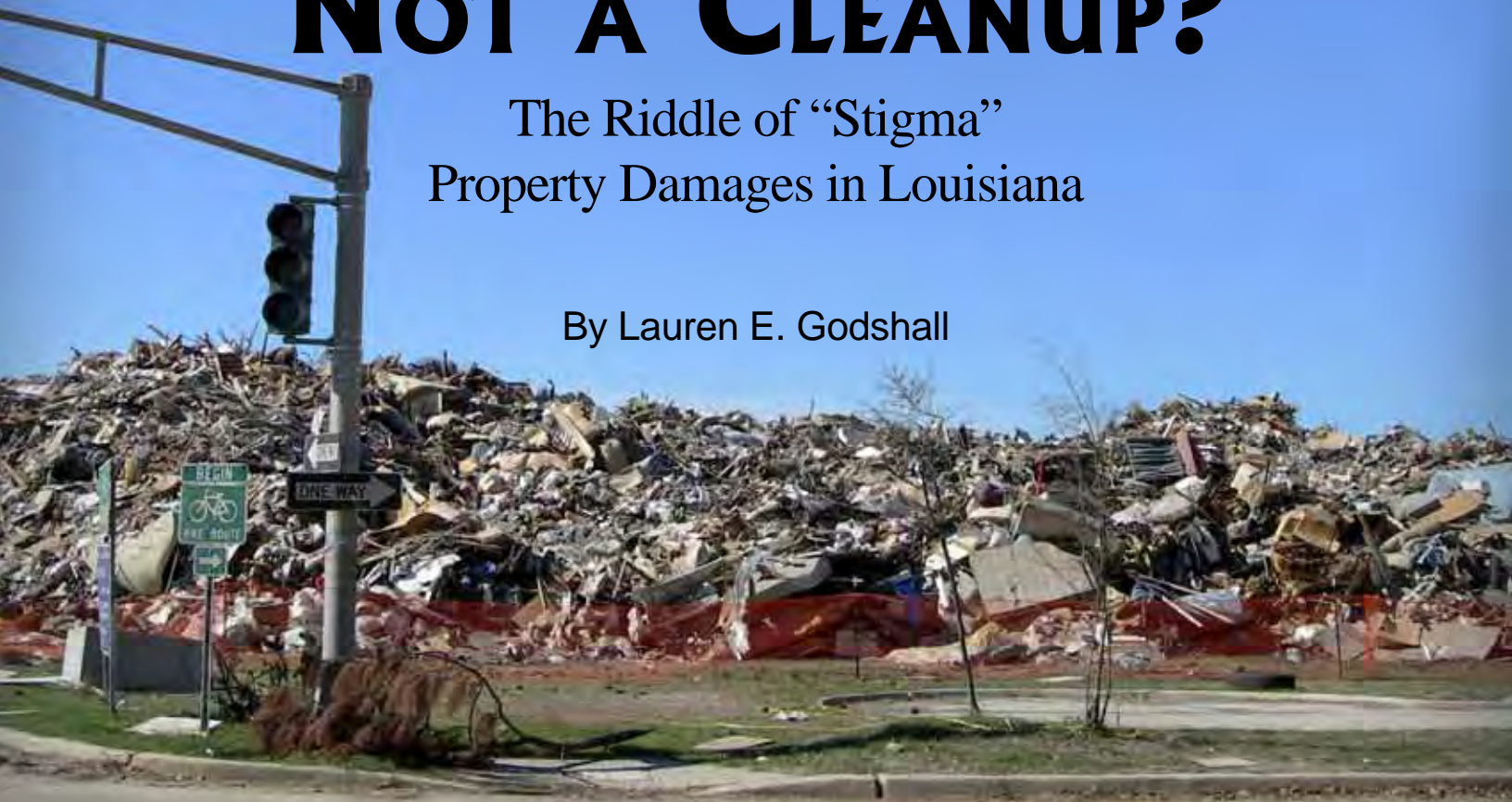


WHEN IS A CLEANUP NOT A CLEANUP?

