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ANALYZING EVIDENCE OF ENVIRONMENTAL JUSTICE

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I. INTRODUCTION

A new and powerful movement has swept through environmental and land use law, challenging many of its basic tenets and forcing it to confront the difficult issues of *who* gets *what* kind of environmental quality, *where* environmentally undesirable land uses get put, and *why*.[1] The movement, known as environmental justice, focuses on the distributional implications of the way in which our society seeks to manage environmental threats and improve and protect environmental quality.[2]

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1. *See* Robert D. Bullard, *Conclusion: Environmentalism with Justice, in* CONFRONTING ENVIRONMENTAL RACISM, VOICES FROM THE GRASSROOTS 195, 203, 206 (R. Bullard ed., 1993); David M. Smith, *Who Gets What Where, and How: A Welfare Focus for Human Geography*, 59 GEOGRAPHY 289 (1974).

2. For an overview of the Environmental Justice Movement's concerns and goals, see, e.g., Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement, in* CONFRONTING ENVIRONMENTAL RACISM, 15, 17-19; *Bullard, supra* note 1, at 195. The literature on environmental justice is extensive. For a survey of much of the legal literature, see Robert W. Collin, *Review of the Legal Literature on Environmental Racism, Environmental Equity, and Environmental Justice*, 9 J. ENVTL. L. & LITIG. 121 (1994). For collections of the literature, see Symposium, *Environmental Justice: The Merging of Civil Rights and Environmental Activism*, 9 ST. JOHN'S J. LEGAL COMMENT. 437 (1994); Symposium, *Third Annual Stein Center Symposium on Contemporary Urban Challenges*, 21 FORDHAM URB. L.J. 425 (1994); Symposium, *Environmental*

In the past year, the foundation of some of the environmental justice arguments was shaken by the release of a nationwide study which challenged the substantial body of evidence that locally undesirable land uses (LULUs) are disproportionately placed in communities that are predominantly populated by people of color and the poor.[3] The analysis, conducted by the Social and Demographic Research Institute (SADRI) at the University of Massachusetts, studied the siting of commercial hazardous waste facilities.[4] Those are the same facilities examined in the pioneering 1987 study by the Commission for Racial Justice (CRJ).[5]

The CRJ study gave the environmental justice movement substantial credibility and is cited as the justification for many of the environmental justice proposals considered in recent years by Congress and state legislatures.[6] The study found a significant correlation between the number of commercial hazardous waste facilities in a zip code and the percentage of people of color in the zip code's

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Justice, 5 MD. J. CONTEMP. LEGAL ISSUES 1 (1994); Symposium, *Earth Rights and Responsibilities: Human Rights and Environmental Protection*, 18 YALE J. INT'L L. 213 (1993); Symposium, *Race, Class, and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992); *Environmental Equity in the 1990s: Pollution, Poverty, and Political Empowerment* 1 KAN. J.L. & PUB. POL'Y 1 (1991); *see also* ROBERT D. BULLARD, UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (1994); *Bullard*, *supra* note 1; ENVIRONMENTAL JUSTICE (Jonathan S. Petrikin ed., 1995); KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE (1995); RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE (Bunyan Bryant & Paul Mohai eds., 1992); TOXIC STRUGGLES: A THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE (Richard Hofrichter ed., 1993).

3. For the most recent survey of the literature, see Vicki Been, *Environmental Justice*, *in* P. ROHAN, ZONING AND LAND USE CONTROLS Ch. 25D.02 (1995); *see also* BENJAMIN A. GOLDMAN, NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE 3-25 (1994); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1392-98 (1994)[hereinafter Been, *Undesirable Land Uses*]; Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 622-27 & nn.8-18 (1992); Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992).

4. Douglas L. Anderton et al., *Environmental Equity: Evaluating TSDF Siting Over the Past Two Decades*, WASTE AGE, July 1994, at 83 [hereinafter Anderton, *Evaluating TSDF Siting*]; *see also* Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229 (1994)[hereinafter Anderton, *Demographics of Dumping*](reporting results of analysis using 1980 census data); Douglas L. Anderton et al., *Environmental Equity: Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, 18 EVALUATION REV. 123 (1994) (reporting results of analysis using 1980 census data).

5. UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, TOXIC WASTES AND RACE IN THE UNITED STATES (1987) [hereinafter CRJ study].

6. *See, e.g.*, H.R. 1924, 103d Cong., 1st Sess. (1993) ("findings" section of the bill cites the study and reports its main findings); 139 CONG. REC. S8107 (daily ed. June 24, 1993) (statement of Mr. Baucus quoting the findings of the Commission for Racial Justice, although not crediting the report, in introducing S. 1161, Environmental Justice Act of 1992, 103d Cong., 1st Sess. (1993)).

population.[7] Areas with one operating facility other than a landfill had almost twice as many people of color as a percentage of the population as areas without such facilities had.[8] As the number or noxiousness of the facilities in a neighborhood increased, so did the percentage of people of color in that neighborhood.[9] In 1994, the CRJ updated its study using 1990 census data, finding that zip codes hosting one facility again had more than twice the percentage of people of color as non-host zip codes.[10]

The recent SADRI study reached quite different conclusions. It found that as of the 1990 census, there was no statistically significant difference between the percentages of African Americans or Hispanics in host census tracts and non-host tracts.[11]

The CRJ study found that class differences, as measured by mean household incomes, differed less significantly than the racial composition of host and non-host zip codes.[12] SADRI, on the other hand, found that although racial composition did not differ significantly between host and non-host census tracts, there was a statistically significant difference in the percentage of families living below the poverty level.[13]

At the time the SADRI research was released, we were working on a similar study. That study focuses not on the current distribution of hazardous waste facilities, but analyzes instead the demographics of the host neighborhoods at the time of the initial siting, and then studies changes in the demographics of the communities following the siting. The purpose of that study is to shed some light on the question whether sitings themselves were disproportionate, or whether the market response to sitings led the surrounding communities to become disproportionately populated by people of color and the poor.[14] The results of that study are not yet ready to be released.

The data we had for that longitudinal study allowed us to explore possible explanations for the different results reached by the CRJ and SADRI researchers. The easy explanation is that the two studies used different units of analysis: SADRI examined the census tracts in which the LULUs were located,[15] while the CRJ examined the zip codes.[16]

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7. CRJ study, *supra* note 5, at 13-14.
8. *Id.* at 13, 41-44.
9. *Id.*
10. BENJAMIN A. GOLDMAN & LAURA FITTON, TOXIC WASTES AND RACE REVISITED 3 (1994).
11. Anderton, *Evaluating TSDF Siting*, *supra* note 4, at 84.
12. CRJ study, *supra* note 5, at 13.
13. Anderton, *Evaluating TSDF Siting*, *supra* note 4, at 84.
14. For a discussion of the role of market dynamics in the distribution of undesirable land uses, see Been, *Undesirable Land Uses*, *supra* note 3, at 1388-92.
15. Anderton, *Evaluating TSDF Siting*, *supra* note 4, at 83.

Indeed, SADRI reconciled its findings with those of the CRJ by showing that when host tracts were combined with other tracts within a 2.5 mile radius of the facility, their findings began to look similar to those of the CRJ.[17]

The differences between the units of analysis used in the studies seemed to be only part of the story, however. The SADRI study was roundly criticized by environmental justice advocates on several other grounds,[18] and in the course of our longitudinal study, we had developed additional questions about the methodology of both the CRJ and SADRI studies. Accordingly, we took a hard look at the methodological choices the SADRI and CRJ researchers had made, trying to identify which of those choices affected the results, and in what fashion. What we discovered sheds some light on various criticisms of the SADRI study and defenses of the CRJ study. The broader purpose of this analysis, however, is to highlight the methodological issues researchers need to address, and to present alternative methodologies that should improve our ability to understand the nature of the distribution of environmental "goods" and "bads."

II. COMPARISON OF HOST AND NON-HOST CENSUS TRACTS AS OF 1990

Like SADRI, we analyzed the demographics of host census tracts, not zip codes. Census tracts were more suitable for our longitudinal study for several reasons. First, we needed data from 1970 onward, because the main purpose of the longitudinal study is to examine changes over time in host communities. National zip code data became readily available only in 1980, but tract data is available for the 1970 census.

Additionally, we wanted a unit that would change as little as possible over the relevant decades, and we needed to be able to identify any changes so that the units could be reconfigured to be equivalent over time. Census tracts are intended to remain relatively stable, and when they do change, the exact nature of the changes is published. Zip codes, on the other hand, change at the convenience of the postal service, and no published record of changes is available.

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16. CRJ study, *supra* note 5, at 13.

17. Anderton, *Demographics of Dumping*, *supra* note 4 at 357-59; John M. Oakes et al., Environmental Inequity, Industrial Siting, and the Structure of American Cities, Paper Presented at the *1995 Annual Meetings of the National Association of Environmental Professionals: Washington D.C.* (June 10-13, 1995).

18. *See, e.g.*, GOLDMAN & FITTON, *supra* note 10, at 14-15; Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 9 ST. JOHN'S J. LEGAL COMMENT. 445, 467-69 (1994).

Even for cross-sectional analysis, census tracts are a more appropriate unit of analysis than zip codes.[19] Census tracts are drawn up by local committees, and accordingly are more likely to reflect the community's view of where one neighborhood ends and another begins. Zip codes, on the other hand, are constructed only for the convenience of the postal service, and do not necessarily coincide with neighborhoods.[20] Tracts also are comparable in population, while zip codes may contain widely varying numbers of people and cover areas of widely varying sizes.[21] Tracts reflect the area right around the facility—the area that usually will bear its worst impacts. Zip codes may extend for miles beyond the facility, into areas where many people may not even be aware of the facility's presence.

Using census tracts as the focus of analysis, we compared the means of various demographic variables for about 600 tracts hosting commercial hazardous waste treatment storage and disposal facilities (TSDFs) in 1994 to those of almost 60,000 non-host tracts. The results are presented in the Appendix, Figure 1. Unlike the CRJ study of zip codes, and like the SADRI study of census tracts, the study results show no statistically significant difference between the mean percentage of African Americans in host tracts and non-host tracts. However, the results show a substantial and statistically significant difference between the mean percentage of Hispanic persons in host and non-host tracts, unlike the SADRI study. While SADRI's analysis was limited to African American and Hispanic populations, our results show a statistically significant difference between host and non-host tracts in the mean percentage of all minorities (all races other than white, and all Hispanics, whether white or of another race).[22]

The results show a considerable difference along measures of wealth and social class: host tracts have much lower median family

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19. For discussions of the appropriate unit of analysis in environmental justice studies, see, e.g., Been, *Undesirable Land Uses*, *supra* note 3; Michael Greenberg, *Proving Environmental Inequity in Siting Locally Unwanted Land Uses*, 4 RISK: ISSUES IN HEALTH & SAFETY 235, 238 (1993); Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage is How We Measure*, 21 FORDHAM URB. L.J. 633 (1994); John Fahsbender, Note, *An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, 4 N.Y.U. ENVTL. L. REV. (forthcoming Fall 1995).

20. MICHAEL J. WHITE, AMERICAN NEIGHBORHOODS AND RESIDENTIAL DIFFERENTIATION 18-20, 289-98 (1987). *See also* Mark Monmonier, *Zip Codes, Data Compatibility, and Environmental Racism*, 2 GIS LAW 4, 5 (1994).

21. Tracts are supposed to contain between 2500 and 8000 residents, and have an average of 4000 people. WHITE, *supra* note 20, at 292-95.

22. The Census Bureau classifies by race (White; Black; American Indian, Eskimo and Aleut; Asian or Pacific Islander; and other) and by Spanish origin. Persons of Spanish origin may be of any race. We use the term "minorities" to mean all persons who are not white and all white Hispanics.

incomes and somewhat higher percentages of people living in poverty than non-host tracts. Host tracts have a much less educated population, higher levels of unemployment, lower levels of employment in the professional occupations[23] and higher levels of employment in manufacturing occupations.[24] Median housing value is strikingly lower in host tracts than in non-host tracts. Each of these class differences is statistically significant.

The univariate results, therefore, tend to support those SADRI findings which dispute the allegation that hazardous waste facilities currently impose a disproportionate burden on African American neighborhoods. Our results depart from or go beyond the SADRI findings, however, on other measures of racial and class differences.

To examine the correlation between each of these demographic variables and the presence of TSDFs when all of the variables are considered together and correlations among the variables themselves are controlled, we used a logit regression. The dependent variable was the presence or absence of a facility in the tract. The independent variables were eight of the demographic characteristics discussed above: percentage of African Americans, percentage of Hispanics, percentage of individuals living below the poverty line, percentage with no high school education, median family income, percentage of the labor force unemployed, percentage of the labor force employed in manufacturing occupations, and median housing value.[25]

The logit estimations, presented in the Appendix in Figure 2A, show that the percentage of Hispanics, median housing value, and percentage of the labor force employed in manufacturing occupations are statistically significant predictors of the presence of a facility. The higher the percentage of Hispanics or the higher the percentage of persons employed in manufacturing occupations, the greater the

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23. For the purposes of this analysis, professional employment means those persons employed in executive, administrative and managerial occupations (occupational codes 3-37) and those employed in professional specialty occupations (codes 43-199). The percentage of workers employed in those categories was calculated by dividing the number of persons employed in those categories by the total number of males and females age 16 or older employed in the civilian labor force.

24. Manufacturing employment is defined here as employment in precision production, craft and repair occupations (codes 503-699), as machine operators, assemblers and inspectors (codes 703-799), in transportation and mineral moving occupations (codes 803-859), and as handlers, equipment cleaners, helpers, and laborers (codes 863-889). The percentage of workers employed in those categories was calculated by dividing the number of persons employed in those categories by the total number of males and females age 16 or older employed in the civilian labor force.

25. The percentage of minorities in the tract, and the percentage of the labor force employed in professional occupations were excluded from the analysis because they were so highly correlated with, respectively, the percentage of African Americans and Hispanics and the percentage of the labor force employed in manufacturing occupations.

probability that the tract hosts a facility. The higher the median housing value, the lower the probability that the tract hosts a facility.

Our logit specification did not attempt to model the siting process, for several reasons. First, we lacked data on factors such as access to transportation that probably are quite important in the siting decision. Second, our goal was not to explain the reasons why sites are chosen, but to explore whether they are being chosen in a manner that has a disproportionate impact upon people of color and the poor. Nevertheless, we included a population density variable in the regressions reported in the Appendix in Figure 2B. The decision to locate a facility is likely to turn in part upon the population density within a proposed host community because sites with greater density put more people at risk (other things being equal), increase the number of people who may oppose the site, and may increase the costs of buying out and relocating residents. The univariate analysis shows that population density is substantially lower in host sites, and that the difference is highly significant. Population density also is highly correlated, positively, with several of the demographic variables, such as the percentage of African Americans, so its omission from the regressions could hide the effect of those variables. Accordingly, we were comfortable adding the density variable to the regression of demographic variables, even without a fully specified model of the siting process.

With the density variable, the regressions show that the percentage of African Americans, Hispanics, unemployed persons and persons employed in manufacturing occupations all are significant predictors of the presence of a facility (the higher the variable, the higher the likelihood that the tract hosts a facility). The percentage of individuals with incomes below the poverty line and the population density are significant, but negative predictors: the higher the variable, the lower the likelihood that the tract hosts a facility. Adding the population density variable to the regression accordingly reduces the significance of median housing value, and increases the significance of the percentage of African Americans in the host tracts.

The univariate analysis and the multivariate analysis considering population density reveal that the percentage of Hispanics, unemployment rates, and the percentage of the workforce employed in manufacturing occupations are significantly different in host and non-host tracts and are significant predictors of the location of TSDFs. The multivariate analysis considering population density also reveals that the percentage of African Americans is a significant predictor of the presence of facilities. The comparison of means and the regressions therefore reveal a greater correlation between the racial demographics

of a census tract and the presence of TSDFs than did the SADRI study.[26]

What is different about our analysis? What explains the results that differ from the SADRI findings, and why do these results deserve greater credibility than the SADRI findings? The analyses presented in this article address five major methodological issues:

1. How reliable was the data the SADRI and CRJ studies used?

2. Did SADRI's decision to compare host tracts only to non-host tracts with at least one facility in Metropolitan Statistical Areas (MSAs) or rural counties affect the findings?

3. Are certain types of facilities more prone to impose a disproportionate burden upon people of color or the poor than others?

4. Does the nationwide comparison of the demographics of host tracts to those of non-host tracts present a different picture of the distribution of facilities than more localized comparisons?

5. Would closer attention to the distribution of the population around the demographic means of the host and non-host tracts reveal more about who is bearing the burden of the facilities than simple comparisons of means?

III. THE RELIABILITY OF THE DATA USED

As noted previously, the CRJ and SADRI studies, as well as this analysis, examined the location of TSDFs.[27] Both the CRJ and the SADRI studies used the directory of commercial TSDFs published by Environmental Information Ltd., *Environmental Services Directory* (ESD) as their databases. The CRJ's most recent study, *Toxic Wastes and Race Revisited*, identified 530 TSDFs from the 1992 ESD.[28] The

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26. SADRI's multivariate analysis found that "race and ethnicity have no significant association with TSDF location. Industrial employment stands out with a strong, positive relationship. The only other significant associations are for housing value and percent of housing built prior to 1960, both relationships being negative." Anderton, *Evaluating TSDF Siting*, *supra* note 4, at 92.

27. The CRJ defined commercial TSDFs as "facilit[ies] (public or private) that accept[] hazardous waste from a third party for a fee or other remuneration, for the specific purpose of treating, storing or disposing of that waste, except captive facilities . . . [(]those facilities established by a specific company to accept only that firm's own waste products.[)]" CRJ study, *supra* note 5, at 65 (citing EPA definition). SADRI defined commercial TSDFs as those "which [are] privately owned and operated and which receive[] waste from firms of different ownership." Anderton, *Demographics of Dumping*, *supra* note 4, at 232 & n.7.

28. GOLDMAN & FITTON, *supra* note 10, at 19-20. The CRJ checked data from the ESD against FINDS (an EPA database with the names, addresses, and EPA identification number of facilities regulated under EPA's various programs), and eliminated facilities that could not be confirmed in FINDS. *Id.* at 20.

SADRI study identified 520 commercial TSDFs that were operating in 1992 from the ESD.[29]

Our study also began with the ESD, but in the course of our work we became concerned that the ESD might not represent an accurate listing of commercial TSDFs. First, the ESD appeared to understate the universe of commercial hazardous waste TSDFs. It identified less than 500 facilities being regulated under RCRA[30] as commercial hazardous waste TSDFs, while the EPA's database, RCRIS (Resource Conservation and Recovery Information System), identified more than 600 facilities as being TSDFs that received off-site waste (a proxy for commercial status). Consequently, the ESD potentially understated the universe of facilities by as much as 17%.

In addition, the ESD listings seemed skewed toward the potentially least bothersome facilities.[31] The ESD included more than eighty facilities that identified themselves as not being subject to the requirements RCRA imposes upon hazardous waste TSDFs.[32] Such facilities include, for example, companies that recondition the clean empty drums that once held hazardous waste. While such facilities may be a nuisance to those living nearby, many are much less burdensome than such regulated hazardous waste TSDFs as landfills and incinerators.[33]

Similarly, the ESD included more than seventy sites that were identified as mobile treatment facilities, for which the address listed was the headquarters of the firm, where no hazardous waste was treated, stored, or disposed of. The inclusion of such facilities could potentially skew the results of any environmental justice study by understating the extent of any disproportionate siting.

To resolve those difficulties, we painstakingly constructed a database using both the ESD and the RCRIS: drawing from each the information we could verify by cross-referencing the other, incorporating other sources of information about TSDFs, and surveying facility personnel. We began by pulling information from RCRIS on 600 facilities that RCRIS identified as having a "TSD indicator"[34] and

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29. Anderton, *Evaluating TSDF Siting*, *supra* note 4, at 86.

30. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1988 & Supp. V 1993).

31. Our reservations about using the ESD are not meant as criticisms of Environmental Information Ltd. or the ESD. The ESD clearly indicates that it includes facilities which would not be classified as hazardous waste TSDFs under RCRA.

32. 40 C.F.R. § 270.1(c)(2).

33. For further discussion on this issue, see text accompanying note 39.

34. RCRIS contains a "TSD Indicator" code (in the Handler2 file, activity segment, HTSD field) indicating that the handler is engaged in the treatment, storage or disposal of hazardous waste. The code is derived from the "notification" forms the handlers complete as part of their

receiving waste from off-site sources.[35] After eliminating government or university facilities and facilities located outside the continental United States, and after adding in data about Florida and West Virginia facilities, which RCRIS inadvertently failed to code, we had 612 facilities.

We then turned to the ESD. The 1994 ESD, a later version than that used by the CRJ or SADRI, listed 771 facilities in the continental United States. Almost 400 of the ESD facilities were not on the RCRIS list of facilities identified as TSDFs with off-site waste receipts. Conversely, of the facilities identified by RCRIS, more than two hundred were not listed in ESD. To determine which of the facilities appearing on only one of the lists should be included in our database, we compared the ESD list with the entire RCRIS file to identify facilities that were contained in RCRIS, but did not have one of the two indicators—TSDF universe and off-site waste receipt—that had defined our original extract. This resulted in 110 matches for facilities that had a TSDF indicator in RCRIS, but had not appeared in our extract because they were missing an "off-site receipt" indicator (the proxy for commercial status). We included all those facilities in the database because the fact that the facility had chosen to be listed in the ESD assured us that it was in fact commercial, despite the missing "off-site receipt" indicator.

The remainder of the facilities included in the ESD directory, but missing a TSDF indicator, or missing from the RCRIS entirely, turned out to be the facilities mentioned earlier: those the EPA exempts from the hazardous waste TSDF regulations, such as temporary storage and transfer facilities, mobile facilities, drum reconditioners, waste oil

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obligation to inform the EPA of their status, from the "Part A" permit applications handlers were required to file in order to remain in operation, and from the Biennial Reports periodically required of handlers. Almost 6000 facilities had the TSD indicator code.

RCRIS has an additional code indicating that the handler is in the "storage/treatment universe" (Handler1 file, HAND-KEY segment, HUSTORTRT field). That code is triggered only if the TSD indicator shows that the handler is a TSD other than an incinerator, and the TSD activity is identified as RCRA-regulated, and the facility has storage/treatment process codes that have been verified. Only 2091 facilities had the storage/treatment universe code, and only 325 of those also had the off-site waste receipt code. We therefore were concerned that the use of the storage/treatment universe code would understate the universe of TSDFs, and opted to use the more inclusive TSD indicator code. While that code had not been verified to the same degree as the "storage/treatment universe," we were confi dent that any facilities erroneously classified as TSDFs by the indicator would be identified through our cross-checks and telephone survey.

35. To identify facilities that received waste from off-site sources, we used the off-site waste indicator (Handler1 file, hand_key segment, Edgeoff_site field). That field contains a code indicating whether the facility accepts hazardous waste from any off-site source(s), accepts waste from only a restricted group of off-site generators, is verified to be non-commercial, or has an unknown commercial status.

recyclers, and facilities that manage medical waste. Because those facilities are treated by EPA regulations as different from the usual commercial hazardous waste TSDF, we put them into a separate "exempt" category. About 250 facilities fell into that category.[36]

For the facilities that were listed as TSDFs receiving off-site waste in RCRIS, but were not included in ESD, we attempted to verify that the facilities were indeed operating commercial TSDFs by phoning the facility.[37] Through these checks, we eliminated about eighty of the facilities because they had closed or were in the process of closing, or because they no longer had working phone numbers. Another forty were eliminated because they were not commercial or did not currently accept hazardous waste for treatment, storage, or disposal, or because they had never in fact opened. The resulting list contained 608 facilities, approximately 125 of which did not appear in the most recent version of the ESD. The process of verifying the regulatory status and current operating status of the facilities resulted in about 425 facilities being eliminated from the database, approximately 300 of which were facilities listed in the ESD.

The accuracy of the database depended not only on including all the facilities currently operating and excluding closed facilities,[38] but also upon the quality of the addresses given for each facility. Because the address determines the census tract to which the facility is assigned, errors in the addresses could produce significant errors in any demographic analysis. Both the ESD and the RCRIS databases contained numerous address errors, and the ESD sometimes provides the address of a facility's business or sales office, rather than the address of the facility itself. To remedy such inconsistencies, we verified as many addresses as possible through phone surveys of more than two-thirds of the facilities. The resulting database is one that is much more accurate, both in capturing the complete universe

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36. The exempt database, after corrections for facilities that had closed, had no current phone listing, or were not listed in FINDS, included 142 facilities.

37. We also checked our lists against other lists of facilities provided by trade organizations and others. *See, e.g.*, Environmental Protection Agency, Office of Solid Waste and Emergency Response, Combustion Emissions Technical Resource Document (draft, May 1994) (listing commercial hazardous waste incinerators, cement kilns, and lightweight aggregate kilns); Cement Kiln Recycling Coalition, *Plant Locations Using Waste-Derived Fuel* (1994); Pat Costner & Joe Thornton, *Playing with Fire: Hazardous Waste Incineration* (Greenpeace 1991) (list of eighteen hazardous waste incinerators then operating); CRJ study, *supra* note 5, at 66 (listing twenty-seven hazardous waste landfills).

38. Closed facilities had to be excluded because thousands of facilities have closed over the years but cannot be easily identified. To include known closed facilities, without being able to include the many that we cannot identify, could skew the results of any analysis significantly. Both the CRJ and the SADRI studies also excluded facilities known to have closed.

of facilities that are properly classified as commercial TSDFs and in getting the addresses and locations of those facilities correct.

What difference did all this careful checking make? The difference is hard to quantify because we used a more recent ESD than did the SADRI and CRJ studies. Therefore, our database, even before any changes produced by our accuracy checks, was somewhat different from both those studies.

To get some idea of the differences, however, we examined the demographics of the areas surrounding 144 facilities listed in the ESD that were eliminated from our database because they were exempt from regulation as hazardous waste facilities.[39] The results are presented in the Appendix, Figure 3. The demographics of those facilities look very similar to those of the non-host tracts, except that the exempt facility hosts had significantly lower median housing values and lower levels of education than the non-hosts. Inclusion of those facilities, therefore, had the potential to skew the results of any environmental justice study away from a finding that facilities are sited disproportionately in communities of color.[40]

The conclusions of any study are only as good as the data used for the study. We believe that our database is much more accurate than that used by either the CRJ or the SADRI researchers, and that our results therefore stand on firmer ground.

IV. LIMITATION TO METROPOLITAN STATISTICAL AREAS OR RURAL COUNTIES WITH AT LEAST ONE FACILITY

One of the major criticisms of the SADRI study was that it artificially limited its comparison to those non-host tracts in MSAs or rural counties with at least one facility.[41] SADRI's reasoning for not including other non-host tracts was that only tracts in the same MSA as a facility can serve as possible alternative sites for the same market.[42] Critics argued, however, that alternatives for the site might be located much more broadly.[43]

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39. *See supra* notes 31-33 and accompanying text. Approximately 250 facilities were eliminated because they were exempt from regulation as hazardous waste facilities. Of these, approximately 100 were either closed, or would have been eliminated from the CRJ study, and possibly from the SADRI study, because they did not appear in the FINDS database that the CRJ used to check the regulatory status of the facilities.

40. No intimation is being made that the inclusion of the exempt facilities was intended to bias the analysis. At any rate, since both CRJ and SADRI relied upon the ESD, both studies would have been biased in the same direction.

41. GOLDMAN & FITTON, *supra* note 10, at 14; Bullard, *supra* note 18, at 467.

42. Anderton, *Evaluating TSDF Siting*, *supra* note 4, at 92, 96, 100.

43. GOLDMAN & FITTON, *supra* note 10, at 14; Bullard, *supra* note 18.

Our analysis is based on a comparison between all host and all populated non-host tracts within the continental United States. When we compared our host tracts to SADRI's limited set of non-host tracts, about 18,000 non-host tracts dropped out of the analysis. The results are presented in the Appendix, Figure 4.

Dropping those tracts from the analysis had several effects. First, the percentage of African Americans in the non-host tracts increased. As a result, the mean percentage of African Americans in non-host tracts actually was higher than for host tracts, although the difference was not statistically significant. The percentage of Hispanics in the non-host tracts also increased and, consequently, there was no statistically significant difference in means. The percentage of poor individuals living below the poverty line in the non-host tracts fell, resulting in an increase in the statistical significance of the difference in means. The median family income and median housing value in the non-host tracts increased, making the difference in means between host and non-host tracts greater.

The SADRI limitation reduces the differences between host and non-host tracts in racial terms, and even changes the direction of the difference in the case of African Americans. The SADRI methodology, while deservedly controversial, raises a very important issue about the analysis of environmental justice. Researchers have not developed a good model of how facilities are sited, and thus it is difficult to specify with any degree of precision which non-host tracts are viable alternative sites for the facilities. Until such a model is specified and agreed upon, it is impossible to evaluate whether the SADRI limitation is appropriate. We are trying to develop a model that would help us compare the host tracts to other tracts that really are alternatives; the results of that research will be presented in the near future.

V. FAILURE TO DIFFERENTIATE BETWEEN DIFFERENT TYPES OF FACILITIES

Professor Bullard has criticized the SADRI study because it "does not breakout the different types of TSDFs. The study design operates as if all TSDFs are the same, yet landfills and incinerators are very different from storage facilities. Specifically, no data is provided on the siting of hazardous waste incinerators."[44] Our breakout of the

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44. Bullard, *supra* note 18, at 468. Professor Bullard's criticism was directed in part to the fact that SADRI's initial research was funded in part by Waste Management Incorporated, which owns and operates hazardous waste facilities, including the types of facilities that

most troublesome facilities—landfills, incinerators, and kilns—reveals that there are some differences between the tracts hosting the most noxious facilities and other host tracts. The results are presented in the Appendix, Figure 5.

Comparison of means tests show that tracts containing landfills, incinerators, and kilns have higher percentages of African Americans and the poor than both non-hosts and hosts of other facilities. None of the differences is statistically significant, however. Statistical significance depends in part upon the number of observations that went into the calculation. Because the number of landfills and incinerators is fairly low, it would take a larger difference in means to register as statistically significant than for the universe of all facilities, assuming a constant variance (standard deviation).[45] The tracts hosting landfills, incinerators, and kilns do have much lower median family incomes, median housing values, and median rents than either the non-hosts or other facilities. Those differences generally are statistically significant.

The charge, then, that the SADRI research was biased because it failed to analyze the most troublesome facilities separately is not borne out by study. The breakout reveals no statistically significant differences on the percentage of African Americans and the percentage of poor living near the facilities. There are differences in the areas surrounding those least desirable facilities, but the differences lie in the property values surrounding the facilities and in the level of income and educational attainment of the facilities' neighbors.

VI. THE COMPARISON TO NATIONAL MEANS

Comparison of host tracts to the average of non-host tracts across the nation may smooth out differences between host tracts and their surrounding areas. Host tracts in a particular area could have a 14% African American population, for example, which could be four times that of the surrounding metropolitan area, yet equal to the national average. Although the host tract is disproportionately sited in comparison to its metropolitan area, it looks unproblematic when compared to the country as a whole. Conversely, a host tract in a particular area could have a percentage of African Americans that is much higher than the national average and, therefore, appear to be the victim of disproportionate siting, even though the host tract's percentage is in line with the average of the state or metropolitan area.

Professor Bullard identified as most troublesome. *See* Anderton, *Demographics of Dumping*, *supra* note 4, at 229.

45. Even combining all landfills, incinerators, and kilns fails to produce statistically significant differences in the means of the percentages of African Americans and the poor.

Regions of the country, as well as states and cities within those regions, differ markedly in their racial composition. The percentage of African Americans, for example, varies from slightly more than 2% in the New England states to 25% in the east south central states.[46] The percentage of Hispanic persons varies from less than 1% in the east south central states to more than 20% in the Pacific region.[47] Sitings that are disproportionate at the state or MSA level, therefore, can be hidden by comparing host tracts to the national average of non-host tracts.

Both SADRI and the CRJ recognized the potential for national averages to hide disparities at less aggregated levels. SADRI compared host tracts to non-host tracts within the same Environmental Protection Agency region (the EPA divides the country into ten regions for purposes of administrative and regulatory convenience). SADRI found that the average percentage of African Americans was significantly lower in host tracts in the north mid-Atlantic states (EPA region II), but otherwise was not significantly different. The percentage of Hispanics was significantly higher in host tracts only for the southwest (EPA region IX).[48] The CRJ compared host zip codes to non-host zip codes within the same state, finding disparities to be highest in Kansas, Kentucky, Tennessee, Indiana, Nebraska, Michigan, and Alabama.[49] Determining whether a comparison of host tracts to their surrounding regions or MSAs is more appropriate than a nationwide comparison depends on how location decisions actually are made. As noted previously, researchers haven't agreed upon a model of the siting process. Facilities may have restricted their siting choice to the state or metropolitan area in which they eventually located because of proximity to customers, availability of transportation networks, regulatory climate, or other geographically specific factors.[50] On the other hand, the facilities may have been able to locate almost anywhere in the United States.

To determine whether a more limited comparison would change the nature of any disparities shown between host and non-host tracts, we calculated the ratio of the demographics of host sites to the demographics of all non-host sites within the state and within the

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46. MARK T. MATTSON, ATLAS OF THE 1990 CENSUS 101 (1992) (designating Tennessee, Alabama, and Mississippi as the east south central region).

47. *Id.* at 109.

48. Anderton, *Demographics of Dumping*, *supra* note 4, at 239 & Figure 1.

49. GOLDMAN & FITTON, *supra* note 10, at 10.

50. SADRI's decision to limit comparison non-host tracts to those in areas that had at least one facility would be on firmer ground if facilities felt their site choices were restricted to nearby tracts. *See supra* notes 41-43 and accompanying text.

MSA. If the host tract had a 30% African American population, for example, while the non-host tracts within the state had 15%, the ratio was 2:1. We then calculated the mean of those ratios and tested to see whether that mean was significantly different from one, the ratio that would result if the host tract and non-host tracts had the same demographics. The results are presented in the Appendix, Figure 6.

We found that those demographic variables of the host tracts that were significantly different from the demographics of the non-host tracts at a national level continued to be significantly different at a state level. The percentage of African Americans in the host tracts continued to be insignificantly different from the percentage of African Americans in non-host tracts.

The picture changes, however, when the comparison is drawn between host tracts and non-host tracts within the same MSA. The percentage of African Americans in the tracts remains insignificantly different. The percentage of Hispanics remains significantly different, but the difference narrows. The difference between the percentage of the poor in the host and non-host tracts increases, and becomes more statistically significant.

The most interesting changes, however, are in the financial variables. The difference between the median family incomes in host and non-host tracts narrows considerably, and loses statistical significance. Similarly, the difference between median housing value in the host and non-host tracts narrows, and drops in statistical significance from the 99% to the 95% confidence levels.

The similarity between the median family incomes of the host and non-host tracts within the same MSA calls into question both the extent to which siting disparities are related to class and the extent to which that relationship is inappropriate. The sitings had a disproportionate impact upon those with lower incomes than their non-metropolitan neighbors. But within a metropolitan area, there was little difference between the median family incomes in host and non-host tracts. Accordingly, any injustice lies in the placement of LULUs within metropolitan areas instead of in more rural areas or in smaller cities outside metropolitan areas, rather than in the placement of LULUs within the host city itself. There are substantial and non-controversial reasons for placing LULUs in the less densely populated areas of an MSA, however. For example, facilities in the cities are likely to be closer to the waste sources, which reduces the risk of accidents in transport.

Similarly, the fact that the difference between the median housing values in host and non-host tracts narrows considerably when only the host MSA is studied, calls into question both the extent to which

sitings may be based on class, and the extent to which sitings may be having a negative impact on surrounding property values.

These problems illustrate the need for further discussion about what constitutes environmental injustice. If the siting of TSDFs has a disproportionate impact on poorer families only because most facilities are located in urban areas, and their urban neighbors are poorer than people living outside urban areas, then the remedy may lie in changing the allocation of power among cities and between local, state, and federal governments, rather than by reforming the nature of the siting processes. The definition of the relevant comparison group accordingly has implications both for determining whether facilities are cited disproportionately and if so, for determining the nature of the remedy.

VII. FAILURE TO EXAMINE THE DISTRIBUTION OF THE POPULATION AROUND THE MEANS

Both the CRJ and the SADRI researchers focused their reports on comparisons of means and regression analyses based upon those comparisons.[51] The mean is simply the average, and an average tells us little about the dispersion of the numbers around the average.

A comparison of means may show, for example, that host tracts have significantly lower mean family incomes, but will not show whether the mean is being pulled down in host tracts by the presence of many poor families, or by the absence of rich families. The two distributions may have different implications for environmental justice advocates. To gain a more sophisticated understanding of exactly how undesirable land uses are being sited, it is necessary to examine not only the means of the demographic variables, but also how the distribution of the facilities matches the distribution of the population around the mean.

To examine the distribution, we looked at how the non-host tracts are distributed in terms of the major variables we examined: the percentage of African Americans, percentage of Hispanics, percentage of all minorities, percentage of poor, median family income, median housing value, and percentage with no high school education. For each variable, we broke the numbers down into deciles or, in some cases, even finer distributions. In other words, we looked at how many of the non-host tracts in the United States have African

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51. SADRI reported in a footnote that it had compared "variable distributions for TSDF tracts and quartile values derived from tracts without facilities, using chi-square goodness-of-fit tests" but that "[t]hese tests provided no substantial insights beyond those produced by the Wilcoxon rank-sum tests." Anderton, *Demographics of Dumping*, *supra* note 4, at 247 n.22.

American populations of 0% to 10%, how many have African American populations of more than 10%, but less than 20%, and so on. We then looked at how many of the host tracts fell within those same deciles.

Assuming that a "fair" distribution of the facilities is one in which the distribution of the facilities was proportionate to the distribution of the population,[52] we calculated the number of facilities that would be located in a particular type of neighborhood if there were a proportionate distribution of facilities. If neighborhoods with 0% to 10% African American populations make up 73% of the non-host tracts, for example, then a proportionate distribution would be achieved if 73% of the facilities were located in those tracts.

Our analysis of the distribution revealed several interesting results. Looking first at the distribution of tracts by their percentage of African Americans (see Appendix, Figure 7), the distribution of the population is slightly different from the distribution of the facilities. The difference is statistically significant at the 95% confidence level.

At the far end of the graph, where the African American population is 10% or less of the tracts' population, the percentage of facilities is *lower* than the percentage of non-host tracts. In neighborhoods with African American populations of more than 10% but less than 70% African American populations, there is a *higher* percentage of facilities than of non-host tracts. In tracts that are virtually all African American, the trend reverses and there is a *lower* percentage of facilities than of non-host tracts.

In terms of raw numbers (see Appendix, Figure 8), if the distribution of facilities followed the distribution of the population, there would be twenty-four more facilities sited in the neighborhoods with no or very few African Americans. In neighborhoods where African Americans made up more than 10% but less than 70% of the population, there would be thirty-four fewer facilities. Neighborhoods with African American populations of more than 70% would have ten more facilities.

Similarly (see Appendix, Figure 9), neighborhoods with Hispanic populations of more than 20% are bearing more than their fair share of the facilities: they host about thirty-five more facilities than they would if facilities were distributed in the same way as the population.

