[A person who] [A business that] [provides] [uses] an inherently dangerous [instrumentality/material/substance]…must use the highest standard of care, using every reasonable precaution to avoid injury to everyone lawfully in the area. If you find [name of defendant] did not use the highest standard of care, then you must find [name of defendant] negligent.").

[90] *Crosstex* at *18-19.

subject to strict liability.[91] The availability of strict liability nuisance is more of an open question in Texas, where *Crosstex* left open questions on the viability and scope of this theory,[92] and in Ohio, where courts seem willing to consider differences between hydraulic fracturing and other extraction activities before deciding whether strict liability could apply.[93]

4. Causation. A plaintiff must prove that the defendant's conduct was a legal cause of the interference with the plaintiff's use and enjoyment of the property.[94]

Like any other tort, nuisance claims require a showing of causation. Even a modicum of evidence of causation may be sufficient to send the question to the jury. For example, in *Ely v. Cabot Oil & Gas Corp.*, the plaintiffs claimed property damage from Cabot's natural gas drilling operations.[95] During trial, after the close of the plaintiffs' case-in-chief, Cabot moved for a directed verdict based on lack of evidence of causation, citing the lack of evidence showing a definitive pathway between Cabot's gas wells and the plaintiffs' water wells and the fact that plaintiffs had testified that they had experienced problems with their water before Cabot began drilling the gas wells at issue. The trial judge expressed "grave concerns" about the plaintiffs' proof of causation, but denied Cabot's motion without prejudice and allowed the plaintiffs' nuisance claims to be decided by the jury. The jury awarded plaintiffs approximately $4.25 million for their nuisance claims.[96] On March 31, 2017, the Court granted Cabot's motion for new trial on two separate grounds: (1) that the verdict was against the weight of the evidence, and (2) and misconduct by plaintiffs' counsel.[97] The Court "agree[d] with Cabot that the weaknesses in the plaintiffs' case and proof, coupled with serious and troubling irregularities in the testimony and presentation of plaintiffs' case – including repeated and regrettable missteps by [plaintiffs'] counsel in the jury's presence – combined so thoroughly to undermine faith in the jury's verdict that it must be vacated and a new trial ordered."[98] The Court further found that the

[91] *Ely v. Cabot Oil & Gas Corp.*, 38 F. Supp. 3d 518, 519 (M.D. Pa. 2014) (refusing to "take a step which no court in the United States has chosen to take, and decide hydraulic fracturing to be an ultra-hazardous activity that gives rise to strict tort liability . . . . Instead, courts consistently have found that claims for property damage and personal injury allegedly resulting from natural gas drilling operations are governed by the more traditional negligence principles.").

[92] *Crosstex* at * 19 (noting that the Court was only addressing strict liability nuisance "to the extent that [such] a claim exists in Texas.").

[93] *Boggs v. Landmark 4, LLC*, No. 1:12CV614, 2013 WL 944776 (N.D. Ohio Mar. 11, 2013) (declining to dismiss strict liability nuisance claim and noting that, in the context of hydraulic fracturing, factual development is necessary to decide whether defendants' activities were abnormally dangerous).

[94] *See id.* at *15.

[95] 38 F. Supp. 3d at 518.

[96] *See Ely v. Cabot Oil & Gas Corp.*, No. 3:09-02284-JEJ-MCC (M.D. Pa. Nov. 9, 2011) (Doc. 765).

[97] *See Ely v. Cabot Oil & Gas Corp.*, No. 3:09-02284-JEJ-MCC (M.D. Pa. Nov. 9, 2011) (Doc. 799).

[98] *Id*.

$4.24 million award "bore no discernable relationship to the evidence, which was at best limited."[99] At the time of this writing, a new trial has yet to be scheduled.

Two additional causation issues are discussed below: (1) whether a plaintiff may avoid medical causation requirements under a nuisance theory; and (2) whether a plaintiff may be required to comply with a "Lone Pine" case management order before discovery.

The first issue—whether a plaintiff may, under a nuisance theory, avoid medical causation requirements for personal injuries—has been litigated in two separate cases in Texas. In *Cerny v. Marathon Oil Corporation*, the plaintiffs claimed that Marathon's operations caused extensive property damage and noxious fumes, along with numerous physical ailments, including headaches, rashes, and nosebleeds.[100] The plaintiffs, however, disclaimed "disease" allegations and claimed to seek damages only for "discomfort."[101] Despite this disclaimer, the court granted Marathon's motion for summary judgment on grounds that the plaintiffs could not prove causation.[102] As to the plaintiffs' physical ailments, the court held that plaintiffs could not meet the medical causation requirements the Texas Supreme Court set forth in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, requiring a plaintiff to present reliable expert testimony that establishes general and specific causation, establishes dose, and rules out other potential causes.[103] The court of appeals affirmed the trial court's grant of summary judgment.[104]