The Riddle of “Stigma” Property Damages in Louisiana

By Lauren E. Godshall



Toxic waste is spilled in a residential neighborhood, sending chemicals into local soils and streams. A response team is mobilized, and a remediation plan is carefully developed. Remediation occurs and the governing environmental agency gives the area its stamp of approval. No traces of contamination remain, and there is no reason to suspect this will ever happen again.

Local homeowners cannot sell their homes. Property prices plummet. No one is interested in moving to a neighborhood recently swarming with backhoes, monitors and mysterious testing equipment.

The danger is gone and the mess is cleaned up. But the perception of risk, rightly or wrongly, remains. The local homeowners are angry their property values have decreased; the toxic waste company is frustrated that it has taken every remediation action it could. An economic loss of some kind has occurred — but is it real? Is it permanent? Is it measurable? And when the market is irrational, who should bear the cost of that irrationality?

Those are the questions frequently faced by courts where plaintiffs claim the right to recover “stigma damages,” *i.e.*, property value losses that are un-

related to remaining contamination but are nonetheless felt. As the 5th Circuit noted in *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 175 (5 Cir. 1997), “Whether market stigma is a recoverable element of damages has been the subject of considerable debate.” Courts have been cautious and not necessarily consistent in handling these issues. Courts have “struggle[ed] with the desire to make the plaintiff whole while awarding only those damages that are proven with reasonable certainty.” Jennifer L. Young, “Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty,” 52 S.C. L. Rev. 409, 410 (Summer 2001).

Compounding the problem is the extreme difficulty faced in determining a proper amount to award. The “stigma” that is reducing the value of the property

may decrease over time, or vanish — and the amount of that reduction in value is itself up for debate, as property valuation can be more of a subjective art than an objective science.

The entire New Orleans region, for example, could arguably suffer from the stigma associated with the disaster of Hurricane Katrina and the subsequent massive flooding. However, New Orleans real estate is widely reported to be on a major upswing, and property values have largely risen; “eight years after Hurricane Katrina flooded 80 percent of the city and displaced 400,000 residents, New Orleans has become one of the fastest-growing U.S. commercial real estate markets.” Nadja Brandt, “A New Orleans Real Estate Boom Eight Years After Katrina,” Sept. 5, 2013; www.businessweek.com/articles/2013-09-05/a-new-orleans-real-estate-boom-eight-years-after-katrina.

As reported by the Times Picayune in August 2013, as the eighth anniversary of Katrina neared, “In New Orleans, prices rose 6 percent to \$150 per square foot. Among the thousand homes sold through June, the average price was \$327,498. Before Hurricane Katrina in 2005, the average house sold for \$228,620 or \$114 per square foot, which means prices are up by a third in the city since the storm.” Katherine Sayre, “New Orleans metro home prices climbed in first half of year,” Aug. 8, 2013; www.nola.com/business/index.ssf/2013/08/new_orleans_metro_home_prices_1.html.

Despite this regional upswing, there are still lawsuits percolating through the system alleging that property values were indeed affected negatively by the public perception of the flooding that followed the hurricane. This article sets out some of the litigation, in both the federal and state systems, to demonstrate how local courts have dealt with the enigmatic question of stigma.

Federal Court: Show Me the Physical Injury

Many jurisdictions require that plaintiffs asserting a “stigma damages” claim must experience some physical injury to their property before they may recover

stigma damages. The U.S. 5th Circuit is no exception. In *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 826 (5 Cir. 1993), the court was faced with a group of plaintiffs claiming stigma damage to their property based on the illegal dumping practices of a tire manufacturer. The plaintiffs in *Berry* did not live on the illegal dumping sites but did live nearby. They presented expert witness testimony that, in the local real estate market, “the plaintiffs’ properties were perceived to be contaminated by toxic wastes and... a negative market stigma significantly reduced the market values of plaintiffs’ properties.” *Id.* The 5th Circuit, applying Mississippi law, refused to grant any damages without evidence the property itself had been contaminated. “Plaintiffs have cited no case, and the court has found none, holding that Mississippi common law allows recovery for a decrease in property value caused by a public perception without accompanying physical harm to the property.” *Id.* at 829.