In terms of income (see Appendix, Figure 10), lower and middle income neighborhoods are bearing an unfair share of the facilities.

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52. For discussions of what fairness means in the context of environmental justice, see for example, Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993), and sources cited therein.

Neighborhoods with a median family income of less than $10,000 are bearing fewer facilities than their percentage of the tracts. However, neighborhoods with a median family income of $10,001 to $40,000 bear a greater share of the facilities than they constitute in society. Those neighborhoods are bearing sixty-two (about 15%) more facilities than would be proportionate. (*See* Appendix, Figure 11).

Analysis of Figure 12 (see Appendix) reveals stark disparities regarding educational attainment. Those neighborhoods in which more than 70% of the population graduated from high school bear *less than or equal to* their proportionate share of the facilities. Neighborhoods in which 30% to 70% of the population have no high school diploma bear *more than* their proportionate share. To quantify those numbers, neighborhoods in which 30% to 70% of the population do not have a high school diploma have seventy more facilities than their proportionate share would warrant, an excess of 14%.

These numbers capture the distribution of neighborhoods only along one dimension: the percentage of African Americans, median family income, and so on. But, of course, neighborhoods differ along many dimensions at one time. To test how income and race together are related to the distribution of income, we broke the host and non-host tracts down by the joint distribution of the percentage of African American and median family income. The results are presented in the Appendix, Figure 13. That analysis shows, more clearly than any of the prior cross-sectional research, who is currently bearing a disproportionate share of undesirable facilities.

As indicated above, neighborhoods with median family incomes between $10,001 and $40,000 are bearing a disproportionate share of the nation's hazardous waste facilities. (*See* Appendix, Figure 10). Of these neighborhoods, tracts in which there are few or no African Americans host about 10% more facilities than their share of the population as a whole. (*See* Appendix, Figure 13). Tracts within the income group and with African American populations of between 10% and 60% host about 40% more facilities than their proportionate share. Neighborhoods with African American populations of 60% to 80% bear only their proportionate share, and neighborhoods with African American populations of 90% bear less than their proportionate share. If all neighborhoods with more than 10% African American populations are considered together, they bear 30% more facilities than their proportionate share of all tracts in the population.

There is no firm agreement on what percentage of African Americans constitute an "African American neighborhood," so it is difficult to draw clear lines about which neighborhoods should be counted in any analysis of siting disparities. Nor is it clear how the

fact that tracts with very high percentages of African Americans have fewer facilities that their proportion in society should affect the findings about more racially integrated tracts. In addition, the significance of this analysis depends upon further study of whether the host neighborhoods with low African American populations are in fact populated by other people of color, rather than non-Hispanic whites. The distributional analysis presented here cannot address that issue, although we are in the process of studying that issue with other econometric tests.

Figure 13 (see Appendix) shows that tracts within the burdened income group, including those that might be considered African American neighborhoods, bear more than their share of the nation's facilities. It does not reveal, however, whether that burden is distributed disproportionately by race. To help us to illuminate that issue, Figure 14 (see Appendix) further compares the actual distribution to the distribution of tracts with the specified characteristics across society as a whole. Figure 14 compares the actual distribution to the distribution that would occur if the admittedly disproportionate number of facilities imposed upon tracts with median family incomes of $10,001 to $40,000 were distributed proportionately within those tracts according to race. The tracts with median family incomes of $10,001 to $40,000 hosted 463 facilities. If those facilities were distributed within the income set in proportion to the distribution of African Americans within the set, 15 fewer (3%) would be located in tracts with more than 10% African Americans than are in fact located in those tracts. In other words, if you assume the disproportionate burden imposed upon the tracts to be a function of income, the burden should be distributed within those tracts without regard to race. Because the distribution by race within the income group is only very slightly different from a proportional distribution, the analysis provides evidence that the disproportionate burden imposed upon these income groups is more a function of income than race.

The picture that emerges from this analysis is much different than either the SADRI results or the CRJ results. Unlike the SADRI study, these results show that many neighborhoods with percentages of African American populations greater than the national average are bearing a disproportionate share of the nation's facilities. Unlike the CRJ study, however, these results show that almost as many neighborhoods with few African Americans also are bearing a disproportionate share. Indeed, Figure 14 reveals that within the most affected income group, the burden is only slightly different for neighborhoods with more than 10% African Americans than for those with very few African Americans. That undermines CRJ's conclusion

that race, not class, is the most important correlate of the location of undesirable facilities.

VIII. CONCLUSION

We have tried to illuminate where assumptions and methodological choices may be either obscuring or exaggerating problems of environmental justice. While the most accurate analysis of environmental issues must await the longitudinal analysis that we have underway, several conclusions can be drawn from our work thus far. First, the SADRI study's results are not biased by its failure to break out the analysis by type of facility. Second, SADRI's analysis decreases the importance of race as an explanatory variable, by limiting the comparison to non-host tracts in metropolitan areas or rural counties that already have one facility. Whether SADRI's limitation is appropriate depends upon further analysis about where those who are locating TSDFs look for alternative sites.

Third, comparing the demographics of host tracts to the means of non-host tracts in the same state reveals the same relationships as a nationwide analysis. When host tracts are compared only to non-host tracts in the same metropolitan area, however, differences in median family incomes and median housing values between host and non-host tracts narrow and lose much of their significance, while the percentage of Hispanics remains strikingly different.

Finally, a more sophisticated comparison of the distribution of facilities to the distribution of neighborhoods with particular demographic characteristics reveals that certain types of neighborhoods—those with median family incomes between $10,001 and $40,000, those with African American populations between 10% and 70%, those with Hispanic populations of more than 20%, and those with lower educational attainment—are being asked to bear a disproportionate share of the nation's facilities. Analysis of the joint distribution of income and percentage of African Americans in the population suggests that income explains most of the disparity. Multivariate analysis, however, suggests that race is a better predictor of facilities than income. In total, the analysis also reveals that environmental injustice is not a simplistic PIBBY—"put it in Black's backyards."[53] It suggests, instead, a much more ambiguous and complicated entanglement of class, race, educational attainment, occupational

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53. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 5 (1990).

patterns, relationships between the metropolitan areas and rural or non-metropolitan cities, and possibly market dynamics.

APPENDIX

FIGURE 1

Comparison of Means Demographics of All Host Tracts, as of 1990 Census

Variable	Host Tracts	Non-Host Tracts	Ratio of Host to Non-Host	Significance
% African American	14.39	13.46	1.07	<95%
% Hispanic	10.34	7.83	1.32	99%
% Minorities (all nonwhite races, and white Hispanics)	27.21	24.17	1.13	95%
% Poor	15.69	14.59	1.08	95%
Median Family Income	$31,602	$34,586	0.91	99%
% No High School Diploma	31.23	26.55	1.18	99%
Median Housing Value	$76,125	$96,808	0.79	99%
% Employed in Professional	19.34	24.57	0.79	99%
%Employed in Manufacturing	33.46	27.52	1.22	99%
Mean Population Density	1749	5076	0.34	99%

* Statistically significant at 95% confidence level
**Statistically significant at 99% confidence level

FIGURE 2-A

Logit Regression Analysis Demographic Variables, Without Consideration of Population Density

Variable	Coefficient	Standard Error	T Score	Significance (P>\t\)
% African-American	.0036241	.0021877	1.657	0.098
% Hispanic	.0093931	.0029039	3.350	0.000**
% Poor	-.0112701	.0073247	-1.539	0.124
% No High School Diploma	-.0052379	.0058567	-0.894	0.371
Median Family Income	.0115458	.007128	1.620	0.105
Median Housing Value	-.0032531	.0011795	-2.758	0.006**
% Unemployed	.0219905	.0116523	1.887	0.059
% Employed in Manufacturing Occupations	.041623	.0053491	7.781	0.000**
Constant	-6.035288	.3326286	-18.144	0.000**

Log likelihood: -2978.05
Number of Observations: 57889
Chi2 (8 degrees of freedom): 148.87
P > chi2: 0.000
Pseudo R2 = 0.0244
** Significant at the 99% confidence level

FIGURE 2-B

Logit Regression Analysis Demographic Variables, Considering Population Density

Variable	Coefficient	Standard Error	T Score	Significance (P>\t\)
% African-American	.0116226	.0023176	5.015	0.000**
% Hispanic	.0201611	.002849	7.076	0.000**
% Poor	-.0250853	.0073889	-3.395	0.000**
% No High School Diploma	-.0014387	.0058139	-0.247	0.805
Median Family Income	-.0026182	.0071752	-0.365	0.715
Median Housing Value	.0009327	.0011834	0.788	0.431
% Unemployed	.0379051	.0107789	3.517	0.000**
% Employed in Manufacturing Occupations	.0331349	.0053752	6.164	0.000**
Population Density	-.0001602	.0000177	-9.049	0.000**
Constant	-5/451763	.3294394	-16.549	0.000**

Log likelihood: -2909.8542
Number of Observations: 57889
Chi2 (9 dgrees of freedom): 285.26
P > chi2: 0.000
Pseudo R2 = 0.0467
**Statistically significant at 99% confidence level

FIGURE 3

Comparison of Non-Hosts, Hosts, and Exempt

Variable	Non-Hosts	Hosts to Exempt	Hosts to TSDFs
% African American	13.46	13.50	14.39
% Hispanic	7.83	7.24	10.34 **
% Poor	14.59	13.53	15.69 *
Median Family Income	34586	34404	31602 **
% No High School Diploma	26.55	29.58 **	31.23 **
Median Housing Value	96808	81726 **	76125 **

* Significant at the 95% confidence level
** Significant at the 99% confidence level

FIGURE 5

Characteristics by Facility Type

Variable	Non-Hosts	Landfills	Incinerators	Kilns	Other
% African American	13.46	15.78	16.48	14.82	14.23
% Hispanic	7.83	13.58	7.08	2.0 **	10.94 **
% Poor	14.59	17.38	17.77	16.84	15.42
Median Family Income	34586	30292	26834 **	28416 **	32138 **
% No High School Diploma	26.55	30.71	33.82 *	34.91 **	30.88 **
% No College Degree	56.82	62.75 *	67.13 **	70.83 **	63.32 **
Median Housing Value	96808	60786 **	52081 **	50097 **	85430 **

* Significant at the 95% confidence level
**Significant at the 99% confidence level

RIPENESS AND FORUM SELECTION IN FIFTH AMENDMENT TAKINGS LITIGATION*

THOMAS E. ROBERTS**

I. A MESSAGE UNHEARD, MISUNDERSTOOD, OR RESISTED

The 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*[1] imposed significant ripeness and forum selection requirements on Fifth Amendment takings claims.[2] The recent takings decisions of *Lucas v. South Carolina Coastal Council*[3] and *Dolan v. City of Tigard*[4] expand the rights of property owners. However, they have only a modest effect on the rules of ripeness and forum selection, which remain formidable hurdles in land use litigation. Although a spate of takings legislation offered around the country has emerged with the aim of further limiting public control over land use, these bills generally do not address ripeness and forum limitation issues.[5]

Hamilton Bank sets out a two prong test. The first prong—called the final decision requirement—requires a property owner to obtain a final decision from local land use authorities for an "as applied" challenge.[6] If dissatisfied with the development rights denied or limitations imposed in seeking a final decision, or if making a facial challenge, the second prong—called the compensation requirement—requires the property owner to seek compensation in the state courts.[7]

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* This article is a revised version of Chapter 3, *Ripeness and Forum Selection in Land-Use Litigation*, *in* TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS (Chicago: American Bar Association 1995) and is used with permission.

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1. 473 U.S. 172 (1985).

2. *See infra* text accompanying notes 243-54 (discussing due process and equal protection claims applicable to the ripeness doctrine). "The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides: '[N]or shall private property be taken for public use, without just compensation.'" Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (citations omitted).

3. 112 S. Ct. 2886 (1992). For general reference and addition al citations on the basic takings law of the Fifth Amendment, see DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE, 222-355 (2d ed. 1994); DANIEL R. MANDELKER, LAND USE LAW, 19-75 (3d ed. 1993).

4. 114 S. Ct. 2309 (1994).

5. *See infra* note 257.

6. *Hamilton Bank*, 473 U.S. at 186.

7. *Id.* at 194.

The rationale of prong one is that a regulation is only a taking if it goes "too far," and a court cannot answer this question without knowing how far the regulation goes.[8] The second prong is based on the nature of the Fifth Amendment claim; the Constitution does not proscribe takings, only takings without compensation. To receive compensation, the property owner must initiate an inverse condemnation action.[9]

Despite these requirements, case reporters over the past decade are filled with suits that have been filed prematurely in both state and federal courts without a final decision from the local authorities.[10] The reporters also carry numerous instances of property owners seeking compensation directly from the federal courts.[11] This suggests that the requirements of *Hamilton Bank* have either not penetrated the consciousness of property owners and their lawyers, or that the property owners' affinity for federal court is so great that they are willing, against great odds, to spend their time and money attempting to fall within narrow exceptions to the rules.

In the 1993 decision of *Celentano v. City of West Haven*,[12] the property owner "insist[ed] emphatically" that he, like other civil rights litigants, did not need to seek final action.[13] The property owner cited as authority the United States Supreme Court's 1982 decision in *Patsy*

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8. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348-49 (1986). For other discussions of the final decision rule, see R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from Hamilton Bank to Lucas*, 9 J. LAND USE & ENVTL. L. 101, 124-27 (1993); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

9. *MacDonald, Sommer & Frates*, 477 U.S. at 350.

10. *See, e.g.*, Restigouche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1212 (11th Cir. 1995); Southview Assocs. v. Bongartz, 980 F.2d 84 (2d Cir. 1992); Jama Constr. v. City of Los Angeles, 938 F.2d 1045 (9th Cir. 1991); Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990); Shelter Creek Dev. Corp. v. City of Oxnard, 838 F.2d 375 (9th Cir. 1988).

11. *See, e.g.*, Jones Intercable of San Diego, Inc. v. City of Chula Vista, 1995 WL 582169 (9th Cir. Apr. 4, 1995); *Restigouche, Inc.*, 59 F.3d at 1208; Reahard v. Lee County, 30 F.3d 1412, 1414 (11th Cir. 1994); Christensen v. Yolo County Bd. of Supervisors, 995 F.2d 161, 164 (9th Cir. 1993); Broughton Lumber Co. v. Columbia River Gorge, 975 F.2d 616, 622 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 60 (1993); J.B. Ranch, Inc. v. Grand Country, 958 F.2d 306, 308 (10th Cir. 1992); *Jama Constr.*, 938 F.2d at 1047-48; Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990); Hoehne v. County of San Benito, 870 F.2d 529, 531 (9th Cir. 1989); Bateson v. Geisse, 857 F.2d 1300, 1306 (9th Cir. 1988). *But see* Dodd v. Hood River County, 59 F.3d 852, 860 (9th Cir. 1995) (stating "to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant").

12. 815 F. Supp. 561 (D. Conn. 1993).

13. *Id.* at 567; *see also* Provident Mut. Life Ins. Co. v. City of Atlanta, 864 F. Supp. 1274, 1280 (N.D. Ga. 1994) (rejecting the same argument under similar circumstances).

v. Florida Board of Regents,[14] where the Court held that no exhaustion requirement applies to section 1983 actions.[15] Yet, in the *Hamilton Bank* case, the Court expressly distinguished *Patsy* and held that as applied takings claims differ from other constitutional claims.[16] Courts do not require an exhaustion of administrative remedies, but courts do require a final decision of the initial decisionmaker.

Some of these premature litigation efforts are understandable in light of the uncertainty regarding the finality of a decision for the purposes of prong one and the difficulty in distinguishing finality from exhaustion. Property owners may encounter difficulty ascertaining the number of applications for development, to whom the applications must be submitted, and the need to apply for development permission when to do so seems futile. Clarity is needed in the prong one final decision rule.

Confusion also exists regarding prong two, the compensation requirement.[17] Despite the fact that the Constitution mandates a compensation remedy,[18] some litigants and courts question the availability of such claims in state courts. The lack of recognition of the res judicata implications of prong two complicates the claim.[19] In this respect, the ripeness label applied to prong two is misleading for it suggests that a claim may be heard in federal court after a state court denies compensation. This is generally not true. Once tried in state court, the claim cannot be relitigated in federal court. Characterizing prong two as a forum restricting rule, rather than a ripeness rule, provides more accuracy and safety.[20]

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14. 457 U.S. 496 (1982).

15. *Id.*

16. *Celentano*, 815 F. Supp. at 567.

17. *See infra* part IV.D.

18. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987). Confusion emerges over whether the claim pursued in state court is one of state or federal law. *See infra* part IV.C. *See also* Dodd v. Hood River County, 59 F.3d 852, 860 (9th Cir. 1995) (taking the position, contrary to that advocated in this article, that the issue is one of state law).

19. *See infra* part IV.D.

20. *See infra* part IV.C. For a detailed discussion of the res judicata issue, see Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 482 (1992) [hereinafter Roberts, *Fifth Amendment*].

The prong two requirement to seek compensation from state courts is sometimes referred to as an exhaustion of state remedies requirement. *See* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). This is in contrast to the question of exhausting administrative remedies, which is not required to meet the final decision prong of *Hamilton Bank*.

This article's focus on choice of forum is limited to *Hamilton Bank*'s prong two. As to other issues such as abstention, see Kenneth B. Bley, *Deciding Whether to Sue in Federal Court*, URB. LAND Feb. 1995, at 39; Thomas E. Roberts, *Forum Selection in Land-Use Cases: Is Federal Court a Viable Option?* 16 URB. ST. & LOC. L. NEWSL. 1 (1993) [hereinafter Roberts, *Forum Selection*].

II. THE LEADING CASES

In *Hamilton Bank*, the developer received preliminary plat approval in 1973 for a cluster home development from the Williamson County Regional Planning Commission.[21] The developer then conveyed open space easements to the county and began putting in roads and utility lines.[22] Over the next few years, the commission reapproved the preliminary plans on several occasions.[23] In 1977, the county changed the density provisions of its zoning ordinance.[24] In 1978, the commission again approved the plans using the prior ordinance. In 1979, the commission reversed itself and advised the developer that the project was subject to the 1977 ordinance.[25] When a revised plat was submitted in 1980, the commission rejected it.[26] The developer then went to the County Board of Zoning Appeals and sought an interpretation of the applicable law.[27] The Board determined that the 1973 ordinance should apply.[28] In 1981, the developer resubmitted two plats.[29] The commission refused to follow the decision of the Board of Zoning Appeals and rejected the plans for eight reasons.[30] The commission based its reasons for rejecting the plans on both new and old laws.[31] The developer then brought suit in federal court.[32]

The United States Supreme Court found that the action was not ripe.[33] The Court noted that a takings claim is premature "until the government entity charged with implementing the regulations has reached a final decision."[34] The Court held that there was no final decision since the developer had not sought "variances that would have allowed it to develop the property according to its proposed plat . . . ."[35] The developer contended "that it '[had done] everything

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21. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 177 (1985).
22. *Id.* at 178.
23. *Id.*
24. *Id.*
25. *Id.* at 178-79.
26. *Id.* at 179.
27. *Id.* at 180.
28. *Id.* at 181.
29. *Id.*
30. *Id.* (two of the reasons were density and grade problems which were cited in the earlier denial).
31. *Id.* at 181-82.
32. *Id.* at 182.
33. *Id.* at 187.
34. *Id.* at 186.
35. *Id.* at 188.

possible to resolve the conflict with the commission.''[36] The Court was not convinced that a final decision had been obtained.[37] The Board of Zoning Appeals had the authority to grant variances dealing with five of the county's eight objections.[38] Moreover, the Commission itself had the power to grant variances to solve the other objections.[39]

The developer's failure to use the inverse condemnation process available in state court caused the second problem. Even assuming that the restrictions constituted a taking because of their severity, no constitutional violations occurred since no compensation had been denied.[40] The wrong forum had been chosen.[41]

In 1986, one year after *Hamilton Bank*, the Court decided *MacDonald, Sommer & Frates v. County of Yolo*.[42] In *MacDonald*, the developer submitted a preliminary plan to subdivide residentially zoned land into 159 lots for single family and multi-family housing.[43] The planning commission rejected the plan due to inadequate public street access, and deficiencies in police protection and water and sewer services.[44] The developer then filed suit in the state court alleging that its property was being condemned to open space and agricultural use.[45]

The Supreme Court affirmed the state court's holding that the action was unripe since the developer had not obtained a final decision from the authorities as to what kind of development could be allowed.[46] The developer failed to convince the Court that it had, with its one application, done enough.[47] The Court noted that "unfair procedures"[48] need not be pursued by a developer, but the "[r]ejection of exceedingly grandiose development plans [would] not logically imply that less ambitious plans [would] receive similarly unfavorable reviews."[49] The Court clearly indicated that the effort required from a developer was not useless or futile.[50] Rather, the Court observed that

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36. *Id.*
37. *Id.* at 187.
38. *Id.* at 188.
39. *Id.* at 188-89.
40. *Id.* at 195.
41. *Id.* at 196-97.
42. 477 U.S. 340 (1986).
43. *Id.*
44. *Id.* at 342-43.
45. *Id.* at 343.
46. *Id.* at 349.
47. *Id.* at 351.
48. *Id.* at 350 n.7.
49. *Id.* at 353 n.9.
50. *Id.* at 353 n.8.

the plaintiff had "'applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan [could not] be equated with a refusal to permit any development . . . . Land use planning [was] not an all-or-nothing proposition.'"[51]

To summarize, *Hamilton Bank* and *MacDonald* require that, prior to filing suit in federal court, developers obtain from state courts a final decision on a meaningful application for development.[52] If a variance procedure exists that might permit a project to proceed, it must be used unless application would be futile. If development permission is denied, compensation must be sought by way of an inverse condemnation action in state court. For a property owner's lawyer, this approach is "easier said than done."

III. THE FINAL DECISION REQUIREMENT

This section addresses the questions raised by the final decision requirement. Does the final decision requirement only pertain to as applied regulatory takings claims (such as those involved in *Hamilton Bank* and *MacDonald*) or to physical and facial regulatory claims as well? Does it apply to exaction cases like *Dolan v. City of Tigard*?[53] What is the distinction between exhaustion and finality in the context of zoning decisions? When is reapplication required? When is a variance request required? What is needed to show futility?

A. The Final Decision Rule is Inapplicable to Physical Takings and Facial Regulatory Takings

Hamilton Bank's final decision rule stems from the nature of an as applied regulatory challenge. An as applied regulatory challenge involves an ad hoc, fact-based examination of a regulation's economic impact and its interference with reasonable investment-backed expectations.[54] To determine whether economic viability has been diminished from a piece of property by enactment of a regulation, a court must determine how much development will be permitted. By contrast, a landowner bringing a physical takings claim is not subject

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51. *Id.* at 347.

52. While *Hamilton Bank* and *MacDonald* are the leading ripeness cases, the Court had, in several prior opinions, expressed concern over the lack of clarity regarding the actual impact of a regulation in finding no taking to have occurred on the merits. In hindsight, these opinions have come to be treated as ripeness cases as well. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

53. 114 S. Ct. 2309 (1994).

54. *See, e.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

to this requirement since the physical invasion itself establishes what has been taken.[55]

Likewise, a property owner whose takings claim makes a facial challenge to a statute or regulation is not subject to the final decision rule. By definition, the mere enactment of the law, and not its application, takes the property.[56]

B. Ripeness in Exaction Challenges

Questions arise as to whether the final decision rule of *Hamilton Bank* applies with the same force to exaction challenges[57] as it does to economic impact cases.[58] The Oregon Court of Appeals recently debated the issue in *Nelson v. City of Lake Oswego*.[59] In *Nelson*, the property owners sought a permit to construct a house.[60] The city manager required the property owners to convey a fifty-five foot drainage easement to the city as a condition for the permit.[61] The property owners did not appeal the city manager's decision to the city council as was allowed under the code.[62] Instead, the property owners conveyed the easement to the city and sued for compensation.[63]

In response to the city's argument that the suit was unripe for failure to obtain a final decision, the court held that the first prong of *Hamilton Bank* did not apply to exaction cases.[64] According to the court, the purpose of the final decision rule was related solely to the "too far" question of economic impact takings cases.[65] A court needs to know, it reasoned, "whether the owner has applied for enough uses or decisions so that the scope of what the local regulations permit or prohibit can be known."[66] Here, the court knew the effect of the

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55. Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). *But see* Harris v. City of Wichita, 862 F. Supp. 287, 291 (D. Kan. 1994) (stating, in dicta, that the law is unclear).

56. *See* Yee v. City of Escondido, 503 U.S. 519, 533-34 (1992); Galbraith v. Planning Dep't, 627 N.E.2d 850, 853-54 (Ind. Ct. App. 1994).

57. *See, e.g.*, Dolan v. City of Tigard, 114 S. Ct. 2309 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

58. Though some question exists as to the final decision rule of *Hamilton Bank* in exaction cases, no one has specifically questioned the applicability of *Hamilton Bank*'s second prong, the compensation requirement. Some concern might exist, however, due to Justice Stevens' dissenting comments in *Dolan*. *See infra* text accompanying notes 168-80.

59. 869 P.2d 350 (Or. Ct. App. 1994).

60. *Id.* at 351.

61. *Id.*

62. *Id.*

63. *Id.* at 351.

64. *Id.* at 352-53.

65. *Id.* at 353.

66. *Id.* at 352.

condition since the condition had "resulted in the actual acquisition of a private property interest."[67]

Judge Landau, in his concurring opinion, disagreed with the majority in *Nelson*.[68] Judge Landau found no distinction between the two types of regulatory taking cases for purposes of the final decision rule.[69] Reading Supreme Court precedent[70] to require that an applicant seek a variance or waiver from the initial decisionmaker (whom he regarded as the city council, not the city manager), Judge Landau thought the city council should have had the opportunity to exercise the power it had reserved in its ordinances to review and reverse the city manager's decision.[71]

The Supreme Court did not address the ripeness issue in *Dolan* since the property owner complied with the final decision rule. However, the policy considerations that underlie the ripeness rules favor the concurrence's approach in *Nelson*. The Supreme Court has insisted that litigants make some effort to give local governments a chance to finalize the application of ordinances to specific land development requests.[72] Pursuit of a final decision gives state and local governments a chance to reevaluate their positions.[73] Only in *Lucas*, where state law did not allow the agency to modify the regulation, did the Court treat an as applied takings claim as ripe without some deliberation between the authorities and the developer.[74]

Since the property owner in *Nelson* conveyed the easement first, and then sued the city, in effect, a physical taking occurred. As noted above, the final decision rule exempts takings claims involving physical invasions. A difference exists, however, between physical takings that result from unilateral government conduct and physical takings that result from regulations. When the physical takings claim stems from the landowner's land being flooded by a dam project or suffering overflights from noisy planes, the landowner and the government have no advance opportunity to consult with each other.[75] The invasion occurs, and nothing exists to negotiate. In the

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67. *Id.* at 350.

68. *Id.* at 355 (Landau, J., concurring).

69. *Id.*

70. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294 -95 (1981).

71. *Nelson*, 869 P.2d at 357 (Landau, J., concurring).

72. *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 (1986); Agins v. City of Tiburon, 447 U.S. 255 (1980).

73. Tinnerman v. Palm Beach County, 641 So. 2d 523, 525 (Fla. 4th DCA 1994).

74. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

75. *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (flooding takings case); United States v. Causby, 382 U.S. 256 (1946) (overflight case).

exaction case, however, the property owner initially approaches the city requesting development permission, and the parties debate the propriety of an exaction. If the purpose behind the ripeness rule is, in part, to give the government "an opportunity . . . to change its mind,"[76] as one court put it, then the property owner ought to make some effort to see that the government has the chance to do so.

The same rationale ought to apply to monetary exactions, or impact fees, whether challenged on Fifth Amendment takings grounds or Fourteenth Amendment due process grounds.[77] The argument requiring a property owner to seek a final decision against the levy of a fee is in fact stronger than in the case of a physical exaction, since the resemblance to a physical taking is lacking.[78]

In sum, prudence suggests that a property owner obtain a final decision and seek a variance from a condition or impact fee imposed in the permit seeking process prior to seeking compensation. This effort will likely shield a property owner from wasting time, effort, and resources by pursuing a lawsuit that a court might declare unripe.

Putting aside the issue of finality in the exaction context, the question remains of how a property owner proceeds when confronted by a municipal demand for land or money in return for a permit. A property owner can do what the *Nelson* plaintiffs did—convey the land or pay the fee to the government and then sue.[79] While this approach worked in *Nelson*, in some states the property owner who follows this approach risks a finding of waiver and may lose the right to challenge the exaction.[80]

By contrast, a property owner may attempt to use the approach found in *Dolan*—refuse to convey the land and challenge the city's decision that a permit will be granted only if certain land is dedicated.[81] This approach avoids the waiver problem. However, according to Justice Stevens' dissent in *Dolan*, this approach makes the takings claim unripe.[82] Specifically, Justice Stevens stated that "Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her

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76. *Tinnerman*, 641 So. 2d at 525.

77. Conceptually, an impact fee fits more appropriately as an arbitrary and capricious substantive due process claim than as a Fifth Amendment taking claim.

78. *See* Nelson v. City of Lake Oswego, 869 P.2d 350 (Or. Ct. App. 1994) (premising non-application of the final decision rule on the similarity between exactions and physical takings).

79. *Id.* at 351.

80. *See infra* note 85.

81. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

82. *Id.* at 2322 (Stevens, J., dissenting).

constitutional right to compensation."[83] Acceptance of Justice Stevens' rationale puts a potential inverse condemnation claimant with an exaction challenge in an untenable position. The city may never take the step suggested by Justice Stevens in his opening sentence above; for example, there may be no direct condemnation. Likewise, the city will not grant the permit without the dedication. This leaves the property owner with three choices.

First, the property owner may drop the development proposal. This results in a denial of a presumably legitimate proposed use. Second, the property owner may deliver a deed to the city under protest and obtain the permit. An advantage to the second approach is that the developer, by proceeding with the project, mitigates damages. This approach is unsatisfactory, however, unless it can be reversed by a judicial challenge voiding the dedication condition or ordering the payment of compensation. This would presumably be acceptable to Justice Stevens, but, unless state law permits payment under protest,[84] the property owner's claim might be waived.[85] Perhaps the Supreme Court would invalidate a state rule that imposed waiver on one who deeded land or paid a fee under duress of an unconstitutional requirement.

Finally, without complying with the condition, the property owner could file suit seeking a declaration that the condition is unrelated to the proposed development and ask the court to void the condition, or request that the court order the payment of compensation if the city refuses to drop its demand. No risk of waiver arises, but this

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83. *Id.* at 2328 (Stevens, J., dissenting). *See also* Preseault v. Interstate Commerce Comm'n, 494 U.S. 1, 11-17 (1990) (finding a takings claim premature because the property owner had not yet sought compensation under the Tucker Act); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 294-95 (1981) (finding no taking where no one "identified any property . . . that has allegedly been taken").

84. *See* Balch Enters. v. New Haven Unified Sch. Dist., 268 Cal. Rptr. 543 (Ct. App. 1990) (suit challenging school fee paid under protest subject to four year statute of limitations).

85. *See, e.g.*, Trimen Dev. Co. v. King County, 829 P.2d 226 (Wash. Ct. App. 1992) (finding that a developer who had paid a park fee and proceeded with development was estopped from challenging legality of ordinance), *aff'd on other grounds*, 877 P.2d 187 (Wash. 1994). *But see* Henderson Homes, Inc. v. City of Bothell, 877 P.2d 176 (Wash. 1994) (finding that where park impact fee was characterized as a tax, suit to recover payment was allowed and the use of estoppel by the city was to be rejected in light of the city's lack of clean hands).

See also Board of Supervisors v. Laurelwood Constr. Co., 600 A.2d 690, 694 (Pa. Commw. Ct. 1991) (holding that state law required developer to appeal condition to zoning board of adjustment or township's legislative body rather than pay fee and seek judicial review); Jesse v. Box Butte County Bd. of Equalization, 374 N.W.2d 235 (Neb. 1985). *But see* Nelson v. City of Lake Oswego, 869 P.2d 350 (Or. Ct. App. 1994) (deciding a case on merits where property owners conveyed easement and then sued, but finding no taking).

approach may delay the property owner's project.[86] The plaintiffs in both *Nollan* and *Dolan* followed this path.[87]

Justice Stevens' suggestion in *Dolan*, which mandates the second option and risks waiver, should be rejected as both unnecessary to meet ripeness concerns and unfair to the property owner. As long as the property owner obtains a final decision either through pursuing the second option (with payment under protest) or the third option (a challenge without compliance), the property owner alerts the local governing body to the risk that the local governing body may have to pay compensation. Furthermore, the local governing body can, if it wishes, decide whether to continue insistence on the exaction condition.

C. Exhaustion, No; Finality, Yes.

Confusion exists between the finality requirement and the exhaustion requirement.[88] As Justice Blackmun explained in *Hamilton Bank*:

> The question whether administrative remedies must be exhausted is conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.[89]

Michael Berger differentiates the two by labeling the exhaustion requirement "vertical finality" and the finality requirement "lateral finality."[90] Accordingly, the property owner incurs no obligation to

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86. Any delay might be compensable under *First English* as a temporary taking. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

87. Dolan v. City of Tigard, 114 S. Ct. 2309, 2311 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 825 (1987).

88. Confusion exists since some courts refer to *Hamilton Bank*'s prong two requirement (to seek compensation from the state courts) as an "exhaustion of state judicial remedies" requirement. *See, e.g.*, Jama Constr. v. City of Los Angeles, 938 F.2d 1045 (9th Cir. 1991).

89. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 192-93 (1985) (citations omitted). Despite this distinction, Shonkwiler and Morgan observe that many state courts mistakenly use the phrase "exhaustion of administrative remedies" to include the requirement that government action be final. JOHN W. SHONKWILER & TERRY D. MORGAN, LAND USE LITIGATION 281 (1986).

90. Michael M. Berger, *The Ripeness Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN, 1, 7-15. (Matthew Bender ed., 1991).

climb the administrative ladder to seek review of local land use decisions, but a property owner must seek some confirmation from the initial decisionmaker that a permit denial is final.

While these characterizations are useful starting points, they must be used cautiously. The specific context of local procedure coupled with the purpose of local land use rules drives the course of action a property owner must take. Resort to a board of adjustment, for example, is not required if the board has only the power to review the application of a regulation (vertical finality). However, appeal to a board of adjustment is required if the board possesses the power to waive or grant a variance from the regulations (lateral finality). *Hamilton Bank* provides an example. The Court in *Hamilton Bank* stated that the developer would not be required to appeal the planning commission's rejection of the developer's plat application to the board of adjustment since the board had the power only to review, and not to participate, in the approval decision.[91] However, the Court instructed that the property owner did have to go to both the board of adjustment and the planning commission to seek variances because those bodies had the power to relieve the property owner of the alleged hardships through a variance.[92]

Hedging is necessary, however, because the case law is muddled. The Third Circuit held, for example, that repeated denials of a building permit by a building inspector do not constitute final action where appeal of the inspector's decisions to a board of adjustment is available.[93] The Third Circuit based its ruling on its determination that the board of adjustment, not the inspector, had the final authority to construe the zoning regulations.[94] Furthermore, a property owner need not appeal the legality on state law grounds of a land use board's action to a state court for a final decision.[95]

Identifying the initial decisionmaker is a major obstacle in determining a final decisionmaker. The "government entity," or the "initial decisionmaker," may include the local legislative body, the

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91. 473 U.S. at 193.

92. *Id.* at 188-90.

93. Acierno v. Mitchell, 6 F.3d 970, 977 (3d Cir. 1993).

94. *Id.* The court noted that the board had plenary review over "'any order, requirement, decision, or determination' under the zoning ordinance by any county officer," and "authority to hear and decide any 'applications for interpretation of any zoning ordinance, code, regulation, or map upon which [it] is empowered to pass.'" *Id.*

95. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 193 (1985); *Acierno*, 6 F.3d at 977 n.17. Nevertheless, property owners have an obligation to go to state court for an inverse condemnation claim. *Hamilton Bank*, 473 U.S. at 194. While in state court, the property owner seeks a declaration that a taking occurred and an award of compensation. *Id.* at 194-95.

planning commission, the building inspector, and the board of adjustment. As the opinion in *Hamilton Bank* demonstrates, it is a mistake to view the term "initial decisionmaker" narrowly.[96] The plural term "decisionmakers," rather than the singular, more accurately expresses the requirement. Depending on local procedure, resort to all four (the legislative body, the planning commission, the building inspector, and the board of adjustment) may be required to make a decision final. A request to the legislative body for rezoning may be necessary in addition to seeking a variance, especially where a current zoning classification is somewhat dated.[97]

Courts are generally anxious to give the governing body a "realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property."[98] With this in mind, courts may broadly construe the term "local decisionmaker" to carry out that purpose. If a property owner wishes to minimize the chance of a dismissal on ripeness grounds, prudence dictates resorting to all of the various local agencies, whether they carry administrative or legislative labels.

D. Application and Reapplication: Meaningful, Grandiose, or Meager?

The *MacDonald* Court's statement that the "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews"[99] has led to the requirement that a developer must submit at least one meaningful proposal. The property owner may incur difficulty in deciding when and how often reapplication is necessary.

In *MacDonald*, the Court said that "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."[100] This phrase oversimplifies the problem and unduly burdens the property owner's quest to ascertain what the city will allow. The land development permitting process typically does not involve the developer merely going to the city and asking, "What will you let me do?" That might occur in a classical, simple, and

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96. The Court in *Hamilton Bank* required resort to both the planning commission and the board of adjustment. 473 U.S. at 188.

97. *See* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. Unit A May 1981), *cert. denied*, 455 U.S. 907 (1982). By contrast, where an application for development permission is denied and the land then is immediately downzoned, a request for rezoning is not required since the recent nature of the downzoning shows it would be futile. Hoehne v. County of San Benito, 870 F.2d 529, 535 (9th Cir. 1989). *See also infra* notes 132-43 and accompanying text.

98. *Hernandez*, 643 F.2d at 1200.

99. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986).

100. *Id.* at 348.

mythical Euclidean zoning scheme, where the city would respond by allowing commercial use on the lot and that would be the end of the matter. Under most land use schemes, however, a parcel's current zoning classification is only the beginning. More often, the developer must pursue subdivision approval or employ a flexible zoning tool (a conditional use permit, floating zone, or site review). These processes require the developer to submit a proposal to the city. If the answer is "yes," the developer faces no problem and the development proceeds.

If the answer is "no" or "maybe," the developer must decide whether its proposal was meaningful or grandiose. If the developer thinks that the proposal might have been grandiose, the developer must reapply. This determination will not be easy to make. If the record shows that the city might be receptive to a modified proposal, the developer will need to reapply. This occurred in both *MacDonald* and *Penn Central Transportation Co. v. City of New York*.[101] More recently, the Second Circuit found a claim unripe where the commission had denied permission after determining that the location of the structures on the land in question would interfere with a deer habitat.[102] After review, the commission indicated "that it would be receptive to a subdivision proposal that placed lots in a different segment" of the parcel.[103] The commission also determined that the developer "had not undertaken all feasible and reasonable means of reducing the development's effect on the deeryard."[104] Based on these facts, the court held that the developer needed to reapply and alter its development request in order to determine what the commission would allow.[105] Since some development seemed likely to be permitted, the developer had to ask for permission to develop.