In *Parr v. Aruba Petroleum, Inc.*, the plaintiffs claimed property damage from Aruba's operations, as well as physical ailments such as headaches, rashes, and nosebleeds.[105] Aruba moved for summary judgment, arguing—like Marathon in *Cerny*—that the plaintiffs could not meet *Havner*'s causation requirements. To avoid *Havner*, the Parr plaintiffs—like the Cerny plaintiffs—disclaimed "disease" allegations and sought damages only for "discomfort."[106] The court granted summary judgment in part but allowed plaintiffs to seek damages for injuries within the common knowledge and experience of a layperson.[107] The plaintiffs then presented a "toxic tort" case to the jury. The jury awarded plaintiffs approximately $2.9 million, including

[99] *Id*.

[100] *Cerny v. Marathon Oil Corp.*, No. 13-05-00118-CVK (Tex. Dist. Ct. Karnes Cnty. Aug. 14, 2014).

[101] *Id.*

[102] *Id*.

[103] *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

[104] *Cerny v. Marathon Oil Corp.*, 480 S.W.3d 612 (Tex. App.—San Antonio 2015, pet. denied).

[105] *Parr v. Aruba Petroleum, Inc.*, No. 11-01650-E (Tex. Cnty. Ct., Dallas Cnty. Apr. 22, 2014).

[106] *Id.* The Parr plaintiffs added their "disclaimer" to their petition before the Cerny plaintiffs, but the *Cerny* case reached final judgment before the *Parr* case.

[107] *Id.*

almost $300,000 for diminution in property value.[108] On appeal, the court reversed and rendered a take-nothing judgment but did not reach the causation issue.[109]

Second, "Lone Pine" orders, which have been litigated recently in Colorado and other jurisdictions, may be a viable discovery tactic in some jurisdictions.[110] In many cases, energy companies have attempted to obtain "Lone Pine" orders requiring toxic tort plaintiffs to provide evidence of injury, exposure, and causation before discovery—facts generally only obtainable by the plaintiff—or face dismissal.[111]

In *Strudley v. Antero Resources Corp.*,[112] a Colorado district court entered a "Lone Pine" order requiring plaintiffs to make a *prima facie* showing linking their alleged personal injuries to defendant's nearby oil and gas drilling.[113] In their lawsuit, the plaintiffs alleged that Antero's hydraulic fracturing operations contaminated their water well and caused a myriad of personal injuries.[114] When they failed to make a *prima facie* showing of any connection between Antero's activities and their injuries, the court dismissed the lawsuit with prejudice.[115] The Colorado Court of Appeals subsequently reversed the "Lone Pine" order and the dismissal order, holding that a "Lone Pine" order was inappropriate for a case that was not "any more complex or cost intensive than an average toxic tort case."[116] The Colorado Supreme Court agreed with the court of appeals, holding that the Colorado Rules of Civil Procedure do not allow a trial court to use a case management order such as a "Lone Pine" order, and remanded the case to the trial court.[117]

Although the Supreme Court of Colorado's decision forecloses the use of "Lone Pine" orders in state court cases in Colorado, the ruling is based on the unique language of Colorado Rule of Civil Procedure 16, which limits a trial court's discretion and has no parallel in Texas or

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[108] *Id.*

[109] *Aruba Petroleum, Inc. v. Parr*, No. 05-14-01285-CV, 2017 WL 462340 (Tex. App.—Dallas Feb. 1, 2017, no pet. h.)).

[110] In *Lore v. Lone Pine Corp.*, No. L33606-85 (N.J. Super. Ct. Law. Div., Monmouth Cnty., Jan. 1, 1986), the case from which these discovery control orders derive their name, the court ordered plaintiffs to provide specific documentation regarding each claim for personal injuries and information and reports supporting each individual plaintiff's claim for diminution of property value.

[111] *See, e.g. Schneider* at 268 (noting the trial court signed a "Lone Pine" order regarding plaintiffs' nuisance claims).

[112] *Strudley v. Antero Res. Corp.*, No. 2011-cv-2218 (Denver Cnty. Dist. Ct. Mar. 23, 2011).

[113] *Antero Res. Corp. v. Strudley*, 347 P.3d 149, 158-59 (Colo. 2015).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

Pennsylvania. Indeed, defendants have obtained "Lone Pine" orders in other jurisdictions,[118] although the timing of requesting one can affect a court's willingness to grant one.[119] "Lone Pine" orders "appear to be utilized most often in cases involving complicated legal and factual issues in complex mass tort and toxic tort litigation involving multiple parties,"[120] although their future viability may be in question.