This rule was re-emphasized a few years later in *Bradley*, 130 F.3d at 176. Again, the court required that the “stigma” claim be made only where property was actually damaged. “The requirements of permanent and physical injury to property ensure that this remedy does not open the floodgates of litigation by every property owner who believes that a neighbor’s use will injure his property.” *Id.*

More recently, in the U.S. District Court, Eastern District of Louisiana, Judge Carl J. Barbier addressed a true “pure” stigma claim as a part of the Deepwater Horizon oil spill litigation. *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico on April 20, 2010*, 902 F.Supp.2d 808 (E.D. La. Oct. 1, 2012). In October 2012, he released an opinion addressing the “Pure Stigma Claims” that had been brought in the oil-spill-related litigation, which he defined as “claims by or on behalf of owners, lessors, and lessees of real property that they have suffered damages resulting from the taint of their property caused by the oil spill, although no oil or other contaminant physically touched the property.” These are claims by, for example, high-rise condominium owners in Orange Beach whose property value was allegedly affected by the oil spill

although the condo itself was not touched by any oil. The “Pure Stigma Claims” plaintiffs argued that stigma damages are recoverable under the Oil Pollution Act (OPA), pursuant to general maritime law and Louisiana law.

Judge Barbier held that OPA preempted the application of Louisiana law, thus avoiding a discussion of whether Louisiana law would allow a “pure” stigma damages claim like this. *Id.* at 815. However, even under OPA, no stigma damages could be awarded because of the plaintiffs’ inability to prove they actually suffered a loss. “[T]he ‘Pure Stigma Claims’ concern property that was not sold; they are claims for unrealized diminution or real property value. Such claims concern neither a ‘loss of profits’ nor ‘impairment of earning capacity.’ Before real property is sold, there can be no ‘profits’ to be lost. . . . Furthermore, until property is sold and a loss realized, damages are speculative — *it is possible that the value of real property eventually may meet or exceed its pre-spill amount.*” *Id.* at 816 (emphasis added).

The New Orleans post-Katrina real estate recovery supports the judge’s decision as this price upswing does show that theoretical stigma damages can vanish before any actual monetary loss is suffered. In any event, the federal cases demonstrate an insistence that while stigma damages must be awarded, they are only done so narrowly in those cases where all prerequisites are precisely met.

State Courts: Sometimes You’ll Get Stigma Damages, Sometimes You Won’t

Louisiana state courts have been less consistent and more flexible in granting awards for decreased values from environmental stigma. The Louisiana Supreme Court, in 2003, affirmed an award for “pure” stigma damages in *Bonnette v. Conoco, Inc.*, 01-2767 (La. 1/28/03), 837 So.2d 1219, 1239. In this case, plaintiffs claimed diminished property values due to the stigma of asbestos contamination, *even though the contamination had already been remediated*. Plaintiffs put on the expert testimony of a Mr. Pauley

in support of their stigma claims, who “opined that plaintiffs’ property values would be lower even after the property had been remediated due to the ‘stigma effect’ the presence of asbestos would have on the properties. He explained... most prudent buyers would be more likely to buy a house that has never been contaminated with a hazardous substance than one that has been contaminated and remediated. He stated that the word ‘asbestos’ is frightening to people because most people are aware that it is a carcinogen, and even if it is cleaned up, people are still concerned.” *Id.*

The trial court determined Mr. Pauley’s testimony was more credible than the testimony of the defendants’ expert on the same topic and awarded plaintiffs stigma damages by estimating that their property values had been diminished by 10 percent. This award was upheld by the Supreme Court without much discussion as to the appropriateness of a general stigma award of this nature, based on its deference to the trial court’s assessment about the relative credibility of the expert witnesses.