The Supreme Court has given some examples of grandiose and meaningful applications, though these examples are not especially helpful. The proposal rejected by the county in *MacDonald* was

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101. *MacDonald*, 477 U.S. at 352-53; Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

102. Southview Assocs. v. Bongartz, 980 F.2d 84, 90-92, 99 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993). Reapplication to the initial decisionmakers is required as opposed to appeal of the initial denial. In *Southview*, the developer filed an application for development permission with the district environmental commission. When the commission denied the permit, the developer appealed to the state environmental board. After losing that round, the developer appealed to the state supreme court. Again, the developer lost. The court affirmed the permit denials. The developer then sued in federal court arguing that the developer had obtained a final decision rendering the claim ripe. The court held that the developer must reapply to the commission. *Id.*

103. *Id.* at 99.

104. *Id.*

105. *Id.* at 98.

referred to as an "intense type of residential development."[106] The *MacDonald* Court also intimated that the "five Victorian mansions"[107] sought in *Agins v. City of Tiburon*[108] and the nuclear power plant in *San Diego Gas & Electric Co. v. City of San Diego*[109] were of the grandiose variety.[110] The proposed fifty-five story office tower atop the landmark Grand Central Station in the *Penn Central* case was also likely "grandiose."[111]

Circumstances dictate when and how often reapplication must be made. Take, for example, *Gil v. Inland Wetlands & Watercourses Agency*.[112] The court in *Gil* found a lack of finality even though the developer submitted four applications:

> Our review of the record, however, convinces us that the plaintiff has not met his burden of demonstrating finality. A number of factors lead us to this conclusion. First, although we agree with the Appellate Court that the plaintiff had a reasonable expectation of developing the property for residential purposes, the wetlands status of a portion of the property should also have warned the plaintiff that development would be difficult and that repeated applications might be necessary before the agency would approve an application for a building permit. In this case, although the plaintiff submitted four applications, only three were actually reviewed on their merits.
>
> Additionally, the record discloses that whereas neighboring homes on similarly sized lots varied in footprint size from 800 to 900 square feet, each of the plaintiff's applications proposed single family houses with footprints exceeding 1500 square feet. Furthermore, although the plaintiff's final application reduced the footprint of the proposed house to 1800 square feet from the 2100 square feet of the preceding application, the final application nonetheless represented an increase from an earlier application's 1500 square feet proposed residence. In light of these factors, we cannot say that the agency would have rejected a more modest proposal if one had been offered by the plaintiff.[113]

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106. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 352 n.8 (1986).

107. Although the *MacDonald* court elaborately characterized the residential developments at issue in *Agins* as "Victorian mansions," the Court in *Agins* simply referred to the residential developments as "property." Agins v. City of Tiburon, 447 U.S. 255, 257 (1980).

108. 447 U.S. 255 (1980).

109. 450 U.S. 621 (1981).

110. *MacDonald*, 477 U.S. at 353 n.9.

111. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

112. 593 A.2d 1368 (Conn. 1991).

113. *Id.* at 1374-75.

Gil, of course, is an easy case since the submissions increased the size of the initially rejected proposal. A more typical response to the denial of the 1500 square feet proposal would have been to reduce the size of the proposal, but by how much? Should the builder necessarily be bound by the 800 square feet of existing homes that perhaps were built to meet the needs of a different market? No easy answer to this question exists.

In addition to the guesswork of whether to reapply, the developer must evaluate the potential for waiver. The developer trying to make a case ripe by making meaningful, non-grandiose submissions may ask for less than the developer wants. If the city says "no" to one or two "greedy" requests, and says "yes" to a third, more moderate request, the developer can proceed to build according to the approved plans. But does the developer have the right to sue for the losses sustained as a result of the prior denials? Since the city has approved the meager request, has not the developer waived the right to challenge the prior denials of the "greedy" requests?

If waiver poses a realistic risk, the developer should not make a meager request nor be required to do so. The property owner in *Dolan* did not do so in her case.[114] She simply sought a variance to proceed with her initial plan, which was denied.[115] Presumably, since the issue was not discussed, her request was meaningful and not grandiose. Only when the request is grandiose is the developer required to accommodate by asking for less.

Although the developer may always have to engage in some guesswork, the meaningful proposal rule ought not force the developer to make repeated, increasingly meager requests in order to make a claim ripe. Recall that *MacDonald* is the source of the meaningful application rule. In *MacDonald*, the Court spoke disapprovingly only of "relatively intense" and "grandiose" proposals.[116] The case need not be read as requiring repeated submissions. On one level, a developer may be required to submit a request or requests and make some concessions. However, reading the meaningful application rule to make a local government's decision unreviewable because a developer is unwilling to significantly reduce a project to meet what that developer considers unreasonable demands is an overly broad application of the rule.

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114. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

115. *Id.* at 2314. The Court did not discuss ripeness. The Court did note that when Dolan sought a variance after the initial imposition of the exactions, she did not offer to downsize her project in order to mitigate the harm to the city. She simply argued that her project was consistent with the city's plan. *Id.* Implicitly, that was enough to meet prong one.

116. *See supra* text accompanying notes 42-51 and 99-111.

The grandiose concern should be used sparingly to strike claims on the grounds of ripeness. Though *MacDonald* envisions some reapplication process, compelling the developer to repeatedly downsize its project is inconsistent with the variance requirement of *Hamilton Bank*. In *Hamilton Bank*, the Court used the developer's proposal as the frame of reference.[117] The Court only required the developer to seek variances "that would have allowed it to develop the property according to its proposed plat."[118] Even in a case like *Gil*,[119] a proposal that is significantly larger or more intense than existing uses in the surrounding area may be reasonable. The current zoning may be excessive and the surrounding property may be underused.

Favoring the property owner by relaxing and clarifying the final decision rule does not impose unreasonable burdens on the government. It simply gives the property owner his or her "day in court." More favorable rulings on final decision ripeness will not necessarily overwhelm municipal treasuries with huge judgments, since the substantive rules of takings law make it clear that property owners who seek to maximize the development potential of their land run a very real risk of losing on the merits. Thus, the substantive rules of takings law ought to deter hasty filings. More favorable rulings, however, will occupy more of the courts' time in hearing cases that allege government overreaching. However, government overreaching ought not be immune from being tested in court. Protection of constitutional rights justifies the added judicial expense.

E. Prong One Futility

The *MacDonald* Court suggested that futile or useless applications are not necessary.[120] But what does it take to convince the Court?[121] *Lucas* demonstrates that a property owner need not pursue applications for relief that the authorities lack the power to give.[122] However, the likelihood of success is not the test. Relief must be pursued if it is theoretically possible that it can be granted.[123]

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117. 473 U.S. at 188.

118. *Id.*

119. Gil v. Inland Wetlands & Watercourses Agency, 593 A.2d 1368, 1374-75 (Conn. 1991).

120. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.8. *See also* Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 48 (1992) ("In Justice White's view, the 'ripeness' requirements of both *Williamson County* and *MacDonald* could be satisfied upon a showing of futility."); Overstreet, *supra* note 8, at 113.

121. Futility is a question of law for the court. Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1232-33 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 193 (1994).

122. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

123. *Id.* at 2891; *Hamilton Bank*, 473 U.S. at 188.

Suspicions as to local hostility or even oral statements by local officials generally cannot be relied upon to release the property owner from the obligation of making a formal application. In *Wheeler v. City of Wayzata*,[124] the property owners wished to construct docks on waterfront land as part of a commercial marina, but were prevented from doing so because the land was zoned for single-family use.[125] Since the physical characteristics of the land precluded residential structures, the property owners were left with no use of their land.[126] Without seeking a variance, special use permit, or rezoning, the property owners brought a takings claim.[127] In response to a challenge that the claim was not ripe under *Hamilton Bank*, the property owners said it would have been futile to seek relief from the city because a few years earlier the city manager told the owners that "the city 'does not want any development of that property.'"[128] The court rejected the futility argument, noting that the burden is on the challenger to prove futility.[129] An oral statement made years earlier by one authorized to grant or deny land use permission does not suffice to reflect the town's current position on development.[130]

While the absence of a variance or other similar procedure may render the claim ripe as to prong one on futility grounds,[131] such an absence, standing alone, is not proof of futility. Even where no variance procedure exists, instances arise where a rezoning must be sought. This is particularly true where the currently contested zoning classification is a dated one.[132] In *Celentano v. City of West Haven*,[133] for example, land was zoned for open space in 1967 under the mistaken assumption that it was publicly owned.[134] The court dismissed the property owner's 1990 suit on ripeness grounds since he

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124. 511 N.W.2d 39 (Minn. Ct. App. 1994), *rev'd on other grounds*, 533 N.W.2d 405 (Minn. 1995). *See also* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

125. *Wheeler*, 511 N.W.2d at 41.

126. *Id.* at 42.

127. *Id.*

128. *Id.* at 43.

129. *Id.*

130. Recent rejections of claims of futility include a case where the property owner alleged that city officials were predisposed to voting against any request he might make. Celentano v. City of W. Haven, 815 F. Supp. 561 (D. Conn. 1993). Reliance on private or off-the-record comments was found to be insufficient to establish that formal application would be futile. *Id.*

131. *See Lucas*, 112 S. Ct. at 2890-91; Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068, 1072 (M.D.N.C. 1992).

132. *See generally* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. Unit A May 1981) (stating that a municipality must be given a "realistic opportunity" to review its zoning legislation and correct the inequity), *cert. denied*, 455 U.S. 907 (1982).

133. 815 F. Supp. 561 (D. Conn. 1993).

134. *Id.* at 563-64.

had failed to formally apply for a rezoning.[135] The court refused to "permit a disgruntled landowner to by-pass or preempt the local agency charged with adjudicating the validity of zoning designations in favor of a federal district court."[136] Thus, the city gets a chance to make a current determination as to how the land is to be used before the city is hauled into court.

If the legislation is recent it is less likely that the legislative body will change its mind. In such case the developer need not seek a rezoning or variance. A recent downzoning itself may be evidence of finality. In *Resolution Trust Corp. v. Town of Highland Beach*,[137] the town granted permission in 1980 for a planned unit development to be constructed by 1990.[138] In 1984, a new town board decided to shorten the completion date to 1985.[139] The developer did not meet the new deadline. In 1987 the town downzoned the land to eight units per acre, and the developer sued.[140] In 1990, the town downzoned the land to six units per acre.[141] The town argued that the developer should have appealed or sought an extension of time from the 1984 decision, but the court found that the later downzonings evidenced a final decision.[142]

Some courts are more stringent. In *Southern Pacific Transportation Co. v. City of Los Angeles*,[143] a strip of railroad land was zoned in varying classifications consistent with the zoning of adjacent land along the railroad route.[144] When the railroad applied to the Interstate Commerce Commission for abandonment, the city downzoned the land to a classification allowing only parking lots.[145] The railroad brought a takings claim without first applying for development permission.[146] The court held the claim unripe.[147]

When the local government imposes a moratorium on development, a claim may be ripe under the futility exception.[148] Where a city

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135. *Id.* at 567. Celentano acquired the land in 1974. He filed, then voluntarily withdrew, a site development plan in 1986. In 1987, Celentano and the city engaged in informal discussions regarding development of the property. *Id.* at 563-64.

136. *Id.* at 568.

137. 18 F.3d 1536 (11th Cir. 1994).

138. *Id.* at 1540.

139. *Id.* at 1542.

140. *Id.* at 1542-43.

141. *Id.* at 1546-47.

142. *Id.* at 1547.

143. 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991).

144. *Id.* at 500.

145. *Id.* at 501.

146. *Id.*

147. *Id.* at 504.

148. *See* Carpenter v. Tahoe Regional Planning Agency, 804 F. Supp. 1316, 1324 (D. Nev. 1992) (finding prong one was met where all permit applications were frozen). One court seems

freezes development pending the resolution of a particular problem (for example, adopting a plan to deal with flooding problems) or to give the city time to study community needs,[149] courts have held it to be futile to apply for relief.[150] Of course, if the interim ordinance itself contains a variance procedure or allows some uses, a landowner is obligated to pursue those processes to obtain a final decision.

IV. SEEKING COMPENSATION FROM STATE COURTS

The second prong of *Hamilton Bank* requires takings claimants to seek compensation from the state courts.[151] While *Hamilton Bank*, decided in 1985, made the second step contingent on whether the state provided a procedure for awarding compensation for regulatory takings,[152] that contingency was removed in 1987. In 1987, the Court held in *First English Evangelical Lutheran Church v. County of Los Angeles*[153] that the self-executing nature of the Fifth Amendment required a compensation remedy.[154] Under the Supremacy Clause,

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to think that the ripeness rules of *Hamilton Bank* do not apply to temporary takings claims. Alexander v. Town of Jupiter, 640 So. 2d 79 (Fla. 4th DCA 1994). The court in *Alexander* noted that the United States Supreme Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), did not discuss ripeness. *Id.* From that, the court in *Alexander* concluded that ripeness is not a component of a temporary takings claim, only a permanent claim. *Id.* at 81-82. Several problems arise with this conclusion. First, the *First English* "temporary taking" label is a remedy issue only. It simply describes the option the state has of limiting its damages by lifting the ordinance that the court finds to be excessive. Second, *First English* did not need to address the ripeness of the takings claim because it assumed, for the purposes of argument, that a taking had occurred and dealt solely with the remedy issue. 482 U.S. at 311. Third, the *First English* Court noted that the church had complied with prong two of *Hamilton Bank*, which it assumed applied. *Id.* at 314. Finally, had the final decision been discussed, the futility doctrine would have applied. The moratorium challenged in *First English* flatly prohibited any use of the property while studies were undertaken to determine what uses eventually should be allowed in light of flooding dangers. *Id.* at 307. It would have been pointless for the church to seek a development permit.

149. *See* Thomas E. Roberts, *Interim Development Controls, in* 3 ZONING AND LAND USE CONTROLS ch. 22 (Rohan ed., 1989).

150. *Carpenter*, 804 F. Supp. at 1324. The *Carpenter* court found the final decision prong met on the basis that a moratorium made it futile to seek development permission. *Id.* The court then proceeded to the merits of the takings claim without requiring that the plaintiff seek compensation from the state. *Id.* Whether that is correct is unclear. Subsequent to *Carpenter*, the Ninth Circuit held that prong two of *Hamilton Bank* applies to interstate compact commissions which should be sued in state court. Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616, 622 (9th Cir. 1992), *cert. denied*, 114 S. Ct. 60 (1993). A Washington state court, however, has held that the state is not liable for a county's costs in inverse condemnation. Klickitat County v. State, 862 P.2d 629, 634 (Wash. Ct. App. 1993).

151. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985).

152. *Id.*

153. 482 U.S. 304 (1987).

154. *Id.* at 315.

state court judges are bound to enforce the Constitution.[155] Thus, after *First English*, no state court is free to reject a compensation award where a taking is found.[156]

Prior to *First English*, some state courts, notably Florida, New York and California, rejected money damages as possible relief for regulatory takings.[157] These state courts are no longer free to make that choice.[158] No state court can assert that its law does not provide a compensation remedy since federal law, in effect a part of state law, provides that remedy.[159]

A. Prong Two Is Applicable to All Takings Claims

All takings claims, physical and regulatory, are subject to the requirement that the property owner seek compensation from the state. The reason is inherent in the nature of the Fifth Amendment. The Fifth Amendment does not proscribe takings. The Fifth Amendment proscribes takings without compensation. The long standing rule of interpretation is that the mandate of the Fifth Amendment is satisfied by post-taking compensation.[160] Thus, if property owners think that government conduct by physical invasion or regulation has taken their property, they must bring an inverse condemnation action.

It should not matter whether the taking occurs by application of a law or the mere enactment of a law. The state violates the Fifth Amendment when it refuses to pay. In other words, prong two

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155. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (referring to the Constitution as "the fundamental and paramount law of the nation"); Cooper v. Aaron, 358 U.S. 1 (1958) (holding that "[n]o state legislator or executive or judicial officer can war against the Constitution" where a state governor attempted to defy Supreme Court order).

156. *See* Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468, 475 (9th Cir. 1994) ("The remedy has been available since 1987, when the Supreme Court ruled in [*First English*] that California's *lack of a damages remedy for a regulatory taking was unconstitutional.*") (emphasis added) (citation omitted); Tari v. Collier County, 56 F.3d 1533, 1537 n.12 (11th Cir. 1995).

157. *See, e.g.*, Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980); New Port Largo, Inc. v. Monroe County, 985 F.2d 1488 (11th Cir.), *cert. denied*, 114 S. Ct. 439 (1993).

158. The Eleventh Circuit wrongly stated that it does not know "whether Florida [law] now [post *First English*] recognizes a cause of action wrought by regulatory takings." New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1493 n.12 (11th Cir.), *cert. denied*, 114 S. Ct. 439 (1993). See *New Port Largo, Inc. v. Monroe County*, 873 F. Supp. 633 (S.D. Fla. 1994) for the correct analysis. The Eleventh Circuit later found that Florida explicitly recognized a cause of action for damages in inverse condemnation in *Reahard v. Lee County*, 30 F.3d 1412, 1417 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1693 (1995).

159. Howlett v. Rose, 496 U.S. 356, 369 (1990) (stating that a state court may not refuse to hear a federal claim without a valid excuse). The instances when state courts can refuse to hear federal claims are few and far between and not applicable to takings claims. *See, e.g.*, Testa v. Katt, 330 U.S. 386, 394 (1947).

160. *See* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985). *See generally* Roberts, *Fifth Amendment*, *supra* note 20, at 482.

applies to facial claims and as applied claims.[161] Some authorities dispute this. In *Adamson Cos. v. City of Malibu*,[162] the court found a facial takings claim ripe in federal court without satisfying prong two[163] but the court mistakenly relied on *Yee v. City of Escondido*[164] to do so.[165] In *Yee*, the Supreme Court heard a facial takings claim and noted that the facial takings claim was not subject to prong one finality.[166] The *Yee* Court, however, had no occasion to address prong two. Prong two had been met since *Yee* came to the United States Supreme Court from the state courts.[167]

B. Prong Two in Nollan/Dolan Type Exaction Cases

As discussed above,[168] some question exists as to the application of *Hamilton Bank*'s first prong to exaction cases. Apparently, no property owner has specifically questioned the applicability of *Hamilton Bank*'s second prong to the exaction cases. The issue merits discussion due to the following comment by Justice Stevens in his dissent in *Dolan*:

> If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.[169]

Justice Stevens misplaces his apprehension if his reference to "micro-management" means the lower federal courts. As with economic impact claimants like Lucas, *Nollan/Dolan* type claimants who suffer a physical exaction raise a Fifth Amendment issue. No Fifth Amendment violation occurs when the government takes property. Only a

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161. *See* Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 505-06 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991).

162. 854 F. Supp. 1476 (C.D. Cal. 1994).

163. *Id.* at 1496-97; *see also* Christensen v. Yolo County Bd. of Supervisors, 995 F.2d 161, 164-65 (9th Cir. 1993) (assuming, without discussion, that the facial claim was ripe).

164. 503 U.S. 519 (1992).

165. *Adamson*, 854 F. Supp. at 1490.

166. 503 U.S. at 534.

167. *Id.* at 531-32. Other Supreme Court facial takings claims likewise came through the state courts, were against federal agencies, or were brought in federal court before *First English* when the state did not provide a compensation remedy. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (brought in federal court before *First English*); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (coming through the state court); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (against a federal agency); Agins v. City of Tiburon, 447 U.S. 255 (1980) (coming through the state court). For a full discussion, see Roberts, *supra* note 149, at 489.

168. *See supra* notes 57-86 and accompanying text.

169. Dolan v. City of Tigard, 114 S. Ct. 2309, 2326 (1994).

taking without compensation violates the Fifth Amendment. A cause of action arises when compensation is sought and denied and claimants can litigate this matter in state courts.

With *Lucas*-type economic impact cases, the property owner asks for compensation. If a taking is found, the state decides whether to pay temporary or permanent damages. With an exaction case, the property owner can go to state court to ask for invalidation of the exaction or compensation. If the requisite nexus exists, no taking occurs. If no nexus exists, the state can choose to drop the condition or pay for it.[170]

Amoco Oil Co. v. Village of Schaumburg[171] demonstrates that there is potential for confusion. In *Amoco*, the village conditioned Amoco's request for a special permit on Amoco's dedicating twenty percent of its land for a highway.[172] No nexus existed[173] and a federal challenge ensued.[174] While the case was pending, the village revoked the permit.[175] This left Amoco with no requirement of dedication and no permit.[176] Amoco convinced the federal district court that the exaction was invalid under *Nollan*.[177] The *Amoco* court nonetheless dismissed the case and directed the developer to state court.[178] The court was satisfied that the Illinois courts reviewed special permit denials with *Nollan*-like scrutiny[179] and that Amoco was likely to obtain a state court ruling that the reason for the permit denial was arbitrary.[180]

The *Amoco* court opined in dicta that if the state court found a non-arbitrary denial, Amoco could return to federal court.[181] Property owners should not rely on this. *Hamilton Bank* says that when a city takes property without paying for it, the property owner goes to the state courts.[182] In an *Amoco*-type case, the property owner would go to state court and assert that the denial of the permit was wrong. The

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170. Compensation might be due for the period of the delay under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

171. 1992 WL 229591 (N.D. Ill. Sept. 11, 1992).

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.* at *1.

177. *Id.* at *2.

178. *Id.* at *6.

179. The state court would have no choice but to apply *Nollan* and *Dolan* to Fifth Amendment claims. *See supra* note 152 and accompanying text.

180. *Amoco*, 1992 WL 229591 at *5.

181. *Id.*

182. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

property owner would then request that either a permit be issued without the condition or that the state be ordered to pay compensation for the dedication. If the state court in response says to the developer, "I think that the condition is validly imposed. If you want the permit, you must dedicate the land," then that constitutes a lower court finding that a nexus exists. That finding equals a determination that no taking has occurred and no compensation is due. Furthermore, that finding renders the case ripe, subject to direct appeal, and not subject to collateral attack in federal court.[183]

Nollan and *Dolan* demonstrate the feasibility of trying these issues in state court.[184] Both parties lost at the state level on the issue of legitimacy of the condition. Both appealed directly to the Unites States Supreme Court and prevailed.[185] If the Nollans or Dolan had gone to federal district court after the state courts had found the conditions valid, the federal courts would have been obliged to give full faith and credit to those findings.

C. The Nature of the Remedy: Federal or State?

Since the Constitution mandates a compensation remedy, the procedure need not be statutorily authorized.[186] State courts will hear a takings claim even if the contours of the action are somewhat uncertain.[187] Some courts have found an available remedy based on independent state constitutional guarantees similar to the Fifth Amendment.[188] This unnecessary process complicates matters.

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183. *See* Roberts, *Fifth Amendment, supra* note 20, at 484-88.

184. *See* Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

185. *Dolan*, 114 S. Ct. at 2309; Nollan v. California Coastal Comm'n, 483 U.S. 825, 830-31 (1987).

186. *See generally* Southview Assocs. v. Bongartz, 980 F.2d 84, 100 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); J. B. Ranch, Inc. v. Grand County, 958 F.2d 306, 308-09 (10th Cir. 1992); Lerman v. City of Portland, 675 F. Supp. 11, 16 (D. Me. 1987); Drake v. Town of Sanford, 643 A.2d 367, 369 (Me. 1994).

187. See *Southview Assocs.*, 980 F.2d at 99-100, where the court's research revealed no reported state regulatory takings case. However, the court found a state constitutional provision protecting property from damage and cases providing monetary relief for physical damage. *Id.* at 100. Based upon this finding, the court concluded that relief would be available in state court. *Id.* Resort to the Vermont courts was thus required. *Id.*

188. The Second Circuit, for example, noted that the Vermont Constitution had been interpreted to require the government to compensate property owners for physically damaged property. *Southview Assocs.*, 980 F.2d at 100. Thus, the Second Circuit found that a state remedy for a regulatory taking could likewise be recognized in Vermont. *Id.* at 100. The Tenth Circuit recognized that Utah's Constitution provided for compensation and found implicit the availability of a state judicial remedy. *J. B. Ranch*, 958 F.2d at 308-09. *See also* Anderson v. Alpine City, 804 F. Supp. 269, 274 (D. Utah 1992).

Two grounds cause confusion. First, *Hamilton Bank* referred to state law as evidence of how to fulfill the requirement.[189] Second, *Hamilton Bank*, preceding *First English* by two years, held that a property owner had to resort to state remedies where adequate.[190] As proof of adequacy in *Hamilton Bank*, the Court cited Tennessee statutes that allowed an inverse condemnation action.[191] The Tennessee Constitution's analogue to the Fifth Amendment formed the basis of the inverse condemnation statutes. However, since the right to compensation is self-executing, the right to compensation in the Tennessee state court would have existed even if the legislature had not enacted the statute[192] and even if the Tennessee Constitution had lacked a takings clause.[193]

While the self-executing nature of the Fifth Amendment's Just Compensation Clause renders unnecessary state constitutional or statutory authorization,[194] state legislatures are free to adopt procedures for litigants to pursue this right.[195] A state may establish administrative mechanisms to adjudicate inverse condemnation claims.[196]

When a property owner looks for a state procedure to bring a takings claim, the search quickly leads to the state's detailed eminent domain code. These codes present two difficulties. First, state legislatures generally enact eminent domain statutes primarily to address direct condemnations. The statutes address inverse condemnation indirectly, if at all.[197] Second, there is no express statement on whether the state legislatures designed these statutes solely to

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189. *Hamilton Bank*, 473 U.S. at 196.

190. *Id.* at 194.

191. *Id.* at 196.

192. *See* Brooksbank v. Roane County, 341 S.W.2d 570, 573 (Tenn. 1960).

193. *See* Alper v. Clark County, 571 P.2d 810, 811 (Nev. 1977).

194. Bacich v. Board of Control, 144 P.2d 818, 821 (Cal. 1943).

195. *See* Horn v. City of Chicago, 87 N.E.2d 642, 649 (Ill. 1949) (holding that the legislature can require that the inverse condemnation action be pursued within a specified period of time).

196. Department of Agric. & Consumer Servs. v. Bonanno, 56 8 So. 2d 24, 28-29 (Fla. 1990) (finding no constitutional right to jury trial on inverse condemnation claims where statute provided administrative mechanism for a hearing to determine what constituted just or full compensation for destroyed plants). Not just any administrative procedure will suffice to adjudicate a takings claim. *See* Healing v. California Coastal Comm'n, 27 Cal. Rptr. 2d 758, 768 (1994) (holding that a petition to review an administrative mandate was not an adequate procedure to determine inverse condemnation issues, in part because the administrative agency was not vested with adjudicatory powers to decide issues of constitutional magnitude; landowner entitled to present matter to state trial court).

197. Some state eminent domain statutes have been held inapplicable to inverse condemnation actions. *See* Drake v. Town of Sanford, 643 A.2d 367 (Me. 1994); *see also infra* note 210.

administer[198] state constitutional just compensation requirements or to administer Fifth Amendment takings claims as well.

A sampling of state eminent domain statutes shows the ill fit of such statutes with regulatory takings actions. Section 29-16-123(a) of the Tennessee Code Annotated, entitled "Action initiated by owner," provides:

> If, however, such person or company *has actually taken possession* of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or he may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.[199]

The requirement that the condemnor "has actually taken possession" is easy to apply in some inverse condemnation situations like flood damage or overflights. But what about regulatory limits on use? The Tennessee courts have interpreted the above statute to apply to zoning restrictions,[200] but that interpretation was not the only rational response possible.

Section 1-26-516, Wyoming Statutes, entitled "Action for inverse condemnation," provides:

> When a person possessing the power of condemnation takes possession of or damages land in which he has no interest, or substantially diminishes the use or value of land, *due to activities on adjoining land* without the authorization of the owner of the land or before filing an action of condemnation, the owner of the land may file an action in district court seeking damages for the taking or shall be granted litigation expenses if damages are awarded to the owner.[201]

The Wyoming statute appears applicable to zoning enactments that destroy land use "due to activities on adjoining land."[202]

North Carolina's inverse condemnation law provides that

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198. Because the right is self-executing, the use of the word "implement" would be inappropriate.

199. TENN. CODE ANN. § 29-16-123(a) (1995) (emphasis added). This provision was cited by Justice Blackmun in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 196 (1985), to show the availability of an inverse condemnation action in Tennessee state court.

200. Davis v. Metropolitan Gov't of Nashville, 620 S.W.2d 532, 534 (Tenn. Ct. App. 1981).

201. WYO. STAT. § 1-26-516 (Supp. 1995) (emphasis added).

202. *See* Rodney Lang, *Wyoming Eminent Domain Act: Comment on the Act and Rule 71.1 of the Wyoming Rules of Civil Procedure*, 18 LAND & WATER L. REV. 739, 761 (1983).

> [i]f the property has been taken by an act or omission of a condemnor . . . and no complaint containing a declaration of taking has been filed the owner of the property, may initiate an action to seek compensation for the taking. The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later.[203]

Section 40A-3(b) of the North Carolina General Statutes defines local public condemnors as "the governing body of each municipality or county . . . [that] possess the power of eminent domain and [that] may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes . . . ."[204] The statute then lists as purposes: roads, public enterprises, parks, sewers, hospitals, cemeteries, libraries, drainage, and "[a]cquiring designated historic properties."[205] On its face, the North Carolina statute fails to deal with excessive exercises of regulatory powers.

Statutes, like those above, are not necessarily inappropriate to deal with regulatory takings claims, but they create confusion for litigants trying to identify the proper claim to file. For example, a tendency exists to refer to the fulfillment of prong two as seeking compensation under "state law."[206] It is state law in the sense that state procedures are used to assert the right, but litigants assert a Fifth Amendment right.[207] Yet, due to the fact that only an *uncompensated* taking violates the Fifth Amendment, some courts have taken the position that the claim presented to the state courts is not a federal claim since the federal claim, unripe under *Hamilton Bank*, does not yet exist.[208]

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203. N.C. GEN. STAT. § 40A-51 (1994).

204. N.C. GEN. STAT. § 40A-3(b) (1994).

205. N.C. GEN. STAT. § 40A-3(b) (1994).

206. *See* Roberts, *Fifth Amendment*, *supra* note 20, at 492.

207. However, in *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995), the Ninth Circuit Court found that the pursuit of compensation for a taking in state court under the mandate of *Hamilton Bank* was not a Fifth Amendment claim, but merely a resort to state substantive law. The court reached this conclusion despite its acknowledgement that *First English* said that claims for compensation are grounded in the Constitution. *Id.* at 861. Still the limited reading of *Hamilton Bank* was prompted, the majority said, because a contrary ruling would "deny a federal forum to every takings claimant." *Id.* at 860. The *Dodd* court did, however, recognize that the pursuit of the state law claim in state court might preclude relitigation in federal court by way of claim or issue preclusion rules. *Id.* The court found that claim preclusion would not bar the claim because, under Oregon law, state courts had consented to claim splitting. *Id.* at 862. The court remanded the matter for a determination as to whether issue preclusion applied. *Id.* at 863.

208. *See, e.g.*, Impink v. City of Indianapolis, 612 N.E.2d 1125, 1127 (Ind. Ct. App. 1993); *see also* Bakken v. City of Council Bluffs, 470 N.W.2d 34 (Iowa 1991) (holding that the state court should dismiss a section 1983 claim due to the property owner's failure to use the state's inverse condemnation procedure).

Looking at prong two as one of "state law" can have unusual and unfortunate results. This view led the Maine Supreme Court in *Drake v. Town of Sanford*[209] to take the position that the Maine state courts had no jurisdiction over a Fifth Amendment takings claim until the party sought compensation under the state constitution.[210] In *Drake*, the plaintiff property owners filed an action in state court alleging that the town's shoreland zoning ordinance had taken their property without compensation in violation of the federal and state constitutions.[211] This claim paralleled *Foss v. Maine Turnpike Authority*,[212] a prior state supreme court opinion. The *Foss* court held that while no Maine statute provided for an inverse condemnation suit, such a right existed at common law based on the federal and state constitutions.[213] At trial, the plaintiffs dismissed with prejudice their claim under the state constitution.[214] A jury found a taking based on the Fifth Amendment.[215]

On appeal, the Maine Supreme Court overturned the jury's verdict and dismissed the case for lack of jurisdiction.[216] The court decided that the case was not ripe until the plaintiffs resorted to "the state procedure" for determining compensation; "the state procedure" meant a claim based on the Maine Constitution.[217] The plaintiffs'

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209. 643 A.2d 367 (Me. 1994).

210. *Id.* When a party files in the state court and the state court adjudicates the claim, as it must, then res judicata normally prevents relitigation in the federal court. In *Drake*, the plaintiffs dismissed their state constitutional claim and proceeded to trial on the Fifth Amendment claim and won. *Id.* at 368-69. On appeal, the Maine Supreme Court said that it had no jurisdiction over the federal claim because the claim was not ripe. *Id.* at 369. The state court's refusal to hear the Fifth Amendment claim was evidence of an inadequate state procedure entitling the plaintiffs to present a ripe claim in federal court. The dismissal with prejudice of the state takings claim was not relevant to the fact that the Fifth Amendment claim was thrown out of court. In other words, the opinion establishes the plaintiffs' inability to get the state to hear the claim.

In *Impink*, 612 N.E.2d at 1128, a claim was dismissed by a state court where the claimant did not use the state inverse condemnation statute for a state takings claim, but apparently directly invoked the general jurisdiction of the court to hear federal claims. Indiana law provides that "[a]ny person having an interest in any land which has been or may be taken for any public use without having first been appropriated under this or any prior law may proceed to have his damages assessed under this chapter, substantially in the manner herein provided." IND. CODE ANN. § 32-11-1-12 (Burns 1995).

211. *Drake*, 643 A.2d at 367.

212. 309 A.2d 339 (Me. 1973).

213. *Id.* at 344-45. *Foss* held that "while it is true that the Legislature may authorize that which otherwise would be a 'nuisance' or 'trespass,' it is equally true that the Fifth Amendment of the United States Constitution prohibits the 'taking' of property for public use without 'just compensation.'" *Id.* at 344. *See also* ME. CONST. art. I, § 21.

214. *Foss*, 309 A.2d at 339.

215. *Id.*

216. *Id.*

217. The *Drake* court premised its holding on a federal court decision, Lerman v. City of Portland, 675 F. Supp. 11 (D. Me. 1987), *cert. denied*, 493 U.S. 894 (1989). The *Drake* court held

dismissal of that claim meant that they had not completed *Hamilton Bank*'s prong two.[218] This decision was an unnecessary and wasteful interpretation of *Hamilton Bank.*

The Maine Supreme Court erred in failing to recognize that a state court has an obligation to enforce federal rights. A property owner has a federal constitutional claim under the Fifth Amendment enforceable in state court independent of the state constitution. While a state can compel a litigant to follow its procedures, a state should not use prong two to force a property owner to rely on the state constitution or some other source of state substantive law. All states have some counterpart to the Fifth Amendment requiring compensation for takings.[219] In some states the protection conferred by the state constitution is greater than that conferred by the federal constitution.[220] Nonetheless, states are not required to have just compensation clauses in their constitutions, nor must they interpret them to provide as much protection as the Fifth Amendment provides.[221]

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that the state's common law remedy was based solely on the state constitution. 643 A.2d at 367. The *Lerman* court, misreading Maine law, held that "Maine law provides relief [in the form of compensation for a taking] under the Maine Constitution . . . ." 675 F. Supp. at 15. The federal court's authority originated in *Foss*; but, as noted, *Foss*'s primary authority for finding that state agencies in Maine would be liable in a common law action for taking property was not the state constitution, as approved by *Lerman*, but the United States Constitution. *Foss*, 309 A.2d at 344. Thus, while the plaintiffs in *Drake* sued in state court based on either the federal or state constitution as *Foss* said they could do, the court dismissed their claim. *Drake*, 643 A.2d at 370.

218. The *Drake* court noted that the dismissal of the state constitutional claim with prejudice might mean that the claim could never ripen. 643 A.2d at 369. The plaintiffs' claim under the state constitution was independent of the federal claim. The fact that it was dismissed had no bearing on the plaintiffs' Fifth Amendment right to ask the state (through its state court) to pay them for their loss. The court noted that "the *only* claim requesting damages for the alleged taking *under state law*, was dismissed with prejudice." *Id.* (emphasis added). This decision was erroneous; the plaintiffs also asked for damages *under federal law*.

219. In at least two states, North Carolina and New Hampshire, the right to compensation is only implied. *See* 1 NICHOLS' THE LAW OF EMINENT DOMAIN § 1.3 (Patrick J. Rohan et al. eds., rev. 3d ed. 1995).

220. A number of state constitutions say that property cannot be "taken or damaged" without compensation being paid. 2A NICHOLS' THE LAW OF EMINENT DOMAIN § 6.02[2][c] (Patrick J. Rohan et al. eds., rev. 3d ed. 1995). Whether the word "damage" extends protection beyond a "taking" has been the subject of debate. *Id.* at § 6.02[2][d]. *See* Citizens Utils. Co. v. Metropolitan Sanitary Dist., 322 N.E.2d 857 (Ill. App. Ct. 1974) (construing the Illinois constitutional provision regarding "taken or damaged" property to be broader than the Fifth Amendment). *See also* Donaldson v. City of Bismarck, 3 N.W.2d 808 (1942). However, note that both of these cases wrongly assume that the Fifth Amendment does not apply to the states; the Fifth Amendment applies by incorporation. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (finding that the Takings Clause of the Fifth Amendment of the United States Constitution is made applicable to the States through the Fourteenth Amendment).

221. States cannot refuse to enforce the Fifth Amendment or interpret it in a manner to provide less protection than the Supreme Court requires. *See supra* note 156 and accompanying text.

State statutes, like those discussed above, simply say that where state agents take property the state shall pay. The statutes normally do not identify a source, and state courts may conclude that the state constitutional guarantees form the basis of the statutes.[222] Yet, these statutes may just as well be seen as having their basis in the Fifth Amendment.[223] If the state channels such actions through its inverse condemnation procedures and recognizes that the process that exists to implement a state constitutional requirement is also a logical way to litigate a similar federal constitutional requirement, then no harm is done to the federal right. However, the federal right is harmed if it is not allowed to be asserted, as was done in *Drake*.

Undue emphasis on the label chosen by the property owner pursuing compensation in state court runs a risk of reestablishing the tyranny of the common law forms of action that supposedly were buried years ago. This lack of clarity over whether the state condemnation procedure or a common law action should be used compels attorneys for property owners to carefully study state law.

D. Res Judicata Implications of Pursuing State Court Relief

Once a property owner completes prong two, the law of res judicata usually precludes a Fifth Amendment claim from being pursued in federal court.[224] Adjudication of the claim in state court bars a subsequent suit in federal court under the full faith and credit statute.[225] Collateral attack of the state court judgment is not permitted.[226] This limits property owners who are dissatisfied with the results obtained from the state court to appeal directly to the United States Supreme Court.

This is true even if a court takes the position discussed above[227] that the state claim must be litigated first since the federal claim is unripe. Once the state claim is litigated, the rule of issue preclusion will likely bar a suit in federal court on the federal claim since the

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222. *See* Brooksbank v. Roane County, 341 S.W.2d 570 (Tenn. 1960).