[118] *See, e.g.*, *Roth v. Cabot Oil & Gas Corp*., 919 F. Supp. 2d 476 (M.D. Pa. 2013); *Morgan v. Ford Motor Co*., No. 06-1080 (JAP), 2007 U.S. Dist. LEXIS 36515, at *39-40 (D.N.J. May 17, 2007) (holding that, in a mass action, "[d]efendants are not entitled to file what amounts to a summary judgment motion without first allowing the party opposing the motion a chance to conduct discovery" and instead mandated that plaintiffs provide only "a simple statement from each plaintiff pursuant to Rule 26(a)(1) identifying the 'nature and extent of injuries suffered'" and also granted a request for the use of bellwether plaintiffs as a case management tool."); *Burns v. Universal Crop Protection Alliance*, No. 4:07-CV-535, 2007 U.S. Dist. LEXIS 71716, at *3 (E.D. Ark. Sept. 25, 2007) (granting a "Lone Pine" order before commencing discovery).

[119] *See, e.g.*, *Morgan*, 2007 U.S. Dist. LEXIS at *39-40*; Simeone v. Girard City Bd. of Educ.,* 872 N.E.2d 344, 352 (Ohio Ct. App., Trumbull Cnty. 2007) (overturning a trial court's grant of a Lone Pine order as an abuse of discretion because "the timing of the issuance of the 'Lone Pine' order ... [before discovery] effectively and inappropriately supplanted the summary judgment procedure" and shifted the usual burdens of proof onto the non-moving party; *Abrams v. Ciba Specialty Chem. Corp*., No. 08-68, 2008 U.S. Dist. LEXIS 86487, at *18 (S.D. Ala. Oct. 23, 2008) (declining to issue a Lone Pine order precisely because some discovery had already occurred: "Lone Pine orders are 'pre-discovery' orders. ... [T]he entry of a Lone Pine order is unwarranted [in this case because] the properties of each plaintiff have been tested for the presence of [the chemical substance] DDTr and defendants have been provided with the results.").

[120] *Roth v. Cabot Oil & Gas Corp*., 287 F.R.D. 293, 297 (M.D. Pa. 2012); *see also Acuna v. Brown & Root*, 200 F.3d 335, 339 (5th Cir. 2000) ("Lone Pine orders are designed to handle the complex issues and potential burdens on defendants and the court in mass tort litigation" and such orders "are issued under the wide discretion afforded district judges over the management of discovery under Fed. R. Civ. P. 16.").

5. **Actual damages.** A plaintiff must prove that the interference resulted in actual damages to the plaintiff.[121]

The general damages remedies for nuisance are fairly well defined. In general, for a temporary nuisance, the land owner may recover only lost use and enjoyment, *e.g.*, loss of rental value or possibly the cost of restoration.[122] If permanent, the plaintiff may recover lost market value, a value which reflects all property damages, including lost rents expected in the future.[123] The presumed highest and best use of land, against which damages are to measured, is its existing use.[124] Although generally the test in permanent injury is the market value before and after the injury, where there is no isolated event that caused the injury, the proper comparison may be of market value with and without the alleged nuisance.[125] Yet issues remain to be resolved.

One area of dispute is the possibility of damages for "annoyance and discomfiture" or "inconvenience and discomfort." Like many other areas of nuisance law, there is considerable

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[121] In light of the emphasis in *Crosstex* on the "legal injury" (or invasion of a legal right) aspect of nuisance, some may argue that actual damages are no longer an essential element. It is true that there is some authority for the general proposition that actual damages are not required, and nominal damages may be recovered, when a "plaintiff sues for damages for the invasion of a legal right, and fails to show on the trial any actual damage sustained." *See, e.g.*, *Ehlert v. Galveston, H. & S.A. Ry. Co.*, 274 S.W. 172, 174 (Tex. Civ. App.—Galveston 1925, writ dism'd w.o.j.). For example, actual damages are not an essential element for trespass claims. *See, e.g.*, *Meyers v. Ford Motor Credit Co.*, 619 S.W.2d 572, 573 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) ("The law is well settled that a trespasser is liable to the property owner even though there is no proof of actual damages in any specific amount.").

Despite the general proposition above and the Texas Supreme Court's emphasis in *Crosstex* on "legal injury," actual damages are likely still an essential element of a nuisance claim. First, nuisance is derived from trespass on the case, and the court has explained that a trespass on the case plaintiff "must prove actual injury" and is not entitled to nominal damages. *Coastal* at 11. Second, without actual damages, a nuisance claim should logically fail to meet the legal injury requirements—that the interference is substantial and unreasonable. *See Crosstex* at *8 ("Only a substantial interference that has unreasonable effects constitutes the kind for which the defendant should be liable in damages.") (internal quotations and citations omitted); *Trinity Portland Cement Co. v. Horton*, 214 S.W. 510, 511 (Tex. Civ. App.—Amarillo 1919, writ dismissed w.o.j.) (stating that nominal damages are not available for nuisance because "[t]he gravamen of the action is the injury"); Thomas W. Merrill, *Trespass, Nuisance, & the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 18 (1985) ("Failure to show actual damages in nuisance . . . usually results in the denial of all relief (because of the failure to satisfy the 'substantial harm' requirement for liability).").