Ten percent was again the magic number in *Johnson v. Orleans Parish School Board*, 06-1223 (La. App. 4 Cir. 1/30/08), 975 So.2d 698 705. In *Johnson*, the City of New Orleans had previously leased 100 acres of land as a landfill and garbage dump, then had the land later developed for public housing without ever testing or remediating the property. The EPA eventually tested the soil in the area and found serious contamination. Remediation of the top two feet of soil was ordered and completed, and the residents were given a certification of completion confirming their property had been partially remediated. The EPA also gave the residents a list of permanent restrictions on the use of their property. In that case, the trial court gave the property owners who lived on the landfill site itself their fair market property value. In addition, property owners in the adjacent area “were awarded 10 percent of their property value for stigma damages.” *Id.* Once again, the appellate court only noted its deference to the trial court regarding its decision about awarding damages and did not provide any analysis beyond the statement, “There is

objective evidence in the record to make such a finding reasonable.” *Id.* at 711.

Contrarily, stigma damages were not awarded in the case *Mitchell v. East Baton Rouge Parish*, 2010 WL 2889572, 09-1076 (La. App. 1 Cir. 7/16/10), ___ So.3d ___. In that case, the City of Baton Rouge was sued by residents living near the North Wastewater Treatment Facility, which was built in 1960 and expanded several times, including in 1997-98. “Monetary [stigma] damages were awarded to nineteen plaintiffs for stigma damage to their residences.” *Id.* at *1. The appellate court, however, reversed the trial court’s award of the stigma damages, noting that plaintiffs could only be claiming damages from the 1997-98 expansion; claims from decreased property values from prior to that time would have already prescribed. However, the plaintiffs’ expert on the stigma’s effect on property values “did not consider the effect of the 1997 expansion on the property, but the total effect of the sewerage treatment plant, which has existed since 1960.” *Id.* at *4. Moreover, “the costs of many of the plaintiffs’ homes reflected a decreased value due to the plant at the time of the purchase.” *Id.* In other words, the plaintiffs who purchased their property after the wastewater plant was already built had in effect already been granted their stigma damages by buying their property at a reduced price. A second award of money would have, in effect, been a double windfall. Notably, the court did not suggest that stigma damages arising simply from the proximity of the plant could not be awarded in any case. Instead, it focused on the fact that the plaintiffs had failed to prove they suffered additional “stigma” to their already-stigmatized property in the relevant time window of 1997-98.

In a case involving Jefferson Parish property that flooded during Hurricane Katrina, but which was also unlikely to flood again, the appellate court allowed the admission of expert testimony on the value of the stigma claim. *Chicago Property Interests, L.L.C. v. Broussard*, 2012 WL 4761505, 11-0788 (La. App. 4 Cir. 5/23/12), ___ So.3d ___. The expert in question previously reported on the “potential for loss in market value of the subject properties due to stigma dam-

ages.” *Id.* at *7. This was a preliminary ruling on writs only, not an appeal on the merits of the case, but the 4th Circuit did indicate that stigma damages could be calculated as a part of any damages award. “[T]he district court did not abuse its discretion in accepting the expert reports and formulating a mathematical calculation of the damages that can be used in the future of this litigation if the court sees fit.” *Id.* at *9.

An Uncertain Future

Overall, Louisiana courts are more willing than federal courts to allow the recovery of diminished property values arising from environmental stigma. These claims can be brought by property owners who do not claim any permanent physical injury to their property.

In general, stigma claims present unusual challenges for courts. The public’s unreasonable fear that property could be contaminated is not the basis for a suit. But, under a stigma claim, unreasonable public fear, resulting in a decreased property value, may indeed be compensable, particularly in Louisiana state courts. No permanent injury to the property needs to be shown for an environmental property stigma claim to be successful. It is a risk that Louisiana chemical and energy companies must understand they are taking by operating in this state.

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