223. *See* Galt v. Montana, 749 P.2d 1089 (Mont. 1988) (recognizing that the right to just compensation was protected and measured by both the federal and state constitution); Herman v. Southern Pac. Co., 445 P.2d 186 (Ariz. Ct. App. 1968) (finding same).

224. For a complete discussion of this issue, *see* Roberts, *Fifth Amendment*, *supra* note 20, at 479.

225. 28 U.S.C. § 1738 (1988 & Supp. V 1993). *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); American Nat'l Bank & Trust Co. v. City of Chicago, 826 F.2d 1547, 1550 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987).

226. *See* Palomar Mobilehome Park Ass'n v. City of San Marcos, 989 F.2d 362, 365 (9th Cir. 1993); Peduto v. City of N. Wildwood, 878 F.2d 725, 729 (3d Cir. 1989).

227. *See supra* notes 207-218 and accompanying text.

issues being tried under the state constitution's takings clause would be the same.[228]

The Eleventh Circuit has suggested a "possible exception" to the doctrine of res judicata.[229] The "possible exception" is a reservation of the right to litigate federal rights in federal courts under the doctrine laid down in *England v. Louisiana State Board of Medical Examiners*.[230] Critics disagree, however, over whether a reservation of rights can be made in state-initiated proceedings.[231]

In sum and perhaps ironically, the action required to make a claim ripe also terminates the claim. This is surprising to those who are misled by the language of ripeness, which suggests that the state law suit is merely preparatory to a federal suit. The harm of this misleading language is discussed below.[232] The following section explores the one narrow instance where litigants can avoid the bar of res judicata.

E. Prong Two Futility or Inadequacy

The property owner bears a difficult burden to establish inadequacy of the state's compensation remedy.[233] Uncertainty automatically does not equal inadequacy of state remedies.[234] Also, if the property owner allows the state statute of limitations to run, that property owner forfeits any right to seek compensation in federal court.[235] If the court dismisses with leave to amend the property owner's state action and the property owner fails to amend, no federal suit will lie.[236]

In rare instances, prong two futility can be established by proving that the state courts have rejected takings claims that are on all fours with the challenger's case. Since takings claims are usually highly ad

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228. *See Palomar*, 989 F.2d at 365 (discussing the rules of issue preclusion).

229. New Port Largo, Inc. v. Monroe County, 985 F.2d 1488, 1496 (11th Cir.), *cert. denied*, 114 S. Ct. 439 (1993); Fields v. Sarasota Manatee Airport Auth., 953 F.2d 1299 (11th Cir. 1992).

230. 375 U.S. 411 (1964).

231. *See* Roberts, *Fifth Amendment*, *supra* note 20, at 502 n.106.

232. *See infra* part VI.

233. *See* Belvedere Military Corp. v. County of Palm Beach, 845 F. Supp. 877, 879 (S.D. Fla. 1994) (holding that if the Florida state court had "unequivocally indicated that an individual in [the] Plaintiffs' situation had no cause of action under state law," then they need not bother asking).

234. *See* Aiello v. Browning-Ferris, Inc., 1993 WL 463701 (N.D. Cal. Nov. 2, 1993) (finding that although state law is not clear on whether a private party acting under the color of law is liable in an inverse condemnation action, the plaintiff nevertheless is required to resort to state court).

235. Gamble v. Eau Claire County, 5 F.3d 285 (7th. Cir. 1993), *cert. denied*, 114 S. Ct. 1096 (1994).

236. *Belvedere*, 845 F. Supp. at 879.

hoc affairs, this will not often occur.[237] However, it does happen. The court in *Naegele Outdoor Advertising, Inc. v. City of Durham*[238] deemed ripe in federal court a challenge to a five and one half year billboard amortization ordinance.[239] No pursuit of a suit in the state court preceded the claim in the federal court since the North Carolina state courts had, on several occasions, upheld the same type of amortization ordinance.[240] The federal court concluded that a five and one half year sign amortization provision would not be viewed as a taking by the North Carolina courts and that it would be pointless to ask the state court for relief. The Ninth Circuit made a similar finding with respect to certain rent control statutes as they were been construed in California state courts.[241]

Finally, if the government defendant removes a takings case to federal court, the federal court may appropriately find that prong two cannot be met.[242]

V. RIPENESS FOR DUE PROCESS AND EQUAL PROTECTION CLAIMS

In addition to or instead of a Fifth Amendment takings claim, property owners often assert Fourteenth Amendment due process and equal protection challenges to land use restrictions. These Fourteenth Amendment challenges include (1) substantive due process takings claims, (2) substantive due process arbitrary and capricious claims, (3) procedural due process claims, and (4) equal protection claims.[243] Property owners are less likely to prevail on the merits of these claims since courts give greater deference to government action under these

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237. *See, e.g.*, Rockler v. Minneapolis Community Dev. Agency, 866 F. Supp. 415, 417-18 (D. Minn. 1994).

238. 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir.), *cert. denied*, 115 S. Ct. 317 (1994).

239. *Id.*

240. *Id.* at 1073. Initially, the state supreme court had found such schemes not per se unconstitutional as applied to a three year provision for the removal of junk yards. State v. Joyner, 211 S.E.2d 320 (N.C. 1975), *appeal dismissed*, 422 U.S. 1002 (1975). Had that been the extent of the law on the subject, a challenge as to sign amortization would not have been futile since one premise of the *Joyner* case was that the validity of amortization schemes would be examined on a case by case basis. Two later intermediate court of appeals decisions, however, had ruled in favor of billboard amortization. Summey Outdoor Advertising, Inc. v. County of Henderson, 386 S.E.2d 439 (N.C. Ct. App. 1989); R.O. Givens, Inc. v. Town of Nags Head, 294 S.E.2d 388 (N.C. Ct. App. 1982).

241. *See* Schnuck v. City of Santa Monica, 935 F.2d 171 (9th Cir. 1991).

242. *See* Dodd v. Hood River County, 59 F.3d 852 (9th Cir. 1995).

243. The resulting confusion with respect to the overlapping nature of th ese claims creates a major impediment to clarity. *See, e.g.*, Rockler v. Minneapolis Community Dev. Agency, 866 F. Supp. 415, 420 (D. Minn. 1994) (referencing enigmatically to procedural and substantive due process claims that "fall squarely within the federal takings claim"). *See also* discussion in CALLIES, *supra* note 3, at 311-12.

theories than under the Takings Clause. The question here is whether the ripeness considerations differ.

Hamilton Bank applied the final decision rule not only to Fifth Amendment takings claims but also to those substantive due process claims[244] that allege, in a manner identical to the Fifth Amendment, that a regulation has gone too far. This is the basis for the so-called due process takings claim.[245]

The *Hamilton Bank* opinion did not refer expressly to the just compensation prong in its due process discussion. However, other courts have held that consistency with the rationale of *Hamilton Bank* regarding the Fifth Amendment claim requires that a party asserting a "due process taking" must seek compensation from the state.[246] The point should not matter since it is unlikely that such a cause of action will continue to be recognized in federal court.[247]

Most courts have held that the final decision requirement applies to as applied arbitrary and capricious substantive due process claims.[248] Similar to the case with the Fifth Amendment, the final decision requirement is not applicable to facial claims.[249] The compensation requirement has not been held to apply to substantive due process arbitrary and capricious claims.[250]

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244. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197 (1985).

245. *Id.* at 197. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); *see also* Eide v. Sarasota, 908 F.2d 716, 721-22 (11th Cir. 1990) (comparing substantive due process and Fifth Amendment takings claims), *cert. denied*, 498 U.S. 1120 (1991).

246. *See* Southview Assocs. v. Bongartz, 980 F.2d 84, 98 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); Rocky Mountain Materials & Asphalt, Inc. v. Board of County Comm'rs, 972 F.2d 309 (10th Cir. 1992); Baranowski v. Borough of Palmyra, 868 F. Supp. 86 (M.D. Pa. 1994); *Rockler*, 866 F. Supp. at 420 (holding procedural and substantive due process claims that "fall squarely within the federal takings claim" to be unripe until compensation is sought in state court). *But see* Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1404 (9th Cir. 1988) (rejecting "defendants' contention that the second prong of *Williamson County* requires exhaustion of available state compensation remedies before plaintiffs may pursue their due process claim in federal court"), *cert. denied*, 494 U.S. 1016 (1990).

247. *See* CALLIES, *supra* note 3, at 311-12 (discussing takings and due process claims and the suggestion that a due process takings claim is subsumed by the explicit guarantees of the Fifth Amendment); *see also* Miller v. Campbell County, 945 F.2d 348 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1174 (1992); Pearson v. City of Grand Blanc, 756 F. Supp. 314 (E.D. Mich. 1991), *aff'd on other grounds*, 961 F.2d 1211 (6th Cir. 1992).

248. *See, e.g.*, Christopher Lake Dev. Co. v. Saint Louis County, 35 F.3d 1269 (8th Cir. 1994); *Southview Assocs.*, 980 F.2d at 84; *Eide*, 908 F.2d at 716; *see also* Anderson v. Alpine City, 804 F. Supp. 269, 273 n.5 (D. Utah 1992) (exploring the Tenth Circuit's view as to ripeness for due process claims).

249. Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1232 (9th Cir.), *cert. denied*, 115 S. Ct. 193 (1994).

250. *Southview Assocs.*, 980 F.2d at 96; Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1574 (11th Cir. 1989); *Riverdale*, 816 F. Supp. at 942; Patrick Media Group, Inc. v. City of Clearwater, 836 F. Supp. 833 (M.D. Fla. 1993); Cox v. City of Lynnwood, 863 P.2d 578, 583 (Wash. Ct. App. 1993).

Generally, courts exempt procedural due process claims from the final decision requirement,[251] but equal protection claimants still must seek a final decision from state authorities.[252] Courts have differed over whether the compensation requirement applies to procedural due process[253] and equal protection claims.[254]

VI. CONCLUSION: ARE THE RIPENESS RULES UNDUE BURDENS OR A HOAX?

Critics disagree over whether compliance with the final decision rule is more analogous to fording a raging river or stepping over a trickle of a stream. For one commentator, "no rationality [exists] in the ripeness law" and "anarchy" reigns with lower courts' efforts to provide clarity. In the absence of sound guidance from the Supreme Court, the lower court's efforts are doomed to futility.[255] For another commentator, the courts have developed a "predictable and understandable body of law" and have been "remarkably tolerant of developers' efforts to reach the federal courts."[256]

My view is that some clarification is needed and that an accurate reading of *Hamilton Bank* and *MacDonald* would do the job. Much of the stringency of the final decision rule has come from the lower federal courts' expansion of those cases beyond their bounds. This, presumably, is traceable in large part to the desire of these courts, for good and bad reasons, to keep land use cases off their dockets.

Statutory solutions should also be explored. Florida's property rights legislation adopted in 1995, for example, creates final decision ripeness by compelling a municipality to issue a ripeness determination after the property owner files notice of intent to sue.[257] The

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251. *See* Nasierowski Bros. Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 895 (6th Cir. 1991); Landmark Land Co. v. Buchanan, 874 F.2d 717 (10th Cir. 1989). *But see* New Port Largo, Inc. v. Monroe County, 873 F. Supp. 633, 640 (S.D. Fla. 1994); Baldini West, Inc. v. New Castle County, 852 F. Supp. 251 (D. Del. 1994).

252. *See* Bannum v. City of Louisville, 958 F.2d 1354, 1362 (6th Cir. 1992); Unity Ventures v. Lake County, 841 F.2d 770, 775 (7th Cir. 1988); Herrington v. County of Sonoma, 834 F.2d 1488, 1494 (9th Cir. 1987), *cert. denied*, 489 U.S. 1090 (1989); Harris v. City of Wichita, 862 F. Supp. 287, 290 (D. Kan. 1994).

253. *Compare* Riverdale Realty Co. v. Town of Orangetown, 816 F. Supp. 937, 942 (S.D.N.Y. 1993); Rockler v. Minneapolis Community Dev. Agency, 866 F. Supp. 415, 418 (D. Minn. 1994) (holding that procedural and substantive due process claims that "fall squarely within the federal takings claim" are unripe until compensation is sought in state court) *with* Picard v. Bay Area Regional Transit Dist., 823 F. Supp. 1519, 1523 (N.D. Cal. 1993); New Port Largo, Inc. v. Monroe County, 873 F. Supp. 633 (S.D. Fla. 1994).

254. *Compare Riverdale*, 816 F. Supp. at 942 *with Patrick Media Group*, 836 F. Supp. at 833.

255. Berger, *supra* note 90, at 37-38.

256. Lyman, *supra* note 8, at 127.

257. *See* 1995, Fla. Laws ch. 95-181. The statute authorizes a property owner to file a notice of claim after having an application for development permission turned down. The govern-

ripeness determination must list the allowable uses for the property. This commendable solution comes after a statutorily mandated settlement process. The government will have had ample opportunity to review the desired reach of its laws and can hardly complain of being prematurely hauled into court. Furthermore, the property owner has an assurance that enough requests have been filed.

More troubling is prong two and the paradoxical consequences that result from the mixture of ripeness law and the law of full faith and credit. One understandable reaction to the prong two requirement of *Hamilton Bank* is that it perpetrates a fraud or hoax on landowners. The courts say: "Your suit is not ripe until you seek compensation from the state courts." When the property owner complies, a federal court suit is barred by collateral estoppel and res judicata. While it is unfortunate that courts continue to use misleading ripeness language, the result is justifiable if one thinks that one lawsuit is enough.

Beyond the misleading ripeness language, the litigant incurs no harm simply by being barred from federal court. If the property owner's lawyer knows the law, the property owner can avoid a wasted effort in federal court. In the alternative, if the property owners come to federal court, they come with the knowledge that they are likely to fail if the government defendant or the court *sua sponte* raises the jurisdictional defense of ripeness.[258]

There is a denial of a federal forum but our dual system presumes state court competency. No injury inures to property owners as a class unless one thinks that state courts are likely to be hostile to property owners' rights. Undoubtedly, state courts vary in the deference they accord local land use decisions. Even if hostility exists in some courts, the same would likely be true in federal courts. Numer-

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mental entity must then "put up or shut up." It can develop a number of settlement offers. If no settlement is reached, section 1 (5)(a) compels a written ripeness determination. A federal court would still need to determine that an Article III controversy existed.

For other takings legislation calling for compensation, see the Texas Private Real Property Rights Preservation Act, 1995 Tex. Sess. Law Serv. Ch. 517 (S.B. 14) (Vernon) (to be codified at TEX. GOV'T CODE Ch. 2007).

See also Protection of Private Property Act, WASH. REV. CODE § 36.70A.370 (Supp. 1992). This statute arguably has an implicit ripeness rule. This statute provides that "compensation must be paid to the owner of private property within three months of the adoption of a regulation." *Id.* § 4 (3). It sounds as if the right automatically arises after the passage of time from adoption. The Washington act was suspended pending a November 1995 statewide election.

258. As a matter of subject matter jurisdiction, ripeness can be raised at any time, even on appeal. *See* Unity Ventures v. County of Lake, 841 F.2d 770, 774 (7th Cir. 1988); *see also* Thomas E. Roberts, *Ripeness after Lucas, in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 13-14 (David L. Callies ed., 1993).

ous federal judges have decried being turned into super zoning boards of appeal. Judge Posner has complained of federal courts hearing "garden variety zoning dispute[s] dressed up in the trappings of constitutional law."[259] The denigrating tone of these pronouncements suggests that the outcome for property owners in many instances would be no better, and might be worse, in federal court.

Two solutions emerge if the matter is thought to be in need of change: rewrite the law of res judicata and full faith and credit or rewrite the law of the Fifth Amendment. In rewriting the law of res judicata, the Court or Congress might address the paradox and conceivably say that the second suit in federal court is not barred by the full faith and credit statute. Such a ruling or statute, however, would require a decision as to whether the principles and policies behind full faith and credit and the law of finality of judgments should give way to replication of matters once litigated. Ironically, an unripe suit is barred at the moment it comes into existence. Like a tomato that suffers vine rot, it goes from being green to mushy red overnight. It is never able to be eaten. This anomaly, however, is not necessarily bad. The additional lawsuits might not cause the federal judiciary to collapse, but they would use the limited resources of courts already busy.

If one insists on opening the lower federal courts to these suits, judicial economy would be better served by having just one lawsuit. This could be achieved by reexamining the rule that the Fifth Amendment does not require pre-taking compensation.[260] This rule lies behind prong two's view of the Fifth Amendment that no cause of action exists until demand is made on the state, and the state refuses to pay. The language of the Fifth Amendment does not dictate this rule.

In the context of inverse condemnation, the Fifth Amendment could be read as providing that a taking occurs upon the adoption or application of an excessive or illegal regulation. Regarding as applied claims, a property owner would have to obtain a final decision. After obtaining a final decision, the property owner would then sue either in state or federal court. As to facial claims, prong one not being applicable, the choice of forums would exist upon enactment. With this reinterpretation, at least only one lawsuit would be viable. The

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259. Coniston v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988). *See generally* Roberts, *Forum Selection*, *supra* note 20, at 1.

260. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985). *See also* Roberts, *Fifth Amendment*, *supra* note 20, at 481-82.

state, the wrongdoer in the sense that it took property without paying, could hardly complain that it must defend itself in federal court for violating federal rights. The increased workload on the lower federal courts might affect the inclination to overturn this longstanding rule of inverse condemnation. That, in part, may depend on whether those courts are already obligated to hear land use claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. If so, perhaps the takings claim related to the same facts might be seen as an insignificant addition.

I do not advocate these changes. Federal courts are busy enough. State judges are more familiar with land use disputes and can do a better job of evaluating local and state interests. Further, the bar is not total. Where state courts have definitively ruled out takings claims, a federal action will lie.[261] Finally, I am not convinced that state judges in general harbor hostilities to property owners that would, if true, support the availability of the more independent federal judiciary.

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261. *See supra* notes 236-40 and accompanying text.

THE PERSONAL INJURY ENDORSEMENT: AN UNWARRANTED STRAINING TO OBTAIN INSURANCE COVERAGE FOR ENVIRONMENTAL DAMAGE

RICHARD L. BRADFORD*

I. INTRODUCTION

Both the government and private parties often initiate lawsuits for injunctive relief and damages against landowners and corporations for the cleanup of hazardous waste.[1] These defendants have turned to their insurers to pay the immense costs of defending and indemnifying such claims.[2] In many cases, the insurance companies will not defend or indemnify these claims based on a pollution exclusion clause contained in their insurance policies.[3] Pollution exclusion clauses operate to exclude coverage for pollution damage that is not sudden or accidental.[4] Thus, an insurance policy with such a clause would not provide coverage for gradual pollution caused by the repeated discharge of contaminants onto a third party's soil.[5]

In an effort to obtain coverage for pollution damage, the attorneys for the policyholders have pursued an alternative tactic.[6] Notwithstanding the presence of a pollution exclusion clause, these attorneys assert that the personal injury endorsement, present in many

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1. William J. Bowman & Patrick F. Hofer, *The Fallacy of Personal Injury Liability Insurance Coverage for Environmental Claims*, 12 VA. ENVTL. L.J. 393 (1993). *See, e.g.*, County of Columbia v. Continental Ins. Co., 634 N.E.2d 946 (N.Y. 1994); City of Edgerton v. General Casualty Co., 493 N.W.2d 768 (Wis. Ct. App. 1992).

2. Laura A. Foggan, *Environmental Coverage Sought Under Personal-Injury Policies*, NAT'L L.J., Aug. 19, 1991, at 14. *See generally* MITCHELL L. LATHROP, INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS (1992).

3. Foggan, *supra* note 2, at 14. *See infra* note 54 for an example of a typical pollution exclusion clause.

4. BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES 322-23 (5th ed. 1992).

5. *Id.*

6. Richard D. Williams, *Another Invasion!: Environmental Insurance Coverage Claims Based Upon the Personal Injury Endorsement*, 5 ENVTL. CLAIMS J. 391 (1992-93).

insurance policies, will provide coverage for pollution damage.[7] They argue that a pollutionary event is a trespass or, in the alternative, a nuisance.[8] By relying on the "wrongful entry or eviction, or other invasion of the right of private occupancy" language contained in these policies the policyholders' attorneys assert that the insurers must provide coverage.[9] However, the courts are not in agreement on this issue.[10] Some jurisdictions have rejected the arguments presented by the policyholders.[11] Other courts have recognized that the personal injury endorsement does create a duty for insurers to defend and indemnify pollution claims.[12] For example, in *Gould Inc. v. Arkwright Mutual Insurance Co.*,[13] a federal district court in Pennsylvania denied the insurers' motion for summary judgment.[14] The court held that a personal injury endorsement was not limited by a pollution exclusion clause contained in the property damage portion of the insurance policy.[15]

This article will address whether hazardous waste claims fall within the personal injury endorsement contained in many insurance policies. First, Part II will offer an overview of the potential scope of liability. This section will outline the various ways that a landowner may be responsible for the damages and costs of environmental contamination and the difficulties facing such parties in attempting to receive coverage from their insurance companies. Particularly, this section will address the pollution exclusion clause. Next, Part III will focus on the policyholders' arguments supporting the personal injury endorsement as a method of recovery for environmental claims. Part IV will present *Gould Inc. v. Arkwright Mutual Insurance Co.*,[16] as an

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7. Laura A. Foggan et al., *Looking for Coverage in All the Wrong Places: Personal Injury Coverage in Environmental Actions*, 3 ENVTL. CLAIMS J. 291 (1991); Williams, *supra* note 6, at 391; Bowman & Hofer, *supra* note 1, at 393.

8. Bowman & Hofer, *supra* note 1, at 393.

9. *Id.*

10. *E.g.*, Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203, 209 (5th Cir. 1991) (holding that the personal injury endorsement does not cover environmental claims). *Contra* Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 273 (1st Cir. 1990) (holding that the personal injury endorsement covers environmental claims).

11. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993); Decorative Ctr. of Houston v. Employers Casualty Co., 833 S.W.2d 257, 263 (Tex. Ct. App. 1992).

12. *See* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992); Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265 (1st Cir. 1990); Gould Inc. v. Arkwright Mut. Ins. Co., 829 F. Supp. 722 (M.D. Pa. 1993).

13. 829 F. Supp. 722 (M.D. Pa. 1993).

14. *Id.* at 729.

15. *Id.*

16. 829 F. Supp. 722 (M.D. Pa. 1993).

illustration of an erroneous approach to the personal injury endorsement. Finally, Part V will criticize *Gould* and the policyholders' assertion, arguing that the personal injury endorsement was not intended to deal with environmental problems and that these claims should be barred by the pollution exclusion clause.

II. INCURRING ENVIRONMENTAL COSTS, INSURANCE COVERAGE & THE POLLUTION EXCLUSION CLAUSE

This section will describe how landowners and corporations incur liability for environmental damage. This section will also address their efforts to obtain coverage from their insurance companies and describe how the pollution exclusion clause bars coverage for environmental damage.

A. Liability for Environmental Damage

A number of causes of action can eventually lead to liability for an individual or company responsible for the discharge of chemicals, gases, or some other polluting agent. Plaintiffs often bring trespass and nuisance actions against individuals and companies for the discharge of hazardous waste.[17] Additionally, actions may be brought against individuals and companies under state and federal statutory provisions. This section will address liability under two of the federal statutes: the Resource Conservation and Recovery Act of 1976 (RCRA)[18] and the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[19] Also, this section will briefly address environmental liability under state statutory provisions.

1. RCRA

In 1976, Congress enacted RCRA to protect the public and the environment from the dangers posed by the treatment, storage, and disposal of hazardous waste.[20] RCRA provides the federal government, through the Environmental Protection Agency (EPA), with the authority to regulate and enforce the proper handling, treatment, and

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17. Nancy L. Quackenbush, *The Personal Injury Endorsement: Breathing New Life into CGL Coverage for Pollution-Related Offenses*, 29 GONZ. L. REV. 385 (1993-94).

18. 42 U.S.C. §§ 6901-6992 (1988 & Supp. V 1993).

19. 42 U.S.C. §§ 9601-9675 (1988 & Supp. V 1993).

20. Jarred O. Taylor, II, *Cleaning Up the Dirty Nest: Who Pays for Environmental Cleanup? Issues of Concern to the General Practitioner*, in ENVIRONMENTAL COVERAGE: FROM INTERPRETATION TO LITIGATION 1, 8 (1990).

storage of hazardous waste.[21] RCRA regulates three categories of persons: 1) those who generate or produce hazardous wastes; 2) those who transport hazardous waste; and 3) owners and operators of treatment, storage, and disposal facilities (TSDs).[22] Under section 7003 of RCRA, the EPA may exercise its regulatory authority by suing to compel the cleanup of hazardous waste on property that may present an imminent and substantial danger to health or the environment.[23]

Additionally, RCRA has a citizen suit provision that allows any person to commence a civil action against parties whose past or present hazardous waste activities contribute to an imminent hazard, under a standard similar to section 7003 of RCRA.[24] Formerly, under RCRA's citizen suit provision a private party could only seek injunctive relief and could not obtain money damages.[25] However, the United States Court of Appeals for the Ninth Circuit recently held that under RCRA a private plaintiff may collect restitution for cleanup costs.[26] Thus, in the Ninth Circuit, a landowner may use RCRA's

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21. For example, section 3002 of RCRA gives the EPA the authority to set standards for generators of hazardous waste covering record-keeping, reporting, labeling, and the use of appropriate containers. 42 U.S.C. § 6922 (1988 & Supp. V 1993).

22. Taylor, *supra* note 20, at 19, citing 42 U.S.C. §§ 6922-6924 (1988 & Supp. V 1993).

23. Edmund B. Frost, *Strict Liability as an Incentive for Cleanup of Contaminated Property*, 25 HOUS. L. REV. 951, 955 (1988); 42 U.S.C. § 6973(a) (1988 & Supp. V 1993). Section 6973(a) provides in pertinent part:

> Notwithstanding any other provision of this chapter, upon receipt of evidence that the past or present handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, the Administrator may bring suit on behalf of the United States in the appropriate district court against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation, or disposal to restrain such person from such handling, storage, treatment, transportation, or disposal, to order such person to take such other action as may be necessary, or both.

Id.

24. 42 U.S.C. § 6972(a) (1988 & Supp. V 1993).

25. Walls v. Waste Resource Corp., 761 F.2d 311, 316 (6th Cir. 1985); Portsmouth Redevelopment & Hous. Auth. v. BMI Apartment Assocs., 847 F. Supp. 380, 385 (E.D. Va. 1994); *see also* Taylor, *supra* note 20, at 39-40.

26. KFC Western, Inc. v. Meghrig, 49 F.3d 518, 521 (9th Cir.), *cert. granted*, 116 S. Ct. 41 (1995). The Ninth Circuit noted that under section 6973 of RCRA the EPA may bring reimbursement actions against generators of hazardous waste. *Id.* at 522. The court further reasoned that nothing indicates that Congress intended citizen suits to serve a purpose different than governmental actions. *Id.* Therefore, the court rejected the contention that section 6972 only entitles citizens to injunctive relief. *Id.* at 521-22. *Contra* Furrer v. Brown, 62 F.3d 1092 (8th Cir. 1995)(finding that "the [KFC] court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the KFC Western decision").

citizen suit provision to recover money damages against an owner or operator of a TSD.[27]

2. CERCLA

Congress passed CERCLA because RCRA only covers sites that manage present or on-going hazardous waste and does not cover the cleanup of abandoned or inactive hazardous waste sites.[28] The principal purpose of CERCLA is to achieve prompt cleanup of hazardous waste sites and to impose the cost of cleanup on those responsible for contamination.[29] Listing a hazardous waste site on the National Priorities List (NPL), or in a related state cleanup priorities list, is the primary means of triggering cleanup under CERCLA.[30] Under the Act, the EPA and state governments have the authority to take immediate action to clean up or stabilize a hazardous condition.[31] CERCLA's Hazardous Substance Response Trust Fund (Superfund) finances the expenditures of the EPA and state governments in the cleanup of hazardous waste sites.[32] Nevertheless, the ultimate responsibility to cover cleanup costs lies with any "potentially responsible party" (PRP), not the federal government.[33] Thus, section 107 of CERCLA authorizes governmental agencies to sue PRPs for money expended to clean up hazardous waste sites.[34] Additionally, section 107 of CERCLA allows a private party with land adjacent to a leaking facility to bring a cause of action against a PRP for damages, without prior governmental approval.[35]

Under CERCLA, a PRP falling within the statutory criteria for liability will be found strictly liable unless the PRP satisfies one of the Act's narrow defenses.[36] CERCLA imposes strict liability for cleanup

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27. Landowners in jurisdictions other than the Eighth Circuit, relying on the Ninth Circuit's decision, may also attempt to recover money damages under RCRA against owners or operators of TSDs.

28. Taylor, *supra* note 20, at 12.

29. City & County of Denver v. Adolph Coors Co., 829 F. Supp. 340, 344 (D. Colo. 1993).

30. Frost, *supra* note 23, at 958. The government lists a site on the NPL based on its potential to endanger the public health and the environment. *Id.* Citizen reports to the EPA can also trigger listing a site on the NPL. *Id.* Additionally, a site may be considered for listing if an owner reports a spill of a hazardous substance under section 9603(a) of CERCLA or if contamination is found during the course of an environmental audit or assessment of a facility. *Id.*

31. 42 U.S.C. § 9604 (1988 & Supp. V 1993).

32. 42 U.S.C. § 9611 (1988 & Supp. V 1993).

33. Brette S. Simon, *Environmental Insurance Coverage Under the Comprehensive General Liability Policy: Does the Personal Injury Endorsement Cover CERCLA Liability?*, 12 UCLA J. ENVTL. L. & POL'Y 435, 440 (1994).

34. 42 U.S.C. § 9607(a) (1988 & Supp. V 1993).

35. *Id.*

36. To state a prima facie case under CERCLA, a plaintiff must allege 1) that a waste disposal site is a facility within the meaning of the Act; 2) that release or threatened release of a

costs on three categories of responsible parties: 1) past and present owners and operators of sites containing hazardous substances; 2) certain parties that transported material to a site; and 3) any party that has generated ("arranged for the disposal of") material at the site.[37] Liability is based on responsibility and does not require a showing of causation or culpability.[38] Thus, the mere ownership of a site contaminated with a hazardous substance is sufficient to create liability.[39] Additionally, many courts have interpreted liability under CERCLA as joint and several when the contributions of responsible parties to the dangers posed at a site are indivisible.[40]

3. Liability Under State Statutes

Many states have their own superfund statutes that complement or supplement CERCLA and RCRA.[41] Some of these state statutory schemes go beyond CERCLA and RCRA with separate cleanup and liability provisions.[42] For example, some states require environmental inspections as a prerequisite to the transfer of industrial real estate.[43] Inspections under these provisions may identify contaminated property and trigger cleanup under federal or state provisions.[44]

Many states have other environmental statutes that can create large financial burdens for individuals and companies beyond that imposed by the federal statutes.[45] For example, Florida's Pollutant Discharge Prevention and Control Act seeks to preserve the state's

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hazardous substance from a facility has occurred; 3) that such release or threatened release will require expenditure of response costs that are consistent with the national contingency plan; and 4) that the defendant falls within one of the classes of persons subject to CERCLA's liability provisions. Cose v. Getty Oil Co., 4 F.3d 700 (9th Cir. 1993). The limited exceptions to a liability action brought under CERCLA include acts of God or war or omissions of certain "third parties" such as vandals. 42 U.S.C. § 9607(b) (1988 & Supp. V 1993).

37. 42 U.S.C. § 9607(a) (1988 & Supp. V 1993); *see also* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND HAZARDOUS WASTE INSURANCE COVERAGE ISSUES 11 (1991).

38. *E.g.*, United States v. Mexico Feed & Seed Co., 980 F.2d 478, 484 (8th Cir. 1992).

39. United States v. Rohm & Haas Co., 2 F.3d 1265, 1279 (3d Cir. 1993). Liability also extends to an owner/lessor of a facility and a lessee that maintains control over subleased property. United States v. South Carolina Recycling & Disposal Inc., 653 F. Supp. 984, 1003 (D.S.C. 1984).

40. ABRAHAM, *supra* note 37, at 11. United States v. Alcan Aluminum Corp., 964 F.2d 252, 267 (3d Cir. 1992); United States v. R.W. Meyer, Inc., 932 F.2d 568, 570 (6th Cir. 1991).

41. Frost, *supra* note 23, at 956.

42. *Id.*

43. ABRAHAM, *supra* note 37, at 14. *See, e.g.*, Environmental Cleanup Responsibility Act, N.J. STAT. ANN. § 13:1K-9 (West 1991 & Supp. 1995).

44. ABRAHAM, *supra* note 37, at 14.

45. *See, e.g.*, Pollution Discharge Prevention & Control Act, FLA. STAT. §§ 376.011-.319 (1993 & Supp. 1994); Pollution of Waters Act, N.J. STAT. ANN. § 58:10-50 (West 1992 & Supp. 1995).

seacoast for recreational use.[46] The Florida Act prohibits the discharge of pollutants into or upon any coastal waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state.[47] This Act, like CERCLA, has a citizen suit provision that imposes strict liability on its violators unless they can satisfy one of the Act's limited defenses.[48] Thus, liability is difficult to avoid under this Act.

State environmental statutes provide plaintiffs with an additional means of recovery that might not be available under a federal provision.[49] The statutes are significant because they increase the administrative force behind cleanup requirements and the likelihood that cleanup will be required at any particular site.[50]

B. Insurance Coverage and the Pollution Exclusion Clause

The cleanup of pollution damage under CERCLA, RCRA, state environmental control acts, or common law trespass and nuisance actions can create enormous financial burdens for individuals and companies.[51] The EPA has estimated that the average cleanup cost is twenty-six million dollars per hazardous waste site.[52] Additionally, these individuals and companies have to deal with substantial litigation costs associated with defending these environmental suits. Faced with immense costs and potential bankruptcy, these defendants have sought relief from their comprehensive general liability (CGL) insurance policies.[53] Their insurance companies, however, have denied coverage if the CGL policies contained a pollution exclusion clause.

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46. FLA. STAT. § 376.021 (1993 & Supp. 1994).

47. FLA. STAT. § 376.041 (1993 & Supp. 1994).

48. FLA. STAT. § 376.205 (1993 & Supp. 1994). Acceptable defenses include an act of war, an act of state, federal or municipal government, an act of God which is without human interference, and an act or omission of a third party. FLA. STAT. §§ 376.12(6)(a)-(d) (1993 & Supp. 1994).

49. Frost, *supra* note 23, at 956.

50. *Id.*

51. Simon, *supra* note 33, at 441.

52. JAN P. ACTON & LLOYD S. DIXON, SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS 2 (1992), *noted in* Simon, *supra* note 33, at 441.

53. Simon, *supra* note 33, at 442. The insurance industry designed the CGL policy to provide American industries with coverage against "all manner of claims arising in the performance of their . . . business." Simon, *supra* note 33, at 442 (citing Kissel v. Aetna Casualty & Sur. Co., 380 S.W.2d 497, 506 (Mo. Ct. App. 1964)). The CGL policy provides the insured with basic coverage that protects against third party claims. *Id.* The CGL policy provides the policyholder with insurance coverage for bodily injury and property damage. *See also* ABRAHAM, *supra* note 37, at 24. One significant feature of the CGL policy is that the policy provides general coverage regardless of the identity or nature of the insured's business. *Id.*

After 1973, the standard CGL policy form contained a pollution exclusion clause that excluded coverage for environmental damage unless the discharge, disposal, release or escape of chemicals, gases or some other polluting agent was "sudden and accidental."[54] After 1986, the insurance industry modified the standard CGL policy form with an absolute pollution exclusion clause eliminating the "sudden and accidental" exception.[55] Without the "sudden and accidental" exception, this modified clause virtually excludes all pollution-related claims from coverage.[56]

Most of the litigation surrounding the pollution exclusion clause deals with insurance policies that existed prior to the adoption of the absolute pollution exclusion clause.[57] The primary focus of this litigation is the correct meaning of the "sudden and accidental" exception, with the jurisdictions disagreeing on its meaning.[58] Some courts have held that "sudden and accidental" is unambiguous, having a temporal meaning which only provides coverage for immediate or abrupt discharges of pollutants.[59] Thus, these courts hold that the

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54. George Pendygraft et al., *Who Pays for Environmental Damage: Recent Developments in CERCLA Liability and Insurance Coverage Litigation*, 21 IND. L. REV. 117, 151-52 (1988). The standard 1973 CGL pollution exclusion clause provides that coverage:

> does not apply to bodily injury or property damage (1) arising out of pollution or contamination caused by oil or (2) arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

OSTRAGER & NEWMAN, *supra* note 4, at 322-23 (emphasis added).

55. Pendygraft et al., *supra* note 54, at 151-152; Brooke Jackson, *Liability Insurance for Pollution Claims: Avoiding A Litigation Wasteland*, 26 TULSA L.J. 209, 224 (1990); David J. Barberie, *Reaching in the Wrong Pocket?:* Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corporation, 9 J. LAND USE & ENVTL. L. 161, 168 (1993). The typical absolute pollution exclusion clause provides that coverage does not apply:

> to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or other pollutant into or upon land, the atmosphere or any water course or body water, *whether or not such discharge, dispersal, release or escape is sudden or accidental.*

OSTRAGER & NEWMAN, *supra* note 4, at 338.

56. Jackson, *supra* note 55, at 224; Barberie, *supra* note 55, at 168. Policyholders desiring pollution coverage under the new CGL policy may purchase limited pollution coverage at very high premiums. Jackson, *supra* note 55, at 224; Barberie, *supra* note 55, at 168.

57. Jackson, *supra* note 55, at 224.

58. OSTRAGER & NEWMAN, *supra* note 4, at 320. Most courts agree that the pollution exclusion clause prohibits insurance coverage for events that were expected or intended. *Id.* (*citing* International Minerals & Chem. Corp. v. Liberty Mut. Ins. Co., 522 N.E.2d 758, 767 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 246 (1988)).

59. Barberie, *supra* note 55, at 168-69; *see* Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700, 704-05 (Fla. 1993) (finding a pollution exclusion clause and that the term sudden has a temporal meaning indicating abruptness or brevity); Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 52 F.3d 1522, 1528 (10th Cir. 1995)(finding the terms

pollution exclusion clause precludes coverage for gradual pollution.[60] By contrast, other courts have held that the term "sudden and accidental" is patently ambiguous and have construed liability in favor of the policyholders.[61] Still, other courts, favoring policyholders, have held that the "sudden and accidental" exception refers to pollution damage that is "unexpected or unintentional."[62] Hence, these courts have provided a broader range of coverage for policyholders.

Notwithstanding the dispute concerning the scope of the 1973 pollution exclusion clause, a class of policyholders will face denial of insurance coverage for pollution-related claims. Further, as the 1986 CGL policy replaces the 1973 policy, more policyholders will not have coverage for pollution related claims. Thus, these policyholders will continue to face immense costs to clean up environmental damages. Facing these tremendous costs, the policyholders' lawyers have shifted focus to the personal injury endorsement.