[122] *Crosstex* at *21; *Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 8 (Pa. Super. Ct. 1982); *Bumbarger v. Walker*, 164 A.2d 144, 150 (Pa. Super. Ct. 1960).

[123] *Id.*

[124] *Id.*

[125] *Id.* One issue currently being litigated in Texas is the scope of injunctive relief available. In *Lazy R Ranch, L.P. v. ExxonMobil Corp.*, 456 S.W.3d 332 (Tex. App.—El Paso 2015, pet. granted), the trial court awarded injunctive relief which would require the defendant to incur substantial remediation costs. On appeal to the Texas Supreme Court, petitioners and amici have argued that the trial court's injunction essentially allowed plaintiffs' an end-around the fair market value cap for permanent damages. Petitioners have asserted that the remediation costs are over 100,000 times the market value of the land.

conflicting authority on the scope of these kinds of damages, and it is unclear whether and how these damages might interact with other categories of damages, such as mental anguish.

In Pennsylvania, nuisance plaintiffs may recover for "personal annoyance, inconvenience and discomfort" in addition to damages for loss of use and enjoyment of the property.[126] Such damages are "wholly within the sound discretion of the jury" and are not addressed in the Pennsylvania pattern jury charge.[127]

Texas law is less defined in this area, and some authority even suggests that non-physical "annoyance and discomfiture" is not an injury that allows an award of separate damages.[128] Because annoyance and discomfiture damages were not pled in *Crosstex*, the Court there declined to address "the scope of these damages or determine if they are available for either temporary nuisance, permanent nuisance, or both."[129]

Damages for inconvenience and discomfort may be recoverable under both a negligence theory and a nuisance theory. In *Houston*, the plaintiffs brought a claim for negligence, but not nuisance. While the court ultimately determined that inconvenience and discomfort damages were not permissible because of deficient pleadings, the court implied that, were the damages specifically plead, they would be allowed under negligence. [130]

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[126] *Noerr v. Lewistown Smelting & Refining, Inc.*, 60 Pa. D. & C.2d 406, 458 (Pa. Ct. Com. Pl. 1964); *Evans v. Moffatt*, 160 A.2d 465, 473 (Pa. Super. Ct. 1960) ("The additional award was for the personal annoyance and discomfort plaintiffs suffered – not merely loss of use and enjoyment.").

[127] *Noerr*, 60 Pa. D. & C.2d at 458.

[128] *See Vestal v. Gulf Oil Corp.*, 235 S.W.2d 440, 441 (Tex. 1951) (construing case law to state that additional damages are only allowed for "damages to health or physical discomfort"). Rather, in some instances, these damages seem to be treated as a "loss of enjoyment" and are considered part of property damages. *See Bates*, 147 S.W.3d at 269 n.5 (stating *Vestal* held "award for discomfort and loss of enjoyment was not claim for personal injuries."); *Brooks v. Chevron USA Inc.*, No. 13-05-029, 2006 Tex. App. LEXIS 4479, at *22 n.9 (Tex. App.—Corpus Christi May 25, 2006, pet. denied) (citing *Vestal* for the proposition that "symptoms of discomfort or loss of enjoyment are not personal injury damages"); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984) (citing *Vestal* for the proposition that "[w]here an injury to realty is permanent, the general measure of damages comprehends and includes the loss of use and enjoyment"). In other cases, "annoyance and discomfiture" appears to be treated as a separate and distinct kind of damages. *See, e.g.*, *Lacy Feed Co. v. Parrish*, 517 S.W.2d 845, 851 (Tex. Civ. App.—Waco 1974, writ ref'd n.r.e.) ("[D]amage to the property of the Plaintiff (which includes loss in market value as well as loss of the use and enjoyment of the property) is one element of damage; whereas, damage to the person of the Plaintiff (for personal discomfort, annoyance, and inconvenience) is a separate and distinct, and different element of damage.").

[129] *Id.*; *see also Likes*, 962 S.W.2d at 504 (noting that a nuisance claim may give rise to these damages); *Schneider* at 292 n.144 ("[T]he residents do not allege the nuisances here caused personal injuries beyond symptoms of discomfort and annoyance.").