III. THE PERSONAL INJURY ENDORSEMENT AS A METHOD FOR RECOVERY

Many landowners and corporations facing damage claims and cleanup costs for hazardous waste pollution are turning to their insurers as a "deep pocket" to pay these costs.[63] The attorneys for the insured assert that the personal injury endorsements in the insurance policies require the insurance companies to defend and indemnify these claims.[64] Insurance policies containing a personal injury endorsement will provide coverage for damages during the policy period arising out of specific enumerated offenses.[65] Many personal injury endorsements read as follows:

> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury (herein called personal injury) sustained by any person or

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"sudden and accidental" to be unambiguous). Discrete discharges of pollutants occurring during routine business operations are not "sudden and accidental." *Id.*

60. OSTRAGER & NEWMAN, *supra* note 4, at 328. *See* Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co., 52 F.3d 1522, 1531 (10th Cir. 1995) (holding pollution exclusion clause bars coverage for property damage).

61. Barberie, *supra* note 55, at 169.

62. *Id; see also* OSTRAGER & NEWMAN, *supra* note 4, at 334.

63. *See* Foggan, *supra* note 2, at 14.

64. *See id*.

65. *See* Martin v. Brunzelle, 699 F. Supp. 167, 171 (N.D. Ill. 1988); County of Columbia v. Continental Ins. Co., 634 N.E.2d 946 (N.Y. 1994); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993).

> organization and arising out of one or more of the following offenses:
>
> Group A—false arrest, detention or imprisonment, or malicious prosecution.
>
> Group B—the publication or utterance of a libel or slander or of other defamatory material, or a publication or utterance in violation of an individual's right of privacy . . . .
>
> Group C—wrongful entry or eviction, or other invasion of the right of private occupancy.[66]

The coverage provided by the personal injury endorsement is a supplement to CGL insurance.[67] While the CGL provides coverage for property damage and bodily injury, the personal injury endorsement provides coverage for specific personal injuries not covered in the CGL policy.[68] For example, if a store owner detained a shoplifter, the shoplifter may sue for slander or false arrest.[69] The CGL policy would not provide the owner with coverage since the shoplifter did not sustain any property damage or bodily injury.[70] The personal injury endorsement, however, will provide coverage because slander and false arrest are enumerated offenses in the endorsement.[71] In another example, a tenant may sue a landlord for "wrongful entry or eviction" if the landlord entered the tenant's premises and evicted the tenant.[72] The landlord in this situation would have coverage if his or her insurance policy contained a personal injury endorsement since group C of the endorsement specifically provides coverage for "wrongful entry or eviction."[73] Coverage provided by group C of the personal injury endorsement is the provision that policyholders rely on to assert their indemnification actions.[74]

Frequently, the underlying plaintiffs in environmental damage actions seek relief under theories of trespass, nuisance, and loss of

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66. *See* Bowman & Hofer, *supra* note 1, at 397; Quackenbush, *supra* note 17, at 386-87 n.5.
67. Bowman & Hofer, *supra* note 1, at 397.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. Bowman & Hofer, *supra* note 1, at 397.
73. *Id.*
74. *Id.* An additional example of why PRPs must seek indemnification under the personal injury endorsement is the Fourth Circuit's holding in *Mraz v. Canadian Universal Insurance Co.*, 804 F.2d 1325 (4th Cir. 1986). In this case the court held that although damage to the environment is property damage, CERCLA response costs are not. *Cf.* New Castle County v. Hartford Accident & Indemnity Co., 673 F. Supp. 1359 (D. Del. 1987).

enjoyment of property.[75] The policyholders argue that trespass and nuisance are equivalent to "wrongful entry or eviction, or other invasion of the right of private occupancy."[76] Thus, they argue that the "wrongful entry or eviction, or other invasion" language of the personal injury endorsement covers pollution claims.[77] By contrast, the insurance companies argue that the personal injury endorsement does not encompass claims for trespass and nuisance.[78]

The First Circuit Court of Appeal was one of the first courts to rule in favor of the policyholders under this theory.[79] In *Titan Holdings Syndicate, Inc. v. City of Keene*,[80] residents alleged that light, noise, and noxious odors from the city's sewage treatment plant created a nuisance.[81] The city asserted that the personal injury endorsement in its insurance policies provided coverage for the residents' claims.[82] The First Circuit found that although trespass resembled "wrongful entry," no coverage existed because of the absence of intent allegations in the underlying complaint.[83] The court, however, concluded that an "invasion of the right of private occupancy" may constitute a nuisance.[84] Accordingly, the court allowed coverage under the personal injury endorsement.[85]

Likewise, the Seventh Circuit found that the personal injury endorsement entitles policyholders to coverage for environmental claims.[86] In *Pipefitters Welfare Education Fund v. Westchester Fire Insurance Co.*,[87] approximately eighty gallons of oil spilled, contaminating surrounding property with polychlorinated biphenyls.[88] During a lawsuit resulting from the spill, the policyholder sought indemnification under the personal injury endorsement in its insurance policy.[89] The Seventh Circuit ruled that eviction required an intent to take

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75. *E.g.*, Kirk A. Pasich, *Personal Injury Coverage for Environmental Claims: A Response to "Another Invasion!"*, 5 ENVTL. CLAIMS J. 509, 512 (1992-93).

76. *Id.* at 511; O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 963 (Pa. Super. Ct. 1993).

77. Pasich, *supra* note 75, at 512; *see also* Stephen A. Dvorkin, *Personal Injury Insurance Coverage for Environmental and Toxic Tort Liabilities*, 2 ENVTL. CLAIMS J. 333 (1990).

78. *See* Foggan et al., *supra* note 7.

79. *See* Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265 (1st Cir. 1990).

80. 898 F.2d 265 (1st Cir. 1990).

81. *Id.* at 267.

82. *Id.*

83. *Id.* at 272.

84. *Id.*

85. Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 273 (1st Cir. 1990).

86. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1993).

87. 976 F.2d 1037 (7th Cir. 1993).

88. *Id.* at 1039.

89. *Id.*

possession.[90] However, the court found that "wrongful entry" is "substantially similar to trespass."[91] Reasoning that trespass did not require an intent to take possession, the court also found that "wrongful entry" did not require an intent to take possession.[92] Similarly, applying the principle of *ejusdem generis*,[93] the Seventh Circuit ruled "other invasion of the right to private occupancy" did not require an intent to take possession.[94] Thus, the court found that the personal injury endorsement covered the spill.[95]

In response to assertions that the personal injury endorsement did not cover trespass or nuisance claims, the policyholders argued that the personal injury endorsement was ambiguous and, as a result, coverage was required.[96] The nature of this ambiguity is whether the terms "wrongful entry or other invasion of the right to private occupancy" encompass trespass and nuisance.[97] Policyholders note the well-settled principle of insurance law that requires courts to construe ambiguities in insurance policies in their favor.[98] Accordingly, they contend that the personal injury endorsement provides coverage for environmental claims.[99]

A number of plaintiffs have argued for coverage by applying this ambiguity argument somewhat successfully.[100] For example, in

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90. *Id.* at 1040.

91. *Id.* at 1041-42.

92. Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1041-42 (7th Cir. 1993).

93. Where a general term follows a series of specific terms, the former should not be given its broadest possible meaning, but rather extends only to matters of the same general class or nature as the terms specifically enumerated. *Pipefitters*, 976 F.2d at 1041.

94. *Id.* at 1041.

95. *Id.*

96. Titan Holdings Syndicate v. City of Keene, 898 F.2d 265, 269 (1st Cir. 1990). Indeed, policyholders frequently claim that provisions of their insurance policies are ambiguous when the insurers claim that coverage is precluded. *Id.* at 269 (arguing ambiguity in the pollution exclusion clause and ambiguity in the definition of "pollutant"); Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Co., 636 So. 2d 700, 703 (Fla. 1993) (arguing ambiguity in the term "sudden and accidental" in the pollution exclusion clause); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 962 (Pa. Super. Ct. 1993) (quoting Lower Paxton Township v. United States Fidelity & Guar. Co., 557 A.2d 393, 398 (indicating that a number of courts have rejected policyholders' argument that the pollution exclusion clause is ambiguous)).

97. *Titan Holdings Syndicate*, 898 F.2d at 272.

98. *E.g.*, Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1040 (7th Cir. 1992); *Titan Holdings Syndicate*, 898 F.2d at 270; *see also* Stacy Gordon, *Court Opens New Door to CGL Pollution Coverage*, BUSINESS INSURANCE, Apr. 27, 1992, at 2.

99. *Titan Holdings Syndicate*, 898 F.2d at 273; O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 963 (Pa. Super. Ct. 1993).

100. *E.g.*, Napco, Inc. v. Fireman's Fund Ins. Co., No. 90-0993 (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July 21, 1993). Although this case was ultimately dismissed by stipulation of the parties upon a settlement agreement, the Report and Recommendation issued by Magistrate Judge Benson prior to this dismissal allowed coverage after applying the ambiguity argument.

Napco, Inc. v. Fireman's Fund Insurance Co.,[101] the policyholder sought coverage for a trespass action involving the removal of toxic wastes.[102] The policyholder argued that the trespass action fell under the definition of "wrongful entry" or "other invasion of the right of private occupancy."[103] The Magistrate Judge's Recommendation and Report in *Napco* found that "wrongful entry" and "other invasion of the right of private occupancy," as used in the insurance contracts in question, are ambiguous.[104] Accordingly, the Magistrate Judge construed the ambiguity against the insurer and recommended allowing coverage.[105]

By asserting that the personal injury endorsement provides coverage, policyholders attempt to claim an advantage that is not present in a CGL policy. They argue that the personal injury endorsement is separate and distinct from the CGL policy, each having its own set of exclusions.[106] Many CGL policies contain a pollution exclusion clause precluding coverage for *bodily injury* or *property damage* arising from pollutionary events.[107] The personal injury endorsement does not usually contain a pollution exclusion clause.[108] Thus, policyholders argue that the pollution exclusion clause does not reach the personal injury endorsement, which provides coverage for enumerated *personal injuries*.[109] They also argue that although the pollution exclusion clause applies to property damage and bodily injury, the clause does not apply to personal injuries such as trespass and nuisance.[110]

IV. GOULD INC. V. ARKWRIGHT MUTUAL INSURANCE CO.[111]

Gould Inc. v. Arkwright Mutual Insurance Co.[112] provides an instructive example of how a court erroneously found that the personal injury endorsement requires insurers to pay the costs to defend and indemnify pollution claims. In *Gould*, the policyholder owned a bat-

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101. No. 90-0993 (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July 21, 1993).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. Quackenbush, *supra* note 17, at 395; Foggan et al., *supra* note 7, at 300.

107. OSTRAGER & NEWMAN, *supra* note 4, at 322-23.

108. Quackenbush, *supra* note 17, at 395.

109. Foggan et al., *supra* note 7, at 300.

110. *See generally* Pasich, *supra* note 75.

111. 829 F. Supp. 722 (M.D. Pa. 1993). This case provides an example of how an improper judicial finding of an ambiguity in an insurance policy will lead to an unjust result.

112. *Id.*

tery crushing and lead recovery facility.[113] The emissions from this facility contaminated the premises of nearby property owners.[114] As a result, the property owners filed lawsuits against Gould alleging bodily injury, property damage, nuisance, and trespass.[115] Additionally, the EPA brought an action against Gould to clean up the contamination at and around the facility.[116] Eventually, Gould entered into settlement agreements in all of the cases.[117] The EPA required Gould to enter into a Consent Agreement and Order to conduct site stabilization activities concerning lead and other hazardous substances at the facility and surrounding residential areas.[118]

After entering into the settlement and consent agreements, Gould brought an action in federal court seeking indemnification from its insurance companies.[119] Specifically, Gould sought to indemnify: 1) costs for the defense and settlement of the lawsuits; 2) costs incurred in the government-ordered cleanup of the facility; and 3) a declaration that the insurers had a continuing obligation to defend and indemnify it against any further EPA proceedings arising out of contamination at the facility.[120] In response to this action, one of the insurance companies, National Union, filed a motion for summary judgment.[121]

Gould relied on the personal injury endorsement contained in its insurance policy as the basis for its indemnification action.[122] Gould alleged that the underlying trespass and nuisance complaint fell within the offenses listed in Group C of the policy, which provided coverage for "wrongful entry or eviction, or other invasion of the right of private occupancy."[123] National Union countered this argument, stating that the "personal injury endorsement relates to purposeful

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113. *Id.* at 724.

114. *Id.* at 723.

115. *Id.*

116. *Id.* at 724. As previously stated, CERCLA imposes strict liability on PRPs falling within the statutory criteria with very narrow exceptions. United States v. Alcan Aluminum Corp., 990 F.2d 711 (2d Cir. 1993); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415 (8th Cir.), *cert. denied*, 499 U.S. 937 (1990). Thus, an owner of a contaminated site has difficulty escaping liability.

117. Gould Inc. v. Arkwright Ins. Co., 829 F. Supp. 722, 723 (M.D. Pa. 1993).

118. *Id.* at 724. Gould entered into this first Consent Agreement and Order in 1988. *Id.* Then in 1990, Gould entered into a subsequent Consent Agreement and Order requiring it to undertake interim measures and a facility investigation concerning hazardous wastes allegedly found at the site. *Id.* Gould claimed that it incurred a total cost of $17.5 million. *Id.* This figure illustrates the enormous costs involved in these claims.

119. *Id.*

120. *Id.*

121. *Id.* at 725. National Union argued that "the language of the pollution exclusion clause clearly and unambiguously excludes coverage for gradual pollution from repeated discharges of contaminants." *Id.*

122. Gould Inc. v. Arkwright Ins. Co., 829 F. Supp. 722, 726 (M.D. Pa. 1993).

123. *Id.*

acts of entry, such as a landlord who intentionally deprives or attempts to deprive the injured party of its right to occupy property."[124] National Union also argued that the pollution exclusion clause should relieve them from any duty to pay costs for the settlement or cleanup.[125]

The district court approached National Union's insurance policy by employing principles of contract law.[126] The court noted that an insurance policy is a contract and should be construed as such.[127] A contract is ambiguous if it could be susceptible to more than one interpretation.[128] Courts interpreting ambiguous contracts must resolve any ambiguity against the insurer.[129] Additionally, the district court stated that a court should not "torture the language of a contract to create ambiguity."[130]

After discussing cases in other jurisdictions that considered the issue, the *Gould* court looked at the insurance policy as a whole and how the pollution exclusion clause affected the personal injury endorsement.[131] The court noted that the pollution exclusion clause applied only to property damage and bodily injury.[132] Next, the court found that the pollution exclusion clause did not restrict coverage for personal injury.[133] Although the policy contained a pollution exclusion clause, the court recognized the possibility that the personal injury endorsement represented "an addition or an extension of coverage which is not limited by the pollution clause contained in the property damage portion of the policy."[134] The *Gould* court further noted that one can reasonably interpret the policy as providing coverage for damages which are not subject to the policy's pollution exclusion provisions.[135] The *Gould* court held that the personal injury endorsement, in the context of the entire policy and specifically the pollution exclusion clause, was ambiguous.[136] Accordingly, the

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124. *Id.*
125. *Id.*
126. *Id.* at 725.
127. Gould Inc. v. Arkwright Ins. Co., 829 F. Supp. 722, 725 (M.D. Pa. 1993) (quoting Pennbarr Corp. v. Insurance Co. of Am., 976 F.2d 145, 151 (3d Cir. 1992)).
128. *Gould*, 829 F. Supp. at 725.
129. *Id.* (quoting Little v. MGIC Indem. Corp., 836 F.2d 789, 793 (3d Cir. 1987)).
130. *Gould*, 829 F. supp. at 725 (quoting Pennbarr Corp. v. Insurance Co. of Am., 976 F.2d 145, 151 (3d Cir. 1992)).
131. *Gould*, 829 F. Supp. at 726-29.
132. *Id.*
133. *Id.*
134. *Id.* at 729.
135. *Id.*
136. *Id.* Particularly, the district court found ambiguity in the "wrongful entry" and "other invasion" language contained in the policy. *Id.*

district court denied National Union's motion for summary judgment.[137] It is this author's opinion that the *Gould* court's holding was erroneous.

V. THE PERSONAL INJURY ENDORSEMENT DOES NOT COVER POLLUTION CLAIMS

Despite the policyholders' arguments, insurance companies never intended to use the personal injury endorsement to cover environmental claims.[138] The following discussion demonstrates the flaws in the policyholders' arguments.

The pollution exclusion clause bars claims of property damage, bodily injury, trespass, or nuisance caused by the gradual discharge of gases, chemicals, or other polluting agents.[139] Alternatively, policyholders argue that they are entitled to coverage under the personal injury endorsement.[140] Efforts to find coverage under the personal injury endorsement, however, render the pollution exclusion clause meaningless.[141] Furthermore, "wrongful entry or eviction, or other invasion of the right of private occupancy" are injuries with elements that are common to, yet distinct from, trespass and nuisance.[142] Since these torts are distinct, "wrongful entry or eviction, or other invasion of the right of private occupancy" does not encompass trespass or nuisance.[143] Moreover, courts should construe insurance policies according to the plain and ordinary meaning of their terms.[144] Accordingly, courts should not expand coverage to other offenses such as trespass and nuisance where the personal injury endorsement provides coverage for certain enumerated offenses.[145] Additionally, the doctrine of *ejusdem generis* should restrict the "other invasion of the right of private occupancy" language to offenses equivalent to a "wrongful entry or eviction."[146] This restriction would

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137. Gould Inc. v. Arkwright Ins. Co., 829 F. Supp. 722, 729 (M.D. Pa. 1993).

138. *See generally* Foggan et al., *supra* note 7.

139. OSTRAGER & NEWMAN, *supra* note 4, at 322-23.

140. *See supra* notes 75-110 and accompanying text.

141. County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994). *See infra* notes 155-72 and accompanying text.

142. *See infra* notes 178-222 and accompanying text.

143. *See infra* notes 178-222 and accompanying text.

144. O'Brien Energy Sys., Inc. v. American Employers' Ins. Co. 629 A.2d 957, 960 (Pa. Super. Ct. 1993).

145. *See supra* text accompanying note 66.

146. *See infra* notes 245-70 and accompanying text.

limit "other invasion" to offenses that involve the interference with the possession or occupancy of property.[147]

A. The Pollution Exclusion Clause Bars Coverage

Pollution claims, including those arising under trespass or nuisance, are precluded from coverage if an insurance policy contains a pollution exclusion clause and the pollutionary event was not sudden or accidental.[148] Many pollution exclusion clauses preclude coverage for bodily injury or property damage.[149] Therefore, the policyholders argue that the pollution exclusion clause does not reach personal injuries such as trespass and nuisance.[150] Allowing policyholders to assert environmental claims under the personal injury endorsement nullifies the effect of the pollution exclusion clause.[151] When considering the applicability of the personal injury endorsement, courts should not disregard other provisions in the insurance policy.[152] Rather, courts must look at the policy as a whole, especially the pollution exclusion clause.[153]

Asserting their arguments, the policyholders use semantics to place false boundaries on the pollution exclusion clause. They take an event that caused property damage and claim a personal injury resulted. First, the policyholders seek coverage under the CGL pdicy because chemicals, gases, or some other polluting agent caused property damage to the premises of an underlying plaintiff.[154] When the insurance companies deny coverage based on the pollution exclusion clause, the policyholders then claim that the environmental harm caused a personal injury as well as property damage.[155] Therefore, they argue that the personal injury endorsement entitles them to coverage.[156] If policyholders cannot obtain coverage under a CGL

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147. *See infra* notes 245-70 and accompanying text.

148. *See infra* notes 154-77 and accompanying text; Scott D. Marrs, *Pollution Exclusion Clauses: Validity and Applicability*, 26 TORT & INS. L.J. 662 (1991).

149. OSTRAGER & NEWMAN, *supra* note 4, at 322-23.

150. *See, e.g.*, Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 271 (1st Cir. 1991).

151. *See* Titan Corp. v. Aetna Casualty & Sur. Co., 27 Cal. Rptr. 2d 476, 485 (Ct. App. 1994).

152. *See id.*

153. *Id. See also* County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994).

154. *See* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1039 (7th Cir. 1993) (alleging coverage under property damage and personal injury provisions); *Titan Holdings*, 898 F.2d at 270.

155. *See Titan Holdings*, 898 F.2d at 270 (alleging coverage under CGL policy and the personal injury endorsement). In many cases the policyholders will challenge the pollution exclusion clause asserting ambiguity. *Id. See supra* notes 75-85 and accompanying text.

156. *Titan Holdings*, 898 F.2d at 270.

policy due to an unambiguous pollution exclusion clause, they then will argue that the *same claim* qualifies for coverage under the personal injury endorsement.[157] This effort to obtain coverage fails to recognize that the pollution exclusion clause carries over into the personal injury endorsement.[158]

Allowing coverage for property damage claims under the personal injury endorsement renders the pollution exclusion clause meaningless.[159] Eventually, other policyholders will discover that they may seek coverage under the personal injury endorsement when the pollution exclusion clause bars their property damage claims. Any event involving the discharge or dispersal of gases, chemicals, or other polluting agents would be characterized as a trespass or nuisance.[160] Thus, the personal injury endorsement would cover *all* pollutionary events.[161] In other words, the pollution exclusion clause would be ineffective if a policyholder's insurance policy also contains a personal injury endorsement.[162] Denying coverage in one area, but allowing coverage in another area for the same event, is illogical. Courts should recognize this fallacy and deny coverage when a policyholder claims that the personal injury endorsement covers its environmental damage.

Actually, several courts have recognized this flaw in logic and have denied coverage for these claims under the personal injury endorsement. In *O'Brien Energy Systems, Inc. v. American Employers' Insurance Co.*,[163] the policyholder sought coverage under several CGL policies in an action alleging that the migration of methane gas caused damages.[164] The superior court held the personal injury endorsement in the policies did not provide indemnification for environmental damage claims based on migrating gases.[165] The court found that the pollution exclusion clauses specifically excluded coverage for such

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157. Richard D. Williams, *The Personal Injury Endorsement: An Insurer Reply to the Misguided Policyholder Lawyer*, 6 ENVTL. CLAIMS. J. 79, 85 (1993-94).

158. American Univ. Ins. v. Whitewood Custom Treaters, 707 F. Supp. 1140, 1144 (D.S.D. 1989) (concluding that all exclusions set forth in the policy, including the pollution exclusion clause, must be construed as a part of the general liability insurance endorsement unless otherwise removed by the plain terms of the endorsement). *But see* Gould v. Arkwright Mut. Ins. Co., 829 F. Supp. 722, 729 (M.D. Pa. 1993); City of Edgerton v. General Cas. Co., 493 N.W.2d 768, 782 (Wis. Ct. App. 1992) (finding the insurer's "carry over" argument unpersuasive).

159. *E.g.*, County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994).

160. Bowman & Hofer, *supra* note 1, at 437.

161. *Id.* If the personal injury endorsement covered *all* pollutionary events, it would render the pollution exclusion clause a nullity. *Id.*

162. *Id.*

163. 629 A.2d 957 (Pa. Super. Ct. 1993).

164. *Id.* at 959.

165. *Id.* at 964.

claims.[166] Additionally, the court stated that "[t]o hold otherwise would emasculate the clear and unambiguous provisions of the pollution exclusion and could not be justified except as an unwarranted straining to reach a result different than that intended by the parties."[167]

A New York court reached a similar result in *County of Columbia v. Continental Insurance Co.*[168] In *Continental Insurance*, an underlying complaint alleged that leachate contamination from the policyholders' landfill had polluted another's soil, air, ground and surface waters and had constituted a continuing trespass and nuisance.[169] The New York Supreme Court, Appellate Division, stated coverage was excluded under the personal injury endorsement, holding the pollution exclusion clause barred such a claim.[170] The court noted that "to extend the personal injury coverage to occurrences which fall squarely within the property damage coverage would have the effect of rendering the pollution exclusion meaningless."[171] Affirming the appellate division, the court of appeals stated that "[i]t would be illogical to conclude that the claims fail because of the pollution exclusion while also concluding that the insurer wrote the personal injury endorsement to cover the same eventuality."[172]

Thus, in both *O'Brien Energy Systems* and *Continental Insurance*, the courts followed logic and denied coverage for pollution claims under the personal injury endorsement.[173] The court in *American Universal Insurance v. Whitewood Custom Theaters*[174] recognized that the pollution exclusion clause carries over into the personal injury endorsement.[175] The *Gould* court should have agreed with this reasoning. Instead, the *Gould* court let the policyholder execute an "end around" the pollution exclusion clause by classifying property dam-

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166. *Id.*

167. *Id.* Policyholders may attempt to distinguish this case from their assertions by noting the presence of an absolute pollution exclusion clause that barred coverage for bodily injury, property damage and personal injury. *Id.* at 961. However, the superior court construed three insurance policies: American Employers', Liberty Mutual, and National Union. *Id.* The National Union policy was the only policy containing an absolute pollution exclusion clause. *Id.* Nonetheless, the court found that none of the insurers owed a duty to defend. *Id.* at 959.

168. 595 N.Y.S.2d 988 (App. Div. 1993), *aff'd*, 634 N.E.2d 946 (N.Y. 1994).

169. *Id.* at 989.

170. *Id.*

171. *Id.* at 991.

172. County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994). *See also* Titan Corp. v. Aetna Casualty & Sur. Co., 27 Cal. Rptr. 2d 476, 486 (Ct. App. 1994) (stating that the relabeling of such an injury as an "other invasion" of the right of private occupancy would render the pollution exclusion a "dead appendage to the policy").

173. *See supra* notes 150-168 and accompanying text.

174. 707 F. Supp. 1140 (D.S.D. 1989).

175. *Id.* at 1144.

age caused by contamination as a personal injury to obtain coverage under the personal injury endorsement.[176] If other courts follow this approach, the pollution exclusion clause will become worthless.[177] Courts should recognize this diversionary tactic and deny coverage under the personal injury endorsement.

B. Trespass and Nuisance are Distinct from Wrongful Entry or Eviction

The presence of a pollution exclusion clause is not the only reason why courts should recognize that the personal injury endorsement does not provide coverage for the discharge or dispersal of gases, chemicals, or other polluting agents. Courts should recognize that trespass and nuisance are offenses which are distinguishable from "wrongful entry or eviction."[178] A "wrongful entry or eviction" involves the intent to dispossess an individual of property.[179] Neither trespass nor nuisance threatens a property owner's right of possession.[180] Accordingly, the policyholders' assertions that "wrongful entry or eviction" are equivalent to trespass or nuisance are misplaced.[181]

Both wrongful entry and wrongful eviction require taking possession of property.[182] They involve a dispossession of property by someone other than the occupant who asserts an interest in the property.[183] A wrongful eviction consists of a landlord or his agent entering the premises and dispossessing the tenant.[184] Thus, in a wrongful eviction a tenant will no longer retain possession of the

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176. *Gould*, 829 F. Supp 722.

177. *See supra* notes 163-172 and accompanying text.

178. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F . Supp. 288 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993); Morton Thiokol, Inc. v. General Accident Ins. Co., No. C-3956-85 (N.J. Super., Aug. 27, 1987) (LEXIS, States library, N.J. file).

179. *Breshears*, 832 F. Supp. at 291.

180. Foggan et al., *supra* note 7, at 297.

181. *See* Bowman & Hofer, *supra* note 1. The authors distinguish "wrongful entry or eviction" from trespass and nuisance by discussing the origins and development of the respective torts. *Id.*

182. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993); Morton Thiokol v. General Accident Ins. Co., No. C-3956-85 (N.J. Super., Aug. 27, 1987) (LEXIS, States library, N.J. file).

183. Foggan et al., *supra* note 7, at 296; Williams, *supra* note 157, at 81.

184. Foggan, *supra* note 2, at 14. *See also* Toombs N.J. Inc. v. Aetna Cas. & Sur. Co., 591 A.2d 304, 307 (Pa. Super. Ct. 1991) (finding that a wrongful eviction within the meaning of a CGL policy meant a situation where party was already in possession of the premises and had been evicted without legal justification); 3855 Broadway Laundromat Inc. v. 600 W. 161st St. Corp., 548 N.Y.S.2d 461, 462 (App. Div. 1989) (finding that changing locks and preventing access by tenant amounted to "wrongful eviction" or "actual eviction").

premises.[185] Wrongful entry occurs when someone, other than the landlord, enters the premises without title and claims or acquires a possessory interest in the property.[186] Both wrongful entry and wrongful eviction involve interference with an individual's possession of property.[187]

Trespass has elements that are common to "wrongful entry or eviction."[188] Yet, the offenses are distinguishable.[189] Trespass is an intentional invasion of property by a person or other tangible matter that interferes with an individual's possession of property.[190] However, "wrongful entry or eviction" is permanent and the interference caused by trespass is transitory.[191] A person taking a shortcut across another's property is an example of the transitory nature of trespass.[192] Moreover, the transitory nature of trespass does not involve a dispossession of property by someone asserting an interest in it.[193] Although trespass and "wrongful entry or eviction" contain common elements, the offenses are not identical.

Similarly, nuisance is different from "wrongful entry or eviction."[194] Nuisance involves the interference with an individual's use and enjoyment of property.[195] By contrast, "wrongful entry or eviction" involves interference with possession or occupancy of property.[196] The release of hazardous chemicals across an individual's property may constitute a nuisance.[197] Yet, this release does not affect a property owner's right of possession or occupancy of property.[198] Accordingly, the offenses "wrongful entry or eviction" have striking differences from nuisance.

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185. Foggan, *supra* note 2, at 14.

186. *Breshears*, 832 F. Supp. at 291; Morton Thiokol v. General Accident Ins. Co., No. C-3956-85 (N.J. Super. Ct., Aug. 27, 1987) (LEXIS, States library, N.J. file).

187. *See Breshears*, 832 F. Supp. at 291; Morton Thiokol v. General Accident Ins. Co., No. C-3956-85 (N.J. Super. Ct., Aug. 27, 1987) (LEXIS, States library, N.J. file).

188. Garvis v. Employers Mut. Casualty Co., 497 N.W.2d 254, 259 (Minn. 1993) (recognizing that although a kinship exists between wrongful entry and trespass, the two concepts are not quite the same).

189. *Id.*

190. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 70 (5th ed. 1984).

191. Foggan et al., *supra* note 7, at 297.

192. *Id.*

193. *Id.*

194. Bowman & Hofer, *supra* note 1, at 402.

195. KEETON ET AL., *supra* note 190, at 625; BLACK'S LAW DICTIONARY 736 (6th ed. 1991).

196. *See supra* notes 178-183 and accompanying text.

197. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288, 291 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993).

198. Gregory v. Tennessee Gas Pipeline Co., 948 F.2d 203, 209 (5th Cir. 1991); *Breshears*, 832 F. Supp. at 291.

Several courts have applied similar reasoning to distinguish trespass and nuisance from "wrongful entry or eviction."[199] In *W.H. Breshears, Inc. v. Federated Mutual Insurance Co.*,[200] a policyholder sought indemnity from its insurer for costs incurred in the cleanup of contamination resulting from spilled gasoline.[201] The policyholder argued that the personal injury endorsement in the policy covered the escaped gasoline because the endorsement was subject to claims of trespass, nuisance, and strict liability.[202] The district court rejected the policyholder's contentions, noting that a wrongful eviction "takes place when a tenant is dispossessed by his or her landlord."[203] The court further noted that a "[w]rongful entry takes place when someone other than the landlord claims a possessory interest in the room, dwelling or premises."[204] Next, the court contrasted these offenses with trespass and nuisance stating that neither trespass nor nuisance involve a dispute concerning the occupancy of property.[205] Thus, the district court ruled that the personal injury endorsement did not protect against trespass and nuisance for "ultrahazardous" activity.[206]

Likewise, a New Jersey court distinguished "wrongful entry or eviction" from trespass and nuisance.[207] In *Morton Thiokol, Inc. v. General Accident Insurance Co.*,[208] the policyholder dumped toxic waste containing mercury onto its land for many years.[209] Eventually, the mercury drained into a nearby creek.[210] The policyholder argued that the underlying nuisance action entitled it to coverage under the personal injury endorsement.[211] The superior court disagreed, indicating that eviction requires a dispossession through the legal process.[212] The court further stated that a wrongful entry requires a

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199. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993); Morton Thiokol v. General Accident Ins. Co., No. C-3956-85 (N.J. Super., Aug. 27, 1987) (LEXIS, States library, N.J. file). *See also* Decorative Ctr. v. Employers Casualty Co., 833 S.W.2d 257 (Tex. Ct. App. 1992) (finding no coverage under personal injury endorsement and stating that although appellants intentionally interfered with a right to use property, they did not interfere with right of private occupancy).

200. 832 F. Supp. 288 (E.D. Cal. 1993).

201. *Id.* at 289.

202. *Id.* at 291.

203. *Id.*

204. *Id.*

205. W.H. Breshears, Inc. v. Federated Mut. Ins. Co., 832 F. Supp. 288, 291 (E.D. Cal. 1993), *aff'd in part and rev'd in part*, 38 F.3d 1219 (9th Cir. 1993).

206. *Id.*

207. Morton Thiokol, Inc. v. General Accident Ins. Co., No. C-3956-85 (N.J. Super. Ct., Aug. 27, 1987)(LEXIS, States library, N.J. file).

208. No. C-3956-85 (N.J. Super., Aug. 27, 1987)(LEXIS, States library, N.J. file).

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

"going upon the land for the purpose of taking possession."[213] The court reasoned that the State was not dispossessed of the waters of the creek.[214] Furthermore, the court noted that:

> no one sought to take possession of Berry's Creek, neither the land that forms its bed, nor the waters flowing through it.
>
> The plaintiff has confused the concept of trespass with wrongful entry. . . . Wrongful entry, eviction and occupancy all have to do with the possession of property. The seepage of toxic waste has nothing at all to do with the possession of Berry's Creek.[215]

Thus, the court held that the personal injury endorsement did not provide coverage for the contamination of the creek.[216]

Breshears and *Morton Thiokol* demonstrate that "wrongful entry or eviction" require an interference with the possession of property.[217] The cases also show that trespass and nuisance do not require such an interference.[218] By contrast, the *Gould* court held that coverage for "wrongful entry" and "other invasion of the right of private occupancy" was ambiguous.[219] By suggesting that the personal injury endorsement may provide coverage for the pollution damage, the *Gould* court failed to distinguish trespass and nuisance from "wrongful entry or eviction."[220] Instead, the *Gould* court should have followed the *Breshears* and *Morton Thiokol* line of reasoning that "wrongful entry or eviction" require an interference with the possession and occupancy of property.[221] Furthermore, the *Gould* court should have recognized that the emissions caused by battery crushing, although creating a trespass or nuisance, does not constitute a "wrongful entry or eviction".[222] In the absence of a "wrongful entry or eviction," the *Gould* court should have denied coverage under the personal injury endorsement.

C. The Personal Injury Endorsement Applies to Specific Enumerated Offenses

Neither trespass nor nuisance is covered by the personal injury endorsement because both offenses are separate and distinct from

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213. No. C-3956-85 (N.J. Super., Aug. 27, 1987)(LEXIS, States library, N.J. file).
214. *Id.*
215. *Id.*
216. *Id.*
217. *See supra* notes 199-216 and accompanying text.
218. *Id.*
219. Gould Inc. v. Arkwright Mut. Ins. Co., 829 F. Supp. 722, 729 (M.D. Pa. 1993).
220. *Cf. supra* notes 182-216 and accompanying text.
221. *See supra* notes 199-216 and accompanying text.
222. *See supra* notes 182-216 and accompanying text.

"wrongful entry or eviction."[223] When construing the applicability of the personal injury endorsement, courts should interpret the policy according to its plain and unambiguous language.[224] In other words, courts should recognize that the personal injury endorsement provides coverage only for those offenses enumerated within the endorsement.[225] Indeed, many courts have construed the personal injury endorsement narrowly, requiring allegations of damages resulting from one of the enumerated offenses before extending coverage.[226] Trespass and nuisance are not enumerated offenses under the personal injury endorsement.[227] Therefore, courts should deny coverage under the personal injury endorsement for environmental claims arising under trespass or nuisance.[228] If insurance companies intended to provide coverage for trespass or nuisance they certainly would have included trespass and nuisance as enumerated offenses within the personal injury endorsement.[229]

For example, the New York Court of Appeals recognized that the personal injury endorsement does not provide coverage for trespass and nuisance.[230] In *County of Columbia v. Continental Insurance Co.*,[231] the court of appeals stated the personal injury endorsement did not include trespass and nuisance.[232] The court reasoned that trespass and nuisance were not among the offenses enumerated in the personal injury endorsement.[233] Furthermore, trespass and nuisance are not equivalent to the "enumerated offense of 'wrongful entry or eviction or other invasion of the right of private occupancy.'"[234]

The Pennsylvania Superior Court also recognized that trespass and nuisance are not specifically enumerated under the personal

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223. *See, e.g.*, County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 964 (Pa. Super. Ct. 1993). *C.f.* Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037, 1040 (7th Cir. 1992); Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265, 270 (1st Cir. 1990).

224. *See* O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957 (Pa. Super. Ct. 1993).

225. *Id.*

226. American & Foreign Ins. Co. v. Church Schs., 645 F. Supp. 628, 633-34 (E.D. Va. 1986); A. Meyers & Sons Corp. v. Zurich Am. Ins. Group, 74 N.Y.2d 298, 303 (1989). *See also* Williams, *supra* note 5, at 394.

227. *See supra* text accompanying note 66.

228. *See infra* notes 231-238 and accompanying text.

229. Foggan et al., *supra* note 7, at 296. *See also* Garvis v. Employers Mut. Casualty Co., 497 N.W.2d 254, 259-60 (Minn. 1993) (stating that the policy could have listed trespass as a covered offense, but did not do so).

230. County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994).

231. 634 N.E.2d 946 (N.Y. 1994).

232. *Id.*

233. *Id.*

234. *Id.*

injury endorsement.[235] In *O'Brien Energy Systems, Inc. v. American Employers' Insurance Co.*,[236] the court stated the personal injury endorsement provides coverage for specific torts affording coverage only for defined risks.[237] Recognizing that trespass and nuisance were not equivalent to "wrongful entry or other invasion of the right to private occupancy," the court ruled that the policy did not provide indemnification for environmental claims based on migrating gases.[238]

The district court in *Gould*[239] should have recognized that trespass and nuisance are not equivalent to "wrongful entry or eviction or other invasion of the right to private occupancy."[240] The *Gould* court should have further recognized that trespass and nuisance are not enumerated offenses in the personal injury endorsement.[241] Understanding that the personal injury endorsement provides coverage only for enumerated offenses, the *Gould* court should have denied coverage for the policyholder's environmental claim.[242] If the insurer in *Gould* intended to provide coverage for environmental damage under the personal injury endorsement, the endorsement would have specifically indicated trespass and nuisance as covered offenses.[243] Instead, the insurer provided coverage for "wrongful entry or eviction," which does not encompass environmental claims.[244]

D. Ejusdem Generis

Policyholders have argued that the personal injury endorsement wording "other invasion of the right of private occupancy" encompasses trespass and nuisance, thus allowing coverage for environmental damage.[245] Additionally, some courts have determined that

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235. O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 964 (Pa. Super. Ct. 1993).

236. 629 A.2d 957 (Pa. Super. Ct. 1993).

237. *Id.* at 964.

238. *Id.*

239. Gould Inc. v. Arkwright Mutual Ins. Co., 829 F. Supp. 722 (M.D. Pa. 1993).

240. *See supra* notes 178-222 and accompanying text.

241. *See supra* notes 223-238 and accompanying text.

242. *See, e.g.*, County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 964 (Pa. Super. Ct. 1993); *supra* notes 223-238 and accompanying text.

243. Foggan et al., *supra* note 7, at 296; Garvis v. Employers Mut. Casualty Co., 497 N.W.2d 254, 259-60 (Minn. 1993).

244. *See, e.g.*, County of Columbia v. Continental Ins. Co., 634 N.E.2d 946, 950 (N.Y. 1994); O'Brien Energy Sys., Inc. v. American Employers' Ins. Co., 629 A.2d 957, 964 (Pa. Super. Ct. 1993).

245. *O'Brien*, 629 A.2d at 963. *See supra* notes 75-95 and accompanying text.

this language is ambiguous.[246] Construing ambiguity in favor of the policyholders, these courts allowed coverage for environmental damage.[247] Yet, applying the *ejusdem generis* doctrine to the personal injury endorsement in insurance policies would clarify the meaning of "other invasion of the right of private occupancy."[248] In fact, this doctrine will narrow the application of the personal injury endorsement.[249]

Ejusdem generis is a doctrine of contract interpretation.[250] This doctrine states that when general words follow a specific classification such general words are not to be construed in their widest extent.[251] Instead, the words are to apply only to those things of equal or inferior rank.[252] Under this doctrine, courts should limit "other invasion of the right of private occupancy" to situations equal or inferior to "wrongful entry or eviction."[253] Wrongful entry or eviction applies to situations involving an interference with the right of possession and occupancy of property.[254] Courts should not construe "other invasion of the right of private occupancy" to its widest extent. Rather, courts should limit this clause to situations involving an interference with a right of possession and occupancy of property.[255] Thus, "wrongful entry or eviction, or other invasion of the right of private occupancy" does not encompass environmental claims arising under trespass and nuisance. Applying this doctrine of contract interpretation will eliminate any ambiguity in the construction of an insurance policy's personal injury endorsement.

Numerous courts have recognized that *ejusdem generis* limits the application of the personal injury endorsement to situations involving an interference with a right of possession and occupancy of property.[256] In *Titan Corp. v. Aetna Casualty and Surety Co.*,[257] the California Court of Appeal reasoned that "the term other invasion of

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246. Gould v. Arkwright Mut. Ins. Co., 829 F. Supp. 722 (M.D. Pa. 1993); Napco, Inc. v. Fireman's Fund Ins. Co., No. 90-0993, (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July, 21, 1993).

247. *Gould*, 829 F. Supp. 722; Napco, Inc. v. Fireman's Fund Ins. Co., No. 90-0993 (May 22, 1991) (Report and Recommendation of Magistrate Judge), *dismissed per stipulation*, No. 90-0993 (W.D. Pa. July 21, 1993).

248. *See infra* notes 250-70 and accompanying text.

249. *See infra* notes 250-70 and accompanying text.

250. BLACK'S LAW DICTIONARY 357 (6th ed. 1991); Williams, *supra* note 157, at 81.

251. BLACK'S LAW DICTIONARY 357 (6th ed. 1991); *see also* Williams, *supra* note 157, at 81.

252. *E.g.*, Williams, *supra* note 157, at 81.

253. Williams, *supra* note 6, at 395.

254. *See supra* notes 182-222 and accompanying text.

255. Williams, *supra* note 157, at 81.

256. Martin v. Brunzelle, 699 F. Supp. 167 (N.D. Ill. 1988); Titan Corp. v. Aetna Casualty & Sur. Co., 27 Cal. Rptr. 2d 476 (Ct. App. 1994).

257. 27 Cal. Rptr. 2d 476 (Ct. App. 1994).

the right of private occupancy draws meaning and content from . . . wrongful entry or eviction."[258] The court further reasoned that this language connotes disruptions of a landowners ability to actually occupy the property, rather than mere injuries to the property.[259] The *Titan* court was not persuaded by courts that allowed coverage for environmental damage under the personal injury endorsement.[260] Further, the *Titan* court observed that those courts "overlooked *ejusdem generis* principles, which caution that the 'other invasion' should be interpreted to mean the functional equivalent of "wrongful entry or eviction."[261]

Similarly, an Illinois District Court found no ambiguity in the terms "other invasion of the right of private occupancy."[262] In *Martin v. Brunzelle*,[263] the district court noted that the policyholder erred in urging ambiguity in the policy provision.[264] The court then stated that "*[e]jusdem generis* principles draw on the sensible notion that words such as 'other invasion of the right of private occupancy' are intended to encompass actions of the same general type as, though not specifically embraced within 'wrongful entry or eviction.'"[265] The court continued by noting the phrase "other invasion of the right of private occupancy" provides coverage only if there is a landlord-tenant relationship or if the plaintiff has a vested property right.[266]

In *Gould*, the district court found ambiguity existed in the relationship between the pollution exclusion clause and the personal injury endorsement.[267] Instead of finding ambiguity, the *Gould* court should have followed the reasoning applied in *Titan Corp.* and *Martin*. Applying this reasoning the *Gould* court should have found that *ejusdem generis* limits "other invasion of the right of private occupancy" to situations functionally equivalent to "wrongful entry or eviction."[268] The court should have observed that "wrongful entry or eviction" applies when there is an interference with a right to possession and occupancy of property.[269] By properly limiting the term "other invasion of a right to private occupancy," the *Gould* court

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258. *Id.* at 487.
259. *Id.*
260. *Id. See, e.g.*, Pipefitters Welfare Educ. Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992); Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265 (1st Cir. 1990).
261. *Titan Corp.*, 27 Cal. Rptr. 2d at 487.
262. Martin v. Brunzelle, 699 F. Supp. 167, 170 (N.D. Ill. 1988).
263. 699 F. Supp. 167 (N.D. Ill. 1988).
264. *Id.* at 170.
265. *Id.*
266. *Id.*
267. *See supra* notes 126-137 and accompanying text.
268. *See supra* notes 247-265 and accompanying text.
269. *See supra* notes 247-265 and accompanying text.

should not have found an ambiguity in the insurance policy.[270] Accordingly, the *Gould* court should not have allowed coverage under the personal injury endorsement.

VI. CONCLUSION

The district court in *Gould* found that the personal injury endorsement was ambiguous, indicating the endorsement may cover environmental claims. Yet, the *Gould* court did not distinguish trespass and nuisance from "wrongful entry or eviction." The court should have recognized that a "wrongful entry or eviction" applies to situations involving an interference with the possession and occupancy of property. Furthermore, applying the *ejusdem generis* doctrine would limit the general term "other invasion of the right of private occupancy" to situations similar to "wrongful entry or eviction." Additionally, insurers did not intended to cover pollution claims under the personal injury endorsement. Such claims are addressed under a CGL policy. If more courts allow policyholders to pursue environmental claims under the personal injury endorsement, the result certainly would nullify the pollution exclusion clause. This result defies logic. Instead of granting coverage, courts should recognize the policyholders' claims as an unwarranted straining of the personal injury endorsement. Accordingly, courts facing efforts to obtain coverage under the personal injury endorsement should grant summary judgment in favor of the insurers.

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270. *See supra* notes 247-265 and accompanying text.

FLORIDA'S TROUBLED INLAND PROTECTION TRUST FUND: COMMON LAW ACTIONS AS ALTERNATIVE REMEDIES FOR AN INNOCENT BUYER OF CONTAMINATED COMMERCIAL LAND

ROBERT A. BASS*

> Of course, it is too much to expect that we shall have many judges like Lord Mansfield, with a vision broad enough to see the possibilities lying in the action of assumpsit . . . and with courage enough to keep the law abreast of the current ideas of morality and the needs of commerce. We must often be content, as best we may, with the little judges of narrow historical perspective and little grasp of principle, who tremble at a new decision and know no law for which cannot be found a precedent on all fours.[1]

I. INTRODUCTION

A buyer of commercial real property faces many risks. These transactions are typically brimming with uncertainties: Does the sale price represent the fair market value? Will the property provide a sufficient stream of income to service the underlying debt? Will subsequent governmental regulations destroy the value of the property? Presumably, parties to a commercial property transaction take these uncertainties into account in reaching an agreed-upon sale price, and, for the most part, the parties' expectations are met. Recently, however, commercial property transactions have been burdened by an additional, and often unbargained-for, risk-petroleum or petroleum-based pollution.

Since liability for contaminated property is often predicated on ownership, a buyer of contaminated land may assume exorbitant, unbargained-for costs not reflected in the purchase price.[2] A seller's

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1. Arthur L. Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 540 (1912).

2. Clean-up costs can reach millions of dollars. For a discussion of the pervasiveness of the pollution problem and its attendant social and economic costs, see Kevin Duncan & B. Todd Bailey, *Innocence Amid "LUST": The Innocent Buyer and Leaking Underground Storage Tanks Containing Petroleum*, 7 B.Y.U. J. PUB. L. 245, 245-48 (1993); *see also* Comment, *Lust on Your Corner: Strict Liability, Victim Compensation, and Leaking Underground Storage Tanks*, 62 U. COLO. L. REV. 365, 365-78 (1991); J. Bruce Ehrenhaft, *Caught in the Web—As Hazardous Waste Liability Expands, "Second Parties" Face Liability in Association with Contaminated Realty*, FLA. B.J., Apr. 1989, 21, 21-27.

statutory liability to a buyer of contaminated property may include costs associated with site investigation and clean up,[3] and the restoration of natural resources, including ground water.[4] Further, a seller of contaminated land may be liable in tort.[5] If the contaminants fall within the ambit of federal environmental laws,[6] a buyer may have a private right of action against either the seller or another responsible party to recover the cost of cleaning up the property.[7] Florida courts, in contrast, have not expressly recognized a private cause of action for buyers to recover the costs of cleaning up petroleum-based pollutants under Florida's environmental statutory laws.[8] Moreover, in contrast to their treatment of residential property transactions,[9] Florida courts permit a buyer of contaminated

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3. *See, e.g.*, 33 U.S.C. § 1321(f) (1988 & Supp. V 1993) (Federal Water Pollution Control Act [hereinafter *Clean Water Act*]); Fla. Stat. §§ 403.121, .131, .141 (1993).

4. 33 U.S.C. § 1321(f)(4).

5. Traditional tort liability for environmental damages includes nuisance, strict liability and negligence. *See infra* notes 31-89 and accompanying text.

6. The Comprehensive Environmental Response, Compensation and Liability Act [hereinafter CERCLA] applies to "hazardous substances" as defined in the statute. 42 U.S.C. § 9601(14). Petroleum-based contaminants are specifically excluded from CERCLA liability. *Id.* § 9607. Thus, a buyer of land contaminated with a petroleum-based substance may not, under CERCLA, seek reimbursement of clean-up costs. A recent federal circuit court of appeals case, however, found that the Resource Conservation and Recovery Act [hereinafter RCRA], 42 U.S.C. § 6972(a)(1)(B), provides an aggrieved buyer with a private cause of action to recover the cost of cleaning up petroleum-based contaminants. KFC Western, Inc. v. Meghrig, 49 F.3d 518 (9th Cir.), *cert. granted*, 116 S. Ct. 41 (1995). This case represents the first time that any court has found a private cause of action for damages under RCRA, which has generally been limited to providing injunctive relief. *Id.* Recently, the Eighth Circuit expressly disagreed with the KFC decision. Furrer v. Brown, 1995 WL 478274 (8th Cir. Aug. 15, 1995) (finding that "the [KFC] court began with a questionable proposition and then mistakenly reached its result in reliance on cases from this Circuit that, when carefully analyzed, do not support the KFC Western decision.").

7. 42 U.S.C. § 9607(a)(2)(B)(1988 & Supp. V 1993). *See, e.g.*, Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1078 (1st Cir. 1986); Walls v. Waste Resource Corp., 761 F.2d 311, 318 n.6 (6th Cir. 1985); Marriott Corp. v. Simkins Indus., Inc., 825 F. Supp. 1575 (S.D. Fla. 1993); *see also* Jeffrey M. Gaba, *Recovering Hazardous Waste Cleanup Costs: The Private Cause of Action Under CERCLA*, 13 ECOLOGY L.Q. 181, 183 (1986).

8. It is unclear whether a buyer of contaminated property has a cause of action to recover clean-up costs under Florida's environmental statutes. In Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372 (Fla. 2d DCA 1993), a buyer of contaminated commercial property sued a remote predecessor-in-title for the alleged loss in market value of the buyer's property due to contamination. In affirming the dismissal of the buyer's action, the court held that a cause of action for damages unconnected with the cleanup or removal of the pollutants was unavailable. Thus, the court did not rule out the viability of a claim for restitution for cleanup of pollutants. This approach would be consistent with CERCLA, which permits "any other person" besides the government to recover "any other costs of response" necessarily incurred during a cleanup performed in a manner "consistent with the National Contingency Plan." 42 U.S.C. § 9607(a)(2)(B)(1988 & Supp. V 1993). This article assumes the Florida courts would not construe Florida environmental laws to permit a buyer to have a cause of action to recover the cost of cleaning up contaminants.

commercial property to assert a common law cause of action against a seller only in certain circumstances.[10] Consequently, in Florida, a buyer of commercial property contaminated with pollutants that are outside the scope of federal statutory law is likely to be saddled with the cost of cleaning up the property.

In limited circumstances, Florida law may provide a buyer a common law cause of action against a seller of contaminated land. Many buyers, however, forego litigation and finance cleanup costs by seeking reimbursement from Florida's Inland Protection Trust Fund (Trust Fund).[11] Created in 1986,[12] the Trust Fund is a repository for money that "enable[s] the [Department of Environmental Protection] to respond without delay to incidents of inland contamination related to the storage of petroleum and petroleum products in order to protect the public health, safety, and welfare and to minimize environmental damage."[13]

The Florida Legislature created the Trust Fund to expedite the remediation of petroleum-based contamination in hopes of avoiding cleanup delays that often occur when parties seek to sort out fault and liablility through the judicial process.[14] Money was available from the Trust Fund to reimburse both the Department of Environmental Protection (Department) and eligible landowners who voluntarily clean up their properties.[15] The Trust Fund is supported by

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9. *See* Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (holding that a seller of residential property has an affirmative duty to disclose to a buyer material defects of the property); *see also infra* notes 95-115 and accompanying text.

10. Several recent Florida district court of appeal decisions are instructive of the potential risks of liability assumed by a buyer of commercial property and the inability to seek recovery from the seller. *See Mostoufi*, 618 So. 2d at 1372; Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc., 578 So. 2d 363 (Fla. 3d DCA 1991); Sunshine Jr. Stores v. State Dep't of Envtl. Reg., 556 So. 2d 1177 (Fla. 1st DCA 1990).

11. FLA. STAT. § 376.3071(12) (1993).

12. State Underground Petroleum Environmental Response Act of 1986, Ch. 86-159, § 15, 1986 Fla. Laws 655, 675.

13. FLA. STAT. § 376.3071(2) (1993).

14. FLA. STAT. § 376.3071(1)(c) (1993).

> [W]here contamination of the ground or surface water has occurred, remedial measures have often been delayed for long periods [of time] while determinations as to liability and the extent of liability are made and that such delays result in the continuation and intensification of the threat to the public health, safety, and welfare; in greater damage to the environment; and in significantly higher costs to contain and remove the contamination.

Id.

15. FLA. STAT. § 376.3071(12)(a) (1993).

> The legislature finds and declares that, in order to provide for rehabilitation of as many contamination sites as possible, as soon as possible, voluntary rehabilitation of contamination sites should be encouraged, provided that such rehabilitation is conducted in a manner and to a level of completion which will protect the public health, safety, and welfare and will minimize damage to the environment.

"penalties, judgments, recoveries, reimbursements, loans, and other fees and charges . . . and . . . [petroleum] excise tax revenues . . . ."[16] Recently, however, the number and timing of applications for reimbursement has resulted in a significant backlog that jeopardizes the continued solvency of the Trust Fund.[17]

Florida Governor Lawton Chiles recognized the troubled state of the Trust Fund and issued an Executive Order in March 1995, directing the Department to

> cease processing applications of reimbursement of funds for site rehabilitation work on sites eligible for state-funded cleanup pursuant to Sections 376.305(6), 376.305(7), 376.3071(9), and (12), 376.3072, and 376.3073, Florida Statutes, except for those applications for sites with priority ranking scores equal to or greater than 50 points pursuant to Chapter 62-771, Florida Administrative Code and approved by the Department [of Environmental Protection] prior to the start of work.[18]

The governor subsequently signed into law a bill passed by the Florida Legislature in March 1995 that contained language similar to that found in his executive order. The bill limited reimbursement to restitution work done prior to March 27, 1995,[19] and future rehabilitation work will be reimbursed only if approved by the Department prior to cleanup.[20] The future viability of the Trust Fund is currently unclear. At the close of its 1995 session, the Florida Legislature failed to pass a bill providing for needed reform of the Trust Fund's

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Id.

16. FLA. STAT. § 376.3071(3) (1993).

17. *See*, Ch. 95-2, § 1, 1995 Fla. Laws; Fla. Exec. Order No. 95-82 (March 8, 1995). The Trust Fund is currently supported by yearly credits amounting to approximately $160 million. The Department estimates, however, that its current backlog of unpaid reimbursement claims is $212 million, with a projected increase to $420 million as additional claims (representing current work in progress) are submitted. Prakash Gandhi, *Lawmakers Weigh UST Cleanup Options*, FLORIDA SPECIFIER, May 1995, at 2.

The reimbursement claim approval process also contributes to the Trust Fund's current crisis. Department officials rank contaminated sites based on the degree of threat to public health. *See* Fla. Admin. Code Ann. r. 62-771 (1995). Applications for reimbursement submitted to the Trust Fund, however, are received without regard to the site's impact on human health or the environment. *See* Fla. Admin. Code Ann. r. 62-773.700 (1995). Consequently, there is a risk that a large number of claims from low priority sites could deplete the Trust Fund, or otherwise jeopardize its solvency, while high priority sites go untouched and continue to threaten public health.

18. Fla. Exec. Order No. 95-82, § 2 (March 8, 1995).

19. Ch. 95-2, § 1, 1995 Fla. Laws.

20. *Id.*

administrative procedures.[21] Thus, many rehabilitation projects in Florida stand idle as landowners and contractors await the outcome.

Since 1986, the Trust Fund has been a solution to the problem of how private parties and state government finance the rehabilitation of contaminated property. However, given the Trust Fund's uncertain future, alternative financing solutions must be examined to continue to advance Florida's policy of expediting the cleanup of contaminated land to protect public health and the environment.

This article identifies and examines common law substantive and remedial obstacles encountered by a buyer of contaminated commercial property and discusses an alternative theory of relief untested in Florida courts—restitution. First, the author surveys traditional common law torts and criticizes current Florida law that generally precludes a buyer of contaminated property from seeking relief in tort from the seller.[22] The article then provides a general introduction to the law of restitution[23] and examines unjust enrichment and its potential to provide relief to a buyer.[24] The article concludes that, in light of the Trust Fund's uncertain future, the Legislature should provide a statutory cause of action for restitution of cleanup costs. In the absence of such legislation, however, aggrieved buyers should press the Florida courts to revisit and reassess the rationale of their prior decisions barring relief in tort to buyers of polluted commercial property. Finally, in the event stare decisis prevails, aggrieved parties should consider restitution as an alternative source of relief.[25]

II. TRADITIONAL THEORIES OF RELIEF IN TORT

Tort law provides a remedy to a person who sustains an injury to a legally recognized interest.[26] A landowner whose property has been contaminated by another may be able to recover in tort under theories of nuisance,[27] negligence[28] or strict liability.[29] Florida courts, however, generally limit application of these tort theories to cases

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21. Two suggested reforms were debated by the Legislature. One option would do away with the Trust Fund reimbursement program and "replace it with a petroleum contamination amnesty program." *See* Gandhi, *supra* note 17, at 2. The other option would eliminate the reimbursement program and replace it with a quasi-governmental corporate entity to administer the cleanup program. *Id.*

22. *See infra* notes 26-115 and accompanying text.

23. *See infra* notes 116-151 and accompanying text.

24. *See infra* notes 159-215 and accompanying text.

25. *See infra* notes 216-243 and accompanying text.

26. *See infra* notes 120-121 and accompanying text.

27. *See infra* notes 31-49 and accompanying text.

28. *See infra* notes 50-70 and accompanying text.

29. *See infra* notes 71-89 and accompanying text.

where the buyer had title to the property at the time of the contamination. These tort actions usually are not available to a buyer of property contaminated by the seller because, the courts hold, at the time of the pollution the seller did not owe a legal duty to the buyer. Consequently, a buyer is left to pursue an action not based on the contamination itself, but on the sales transaction between buyer and seller—an action in fraud or misrepresentation.[30] Florida courts, however, limit the availability of a commercial property buyer's fraud claim against a seller. This section provides a critical review of the Florida courts' application of the aforementioned tort theories to an aggrieved buyer of contaminated commercial property.

A. Nuisance

In Florida, a nuisance action is unlikely to provide a buyer with a cause of action against a seller for conditions existing on the land prior to the sale. Nuisance is defined as the unreasonable interference with another's use and enjoyment of land.[31] "The law of nuisance plys [sic] between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor."[32] A person may be liable for maintaining a nuisance while in possession of the property, and the landowner may continue to be liable for the nuisance after the property is transferred to another. The class of potential defendants, however, is limited to those who could have brought an action when the wrongdoer was in possession.[33]

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30. *See infra* notes 90-115 and accompanying text. Fraud is used hereinafter in reference to either misrepresentation or fraud.

31. RESTATEMENT (SECOND) OF TORTS § 821D (1966). The Restatement defines "private nuisance" as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 87 (5th ed. 1984) [hereinafter PROSSER]; Florida E. Coast Properties, Inc. v. Metropolitan Dade County, 572 F.2d 1108 (11th Cir. 1978); State ex rel. Pettengill v. Copeland, 466 So. 2d 1133 (Fla. 1st DCA 1985); § 386.041, Fla. Stat. (1993)(defining "nuisance injurious to health"). This article is limited to discussing private nuisance. For a discussion of the relationship between private and public nuisance, *see* PROSSER, *supra* § 90. *See also* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).

32. Beckman v. Marshall, 85 So. 2d 552, 554 (Fla. 1956) (quoting with approval Antonick v. Chamberlain, 78 N.E.2d 752, 758 (Ohio Ct. App. 1947)).

33. RESTATEMENT (SECOND) OF TORTS § 840(a) (1966). The general rule regarding a seller's continuing exposure to liability for maintaining a nuisance after transferring property is:

> (1) A [seller] of land upon which there is a condition involving a nuisance for which he would be *subject to liability if he continued in possession* remains subject to liability for the continuation of the nuisance after he transfers the land.
>
> (2) If the [seller] has created the condition or has actively concealed it from the [buyer] the liability stated in Subsection (1) continues until the [buyer] discovers

Therefore, while a seller of polluted property may be subject to a nuisance action, a buyer of the property is usually not a member of the class to whom the seller may be liable.[34]

Philadelphia Electric Company v. Hercules[35] is the principal case addressing the issue of whether a seller who has created and maintained a nuisance is liable to a buyer for damages. Philadelphia Electric Company (PECO) sued Hercules, a remote seller, for costs to remediate the contamination and to remove the pollutants[36] discharged from a chemical plant operated by Hercules' predecessor-in-interest.[37] Hercules argued it was immune from liability under the doctrine of caveat emptor.[38] The court agreed with Hercules regarding the caveat emptor defense and rejected PECO's nuisance claim, finding that the complaint did not follow traditional policies of nuisance law.[39] The court noted that nuisance has historically been used as "a means of efficiently resolving conflicts between neigh-

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> the condition and has reasonable opportunity to abate it. Otherwise liability continues only until the [buyer] has had reasonable opportunity to discover the condition and abate it.

Id. (emphasis added).

34. An exception to that rule is where the prospective vendee is an existing neighbor. Liability, however, would be limited to those harms visited upon the neighboring property. *See* Philadelphia Elec. Co. v. Hercules, Inc., 762 F.2d 303, 314 n.8 (3d Cir.), *cert. denied*, 474 U.S. 980 (1985).

35. 762 F.2d 303 (3d Cir. 1985).

36. In contrast to an action for diminution in value of property. *Id.* at 306.

37. *Hercules*, 762 F.2d at 307-08. The nuisance was actually created by Hercules' predecessor-in-interest, but in its acquisition agreement, Hercules expressly assumed "all of the debts, obligations and liabilities" of its predecessor. *Id.* at 309.

38. Traditionally, sellers have invoked the doctrine of caveat emptor to avoid liability in contract for a "bad bargain." The doctrine has also been used to avoid tort liability for injuries caused by transferred property. "Comment a" of section 352 of the *Restatement (Second) of Torts* provides the traditional view regarding caveat emptor and the transfer of land:

> Under the ancient doctrine of caveat emptor, the original rule was that, in the absence of express agreement, the [seller] of land was not liable to his [buyer], or a fortiori to any other person, for the condition of the land existing at the time of transfer. As to sales of land this rule has retained much of its original force, and the implied warranties which have grown up around the sale of chattels never have developed. This is perhaps because great importance always has been attached to the deed of conveyance, which is taken to represent the full agreement of the parties, and to exclude all other terms and liabilities. The [buyer] is required to make his own inspection of the premises, and the [seller] is not responsible to him for their defective condition, existing at the time of transfer.

"Absent an express agreement, a material misrepresentation or active concealment of a material fact, the seller cannot be held liable for any harm sustained by the buyer or others as the result of a defect existing at the time of the sale." Haskell Co. v. Lane Co., 612 So. 2d 669, 671 (Fla. 1st DCA 1993). For a thorough historical treatment of the doctrine of caveat emptor, see Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). Professor Hamilton's article traces the doctrine from biblical times up through the 20th century. *Id.*

39. Philadelphia Elec. Co. v. Hercules, 762 F.2d 303, 314 (3d Cir. 1985).

boring, contemporaneous land uses,"[40] and opined that a contrary holding would upset the allocation of risks between seller and purchaser, which had already been apportioned under the doctrine of caveat emptor.[41]

Although there are no reported Florida cases addressing the precise issue of whether a seller may be liable to a buyer for maintaining a nuisance upon the purchased land, several cases are instructive. In *Beckman v. Marshall*,[42] an oft-cited Florida nuisance case, the court expressly refers to the coexisting rights and obligations among neighbors: the right to be free from unreasonable interference with the use and enjoyment of one's property and the obligation to exercise these rights reasonably.[43] These expectations are absent from the usual seller-buyer relationship. A recent Florida case, *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*,[44] noted the distinction between the scope of a landowner's duty to a neighbor and to a buyer. The court found that a buyer is afforded various protections unavailable to a neighbor. The buyer can inspect the property and, if damaged or likely to be damaged, negotiate the price accordingly;[45] or, in the alternative, simply walk away from the transaction.[46] In contrast, a neighbor is afforded none of these options and, consequently, the law intervenes and expands the duty to appropriately shift the expense of those burdens imposed by a landowner.[47]

Thus, Florida courts view the rights and obligations between landowners, at least with respect to strict liability, in terms of geography as opposed to time. Potential plaintiffs are recognized because of their geographic proximity to the defendant's property, not because of their temporal relationship with the defendant.[48] This notion of a geographical basis for liability is consistent with the holding in *Hercules*.[49] The usual buyer and seller relationship is not geo-

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40. *Id.*

41. *Id.*

42. 85 So. 2d 552 (Fla. 1956).

43. *Id.* at 554.

44. 578 So. 2d 363 (Fla. 3d DCA 1991) (involving a buyer who brought a strict liability claim against a seller); *contra* T & E Industries, Inc. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991). *See infra* notes 79-81 and accompanying text.

45. *Futura Realty*, 578 So. 2d at 365.

46. *Id.*

47. Philadelphia Elec. Co. v. Hercules, 762 F.2d 303, 313 (3d Cir. 1985). "Neighbors, unlike the purchasers of land upon which a nuisance exists, have no opportunity to protect themselves through inspection and negotiation." *Id. See generally* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. REV. 219 (1978).

48. *Id.*

49. *Id.*

graphical, it is temporal; a buyer typically does not occupy the space defining the limits of a seller's nuisance liability. Consequently, in Florida, a buyer is unlikely to recover from a seller for damages to the transferred property under a theory of nuisance.

B. Negligence

Negligence is the failure of a person's conduct to meet community standards of reasonable care. Negligent conduct will give rise to liability when the conduct results in injury to another person.[50] A cause of action for negligence exists when: (1) the defendant has a duty to meet a certain standard of conduct with respect to the plaintiff; and (2) the defendant's failure to meet the standard is the proximate cause-in-fact of injury to the plaintiff causing damage.[51]

The standard of conduct to which most individuals are held is often expressed as that of a reasonable person.[52] Special rules[53] govern the actionability of a landowner's[54] conduct. The extent to which a landowner must exercise reasonable care depends on the landowner's relationship with the plaintiff.[55] Further, the scope of a

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50. *See* PROSSER, *supra* note 31, § 30. *See also* RESTATEMENT (SECOND) OF TORTS § 281 (1965) ("The actor is liable for an invasion of an interest of another if: (a) the interest invaded is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and (c) the actor's conduct is a legal cause of the invasion, and (d) the other has not so conducted himself as to disable himself from bringing an action for such invasion."). RESTATEMENT (SECOND) OF TORTS § 281(a), (b) relate to the defendant's failure to exercise reasonable care or otherwise meet a community's standard of care. Section 281(c), (d) tie in the causation element and the notion that a defense may be available to a defendant. RESTATEMENT (SECOND) OF TORTS § 281 cmt. a, b (1965).

51. *Id. See also* Paterson v. Deeb, 472 So. 2d 1210 (Fla. 1st DCA 1985)(setting out the four elements of nuisance as (1) a legal duty owed by defendant to plaintiff; (2) breach of that duty; (3) injury to the plaintiff caused by such breach; and (4) damages as a result of that injury).

52. *See* Restatement (Second) of Torts § 283 (1965); Prosser, *supra* note 31, § 32.

53. Chapter 13 of the RESTATEMENT (SECOND) OF TORTS §§ 328E-387 (1965), is entitled "Liability for Condition and Use of the Land." The chapter is divided into eight topics which provide rules on the standard of care, under various circumstances, to which an owner and occupier of land is expected to conform. *See* PROSSER, *supra* note 31, § 64.

54. The *Restatement* makes reference to both owners and occupiers to whom these special rules apply. Prosser writes:

> Largely for historical reasons, the rights and liabilities arising out of the condition of land, and activities conducted upon it, have been concerned chiefly with the possession of the land, and this has continued into the present day. This development has occurred for the obvious reason that the person in possession of property ordinarily is in the best position to discover and control its dangers, and often is responsible for creating them in the first place.

PROSSER, *supra* note 31, § 57. A tenant-in-possession may be required to exercise the same degree of care as a landowner. *See, e.g.*, Arias v. State Farm Fire & Casualty Co., 426 So. 2d 1136 (Fla. 1st DCA 1983).

55. The law recognizes four potential relationships: visitor, invitee, licensee and trespasser. Further, the law carves out a special rule for children coming upon one's land. *See* PROSSER, *supra* note 31, §§ 57-64.

landowner's duty to exercise reasonable care depends on whether the potential plaintiff is on or off the defendant's property.[56] A buyer's injury would consist of damages to the conveyed property and possibly to the buyer as well. Accordingly, this section examines the rules that define the scope of the liability of sellers and other transferors of land to persons on the land[57] conveyed.

In the buyer-seller context, liability exists when the parties owe a duty to one another to exercise reasonable care and when one party breaches that duty, causing an injury to the other party. The traditional rule is that a seller is not liable to the buyer for damages caused by either a natural or artificial condition existing upon the property at the time of the conveyance.[58] This rule is founded principally upon the doctrine of caveat emptor.[59] The law thrusts upon a buyer the responsibility of investigating the condition of the property, and if the buyer fails to do so, the buyer must take the property as is.[60] In the absence of an express agreement, material misrepresentation or fraudulent concealment, a seller is under no duty to disclose to a buyer information about the condition of property.[61]

An exception to the traditional rule is that a seller may have a duty to disclose to a buyer the existence of an unreasonably dangerous condition.[62] In the context of land contamination, this exception has

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56. RESTATEMENT (SECOND) OF TORTS §§ 363-379 (1965).

57. RESTATEMENT (SECOND) OF TORTS ch. 13, topic 2 (1965).

58. RESTATEMENT (SECOND) OF TORTS § 352 (1964).

> [I]n the absence of express agreement or misrepresentation, the purchaser is expected to make his own examination and draw his own conclusions as to the condition of the land; and the vendor is, in general, not liable for any harm resulting to him or others from any defects existing at the time of transfer.

PROSSER, *supra* note 31, § 64. This proposition has been applied in Florida to both the sale and lease of real property. *See, e.g.*, Brooks v. Peters, 25 So. 2d 205 (Fla. 1946) (lease); Ramel v. Chasebrook Constr. Co., 135 So. 2d 876 (Fla. 2d DCA 1961) (sale).

59. *See supra* note 38; *infra* notes 95-115 and accompanying text. *But see* Johnson v. Davis, 480 So. 2d 625 (Fla. 1985) (holding that a seller of a *residential* home has a duty to disclose material defects affecting the value of the property).

60. "[B]uyers are expected 'to fend for themselves, protected only by their own skepticism as to the value and condition of the subject of the transaction.' . . . In other words, every purchase is a gamble." Haskell Co. v. Lane Co., 612 So. 2d 669, 671 (Fla. 1st DCA 1993) (quoting Note, *Real Property—Sellers' Liability for Nondisclosure of Real Property Defects*—Johnson v. Davis, 480 So. 2d 625 (Fla. 1985), 14 FLA. ST. U. L. REV. 359, 361 (1986)). *See also* United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), *aff'd*, 688 F.2d 204 (3d Cir. 1982); United States v. Vertac Chemical Corp., 489 F. Supp. 870, 877 (E.D. Ark. 1980).

61. *See Haskell*, 612 So. 2d at 671. *But see Johnson*, 480 So. 2d at 625 (holding that a seller has a duty to disclose to a buyer known facts materially affecting the value of the property which are not readily observable). In Futura Realty v. Lone Star Bldg. Ctrs. (Eastern), Inc., 578 So. 2d 363 (Fla. 3d DCA 1991), the court read *Johnson* as imposing a duty of disclosure only upon sellers of residential property, holding that with respect to commercial land transactions a seller is under no such obligation.

62. Restatement (Second) of Torts § 353 (1965).

been narrowly construed to apply only to those instances "where physical harm is caused to a person, and possibly to the property itself, not where the claim is for [a] pecuniary loss."[63] The courts seem more comfortable providing relief for damage to people rather than property. Recovery for damages to the conveyed property may be limited to those post-sale damages caused by a pre-conveyance discharge; that is, damages caused by migration of the pollutants after the buyer acquires title.[64] Damages for cleanup of the pre-conveyance discharge or for damages accruing before the property was conveyed appear unrecoverable under *Restatement (Second) of Torts* § 353 (1965).[65]

Notwithstanding the limited utility of section 353, Florida courts have not adopted the section. In *Haskell Company v. Lane Company.*,[66] the court rejected a plaintiff's negligence claim based on section 353. Finding section 353 not expressly adopted by a Florida appellate court, the *Haskell* court refused to do so itself and certified the following question to the Florida Supreme Court: "Should the common law doctrine of caveat emptor continue to apply to commercial real property transactions; and, if not, with what legal principles should it be replaced?"[67]

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(1) A [seller] of land who conceals or fails to disclose to his [buyer] any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the [buyer] and others upon the land with the consent of the [buyer] . . . for physical harm caused by the condition after the [buyer] has taken possession, if

(a) the [buyer] does not know or have reason to know of the condition or the risk involved, and

(b) the [seller] knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the [buyer] will not discover the condition or realize the risk.

(2) If the [seller] actively conceals the condition, the liability stated in Subsection (1) continues until the [buyer] discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the [buyer] has had reasonable opportunity to discover the condition and to take such precautions.

Id.

63. Portsmouth Redevelopment & Hous. Auth. v. BMI Apartments Assocs., 847 F. Supp. 380, 389 (E.D. Va. 1994).

64. The author has found no authority either supporting or opposing this view.

65. The availability of a remedy under section 353 may be further proscribed because subsection (1) expressly precludes liability if a buyer knows or has reason to know of the unreasonably dangerous condition at the time of the conveyance. *See* Amland Properties Corp. v. ALCOA, 711 F. Supp. 784, 809 (D.N.J. 1989).

66. 612 So. 2d 669 (Fla. 1st DCA 1993).

67. *Id.* at 676.

The appeal before the Florida Supreme Court, however, was dismissed.[68] Thus, caveat emptor was not added to "the trash heap of discarded legal doctrines and rules."[69] While the question posed by the First District Court of Appeal remains unanswered, Florida courts continue to apply caveat emptor to dismiss negligence claims arising out of commercial real property transactions.[70]

In sum, a seller of commercial property in Florida has no affirmative duty to disclose to a buyer dangerous conditions existing upon the land at the time of the conveyance. Thus, a buyer of contaminated property is unlikely to recover in a negligence action damages for physical harm to person or property, diminution in value of the property, or cleanup costs.

C. Strict Liability

The landmark case of *Rylands v. Fletcher*[71] held that a person is strictly liable for injuries arising from the creation and maintenance of abnormally dangerous conditions and activities.[72] Recently, buyers of real property have, with some success,[73] proffered the rule as a basis for liability against a seller of contaminated property. *Rylands* is reflected in the *Restatement (Second) of Torts* § 519 (1964):

> (1) One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.[74]

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68. *See also* Green Acres, Inc. v. First Union Nat'l Bank, 637 So. 2d 363 (Fla. 4th DCA 1994) (stating that the procedural posture of the case prevented the court from certifying a similar question after the *Haskell* dismissal).

69. *Haskell Co.*, 612 So. 2d at 676.

70. *See supra* note 61.

71. 3 H.L. 330 (1868).

72. PROSSER, *supra* note 31, § 78. Although the following situations occurred outside of the buyer-seller context, examples of conditions and activities to which the rule has been applied . . . include water collected in quantity in a dangerous place, or allowed to percolate; explosives or inflammable liquids stored in quantity in the midst of a city; blasting; pile driving; crop dusting; the fumigation of part of a building with cyanide gas; drilling oil wells or operating refineries in thickly settled communities; an excavation letting in the sea; factories emitting smoke, dust or noxious gases and other toxic wastes in the midst of a town; roofs so constructed as to shed snow into a highway; and a dangerous party wall. *Id.*

73. *See* T & E Indus., Inc. v. Safety Light Corp., 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 587 A.2d 1249 (N.J. 1991); and *infra* notes 79-81 and accompanying text.

74. RESTATEMENT (SECOND) OF TORTS § 519 (1964).

The phrase "abnormally dangerous activity" has been subject to various interpretations.[75] The interpretation that has emerged in the United States is that a court should examine and balance a number of factors to determine whether an activity or condition is abnormally dangerous or, in the words of the American Law Institute, *ultrahazardous*.[76] A recent New Jersey case[77] spurred renewed debate, assessment and examination of the principles underlying the rule in *Rylands*[78] when it applied strict liability principles to the context of a buyer-seller of real property.