[130] It is well established that inconvenience and discomfort damages must be pled to be awarded. *See Houston v. Texaco, Inc.*, 538 A.2d 502, 506 (Pa. Super. Ct. 1988) ("although the law does recognize a cause of action for inconvenience and discomfort caused by interference with another's peaceful possession of his or her real estate, such a claim must be pleaded"); *see also Roth v. Cabot Oil & Gas*

There is little guidance given in jury charges regarding annoyance and inconvenience damages. In *Evans*, the court heard testimony from the plaintiffs regarding "gases and their foul odors, their prevalence, the choking and irritating effect they have on the throat, the interference with sleep they can cause, how they can produce headaches and cause nausea and general discomfort, nuisance and annoyance."[131] In *Noerr*, the jury awarded damages for annoyance, inconvenience, and discomfort damages after hearing evidence of "frequent sore throats, headaches, sensation of eyes burning, inability, at times, to sleep with windows open, discoloration of painted surfaces, soiling of clothes on wash line and being required to spend extra hours of work tending to sick cattle . . . ."[132]

Another open question under Texas and Pennsylvania law is the availability of "stigma" damages. A majority of federal and state courts that have addressed the issue have held that to recover damages for lost market value based on stigma, there must be physical damage to the property.[133]

Corp., No. 12-898, 2013 U.S. Dist. LEXIS 12261, at *43-44 (Jan. 30, 2013) (dismissing cause of action for nuisance and clarifying that *Houston* case requires that claim for inconvenience and discomfort damages must be plead in order to be awarded, but is not in itself independent cause of action).

Although the *Houston* court ultimately decided that inconvenience and discomfort damages were not recoverable, the trial court's jury charge in that case is notable:

> Since certain expenses of all of these plaintiffs have been paid to date by [defendant], such as the drilling of new wells on their properties, your determination of the appropriate damages on the unique facts of this case must be determined as follows: With regard to what we call compensatory damages: 1. Each plaintiff shall be entitled to be reasonably compensated for all aggravation and inconvenience that he or she has suffered as a result of the contamination of their well water; 2. And this is still part of what we call compensatory damages. Each plaintiff shall be entitled to be reasonably compensated for all mental anguish suffered as a result of the contamination of their well water in the manner in which the gas station has been and is being operated.

Houston, 538 A.2d at 504. *See also Noerr*, 60 Pa. D. & C.2d at 437 (awarding $2000 for annoyance, inconvenience, and discomfort in addition to damages to personal property; damages to real property were not at issue).

[131] 160 A.2d at 472.

[132] 60 Pa. D. & C.2d at 437.

[133] *See In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 463 (3d Cir. 1997); *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 175-76 (5th Cir. 1997); *Adams v. Star Enter.*, 51 F.3d 417, 424 (4th Cir. 1995); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993); *Lewis v. Kinder Morgan Se. Terminals LLC*, Nos. 2:07cv47KS-MTP, 2:07cv48KS-MTP, 2008 WL 3540174, at *5 (S.D. Miss. Aug. 6, 2008); *Mehlenbacher v. Akzo Nobel Salt, Inc.*, 71 F. Supp. 2d 179, 185-89 (W.D.N.Y. 1999), *rev'd on other grounds,* 216 F.3d 291 (2d Cir. 2000); *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 743-45 (W.D. Ky. 1998); *Wilson v. Amoco Corp.*, 33 F. Supp. 2d 981, 986 (D. Wyo. 1998); *In re W.R. Grace & Co.*, 346 B.R. 672, 675-77 (Bankr. D. Del. 2006); *Smith v. Kan. Gas. Serv. Co.*, 169 P.3d 1052, 1059 (Kan. 2007); *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-48 (Utah 1998); *Chance v. BP Chems., Inc.*, 670 N.E.2d 985, 993 (Ohio 1996); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 725 (Mich. 1992).

Although the Pennsylvania Supreme Court has not yet ruled on this issue, the Third Circuit has attempted to predict what it would decide:

> The U.S. Court of Appeals for the Third Circuit has held that eligibility for stigma damages [under Pennsylvania law] entails three elements: "(1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land." *In re Paoli R.R. Yard PCB Litig.* ("*Paoli II*"), 35 F.3d 717, 798 (3d Cir. 1994). "*Paoli II* specifically requires proof of some real physical damage to plaintiffs' land, some damage that 'exists in fact' as opposed to damage caused by negative publicity alone." *In re Paoli R.R. Yard PCB Litig.*, 113 F.3d 444, 462-63 (3d Cir. 1997).[134]

Significant for high-profile litigation—like recent cases involving hydraulic fracturing—Pennsylvania law does not allow a plaintiff to recover damages for stigma due to negative publicity alone.[135] While not explicitly defined, the term "ongoing risk" as used in *Paoli II* appears to mean that there is an ongoing risk associated with physical property damage (such as the continued presence of PCBs on the property, or the small risk of future flooding). However, a claim that a property is unmarketable due to the stigma associated with alleged contamination, without more, is insufficient to support a claim for negligence or nuisance damages. In *Golen v. Union Corp., U.C.O.-M.B.A.*,[136] plaintiffs claimed that pollution from the defendant's operations rendered their property unmarketable, and they sought to recover damages under a theory of private nuisance for the inability to sell the property. The court denied the claim, holding that the plaintiffs' "claim of inability to sell property is, by itself, insufficient to establish a private nuisance" and noting that permitting recovery purely for the inability to sell property would "allow unfounded prejudices to dictate property use."[137]