In *T & E Industries, Inc. v. Safety Light Corporation*,[79] a New Jersey intermediate appellate court departed from the traditional application of strict liability to injuries inflicted upon the person, property or land of another and extended the doctrine to provide a remedy to a buyer who discovers the presence of hazardous wastes or other pollutants

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75. *See* PROSSER, *supra* note 31, § 78. After the *Rylands v. Fletcher* decision, the English courts applied strict liability principles to conditions and activities in the context in which they arose. For example, the use of dynamite in a rock quarry is likely to be considered less hazardous than its use in a crowded city. *Id.*

76. RESTATEMENT (SECOND) OF TORTS § 520 (1964). This section provides that the following factors should be taken into account:

> (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
> (b) likelihood that the harm that results from it will be great;
> (c) inability to eliminate the risk by the exercise of reasonable care;
> (d) extent to which the activity is not a matter of common usage;
> (e) inappropriateness of the activity to the place where it is carried on; and
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Id. See also City Serv. Co. v. State, 312 So. 2d 799 (Fla. 2d DCA 1975) (holding that Ultrahazardous activity "necessarily involves a risk of serious harm to the person, land, or chattels of others or cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage."). In Florida the factors to be considered in determining whether an activity is ultrahazardous are: (1) whether the activity involves a high degree of risk of harm to the property of others; (2) whether the potential harm is likely to be great; (3) whether the risk can be eliminated by the exercise of reasonable care; (4) whether the activity is a matter of common usage; (5) whether the activity is appropriate to the place where it is conducted; and (6) whether the activity has substantial value to the community. Old Island Fumigation, Inc. v. Barbee, 604 So. 2d 1246 (Fla. 3d DCA 1992); Great Lakes Dredging & Dock Co. v. Sea Gull Operating Corp., 460 So. 2d 510 (1984).

77. T & E Industries, Inc. v. Safety Light Corp., 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 587 A.2d 1249 (N.J. 1991).

78. *See* William B. Johnson, *Common-Law Strict Liability in Tort of Prior Landowner or Lessee to Subsequent Owner for Contamination of Land with Hazardous Waste Resulting from Prior Owner's or Lessee's Abnormally Dangerous or Ultrahazardous Activity*, 13 A.L.R. 600 (5th ed. 1993); Jim C. Chen & Kyle E. McSlarrow, *Application of the Abnormally Dangerous Activities Doctrine to Environmental Cleanups*, 47 BUS. LAW. 1031 (1992); and Comment, The Rylands v. Fletcher *Doctrine in America: Abnormally Dangerous, Ultrahazardous, or Absolute Nuisance?*, 1978 ARIZ. ST. L.J. 99 (1978) (opining that the doctrine should be extended to subsequent landowners). *See also* Amland Properties Corp. v. ALCOA, 711 F. Supp. 784 (D.N.J. 1989).

79. 546 A.2d 570 (N.J. Super. Ct. App. Div. 1988).

upon the purchased property. The court's reasoning behind its extension of the traditional rule in favor of a buyer of contaminated land, however, was cursory and unsatisfactory. Noting that the plaintiff was an innocent buyer without notice of the hazardous waste, the court wrote: "We see no practical or legal distinction between the rights of a successor in title to use and enjoy its land and the rights of a neighboring property owner. Both have rights and both can suffer injury through the acts of a prior owner."[80]

Further, the court rejected the seller's caveat emptor defense, finding that application of the doctrine to bar the buyer's recovery was inconsistent with contemporary standards of fairness and reasonableness.[81] This perfunctory analysis by the court quite possibly led to its rejection in a subsequent Florida case.[82]

In *Futura Realty v. Lone Star Building Centers (Eastern), Inc.*,[83] a buyer of commercial property sued[84] on a theory of strict liability for damages caused by a prior owner's disposal of various chemicals.[85] Citing the language quoted above by the court in *T & E Industries*, the Florida Third District Court of Appeal rejected the buyer's strict liability argument. The *Futura* court, adopting the reasoning of a federal district court in Massachusetts,[86] held that strict liability is limited to those situations where a landowner's ultrahazardous activity harms an adjoining landowner.[87]

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80. *Id.* at 576-77.

81. *Id.* at 577.

82. Futura Realty v. Lone Star Bldg. Ctrs. (Eastern) Inc., 578 So. 2d 363 (Fla. 3d DCA 1991).

83. 578 So. 2d 363 (Fla. 3d DCA 1991).

84. In *Futura*, the buyer sued two parties: (1) the seller of the contaminated property, under a theory of fraud for failure to disclose the presence of the pollution, *see infra* notes 88-113 and accompanying text; and (2) a remote predecessor-in-title, allegedly responsible for the discharge, under a theory of strict liability. *Id.*

85. *Id.* at 364.

86. *Id.* at 365. *See* Wellesley Hills Realty Trust v. Mobil Oil Corp., 747 F. Supp. 93 (D. Mass. 1990). In *Wellesley*, the buyer sued the seller, Mobil Oil Corp., for the cost of cleaning up oil and hazardous materials allegedly discharged while the seller operated a gasoline service station upon the property. *Id.* at 94. Among the proffered theories of recovery, the buyer argued that the seller was strictly liable under *Rylands v. Fletcher*. While acknowledging that "the operation of a gas station qualified as an abnormally dangerous activity . . ." the court nevertheless rejected the buyer's strict liability argument because, as it viewed *Rylands*, liability had always been predicated on injury to the property or person of another. *Id.* at 101. In *Wellesley*, the court held that since the seller owned the damaged property at the time of the discharge, the seller could not be liable to a subsequent buyer of the contaminated property. That court reasoned that "[i]t would be nonsensical to even formulate a rule that an actor is strictly liable for harm inflicted on his or her own property or person." *Id.* at 102. *Accord* John Boyd Co. v. Boston Gas Co., 775 F. Supp. 435 (D. Mass. 1991); Rosenblatt v. Exxon Co., 642 A.2d 180 (Md. 1994).

87. *Futura*, 578 So. 2d at 365.

In sum, while neither the Florida Supreme Court nor other Florida appellate courts have addressed a buyer's strict liability claim against a seller, the rule in the Third District is that if a landowner maintains an ultrahazardous condition or activity that damages the landowner's property, the owner is not strictly liable to a subsequent buyer of the property.[88] The class of potential plaintiffs to which a seller may be liable is limited to adjoining landowners and has not been expanded to include a buyer of the property.[89]

D. Fraud and Misrepresentation

Though often thought of as an action in contract, a material or fraudulent misrepresentation may also be actionable in tort.[90] The elements of the tort action of fraud are:

> (1) a false statement concerning a material fact;
>
> (2) the representor's knowledge that the representation is false;
>
> (3) an intention that the representation induce another to act on it; and
>
> (4) consequent injury by the party acting in reliance on the representation.[91]

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88. The rule is premised upon the presumption that a vendee can protect itself by inspecting the property prior to conveyance, negotiating the price to take into account possible contamination, etc., means unavailable to a neighboring land owner. *Id.*

89. After the *Wellesley* and *Futura* decisions, the New Jersey Supreme Court affirmed the extension of the *Rylands* rule to the seller-buyer of land context. T & E Indus., Inc. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991). In contrast to the unsatisfying reasoning of the intermediate court's opinion, the New Jersey Supreme Court closely examined *Rylands* and found that its policy underpinnings were: (1) that a person should bear the direct and ancillary costs of producing a product or a service which requires the maintenance of an ultrahazardous activity; and (2) that person is best able to absorb the costs because they can be offset by revenues. *Id.* at 1257. The court concluded that since neither of these policy principles were related to property rights, "liability for the harm caused by abnormally dangerous activities does not necessarily cease with the transfer of property." *Id.* at 1257. Given that the *Futura* court was unable to consider this rationale, it remains to be seen whether, in the future, a Florida court might embrace the New Jersey Supreme Court's view of *Rylands v. Fletcher* and its attendant policies. *But see* Hydro-Mfg., Inc. v. Kayser-Roth Corp., 640 A.2d 950 (R.I. 1994) (applying the holding in *Futura* and *Wellesley Hills*).

90. *See, e.g.*, Hauser v. Van Zile, 269 So. 2d 396 (Fla. 4th DCA 1972). The type of action, whether tort or contract, is determined by which posture the plaintiff wishes to take with respect to the contract. If the buyer wants to rescind the contract, the buyer may do so by raising misrepresentation as a defense in a subsequent action to enforce the contract. If, however, a plaintiff affirms the existence of a contract or otherwise continues to perform under the contract, the plaintiff is precluded from a contract remedy and must seek a remedy in tort. *Id. See also* E. ALLAN FARNSWORTH, CONTRACTS § 4.15 (2d ed. 1990).

91. Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985); Huffstetler v. Our Home Life Ins. Co., 65 So. 1 (Fla. 1914); Thor Bear v. Crocker Mizner Park, Inc., 648 So. 2d 168 (Fla. 4th DCA 1994); Eastern Cement v. Halliburton Co., 600 So. 2d 469 (Fla. 4th DCA 1992).

In the absence of a fraudulent or material misstatement of fact, a person's knowing nondisclosure, in limited circumstances, may give rise to an action for fraud where there is a duty to disclose.[92] The traditional rule with respect to real property transactions is that a seller has no duty to disclose material facts that affect the value of the property, even if unknown to the buyer.[93] A seller was liable only for affirmative misrepresentations; mere nonfeasance was not actionable. The buyer bore the burden and risk of any defects or hidden facts materially affecting the land's value.[94]

In *Johnson v. Davis*,[95] however, the Florida Supreme Court retreated from the traditional rule and held that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the

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Recently, the courts have held that the knowledge element of fraud may be satisfied in one of three ways. A plaintiff demonstrates knowledge if it proves:

(1) the defendant had actual knowledge of the untruthfulness of the statement; or

(2) the defendant uttered the statement knowing the defendant had no knowledge of either the statement's truth or falsity; or

(3) the false statement was made under circumstances where the defendant should have known, if he did not know, of its falsity.

See Thor Bear, *supra*; Sherban v. Richardson, 445 So. 2d 1147 (Fla. 4th DCA 1984).

92. RESTATEMENT (SECOND) OF TORTS § 551 (1965). The section provides:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, *if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question*.

(2) One party to business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known by him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Id. (*emphasis supplied*). *See* Gutter v. Wunker, 631 So. 2d 1117 (Fla. 4th DCA 1994) (showing a duty to disclose in an attorney-client relationship); Kovach v. McLellan, 564 So. 2d 274, 280-81 (Fla. 5th DCA 1990) (Sharp, J., dissenting) (involving a duty to disclose in a lender-borrower relationship).

93. *See, e.g.*, Ramel v. Chasebrook Constr. Co., 135 So. 2d 876 (Fla. 2d DCA 1961).

94. *See* Banks v. Salina, 413 So. 2d 851 (Fla. 4th DCA 1982).

95. 480 So. 2d 625 (Fla. 1986).

seller is under a duty to disclose them to the buyer."[96] The seller's duty to disclose known facts, announced in *Johnson*, is illustrative of the decline of caveat emptor in contemporary jurisprudence.[97] The Florida Supreme Court's holding in *Johnson* thrusts additional rights and obligations upon a seller of property, and courts increasingly examine whether a transaction comports with contemporary notions of fair dealing.

In *Futura*,[98] however, the Third District Court of Appeal refused to extend a seller's duty to disclose material facts affecting the value of property to commercial real estate transactions.[99] The *Futura* court based its decision on two findings: (1) the *Johnson* court never referred to the duty to disclose as extending to commercial property transactions; and (2) the *Johnson* court, in reaching its decision, did not cite to any cases involving the sale of commercial property.[100] The *Futura* court's refusal to extend a duty to disclose to commercial property transactions is based upon a narrow reading of *Johnson*. *Futura* failed, contrary to the court's opinion, to contextually examine the *Johnson* court's opinion to understand its basis.[101] A closer

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96. *Id.* at 629. The *Johnson* court cited Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963), in support of its holding. *Lingsch* set out the elements for failure to disclose as follows:

> (1) Nondisclosure by the defendant of facts materially affecting the value or desirability of the property;
> (2) Defendant's knowledge of such facts and of their being unknown to or beyond the reach of the plaintiff;
> (3) Defendant's intention to induce action by the plaintiff;
> (4) Inducement of the plaintiff to act by reason of nondisclosure; and
> (5) Resulting damages.

Id. at 206.

97. *See* Robert M. Morgan, *The Expansion of the Common Law Duty of Disclosure in Real Estate Transactions: It's Not Just for Sellers Anymore*, FLA. B.J., Feb. 1994, 28, 28. Morgan's article discusses the evolution, in the wake of *Johnson*, of the duty to disclose in Florida, and notes that the duty has been extended to real estate brokers, closing agents, contractors and developers. *Id.*

98. 578 So. 2d 363 (Fla. 3d DCA 1991).

99. *Id.* at 364-65 ("*Johnson* simply does not impose a duty of disclosure in a commercial setting."); *accord* Green Acres, Inc. v. First Union Nat'l Bank, 637 So. 2d 363 (Fla. 4th DCA 1994) (stating that there is no duty to disclose the presence of a Seminole Indian graveyard on property when such disclosure clearly would have impeded buyer's development plans); Mostoufi v. Presto Food Stores, 618 So. 2d 1372 (Fla. 2d DCA 1993) (finding no duty to disclose the existence of abandoned underground storage tanks); Haskell Co. v. Lane Co., 612 So. 2d 669 (Fla. 1st DCA 1993); Slitor v. Elias, 544 So. 2d 255 (Fla. 2d DCA 1989).

100. *Futura*, 578 So. 2d at 364. However, Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963), cited by the *Johnson* court in support of its holding, *see supra* note 107, involved the sale of an apartment building. Thus, while the property in *Lingsch* was not commercial property in the sense of industrial or manufacturing property, it was also not exactly residential property as viewed by the *Futura* court. *Id.*

101. *Futura*, 578 So. 2d at 364. In noting that the *Johnson* court held that the duty to disclose is "equally applicable to all forms of real property, new and used," *Johnson*, 480 So. 2d at 629, the *Futura* court wrote that "the statement when read in context, as it must be, clearly

examination of the reasoning in *Johnson* supports the proposition that a seller of commercial property has a duty to disclose known facts materially affecting property value.

The buyer in *Johnson* sued under theories of breach of contract, fraud and misrepresentation.[102] The court found that the seller made fraudulent statements with respect to the condition of a roof: "The record reflects that the statement made by the [seller] was a false representation of material fact, made with knowledge of its falsity, upon which the [buyer] relied to their detriment . . . ."[103] Thus, the record fully supported an affirmance of the trial court's judgment that the seller committed fraud, and no further discussion on the part of the supreme court was necessary.[104]

The Florida Supreme Court, however, went on to discuss the distinction between misfeasance and nonfeasance, or action and inaction. The court noted that the common law had traditionally provided a remedy in tort only for affirmative conduct and that nonfeasance was not actionable. Further, Justice Adkins, writing for the majority, found that while

> [i]n theory, the difference between misfeasance and nonfeasance, action and inaction is quite simple and obvious; . . . in practice it is not always easy to draw the line and determine whether conduct is active or passive. That is, where failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and, in fact, both essentially have the same effect.[105]

Thus, the court recognized the inequities of a legal system that, on one hand, provided relief to a purchaser induced by misfeasance into completing a transaction, while on the other hand, left a purchaser induced by nonfeasance without a remedy. Reasoning that misfeasance and nonfeasance should not be distinguished as such, the supreme court wrote that a seller has a duty to disclose to a buyer material facts affecting the value of property.[106]

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applies solely to the sale of homes." *Id. See, e.g.*, Cohens v. Virginia, 19 U.S.(1 Wheat.) 264, 399 (1821) and *infra* note 199.

102. *Johnson*, 480 So. 2d at 626.

103. *Id.* at 627.

104. *See supra* note 91 and accompanying text.

105. *Johnson*, 480 So. 2d at 628.

106. *Id.* at 629.

The *Futura* court failed to recognize that the *Johnson* decision was based partly[107] on the absence of a bright line distinction between misfeasance and nonfeasance. The *Johnson* court said that it was irrational to base recovery on whether a purchaser could produce evidence showing affirmative fraudulent conduct when silence could be just as damaging.[108] Are these principles and observations absent in a commercial transaction? Does a bright line between nonfeasance and misfeasance, or inaction and action, radiate more brightly in the commercial realm? Is "the distinction between concealment and affirmative representations [less] tenuous" in commercial sales?[109] The *Futura* court failed to expressly recognize that the *Johnson* decision was based in part on abandoning a distinction that had become impractical to maintain.

In sum, one can read the rationale of the *Johnson* decision more expansively to extend to commercial transactions. Moreover, the *Futura* court could have carved out an exception to *Johnson* and extended the duty to disclose to suits involving commercial transactions with pollution problems.[110] In *Slitor v. Elias*,[111] the court recognized that

> *Johnson* does not convert a seller of a house into a guarantor of the condition of the house. . . . [T]o prove a cause of action under *Johnson*, a buyer of a house must prove the seller's knowledge of a defect which materially affected the value of the house. While knowledge in this regard can be proven by circumstantial evidence, it must nevertheless be proven by competent, sufficient evidence . . . .[112]

Thus, to state a valid cause of action, an aggrieved buyer must allege that the seller knew of the condition materially affecting the value of the property. Given that federal and state environmental laws often require a landowner to notify appropriate governmental agencies of

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107. *Johnson*, 480 So. 2d at 628. In addition to recognizing the impractical distinction between misfeasance and nonfeasance, the court noted that "[m]odern concepts of justice and fair dealing" were inconsistent with the traditional rule of no duty to disclose. *Id.* The supreme court cited, as persuasive authority, cases in California and Illinois in which the courts had retreated from the early common law strict application of caveat emptor. *See* Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963); Posner v. Davis, 395 N.E.2d 133 (Ill. App. Ct. 1979).

108. *Johnson*, 480 So. 2d at 628.

109. *Id.*

110. *See* Elliott H. Levitas & John Vance Hughes, *Hazardous Waste Issues in Real Estate Transactions*, 38 MERCER L. REV. 581, 583 (1987). The authors argue that a requirement of disclosure of contamination is in the public's best interest, given the potential adverse health effects of exposure to hazardous waste. *Id.* at 641.

111. 544 So. 2d 255 (Fla. 2d DCA 1989).

112. *Id.* at 258-59 (citation omitted).

the occurrence of a discharge,[113] it is incongruous to permit a seller to hide behind caveat emptor and not require a disclosure to a buyer.[114] The proposition, however, that a seller of commercial property has no duty to disclose material facts affecting the property's value continues to be good law in at least the first, second, third and fourth judicial districts of Florida.[115] Thus, notwithstanding the unsatisfactory reasoning of the *Futura* holding, a seller of contaminated property is unlikely—in the absence of affirmative concealment, breach of express agreement or fraudulent misrepresentation—to be liable under a tort theory of fraud.

III. RESTITUTION

A. General Principles

To understand restitution[116] and its place in the American legal system, it is useful to consider the common law as a source of potential obligations that may arise as individuals conduct their daily activities.[117] One can view our system of law as a vehicle for protecting expectations that arise out of the commission of a tort or the

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113. *See, e.g.*, 33 U.S.C. § 1321(b)(5) (1988 & Supp. V 1993) (Clean Water Act); 42 U.S.C. § 9603(a) (1988 & Supp. V 1993) (CERCLA); Fla. Admin. Code Ann. r. 17-61.050(1)(b)(5) (1995).

114. *See, e.g.*, Sunnen Prods. Co. v. Chemtech Indus., Inc., 658 F. Supp. 276, 278 n.3 (E.D. Mo. 1987)(holding that a seller who was owner at the time of discharge in violation of CERCLA is liable to a buyer: "[n]o court has accepted the defense of *caveat emptor*, which would improperly shift liability for environmental contamination from the responsible party to an unwitting purchaser . . ."). The court rejected the caveat emptor defense as a matter of law.; Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989)(holding that CERCLA is not a defense to liability for contribution between buyer and seller); State Dep't of Envtl. Protection v. Ventron Corp., 440 A.2d 455 (N.J. Super. Ct. App. Div. 1981), *aff'd*, 468 A.2d 150 (N.J. 1983) (holding that caveat emptor does not apply to latent defects which the seller has knowledge of and fails to disclose). *But see* Mardan Corp. v. C.G.C. Music, Ltd., 600 F. Supp. 1049, 1055 (D. Ariz. 1984), *aff'd*, 804 F.2d 1454 (9th Cir. 1986)(holding that even though the seller was liable to the government under CERCLA, the buyer could not recover costs of closing an on-site waste disposal pond from the seller because the sales agreement released the seller from liability and because the buyer was a disposer and subject to the equitable unclean hands doctrine).

115. *See* Haskell Co. v. Lane Co., 612 So. 2d 669 (Fla. 1st DCA 1993); Mostoufi v. Presto Food Stores, 618 So. 2d 1372 (Fla. 2d DCA 1993); *Futura*, 578 So. 2d at 364; Green Acres, Inc. v. First Union Nat'l Bank, 637 So. 2d 363 (Fla. 4th DCA 1994).

116. For a thorough treatment of restitution see GEORGE E. PALMER, THE LAW OF RESTITUTION (1978). Restitution is far too complex to permit an in-depth treatment of the subject in this article. Accordingly, this portion of the article surveys only the basic contours of restitution and narrows the focus to those specific restitutionary principles that may provide relief to a buyer of contaminated commercial property. S*ee also* Corbin, *supra* note 1; Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989).

117. *See* Corbin, *supra* note 1; and Levmore, *supra* note 116, at 68 (arguing that the law acts as a bargain substitute; if parties had had time before the commission of a tort or a contract breach, they would have bargained for the prospective wrongful conduct).

breach of a contract. This notion can be illustrated by examining a few simple examples. If *A* wrongfully cuts down and removes *B*'s trees, *B* has an expectation, protected by our system of law, that *A* will compensate *B* by an amount equal to the damages *B* sustained;[118] *A*'s wrongful act gives rise to an obligation, protected and enforceable by law, to compensate *B*. Similarly, if *A* and *B* execute a contract, a subsequent breach by *B* gives rise to *A*'s expectation that *B* will either perform according to the terms of the contract or compensate *A* by an amount equal to the damages *A* sustained.[119]

Tort law[120] developed as a mechanism for providing a remedy to those who had suffered a loss of a legally recognized interest.[121] Contract law arose to protect expectations arising out of bargains between parties;[122] if one side commits a breach, the law provides a remedy to the aggrieved party. There is a notion, though not always present, in both contract and tort laws that a party becomes obligated to another upon the commission of a wrongful act. There are instances, however, where despite the absence of a wrongful act, a person derives a profit or benefit at the expense of another and, consequently, the "ties of natural justice and equity"[123] give rise to an

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118. *B* may also have an alternative measure of recovery under a theory of restitution. *See infra* notes 141-145 and accompanying text.

119. Several remedies may actually be available to *A*. *See* FARNSWORTH, *supra* note 90, § 12. For the purposes of this discussion, however, it is best to view the discharge by *B* of any one of the remedies as an obligation to *A* that is protected by law.

120. PROSSER, *supra* note 31. The difficulty in defining a tort is akin to the frustration experienced by Justice Stewart when he declined to attempt a definition of obscenity but proclaimed he would know it if he saw it. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964). PROSSER, *supra* note 31, § 1, reviews the various definitions that have been proffered over the years and finally concludes that "[l]iability in tort is based upon the relations of persons with others; and those relations may arise generally, with large groups or classes of persons, or singly, with an individual."

121. Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 238 (1944). Wright explains:

> Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others—in short, doing all the things that constitute modern living—there must of necessity be losses or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses, and to afford compensation for injuries sustained by one person as the result of the conduct of another.

Id.

122. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

123. Moses v. Macferlan, 97 Eng. Rep. 676, 681 (K.B. 1760). *See also* Craig W. Sharp, P.A. v. Adalia Bayfront Condo., 547 So. 2d 674 (Fla. 2d DCA 1989); Variety Children's Hospital, Inc. v. Vigliotti, 385 So. 2d 1052, 1053 (Fla. 3d DCA 1980) ("Quasi-contracts are obligations imposed by law on grounds of justice and equity. They are imposed for the purpose of preventing unjust

obligation to disgorge the benefit. This obligation is neither contractual nor delictual[124] but is said to rest in quasi-contract or restitution.[125]

Restitution refers to those obligations created by law[126] that share in common the notion that one who has become "unjustly enriched" must disgorge the benefit to the aggrieved party.[127] The difficulty many practitioners have in understanding restitution and the significance of its place in American jurisprudence[128] is that, unlike its neighbors tort and contract, restitution consists of both remedial and substantive principles of law. Restitution can be separated into three general categories: (1) substantive restitution,[129] (2) remedial restitution,[130] and (3) specific restitution.[131]

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enrichment."). It is important to note that equity in this context does not expressly refer to the law of equity. It means a court should balance the parties' respective interests to determine whether the defendant is required to disgorge the benefit. *See* PALMER, *supra* note 116, § 1.2. Professor Dobbs writes: this standard of equity is "not a jurisdictional statement but a standard about the goal or a standard for judging what counts as unjust enrichment." DAN B. DOBBS, LAW OF REMEDIES, § 4.1(2), at 372 n.1 (2d ed. 1993) (citing Philpot v. Superior Court, 36 P.2d 635 (Cal. 1934)).

124. *See* Corbin, *supra* note 1.

125. *Id.* at 532. The standard for liability in restitution is not necessarily fault. *See* Circle Fin. Co. v. Peacock, 399 So. 2d 81, 84 (Fla. 1st DCA 1981) (explaining that a restitution action is not dependent upon the existence of wrongdoing). In a restitution action the plaintiff bears the burden of proving that the defendant is holding onto a benefit that in justice the defendant should not retain; the wrongful taking of the benefit is not what is important, it is the wrongful holding. *Id.*

126. *See supra* notes 117-119 and accompanying text.

127. RESTATEMENT OF RESTITUTION § 1 (1937). That section provides: "A person who has been unjustly enriched at the expense of another is required to make restitution to the other." *Id.* *See* Policastro v. Myers, 420 So. 2d 324 (Fla. 4th DCA 1982) (implying a promise to pay a debt where it was unjust for the defendant to retain the benefit of a loan made to the defendant's former spouse); *Circle Finance*, 399 So. 2d at 84. Note, however, that a plaintiff seeking restitution does not have to show that he or she suffered an expense at the hands of the defendant; the plaintiff's burden is but to show that the defendant has profited in some manner, that the plaintiff is entitled to the profit, and that it would be unjust for the defendant to retain the profits. *See, e.g.*, Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946) (holding that a plaintiff is entitled to profits generated by the use of the property even though plaintiff had no intention of using, selling, leasing or otherwise profiting from the property).

128. Laycock, *supra* note 116, at 1277. Professor Laycock points out that

> [d]espite its importance, restitution is a relatively neglected and underdeveloped part of the law. In the mental map of most lawyers, restitution consists largely of blank spaces with undefined borders and only scattered patches of familiar ground. Few law schools teach a separate course in restitution, no restitution casebook is in print, and scholarship in the field is largely devoted to specific applications.

Id.

129. *See infra* notes 132-137 and accompanying text.

130. *See infra* notes 138-145 and accompanying text.

131. *See infra* notes 146-151 and accompanying text; *see also* Corbin, *supra* note 1; Laycock, *supra* note 116.

Substantive restitution fills that interstice between tort and contract where there is neither identifiable wrongful conduct causing a loss to another's legally recognized interest nor the breach of an enforceable agreement. The roots of substantive restitution are found in Roman law.[132] The introduction and evolution of restitution into English common law, and consequently into American common law, began in 1602 in *Slades Case*.[133] Then referred to as an action of general assumpsit,[134] an English court permitted, for the first time, a creditor to recover a debt by pursuing a claim in assumpsit, thus avoiding the strictures of the action of debt which required an allegation of an express promise to pay. Essentially, the court implied a promise to pay from the factual circumstances surrounding the creation of the debt.[135] Subsequently, in *Bonnel v. Foulke*,[136] the court extended the promise implied-in-fact found in *Slades Case* and found a promise to pay where money had been mistakenly given to another. Although the factual circumstances did not support the finding of a contract, the court constructed a fictional contract to force the unjustly enriched defendant to disgorge the mistaken payment. *Bonnel* gave rise to substantive restitution, or what was then called quasi-contract. The case also illustrates a movement in English law at that time to liberalize the system of writs and provide a cause of action to a person who otherwise would not have had access to the courts.[137]

Remedial restitution provides a person who has lost a legally recognized interest, either in tort or contract, a choice of valuation methods for determining the amount of the remedy. Remedies in tort generally consist of compensating the plaintiff for an injury.[138] For breach of contract, a plaintiff's remedies may include compensation of an amount equal to the expected benefit had the contract been fully performed,[139] or for any damages incurred in reliance on the contract.[140] A plaintiff also may measure damages in tort or contract using restitution principles to arrive at an amount equal to the benefit

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132. *See* Corbin, *supra* note 1, at 533; *see also* FARNSWORTH, *supra* note 90, § 1.6.

133. 76 Eng. Rep. 1074 (1602).

134. *See* PALMER, *supra* note 116, § 1.2.

135. *Id. Cf.* Policastro v. Myers, 420 So. 2d 324 (Fla. 4th DCA 1982).

136. 82 Eng. Rep. 1224 (1657).

137. Quasi-contracts or contracts implied-at-law do not depend on the mutual assent of the parties, and, indeed, a quasi-contract may be contrary to the intent of one or both parties. *See* Circle Fin. Co. v. Peacock, 399 So. 2d 84 (Fla. 1st DCA 1981); Osborn v. Boeing Airplane Co., 309 F.2d 99 (9th Cir. 1962).

138. *See supra* notes 120-121.

139. *See* FARNSWORTH, *supra* note 90, at § 12.8.

140. *Id.* at § 12.16.

conferred upon the defendant, and thus prevent a windfall to the defendant.[141]

Often accompanied by the phrase "waive the tort and sue in assumpsit,"[142] remedial restitutionary principles recognize that a defendant's wrongful conduct may bring a benefit greater than that of the loss sustained by the plaintiff.[143] Remedial restitution permits the plaintiff to recover the value of the defendant's enrichment because it would be unjust to permit the defendant to retain the benefit. This remedy provides a disincentive for wrongdoing and presumably encourages the defendant not to bargain for wrongful conduct.[144] To recover under a remedial restitution theory, the plaintiff must prove the existence of an underlying tort or breach of contract.[145]

Specific restitution, the last of the three branches of restitution, concerns the return, in kind, of the benefit unjustly held by the defendant.[146] In contrast to substantive and remedial restitution, specific restitution includes both equitable as well as legal actions. Equitable actions include constructive trust[147], rescission[148] and subrogation.[149] Ejectment and replevin are specific restitution actions at law.[150]

In sum, restitution stands on its own as a substantive area of law apart from the principles of contract and tort law. Restitution also involves remedial concepts. Substantive restitution may provide relief to a commercial property owner who has cleaned up pollutants

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141. *See* FARNSWORTH, *supra* note 90, § 12.20; DOBBS, *supra* note 123, § 4.1(4); *see also* Corbin, *supra* note 1, at 538; Laycock, *supra* note 116, at 1285.

142. *See* Corbin, *supra* note 1, at 538; PROSSER, *supra* note 31, § 94.

143. *See* Laycock, *supra* note 116, at 1286.

144. This disincentive premise conflicts with the neoclassic school of law and economics which favors the traditional notions of compensation for the purpose of returning the plaintiff to the rightful position. Followers of this school argue that societies' resources are best utilized when its members are able to pay for their wrongful conduct without regard to profit gained. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 1.2 (3d ed. 1986). A discussion of these competing schools is beyond the scope of this paper. For thorough treatments see POSNER, *id.*; Laycock, *supra* note 116, at 1289; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1124-27 (1972).

145. *See* Corbin, *supra* note 1, at 538; PROSSER, *supra* note 31, § 94, at 673; Laycock, *supra* note 116, at 1286. The plaintiff may choose the restitutionary measure of his or her damages and sue in quasi-contract even where the amount is equal to the plaintiff's loss, because the applicable contract statute of limitations is more favorable and a contract claim may afford a greater variety of recoverable damages. *Id.* Restitution also is useful where the defendant is insolvent. An action in restitution can often give one a preference over other creditors because it goes after the property retained by the defendant and declares title to be in the plaintiff and not the defendant. *Id.*

146. *See* Laycock, *supra* note 116, at 1290.

147. *See* DOBBS, *supra* note 123, § 4.3(2).

148. *Id.* at § 4.3(6); *see infra* notes 152-156 and accompanying text.

149. *Id.* at § 4.3(4).

150. *Id.* at § 4.2(2)

discharged by a predecessor-in-title. Specific restitution may permit a buyer to rescind the sales contract and return the contaminated property to the seller in exchange for a return of the purchase price to the buyer. Remedial restitution is of no help here because, as explained above, a buyer must establish an underlying tort action.[151]

B. Mistake and Rescission

An action in rescission may be available to a buyer of contaminated land where the buyer can show that at the time of the execution of the sales contract both the seller and buyer labored under a mutual mistake as to the physical condition of the land.[152] The buyer seeking rescission bears the burden of showing both that he and the seller believed that the property did not contain hazardous wastes. Rescission would result in re-conveyance of the property to the seller and restitution of the purchase price to the buyer.[153]

When the mistake is discovered long after the conveyance, however, rescission may be impracticable and cost-prohibitive because the success of the buyer's enterprise may depend on the property, notwithstanding the presence of the contamination.[154] Moreover, rescission fails to promote the cleanup of hazardous wastes because it simply shifts title in the contaminated property from one party to another.[155] Rescission may only be practicable when the buyer learns of the contamination soon after the conveyance and the buyer has neither invested, apart from the purchase price, a substantial amount of resources in the property nor depended upon the property for the continued success of a business.[156]

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151. *See supra* notes 26-115 and accompanying text.

152. *See* Kenneth J. Rampino, Annotation, *Vendor and Purchaser: Mutual Mistake as to the Physical Condition of Realty as Ground for Rescission*, 50 A.L.R. 1188 (3d ed. 1975); FARNSWORTH, *supra* note 90, § 9.3; *see also* Rood Co. v. Board of Pub. Instruction, 102 So. 2d 139 (Fla. 1958); Moore v. Wesley E. Garrison, Inc., 5 So. 2d 259, 262 (Fla. 1942) ("Where there is a material mistake by one or both parties to a deed as to identity, situation, boundaries, title, and amount or value of land conveyed, equity will grant relief."); Rosique v. Windley Cove, Ltd., 542 So. 2d 1014 (Fla. 3d DCA 1989); Nussey v. Caufield, 146 So. 2d 779 (Fla. 2d DCA 1962).

153. The buyer would have to pay the seller reasonable rent for the time the buyer occupied the property prior to rescission. The seller would have to pay the buyer for any improvements of the property.

154. The successful marketing of the buyer's products may depend on the contaminated property's geographic location, while other locations may increase transportation costs.

155. "Rescission . . . fails to advance the goal of cleaning up the land, for it merely voids the transfer, dumping the tainted parcel back into the lap of the seller." R. Lisle Baker & Michael J. Markoff, *By-Products Liability: Using Common Law Private Actions to Clean Up Hazardous Waste Sites*, 10 HARV. ENVTL. L. REV. 99, 123 (1986).

156. To the extent the sales price does not take into account the presence of pollutants, a seller of contaminated property is unjustly enriched, as it receives more than the market value of the property. An action in unjust enrichment, however, is unavailable to recover this benefit

C. Substantive Restitution as a Basis for Recovering Pollution Cleanup Costs

There are no reported Florida cases addressing the question of whether substantive restitution, in favor of a private litigant, is appropriately applied in the context of environmental cleanups. However, outside Florida, a body of law exists supporting the notion that a discharge of another's statutory duty to clean up an unlawful release of pollutants may give rise to quasi-contractual obligations.[157] In addition, some Florida restitution cases can be synthesized to support an unjust enrichment claim in favor of a buyer of contaminated land who has incurred expenses for cleaning up pollutants discharged by the seller.[158] This section examines more closely the issue of substantive restitution and the cases both within and outside Florida that might lend support to such a cause of action.

As discussed above, substantive restitution can provide relief to a plaintiff who has conferred a benefit upon a defendant where, under the circumstances, it would be unjust for the defendant to retain the benefit.[159] The cases addressing this point are generally found in two contexts: (1) situations where the plaintiff has conferred a benefit to the defendant upon the defendant's request;[160] and (2) situations where the benefit is conferred without the defendant's request.[161] The

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from the seller. An action to recover this benefit would amount to a reformation of the sales contract. Reformation, however, is limited to mistakes in expression or integration--the parties have mistakenly executed a contract that does not accurately reflect their agreement. *See* PALMER, *supra* note 116, § 13. Where the parties are mistaken as to the physical condition of property, the mistake is in the underlying assumptions on which the transaction is based. *See* PALMER, *supra* note 116, §§ 11.2, 12. Reformation is permitted where there is mistake in expression because the courts do not involve themselves in the underlying transaction to which the parties have agreed; the court simply reforms the contract to accurately reflect the parties' agreement. Where there is a mistake in assumptions, in contrast, an underlying agreement does not exist to reform. Thus, the court intervenes only to return the parties to their pre-transaction positions by ordering rescission of the sales contract.

157. *See infra* note 171.

158. *See infra* notes 175-180 and accompanying text.

159. *See supra* notes 132-137 and accompanying text.

160. *See* PALMER, *supra* note 116, § 6.10; DOBBS, *supra* note 123, § 4.2(3).

161. Section 112 of the *Restatement of Restitution* (1937), provides the general rule with respect to restitution for benefits conferred without request:

> A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.

See, e.g., Tipper v. Great Lakes Chem. Co., 281 So. 2d 10 (Fla. 1973).

Professor John W. Wade provides a thorough survey of this restitutionary principle in his article *Restitution for Benefits Conferred Without Request*, 19 VAND. L. REV. 1183 (1966), and concludes that the negative phraseology of section 112 might be better understood from a positive perspective:

latter situation is pertinent here—a buyer remediates, without the seller's request, the contaminated property and thereby confers a benefit upon the seller. Whether a buyer can recoup cleanup costs under a theory of restitution will turn on the buyer's ability to establish two elements: (1) the seller benefitted when the buyer cleaned up the pollutants; and (2) the seller would be unjustly enriched if permitted to retain the benefit without reimbursing the buyer for his or her efforts.[162]

Among the various ways one can confer a benefit upon another is by discharging the latter's statutory or legal obligations.[163] Specifically, a benefit may be conferred when the plaintiff "perform[s] the defendant's obligation to specifically rectify the consequences of [the defendant's actions]."[164] The defendant's obligation may spring from several sources. It may derive from common law, such as an obligation to compensate another for the commission of a tort or the breach of a contract.[165] State or federal statutes may also impose a duty upon the defendant.[166] Further, at least one court has found a duty to perform where the defendant's obligation was based neither on common law nor on a statute, concluding that "[d]uty is a flexible

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> One who, without intent to act gratuitously, confers a measurable benefit upon another, is entitled to restitution, if he affords the other an opportunity to decline the benefit or else has a reasonable excuse for failing to do so. If the other refuses to receive the benefit, he is not required to make restitution unless the actor justifiably performs for the other a duty imposed upon him by law.