Texas has not squarely addressed the issue of stigma either. In *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, the Texas Supreme Court noted as much, yet left the question open.[138] Texas has disallowed damages for nuisance "based solely on fear, apprehension, or

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[134] *Kemblesville HHMO Ctr., LLC v. Landhope Realty Co.*, No. 08-2405, 2011 U.S. Dist. LEXIS 83324, at *12 (E.D. Pa. July 28, 2011).

[135] *See O'Neal v. Dep't of the Army*, 852 F. Supp. 327, 336 (M.D. Pa. 1994); *Gates v. Rohm & Haas Co.*, N. 06-1743, 2008 U.S. Dist. LEXIS 58036, at *7-8 (E.D. Pa. Jul. 31, 2008).

[136] 718 A.2d 298 (Pa. Super. Ct. 1998).

[137] *Id.* at 301 ("Although hazardous waste contamination is undeniably pernicious, when such contamination only impacts a property owner's ability to sell his or her property, a nuisance action does not exist.").

[138] *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, 443 S.W.3d 820, 822 (Tex. 2014) ("Although some federal and other states' courts have recognized a legal right to recover stigma damages, we have never addressed the issue…We decline to do so here, however, because even if we recognized such a right, the landowner's evidence of lost market value in this case is not legally sufficient to support the trial court's judgment").

other emotional reaction that results from the lawful operation of industries" in the past, but the availability of stigma damages—and whether physical damage to the property is required—remains an open question.[139]

B. Redefining private nuisance in Texas—*Crosstex North Texas Pipeline v. Gardiner*

In *Crosstex*, issued June 24, 2016, the Texas Supreme Court considered a noise nuisance claim involving a natural gas compressor station, seizing on the opportunity to redefine nuisance law. Taking a different tone than prior opinions, the Court's analysis squarely addressed where Texas stands on the three historical "accidents" that have troubled nuisance law for over a century.[140]

First, the court distinguished public nuisance from private nuisance.[141] A claim for public nuisance "generally addresses conduct that interferes with 'common public rights' as opposed to private individual rights."[142] Although the Court declined to address public nuisance in full, its short discussion was in line with most modern treatises—public and private nuisance "have nothing in common, except that each causes annoyance or inconvenience."[143] The Court further acknowledged that "a public nuisance may also be a private nuisance," but reaffirmed that "they are two distinct conditions with different requirements and limitations."[144]

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[139] *See Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 100 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *see also Rankin v. FPL Energy, LLC*, 266 S.W.3d 506, 512 (Tex. App.—Eastland 2008, pet. denied) (holding that where the challenged activity is lawful, nuisance actions are limited to instances in which "the activity results in some invasion of the plaintiff's property and by not allowing recovery for emotional reaction alone.").

[140] *Cf. Wales Trucking Co. v. Stallcup*, 474 S.W.2d 184, 186 (Tex. 1971) (refusing to attempt to give nuisance "any exact or comprehensive definition.")

[141] *Crosstex* at *4 n.3. Most modern Texas cases acknowledge the distinction between public and private nuisance, but courts have at times, usually in dicta, blurred the lines between the two. *Compare Sciscoe v. Enbridge Gathering (N. Tex.), L.P.*, No. 07-13-00391-CV, 2015 WL 3463490, at *6 (Tex. App.—Amarillo June 1, 2015, pet. filed) (describing three categories of nuisance as negligent, intentional, and "other inappropriate conduct" and citing statute dealing with public nuisances to describe "other inappropriate conduct") *with, e.g.*, *City of Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997) ("Courts have broken actionable nuisance into three classifications: negligent invasion of another's interests; intentional invasion of another's interests; or other conduct . . . which involves an unusual hazard or risk." (internal quotations and citations omitted)).

[142] *Crosstex* at *4 n.3.

[143] *Id.*; *see supra* notes 23-25 and accompanying text.

[144] *Crosstex* at *4 n.3; *see supra* notes 26-28 and accompanying text. The boundaries of public nuisance are beyond the scope of this article, but many of the same principles apply in public nuisance cases. *See, e.g.*, *Ortega v. Phan-Tran Prop. Mgmt., LLC*, No. 01-15-00676-CV, 2016 WL 3221423, *4-5 (Tex. App.—Houston [1st Dist.] June 9, 2016, pet. denied) (mem. op.) (holding summary judgment proper on negligent public nuisance claim because there was no evidence that defendant owed plaintiff a duty) [Disclosure: Mr. Stewart is counsel for Phan-Tran in the *Ortega* case.].

Second, the Court examined the varied usage of the term nuisance and held that private nuisance is neither a cause of action nor a description of the defendant's conduct; rather, it is a legal injury related to plaintiff's use and enjoyment of property.[145] Stated another way, nuisance—a particular type of injury to a person's right to use and enjoy property—is only one element of a cause of action and "'[a]n injury without wrong does not create a cause of action.'"[146]

Third, the Court clarified that liability for nuisance is fault-based. Consistent with most Texas decisions in the past few decades, the Court held that an action for nuisance could be based an intentional, negligent, or strict liability conduct.[147] In doing so, it rejected the urging of commentators to limit nuisance to intentional conduct—that is, that negligent nuisance should be treated as a normal negligence claim, and strict liability nuisance should be treated as a normal strict liability claim.[148]

Finally, the Texas Supreme Court addressed the difference between private nuisance and trespass. Both involve an interference with an interest in land, and the distinction between the two has been "complex and troublesome."[149] For example, the court "recently referred in passing to trespass claims as those that involve a physical entry . . . as distinguished from nuisance claims in which the entry . . . is 'not physical.'"[150] However, the modern distinction between the two is that "a trespass involves interference with the plaintiffs' right to *exclusive possession* of their land, while a nuisance involves interference with the plaintiffs' right to *the use and enjoyment* of their land."[151] If "a defendant's conduct interferes with both, the plaintiffs may assert either claim, or both."[152]

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[145] *Crosstex* at *6-7.

[146] *Id.* at *12 (quoting *State v. Brewer*, 169 S.W.2d 468, 471 (Tex. 1943)).

[147] *Id.* at *15; *see, e.g., Likes*, 962 S.W.2d at 503 (discussing the three categories of actionable nuisance).

[148] *Crosstex* at *15.

[149] *Id.* at *14 n.17 (internal quotations omitted)

[150] *Id.* (quoting *Gilbert Wheeler*, 449 S.W.3d at 474).

[151] *Id*. One persistent issue courts have struggled with is whether migratory microscopic particles are actionable in trespass, nuisance, or both. *See* HARPER § 1.23, at 103 & n.44 (stating that "with the increase in scientific knowledge and methods many invasions are perceived today as physical that would once have supported an action for nuisance only" and citing conflicting results). The Texas Supreme Court has not definitely weighed in on this subject. *See Schneider* at 292 (sidestepping the issue by "[a]ssuming that entry of photons, particles, or sound waves can constitute a trespass . . . ."); *see also Stevenson v. E.I. Dupont de Nemours & Co.*, 327 F.3d 400, 405-06 (5th Cir. 2003) (making an *Erie* guess that "Texas law would permit recovery for airborne particulates" in trespass). One Texas appellate court recently held that "a trespass claim under Texas law may be premised upon the entry onto property of airborne particulates." *Sciscoe*, *supra* note 141, at *9. The *Sciscoe* case is currently pending in the Texas Supreme Court.

[152] *Crosstex* at *14 n.17.

C. Some defenses in the nuisance context

While a number of defenses to other torts apply to nuisance, two particular defensive theories have recently been litigated, with mixed results. First, limitations arguments continue to be a troublesome area, particularly for nuisance cases in Texas. Second, where a landowner has leased minerals under the land in dispute, a lessee recently successfully argued that the landowners/lessor were quasi-estopped to bring its claim.

First, limitations continues to be a challenging defense in the nuisance context. The limitations period for a private nuisance claim in Texas and Pennsylvania is two years.[153] After the limitations period expires, any nuisance claim is barred.[154] However, determining the accrual date has proved troublesome. In both jurisdictions, the accrual date depends on whether a nuisance is "temporary" or "permanent"—a "permanent nuisance claims accrues when injury *first* occurs or is discovered; a temporary nuisance accrues *anew* upon each injury."[155] This distinction[156] has resulted in a body of case law that "has no standard of reference" and is full of irreconcilable precedents.[157] Pennsylvania also recognizes "continual nuisance," which is similar to permanent nuisance but is characterized by an activity is ongoing and/or repetitive.[158] To classify a particular condition as permanent or continual, Pennsylvania courts consider (1) the character of the structure or thing producing the injury; (2) whether the consequences of the nuisance will continue indefinitely; and (3) whether the past and future damages may be predictably ascertained.[159]

Similarly, in *Schneider*, the Texas Supreme Court stated that the distinction between permanent and temporary nuisance lies in whether the case involves "an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely."[160] Further

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[153] *See Schneider* at 279; *Dombrowski v. Gould Electronics, Inc.*, 954 F. Supp. 1006, 1011-12 (M.D. Pa. 1996).

[154] *Schneider* at 279.

[155] *Id.* at 270.

[156] This distinction has been called "one of the oldest and most complex in Texas law," *Id*. at 274-275.

[157] *Id.* at 274-75; *see also Crosstex* at *1 n.1 (noting the same in its discussion of nuisance as "a morass").

[158] *Cassel-Hess v. Hoffer*, 44 A.3d 80, 87 (Pa. Super. Ct. 2012) (discussing the distinction between permanent and continuing nuisance).

[159] *Cassel-Hess*, 44 A.3d at 87; *Sustrik v. Jones & Laughlin Steel Corp*., 197 A.2d 44, 46-47 (Pa. 1964) (establishing that permanent intrusions to land must be litigated in single action for past and future damages); *see also Cass v. Pa. Co.*, 28 A. 161, 163 (Pa. 1893) (holding that cause of action for permanent nuisance due to bridge that blocked traffic accrued "not later than the time when the work…had progressed to such an extent as to obstruct ingress and egress"); *Graybill v. Providence Twp.*, 593 A.2d 1314, 1316-17 (Pa. Cmmw. Ct. 1991) (finding that intermittent flooding up to ten times per year from construction activities was continuing trespass and not permanent injury).

[160] *Schneider* at 274-75.

complicating things, the Texas Supreme Court recently reformulated the distinction for injuries to real property so that:

- An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, or (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated.

- [A]n injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, and (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty.[161]

Moreover, for some nuisance cases, the problem of a "new" nuisance arises, such as where the activity changes in character during the limitations period. In some instances, what might to some have seemed a "permanent" nuisance barred by limitations has been characterized as a new "temporary" nuisance because "an old nuisance does not excuse a new and different one."[162] Particularly relevant to defendants seeking to bar claims based on limitations, an accrual date based on "subjective criteria like smell and sound"—as opposed to measurable, objective criteria (such as chemical levels in the air)—may be left to the jury.[163]

Finally, a recent Texas case suggests a potential defense where a landowner complains of his lessee's actions, and those actions are taken pursuant to the parties' lease. In *Titan Operating LLC v. Marsden*, the surface owners brought a lawsuit against Titan claiming that noise from drilling, fumes from diesel engines, and lights from the well site that "lit up [the] whole house like a Christmas tree" constituted a nuisance.[164] The jury awarded $36,000. The court of appeals reversed and rendered because, as a matter of law, plaintiffs were precluded from "accepting the benefits of their oil and gas lease . . . and later maintaining a nuisance suit against Titan for acts that the lease . . . contemplated or authorized."[165]

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[161] *Gilbert Wheeler*, 449 S.W.3d at 480.

[162] *Schneider* at 280; *see Atlas Chemical Indus., Inc. v. Anderson,* 524 S.W.2d 681, 683 (Tex. 1975) (new emissions to new property due to new natural forces—but same plaintiff—from plant operating for over forty years).

[163] *Justiss*, 397 S.W.3d at 155("The point at which an odor moves from unpleasant to insufferable or when noise grows from annoying to intolerable might be difficult to ascertain, but the practical judgment of an intelligent jury is equal to the task." (internal quotations, citations, and modifications omitted)).

[164] *Titan Operating, LLC v. Marsden*, No. 02-14-00303-CV, 2015 WL 5727573, at *3 (Tex. App.—Fort Worth Aug. 27, 2015, pet. denied) (mem. op., not designated for publication).

[165] *Id.* at *1; *see also Grimes v. Goodman Drilling Co.*, 216 S.W. 202, 204 (Tex. Civ. App.—Fort Worth 1919, writ dism'd) (affirming that plaintiff was not "entitled to an abatement of the nuisance" created by the drilling of a well on his property by defendants as plaintiff "purchased the premises burdened with the terms of the lease, he is in no position to complain of the conditions produced by [defendants], such as are usual and customary during the drilling of an oil well").

Pennsylvania has not recognized this particular form of estoppel as a defense to nuisance. However, Pennsylvania may consider the extent to which a plaintiff "comes to the nuisance" "when determining the activity's reasonableness on the particular piece of land."[166] This consideration may indicate a willingness by Pennsylvania courts to adopt the *Titan* rule, because a lease constitutes an authorization for oil and gas development on land and, therefore, a tacit acknowledgement that doing so is reasonable.

III. Conclusion

As the case law illustrates, nuisance has been and remains an amorphous doctrine. Despite much recent litigation, a host of questions remain on issues ranging from what conduct supports a nuisance claim to what damages are recoverable. Numerous nuisance cases against energy companies are still pending in various stages of trial and appeal. As the centuries-old doctrine continues to evolve, oil and gas drilling and production activities are today at ground zero in this process.

[166] *Carb v. City of Pittsburgh*, No. 2440CV2010, 2011 WL 10876846, at *2 (Pa. Cmmw. Ct. Oct. 19, 2011).

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