Id. at 1212. Professor Wade correctly points out that the sub-elements of his statement of general principle are subject to judicial construction and discretion, but further notes that the statement sufficiently explains the outcome of recorded opinions and should provide a practicable framework from which future cases might be decided. *Id.*

162. The primary purpose of restitution is to restore the plaintiff to the position in which he or she was before the defendant received the benefit which gave rise to the obligation to restore; hence the plaintiff is entitled to recover that which he or she parted with, or that which the defendant has received. Sun Coast Int'l, Inc. v. Department of Business Reg., Div. of Fla. Land Sales, Condominiums and Mobile Homes, 596 So. 2d 1118, 1120-21 (Fla. 1st DCA 1992).

163. For an early application of this principle, see Metropolitan R.R. v. District of Columbia, 132 U.S. 1 (1889). The *Metropolitan* court found, for purposes of determining which statute of limitation to apply, that a claim by the District of Columbia to recover the cost of discharging a statutory obligation of a railway company, created and chartered by an Act of Congress, sounded in restitution. *Id.* A plaintiff may also enrich another by: "(1) transferring property to the defendant, (2) saving, preserving or improving his property, (3) rendering personal services for him, or (4) performing for him a duty imposed . . . by his own contractual arrangements." *See* Wade, *supra* note 161, at 1183. *See also* Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967).

164. PALMER, *supra* note 116, § 10.6(b).

165. *See supra* notes 115-117 and accompanying text. *See, e.g.*, Nassr v. Commonwealth, 477 N.E.2d 987, 993 (Mass. 1985) ("It is a well-established rule that 'it is the duty of the [property] owner to guard against the danger to which the public is thus exposed, and he is liable for the consequences of having neglected to do so, whether the unsafe condition was caused by himself or another.'"(alteration in original) (citation omitted)).

166. *See* Variety Children's Hosp., Inc. v. Vigliotti, 385 So. 2d 1052 (Fla. 3d DCA 1980).

concept, . . . [and] its existence depends on calibrating legal obligations to factual contexts."[167]

Wyandotte Transportation Company v. United States[168] illustrates that enrichment can arise from the performance of another's statutory duty. In *Wyandotte*, the supreme court held that the United States was entitled to recover the expense of performing the defendant's statutory duty to remove a barge that had sunk and was endangering shipping traffic on the Mississippi River.[169] Here, the government conferred a benefit upon the defendant by performing the company's statutory duty to remove the barge. The court found that retention of the benefit by the company would be unjust and thus held that the defendant could be found liable under a theory of quasi-contract.[170]

Recent environmental law cases hold that statutes providing reimbursement to government entities for the cost of cleaning up pollutants are based upon restitutionary principles.[171] In those actions, the government established that the defendants discharged pollutants and were responsible, pursuant to statute, for cleaning up the contaminants.[172] When the polluters did not undertake cleanup of the pollutants, the government stepped in and remedied the situation. The court in *United States v. P/B STCO 213* found that the polluters were enriched because "by failing to perform their statutory duty to clean up the [pollutants], thereby causing the government to fulfill

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167. United States v. Consolidated Edison Co., 580 F.2d 1122, 1127 (2d Cir. 1978) ("Section 115 of the Restatement [of Restitution] certainly does not require either by its terms or under the case law interpreting it, that a duty must be absolute to fall within its parameters."); *see infra* note 170; *see also* Hebron Pub. Sch. Dist. v. U.S. Gypsum, 690 F. Supp. 866 (D.N.D. 1988) (citing to *Consolidated Edison* in support of its ruling); Sommers v. Putnam County Bd. of Educ., 148 N.E. 682 (Ohio 1922); *cf.* Halliday v. Marchington, 184 N.E. 698 (Ohio Ct. App. 1932).

168. 389 U.S. 191 (1967).

169. *Id.* at 204. *See also Consolidated Edison*, 580 F.2d at 1131.

170. The court does not specifically refer to its holding in terms of restitution, but cites section 115 of the *Restatement of Restitution*, which provides:

> A person who has performed the duty of another by supplying things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if
>
> (a) he acted unofficiously and with intent to charge therefor, and
>
> (b) the things or services supplied were immediately necessary to satisfy the requirements of public decency, health, or safety.

In *Wyandotte*, the removal of the barge impacted public safety in two ways: it eliminated both a waterway hazard and the risk of an environmental accident. *See* Jacksonville v. Sohn, 616 So. 2d 1173 (Fla. 1st DCA 1993)(refusing to adopt § 115 because of the insufficiency of the appellant's allegations).

171. *See* United States v. Monsanto Co., 858 F.2d 160, 176 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (holding that reimbursement of CERCLA costs is restitutionary); United States v. Wade, 713 F.2d 49 (3d Cir. 1983); United States v. P/B STCO 213, 756 F.2d 364 (5th Cir. 1985) (finding that reimbursement of cleanup costs under the Clean Water Act is restitutionary); United States v. Barge Shamrock, 635 F.2d 1108 (4th Cir. 1980), *cert. denied*, 454 U.S. 830 (1981).

172. *See* 42 U.S.C. § 9607(a)(1988 & Supp. V 1993); 33 U.S.C. § 1321 (1988 & Supp. V 1993).

their duty, the defendants avoided the cost of doing what they were primarily obligated to do."[173] While these decisions found that the government's statutory recovery was based on restitutionary principles in the context of determining the applicable statute of limitations, the underlying restitutionary principles are sound. Accordingly, these cases illustrate that performance of another's statutory duty confers a benefit that a court may require one to disgorge. These principles should be equally applicable to both public and private plaintiffs.[174]

There is little case law in Florida relating to the performance of another's duty or legal obligation giving rise to a claim for unjust enrichment.[175] In *Variety Children's Hospital, Inc. v. Vigliotti*,[176] the court held that a mother has a statutory duty to provide "necessaries" for her child and thus, performance of that duty by another may give rise to an action based on unjust enrichment.[177] Similarly, the discharge of pollutants in Florida may give rise to a statutory duty on the part of the polluter to clean up the contaminants.[178]

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173. *P/B STCO 213*, 756 F.2d at 375.

174. *See* One Wheeler Rd. Assocs. v. Foxboro Co., 843 F. Supp. 792 (D. Mass. 1994) (holding action in quasi-contract by current property owner against predecessor-in-title for cost of cleanup of pollutants valid but unnecessary because state environmental statutes provided reimbursement); Presby v. Bethlehem Village Dist., 416 A.2d 1382 (N.H. 1980) (contractor performing duty of government entity to provide sewer entitled, under quasi-contract theory, to recover cost of installation from government entity); Baker & Markoff, *supra* note 155, at 116 (concluding that "to the extent that a cleanup by a current owner discharges the unliquidated liabilities of [polluters] under CERCLA or other statutes, the [polluter] is enriched.").

175. Many of the cases that exist providing for recovery based upon performance of another's legal obligations are subrogation actions. Subrogation actions are restitutionary and ultimately based on unjust enrichment; therefore, many of the principles found in subrogation actions should be applicable to unjust enrichment actions based upon benefits conferred without request. *See, e.g.* West Am. Ins. Co. v. Yellow Cab Co., 495 So. 2d 204, 206 (Fla. 5th DCA 1986) ("Subrogation provides an equitable remedy for restitution to one who in the performance of some duty has discharged a legal obligation which should have been met, either wholly or partially, by another." (citations omitted)).

176. 385 So. 2d 1052 (Fla. 3d DCA 1980).

177. *Id.* at 1054 ("[T]he mother received a 'legal' benefit when the hospital rendered its services to her child. Her duty to provide or procure necessary medical services for her daughter was fulfilled. She would be unjustly enriched if allowed to enjoy that benefit without compensating the hospital."). The court cited to section 744.301, Florida Statutes (1977), as being the source of the mother's duty. *Id.*

178. It is unclear whether these statutes apply retroactively. In Sunshine Jr. Food Stores, Inc. v. State Dep't of Envtl. Regulation, 556 So. 2d 1177 (Fla. 1st DCA 1990), the defendant was cited with a violation of section 376.302, Florida Statutes, which was originally enacted in 1984, for a discharge that allegedly took place sometime between 1979 and 1984. The *Sunshine Jr. Food Stores* holding suggests that at least Chapter 376, Florida Statutes, applies retroactively. *Id. But see* Cunningham v. Anchor Hocking Corp., 558 So. 2d 93, 99 (Fla. 1st DCA 1990) (applying Chapter 376: "[complainant] must . . . prove causes of action arising after the statute's effective date."); State Dep't of Pollution Control v. Int'l Paper Co., 329 So. 2d 5 (Fla. 1976) (Environmental statute does not apply retroactively, construing section § 403.121, Florida Statutes). Consequently, the timing of the discharge may determine whether the defendant

Section 376.305(1), Florida Statutes (1993), provides that "[a]ny person discharging a pollutant as prohibited by sections 376.30-376.319 shall immediately undertake to contain, remove, and abate the discharge to the satisfaction of the [Florida Department of Environmental Protection]. . . ."[179] When a Florida landowner discharges a pollutant, the landowner becomes saddled with a legal obligation to clean up the contaminants and is enriched when the obligation is performed by a subsequent buyer who acquires the land without any contractual assumption of the responsibility to clean up the discharge.[180]

A plaintiff also may enrich a defendant by preventing the accrual of a claim, in favor of a third party, against the defendant.[181] That is, if injury to a third party is prevented by the plaintiff's conduct, the defendant is enriched.[182] In insurance law, a number of cases hold that when an insured's party takes steps to protect the insured property, the insurer should reimburse the insured for the expense of preventing a loss covered by the policy.[183] While references to unjust enrichment are conspicuously absent in these opinions, and the measure of damages was not restitution,[184] these cases can be explained by applying restitutionary principles.[185]

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had a duty to address the discharge and whether the plaintiff's clean up of the discharge confers a benefit upon the defendant.

179. FLA. STAT. § 376.305(1) (1993). "'Discharge' includes, but is not limited to, any spilling, leaking, seeping, pouring, misapplying, emitting, emptying, or dumping of any pollutant which occurs and which affects lands and the surface and ground waters of the state . . . ." FLA. STAT. § 376.301(6) (1993).

180. Although the author has found no Florida case law specifically addressing the question of whether a statutory duty to clean up a discharge survives a conveyance of the contaminated property to another, at least one case implicitly answers the question. Sunshine Jr. Food Stores v. State Dep't of Envtl. Regulation, 556 So. 2d 1177 (Fla. 1st DCA 1990). In *Sunshine Jr. Food Stores*, the court adopted a hearing officer's findings that a corporation was responsible for cleaning up a discharge even though the corporation no longer owned the property and that the state's Notice of Violation was served after the corporation conveyed the property to a subsequent buyer with knowledge that the property contained underground storage tanks. *Id.*

181. *See* PALMER, *supra* note 116, § 10.6(b); Wade, *supra* note 161, at 1188-90.

182. *Id.*

183. *See, e.g.*, Slay Warehousing Co. v. Reliance Ins. Co., 471 F.2d 1364 (8th Cir. 1973); Harper v. Pelican Trucking Co., 176 So. 2d 767 (La. Ct. App. 1965); Leebov v. United States Fidelity & Guaranty Co., 165 A.2d 82 (Pa. 1960).

184. It is likely that an accurate measure of the damages that would have resulted—and thus the measure of the insurer's liability under the policy had the insured not taken preventive measures—is unavailable. Courts generally disfavor speculative damages and thus this may account for the decision to base damages on the insured's out-of-pocket expenses and not the benefit conferred to the insurer.

185. *See* Note, *Allocation of the Costs of Preventing an Insured Loss*, 71 COLUM. L. REV. 1309, 1316 (1971) (suggesting that *Leebov* may have been decided on a quasi-contractual theory); *cf.* McNeilab, Inc. v. North River Ins. Co., 645 F. Supp. 525 (D.N.J. 1986), *aff'd*, 831 F.2d 287 (3d Cir. 1987).

As discussed above, our system of law can be viewed as protecting a person's expectations that are the by-product of obligations springing from the commission of a tort or the breach of a contract.[186] In the insurance cases noted above, the insurer's obligation to pay the arises when the insured sustains a loss. A loss is a condition precedent to the insurer performing under the policy or insurance contract. These cases hold that the insured is entitled to reimbursement for the cost of preventing the insurance company's duty to perform.

Similarly, a tortfeasor's (or contract breacher's) obligation to pay the injured party arises when the injured party sustains a loss.[187] Thus, one who intervenes to prevent the injury may be entitled to reimbursement for the cost of preventing the loss. The tortfeasor is enriched by the intervenor, and the intervenor is entitled to recovery under restitutionary principles[188] if the enrichment is unjust.[189] Assuming the defendant's enrichment is unjust, "[i]t would be an anomaly to allow third parties to sue the [defendant] for injuries resulting from the [defendant's] acts, but not allow the [intervenor] to recover for the cost of preventing the injuries from occurring."[190]

The Florida Supreme Court has recognized that preventing the accrual of liability confers a benefit that may give rise to a quasi-contract.[191] In *Tipper v. Great Lakes Chemical Company*, the court found a quasi-contractual employment relationship between two parties that permitted the plaintiff to claim workers' compensation benefits for injuries sustained while "working" for the defendant.[192] The relationship between the parties arose when a tractor-trailer owned by the defendant, carrying cylinders of methyl bromide gas, was involved in an accident in Florida. The accident caused a rupture of the cylinders, and gas began to escape. The defendant was unable to immediately respond to the accident because the company's home office was in Arkansas.[193]

A local law enforcement official sought assistance from the plaintiff "because of his expertise in the handling of deadly gases as part of his regular employment."[194] The plaintiff subsequently sustained

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186. *Supra* notes 117-119 and accompanying text.

187. PALMER, *supra* note 116, § 10.6(b).

188. Palmer writes that in this situation the "[b]enefit is certainly present, and if self-interest would support restitution to a plaintiff who satisfied the liability, it should do so as well when he forestalled the liability." PALMER, *supra* note 116, § 10.6(b).

189. *See infra* notes 202-209 and accompanying text.

190. *See* Baker & Markoff, *supra* note 155, at 116-17.

191. Tipper v. Great Lakes Chem. Co., 281 So. 2d 10 (Fla. 1973).

192. 281 So. 2d at 10.

193. *Id.* at 11.

194. *Id.*

injuries while assisting with the cleanup. In finding a quasi-contract of employment, the court stated that the plaintiff enriched the defendant when he "restrict[ed] the liability of the [defendant] from further damages from the accident."[195] Although the opinion is silent about whether the plaintiff, given the defendant's enrichment, could recover restitutionary damages,[196] the case shows that a defendant also may be enriched to the extent that the plaintiff permits the defendant to avoid harm to third parties.[197]

When a landowner discharges pollutants, the landowner may be liable for damages in tort for injuring adjacent land and neighbors.[198] A landowner who sells the property after the discharge also may continue to be subject to a tort action for damages.[199] Thus, a buyer of contaminated land who cleans up and contains any contaminants enriches the seller to the extent potential future law suits are averted.

In sum, a plaintiff can establish enrichment of the defendant by showing that the plaintiff performed a duty that the defendant was once obligated to perform.[200] Where a plaintiff intervenes to prevent a defendant's acts from damaging a third party, the defendant also is enriched to the extent that the defendant does not incur liability as a result of the wrongful conduct. A showing of enrichment, however, is just the first step to recovery in restitution. The plaintiff also must show that retention of the benefit by the defendant would be unjust.[201]

The courts determine whether retention of a benefit would be unjust by examining the circumstances under which the plaintiff conferred the benefit.[202] The fact that the defendant did not request the benefit or that the plaintiff voluntarily conferred the benefit is

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195. *Id.* at 15.

196. The court found that the fictional contract permitted the plaintiff to receive compensation in the way of workers' compensation benefits. *Id.*

197. *Id.*

198. *See supra* notes 26-115 and accompanying text.

199. *See* Restatement (Second) of Torts § 373 (1965):

> (1) A [seller] of land who has created or negligently permitted to remain on the land a structure or other artificial condition which involves an unreasonable risk of harm to others outside of the land, because of its plan, construction, location, disrepair, or otherwise, is subject to liability to such persons for physical harm caused by the condition after his [buyer] has taken possession of the land.
>
> (2) If the [seller] has created the condition, or has actively concealed it from the [buyer], the liability stated in Subsection (1) continues until the [buyer] discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the [buyer] has had reasonable opportunity to discover the condition and to take such precautions.

200. *See infra* notes 223-229.

201. *Id.*

202. *See supra* notes 168-174.

generally given great weight.[203] Consequently, courts encounter competing policies in determining whether a benefit is unjust: (1) defendants should not be permitted to retain unjust enrichments, versus (2) defendants should not be forced to disgorge benefits conferred by an officious intermeddler[204] or mere volunteer.[205] Professor Wade has suggested that courts should de-emphasize this dichotomy and consider "the volunteer-policy . . . a factor of consequence in determining whether or not the enrichment is unjust."[206]

Under this volunteer policy, to determine whether the defendant should disgorge the benefit, one should begin with the presumption that the intervenor was a mere volunteer and then examine whether the facts and circumstances rebut the presumption; that is, was there an excuse or justification for intervening in the defendant's affairs?[207] A recent Washington state appellate court addressed the question of whether a plaintiff's intervention was justified by considering:

> (1) whether the benefits were conferred at the request of the party benefitted . . .
>
> (2) whether the party benefitted knew of the [plaintiff's performance], but stood back and let the party make the payment . . . and
>
> (3) whether the benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefitted thereby.[208]

An additional consideration is whether the benefits were immediately necessary "to satisfy the requirements of public decency, health or safety."[209]

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203. *See* Wade, *supra* note 161, at 1184.

204. "*Officiousness* is the term traditionally used to describe interference in the affairs of others that is not justified [under] the circumstances." FARNSWORTH, *supra* note 90, § 2.20.

205. Professor Wade writes that "[m]ost [restitutionary] statements . . . have indicated that the volunteer-policy has prevailed over the unjust-enrichment principle, but a study of the cases indicates that there is a fairly delicate, and somewhat precarious balance between them and that the line of demarcation is a difficult one to draw." Wade, *supra* note 161, at 1184-85. *See also* PALMER, *supra* note 116, § 10.1 ("When restitution of an unsolicited benefit is denied, the court is apt to explain the decision by saying that the plaintiff was a volunteer or that his transfer of the benefit was voluntary.").

206. Wade, *supra* note 161, at 1185. *See also* RESTATEMENT OF RESTITUTION §§ 1, cmt. c, 2 cmt. a (1937).

207. *See* PALMER, *supra* note 116, § 10.1.

208. Ellenburg v. Larson Fruit Co., 835 P.2d 225, 229 (Wash. Ct. App. 1992).

209. RESTATEMENT OF RESTITUTION § 115 (1937). "The law's concern that needless services not be foisted upon the unsuspecting has led to the formulation of the 'officious intermeddler doctrine.' It holds that where a person performs labor for another without the latter's request or implied consent, however beneficial such labor may be, he cannot recover therefor." Nursing Care Servs., Inc. v. Dobos, 380 So. 2d 516, 518 (Fla. 4th DCA 1980) (citation omitted).

For purposes of finding that a buyer is entitled to reimbursement of environmental cleanup costs based on restitution, the focus is likely to be on whether the buyer acted to protect his own interests or those of society.[210] In *Tipper*,[211] the court acknowledged that benefits conferred by a volunteer are not recoverable, but that a person's volunteer status is rebuttable:

> Where it is imperatively necessary for the protection of the interests of third persons or of the public that a duty owed by another should be performed, a stranger who performs it may be entitled to restitution from the other, even though his performance was without the other's knowledge or against his will.[212]

A buyer who cleans up contaminants discharged by a predecessor-in-title protects multiple interests. The buyer protects his or her own interests by avoiding potential tort liability.[213] The buyer protects the interests of neighboring property owners by preventing damage to their property, and similarly safeguards the interests of society by performing the task.[214] Therefore, a buyer who cleans up contaminants discharged by the seller is not acting as a volunteer or officious meddler and, to the extent the seller is enriched, the enrichment is unjust.[215]

IV. ANALYSIS & PROBLEMS

Substantive restitution may provide a remedy to an aggrieved buyer in Florida where traditional tort liability does not. The distinction in principles underpinning tort/contract and restitution may explain why. Tort and contract liability generally require the presence

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210. Professor Palmer notes the perverseness in the means by which the label of volunteer is rebutted: "Our law finds itself in the paradoxical position of aiding one who acted in his own interest while denying aid to one who acted from the generally more laudable motive of protecting the interest[s] of another." PALMER, *supra* note 116, § 10.1.

211. 281 So. 2d 10 (Fla. 1973).

212. *Id.* at 13.

213. *See* PALMER, *supra* note 116, §§ 10.2, 10.5.

214. *Id.*

215. In Florida Power & Light Co. v. Allis Chalmers Corp., 752 F. Supp. 434 (S.D. Fla. 1990), a federal district court synthesized the holdings in *Tipper* and *Vigliotti*, and recognized that an action in quasi-contract may be available to a landowner who by cleaning up contaminated land discharges the statutory duty of the alleged contaminator. Although the alleged contaminator in *Florida Power* was not a predecessor-in-title to the plaintiff-landowner, the opinion suggests that a landowner who has discharged a predecessor-in-title's duty to cleanup pollutants may have available to the landowner an action in quasi-contract for reimbursement of the cost of cleanup. *See* One Wheeler Rd. Assoc. v. Foxboro Co., 843 F. Supp. 792 (D. Mass. 1994), where the court, in ruling on a motion for summary judgment, ruled that a landowner has a cause of action in quasi-contract against a predecessor-in-title to recover costs of cleaning up a predecessor's contamination of the property.

of a pre-existing relationship or a duty between parties coupled with a breach of that duty which causes an injury to a legally recognized interest. The focus, therefore, is on the conduct of the defendant, and the measure of compensation due the plaintiff is based upon the amount of injury or damage to the plaintiff's interests.[216] Further, the availability of affirmative defenses generally turns on the relationship between the parties.[217]

In contrast to liability based on tort or contract, restitution focuses on the enrichment of the defendant and whether notions of justice and equity are such that the defendant should disgorge the benefit.[218] If the circumstances are such that it would be unjust for the defendant to retain the benefit, the court creates a relationship between the parties.[219] This quasi-contractual relationship and its attendant legal obligations are not as vulnerable to attack by a defendant as those obligations to compensate a plaintiff stemming from the commission of a tort or breach of a contract. Nevertheless, restitution actions are not without their own unique problems.

A potential problem confronting a buyer proffering a restitution argument is that the law will not imply a contract were a valid one exists.[220] It is unclear in Florida to what extent application of this principle would preclude a buyer's restitution action against a seller for recovery of the cost of performing the latter's statutory duty to clean up a discharge.[221] One argument is that an absence of specific language in the sales contract referring to pollution problems should permit a buyer's action in restitution because the writing did not deal with the subject matter of the quasi-contract—the presence of pollution. That is to say that the writing did not expressly allocate the risks and obligations with respect to pollution problems between the parties to the contract. However, there is support for the contrary argument

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216. *See* PROSSER, *supra* note 31, § 30.

217. Assumption of risk, caveat emptor, contributory negligence, contractual waiver, Statute of Frauds, etc., are examples of defenses to tort or contract liability. *See* PROSSER, *supra* note 31, §§ 65, 68; FARNSWORTH, *supra* note 90, §§ 6.1-6.12.

218. *See* Corbin, *supra* note 1.

219. *Id.*

220. Hazen v. Cobb, 117 So. 853 (Fla. 1928); Salutec Corp. v. Young & Lawrence Assocs., 243 So. 2d 605, 606 (Fla. 4th DCA 1971); *see* Clark-Fitzpatrick, Inc. v. Long Island R.R., 516 N.E.2d 190 (N.Y. 1987) ("[E]xistence of a . . . written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events rising out of the same subject matter.").

221. Most of the reported Florida opinions in which this principle is discussed are in the context of a plaintiff seeking recovery in quantum meruit where there was a pre-existing employment contract. *E.g.*, Hoon v. Pate Constr. Co., 607 So. 2d 423 (Fla. 4th DCA 1992) (construction contract); Harding Realty, Inc. v. Turnberry Towers Corp., 436 So. 2d 983 (Fla. 3d DCA 1983) (involving real estate broker's fees); *In re* Estate of Lonstein, 433 So. 2d 672 (Fla. 4th DCA 1983) (establishing attorney's fees).

that a plaintiff may not pursue a quasi-contract action if the plaintiff had an opportunity, in a previous contract, to provide for the allocation of risks that are the subject of a quasi-contract action but failed to do so.[222] Consequently, to the extent there was a valid and enforceable sales contract, bargained for under circumstances where the parties had an unfettered opportunity to negotiate and allocate potential risks, a seller may not be able to subsequently seek recovery in quasi-contract for cleaning up a pre-sale discharge of pollutants.

Another impediment to a buyer recovering in quasi-contract stems from the very nature of the cause of action. Before a buyer can recover in quasi-contract, the buyer already must have conferred a benefit upon the seller; the seller is enriched only to the extent the seller's statutory duty to clean up the property is performed. The costs, however, of cleaning up contaminated property can be astronomical, and often a buyer lacks sufficient resources to undertake the cleanup.[223] Actions in tort and contract do not require that the property be cleaned up because the remedial focus in those actions is to compensate the buyer for the diminution of property value or other damages. In contrast, restitution actions look at the enrichment of the defendant. A suggested solution to the problem that cleanup must take place in advance of an action in restitution is application of "restorative restitution" principles.[224]

Restorative restitution permits a person to initiate an action for cleanup costs prior to restoration of the property. Scholars cite to the rationale in *Spur v. Del E. Webb Development Company*[225] as providing

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222. *See* First Commodity Traders, Inc. v. Heinold Commodities, Inc., 766 F.2d 1007, 1011 (7th Cir. 1985) (stating that a plaintiff who failed to sufficiently allocate the risk in a previous bargain "may not [later] unilaterally alter the terms of the contract by . . . claiming unjust enrichment"); *see also* Quadion Corp. v. Mache, 1991 WL 111170 (N.D. Ill. 1991). In *Quadion* a corporation acquired contaminated property in connection with the acquisition of another company. The corporation cleaned up the pollutants and subsequently sought reimbursement by, among other claims, seeking relief in quasi-contract. In ruling against the corporation, the court said "[t]he fact that the contract between [buyer and seller] did not allocate the risk of PCB contamination does not allow [buyer] to now invoke a quasi-contract remedy . . .[the buyer] could have provided for the allocation of this risk under the terms of the contract." *Id.*

223. *See supra* note 2.

224. *See* Baker & Markoff, *supra* note 155, at 121; Steven Ferry, *The Toxic Time Bomb: Municipal Liability for the Cleanup of Hazardous Waste*, 57 GEO. WASH. L. REV. 197, 274 (1988) (arguing that restorative restitution principles may be applied to CERCLA liability apportionment problems).

225. 494 P.2d 700 (Ariz. 1972). *Spur* involved a developer who constructed a residential development next to a feedlot and then subsequently filed a private nuisance action seeking to enjoin the feedlot from further operation. The court found that while prior to construction of the residential development the feedlot was a lawful operation, after development the feedlot constituted a nuisance and therefore must be moved, i.e. abated. However, the court also ordered the developer to pay the cost of removing the nuisance. The court wrote: "It does not seem harsh to require a developer, *who has taken advantage of the lesser land values in a rural area*

a "restorative restitution paradigm"[226] that is applicable to contaminated property and that would support a claim by a buyer to recover cleanup costs prior to remediation. "[T]he question of who should abate a hazard is distinct from who should pay for the abatement . . ."[227] Where one party "must abate a nuisance over which it has control, it is entitled to restitution from another party whose actions created the need for abatement."[228] Thus, in applying restorative restitution to a buyer-seller situation, the buyer should abate the pollution because, as the current landowner, the buyer is in the best position to do so. The cost of abatement, however, should be borne by the seller, who created the nuisance. Application of restorative restitution principles to a buyer-seller situation would permit a declaration of rights and liabilities prior to cleanup.[229]

One final problem a buyer seeking an action in quasi-contract may encounter is measuring the benefit conferred upon the seller. A plaintiff's recovery in restitution is measured by the defendant's enrichment; thus, a buyer's recovery is limited to the extent by which the buyer has conferred a benefit upon the seller. When a buyer discharges a seller's statutory duty to clean up conveyed property, enrichment should be measured by the cost of cleanup that the seller would have otherwise borne.[230]

A more difficult task of measurement arises where the seller does not have a statutory duty to clean up the property, but the buyer's cleanup of the property forecloses the risk of future tort actions against the seller pursued by the seller's former neighbors. The benefit, in this instance, should be measured by the amount in which the seller would have been liable to neighbors; that is to say, the benefit equals the value of the neighbors' damages or injuries. Here, two potential measurements of benefit exist. One measure of benefit is based on the cost the seller would have incurred if the seller had

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as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result." *Id.* at 708 (emphasis added). This language suggests a reading of *Spur* in terms of restitution or unjust enrichment. *See* R. Lisle Baker, *Recovering Privately and Publicly Conferred Windfalls—An Exploratory Essay*, 13:2 URB. LAW. vii (1981).

226. Baker & Markoff, *supra* note 155, at 120.

227. *Id.*

228. *Id.*

229. Although the principles appear sound, the author has been unable to find a single reported case in which the concept is examined. Further, no reported Florida case has relied upon *Spur*. Consequently, it is unclear whether a Florida court would adopt the restitutionary principles found in *Spur*.

230. *See* Wyandotte Transp. Co. v. United States, 389 U.S. 191, 194-95 (1967); United States v. Reserve Mining Co., 408 F. Supp. 1212, 1213-15 (D. Minn. 1976); Variety Children's Hosp. v. Vigliotti, 385 So. 2d 1052 (Fla. 3d DCA 1980).

cleaned up the property to avoid liability to neighbors. Another measure is based on a bargain theory that the benefit is equal to the value of an agreement between the seller and a neighbor, permitting the continued existence of the pollutants. In an efficient market, the bargain-based benefit may be measured by the extent to which the neighbor's property value decreases.[231]

IV. CONCLUSION

The Florida Statutes do not expressly provide an owner of contaminated land with a statutory cause of action against a contaminator.[232] Nor have the Florida courts read a cause of action into the statutes.[233] Although there are provisions contained within the statutes that do not prohibit a person from bringing a private cause of action,[234] this article demonstrates that few, if any, remedies currently are available to an innocent purchaser of contaminated land under Florida case law.

The Florida Legislature created the Inland Protection Trust Fund to expedite the cleanup of petroleum contaminants, and until recently, the fund provided an innocent purchaser of contaminated commercial land a measure of comfort—the land was cleaned up and the state was left with the responsibility and cost of sorting out fault.[235] In light of the Trust Fund's financial troubles, landowners across the state are faced with the uncertainty of when, if ever, they will receive monetary assistance to underwrite the cleanup of their property. Moreover, those landowners who wish to clean up their property and seek out predecessors-in-title who were at fault have neither state statutes nor case law to lend support to their underwriting campaign. Until the

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231. DOBBS, *supra* note 123, views the measuring of restitution as one of its chief problems. *Id.* at 379. Valuation problems in restitution are beyond the scope of this article, and the reader should consult DOBBS, *supra* note 123 and PALMER, *supra* note 116, for further discussion on the topic.

232. Current federal environmental law provides a private cause of action to an owner of land contaminated with hazardous waste. *See* 42 U.S.C. § 9607(a)(1988 & Supp. V 1993). Aggrieved landowners have applied this section to recover from adjacent and contemporaneous landowners as well as from predecessors-in-title. Further, federal courts have refused to apply the doctrine of caveat emptor to these cases. *See* Amland Properties Corp. v. ALCOA, 711 F. Supp. 784 (D.N.J. 1989). However, it must be noted again that petroleum is expressly excluded from the scope of CERCLA. In addition, in crafting what is essentially Florida's equivalent of CERCLA, the Florida Legislature distinctly omitted the private cause of action provision. § 403.727(4), FLA. STAT. (1993). The Florida Legislature created the Inland Protection Trust Fund to pay for cleanup of petroleum-based contamination. § 376.3071(2), Fla. Stat. (1993). However, the Trust Fund was put on hold during the 1995 Legislative session until lawmakers can resolve the funding dilemma facing the fund. *See supra* note 17 and accompanying text.

233. *See* Mostoufi v. Presto Food Stores, Inc., 618 So. 2d 1372 (Fla. 2d DCA 1993).

234. *See* § 376.313, FLA. STAT. (1993).

235. *See supra* notes 11-16 and accompanying text.

Florida Legislature settles the future of the Trust Fund, lawmakers should provide an express statutory provision to assist those landowners who wish to pursue reimbursement of their cleanup costs from the party at fault. Until lawmakers act, however, a buyer of contaminated commercial property in Florida should not forego common law tort actions as a means of recovery and should continue to press the Florida courts to revisit their previous decisions.

Notwithstanding current Florida case law, an owner of contaminated land should not overlook the potential for recovery in fraud or strict liability. The rule announced in *Futura* and the court's reading of *Johnson v. Davis* with respect to a seller's duty to disclose is not only based on dicta,[236] its soundness has not been sufficiently examined.[237] The Florida courts should revisit the *Futura* decision to examine not only the shortcomings of the court's logic,[238] but the effect a rule of non-disclosure has on the commercial real property market[239] and on state environmental policy.[240] Further, in light of the

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236. The *Futura* court reasoned that since *Johnson v. Davis* does not cite to any commercial real property cases, the *Johnson* court intended to exempt sellers of commercial transactions from having a duty to disclose material facts affecting the value of commercial property. It is bewildering to this author that no one has challenged this potentially incorrect inference. Accordingly, the issue may be subject to further scrutiny by the courts.

237. *See supra* notes 98-115 and accompanying text. While not specifically referring to the *Futura* decision, the court in *Haskell Co. v. Lane Co.*, 612 So. 2d 669 (Fla. 1st DCA 1993), criticized the distinction that is made, with respect to a duty to disclose, between residential and commercial real property transactions:

> Many of the policy considerations used to justify a duty to disclose in residential cases apply with equal force to commercial cases. Is it reasonable to assume that a prospective buyer (or lessee) of commercial property is significantly more likely to be capable of examining the property to determine whether hidden effects exist than is a prospective buyer (or lessee) of residential property? . . . Such distinctions may have some merit as to the large corporate purchaser (or lessee), but clearly are inappropriate with regard to a substantial segment of the business community. "Courts should not assume that there is a relevant distinction between purchasers who invest in commercial property and 'simple, gullible folks unable to protect themselves.' People who buy [or lease] real property for business purposes vary widely in their experience, knowledge, sophistication, bargaining power, wealth, and access to outside advisers and experts." (citation omitted) Moreover, the buyer (or lessee) of commercial property has the same reasonable expectations as does the buyer (or lessee) of a residence—that he or she will receive what was bargained for, and be able to use it for its intended purposes.

Id. at 675-76.

238. At the very least, the court should construct an exception to the rule and require disclosure of pollution problems. *See supra* notes 113-114 and accompanying text.

239. Permitting a seller of commercial property to be shielded from liability behind the doctrine of caveat emptor may hinder the alienability of commercial property. *See* Judith G. Tracy, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 STAN. ENVTL. L.J. 169 (1991). Tracy argues that caveat emptor is impracticable in many complex commercial transactions and is better suited to "commonplace market transactions in which both buyer and seller have equal access to information and are at equivalent bargaining strength." *Id.* at 172. Many commercial land transactions may involve hazardous materials, the presence of which

New Jersey Supreme Court's affirmance of the restitutionary principle,[241] aggrieved buyers of contaminated land should press the Florida courts to reexamine the *Futura* court's rejection of strict liability in favor of a buyer of contaminated commercial property. The courts should not yet foreclose tort as a source of relief to a buyer of contaminated property. In addition, aggrieved buyers also should continue to urge the Florida courts to reassess their prior positions in light of economics and state environmental policy, and to adopt additional tort protection for a buyer.[242]

In the meantime, restitution may provide relief to a buyer of contaminated commercial property. A buyer who learns of the presence of contaminants after the conveyance may seek to rescind the transaction on the basis of mistake. Further, substantive restitution principles may also provide relief to a buyer. If there is a state statute imposing a duty upon the seller to clean up the contamination, a buyer who discharges this duty confers a benefit upon the seller. To the extent the buyer did not act as a volunteer, but rather acted in the buyer's own interests or in those of a third party, restitution views the enrichment of the seller as unjust, and the court should order the seller to disgorge the benefit. Further, an application of restorative

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may be known only by the seller and often incapable of detection by the buyer; consequently, the parties do not operate on a level playing field with respect to information. *Id.* Application of caveat emptor to commercial transactions may unnecessarily drive up transaction costs as buyers spend dollars for environmental studies. Moreover, contamination may escape detection, notwithstanding the performance of an environmental study upon the property, and saddle a buyer with unbargained-for future liability. In sum, the transfer of commercial real property is frustrated not only because of increased transaction costs but because of the potential risk of future liability. From an economic standpoint, to the extent the rule of nondisclosure precludes the transfer of property into hands capable of maximizing the property's aggregate social utility, society suffers.

240. If disclosure on the part of the seller were required, dollars spent on trying to level the playing field might be better spent on cleaning up the contamination in the first instance. Thus, to the extent that resources are unnecessarily diverted from the cleanup of contamination to site investigations for the benefit of a buyer (because a seller has no duty to disclose contaminants), environmental policy is thwarted.

241. T & E Indus. v. Safety Light Corp., 587 A.2d 1249 (N.J. 1991). *See supra* notes 78-87 and accompanying text.

242. Justice Cardozo wrote:

> [W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment . . . . Perhaps we should do so oftener in fields of private law where considerations of social utility are not so aggressive and insistent. There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the year.

BENJAMIN CARDOZO, NATURE OF THE JUDICIAL PROCESS 150 (1921).

restitution principles may permit a buyer to recover prior to performance of the seller's statutory duty, and thus avoid having to finance the cleanup prior to recovery in unjust enrichment.

If the Florida courts adopt either tort or restitution principles to hold a seller of contaminated commercial property responsible for compensating a buyer, more information should flow into the marketplace as parties seek to meet their obligations to disclose and thus to avoid litigation. Ideally, the growing pool of information would remove or diminish "external diseconomy" or "market distortions"[243] and permit resources that are otherwise unnecessarily absorbed in a distorted market to be used to clean up contaminated property.

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243. When a market under or over-buys based on an incorrect accounting of true costs, the market is said to be distorted. To the extent a market is distorted, "[s]ociety, by allocating resources in one market incorrectly, loses the opportunity to use them in another." Michael Andrew O'Hara, *The Utilization of Caveat Emptor in CERCLA Private Party Cleanups*, 56 LAW & CONTEMP. PROBS. 149, 165 (1993). O'Hara's article presents an interesting twist on the argument that failure to disclose contaminated property creates a distorted market. He points out that private party actions under CERCLA and the rejection of caveat emptor as a seller's defense creates the potential for "doubly" distorted markets. That distortion occurs to the extent that a buyer acquires contaminated property at a price reflecting the presence of the pollution and then subsequently pursues a CERCLA action to underwrite the cleanup of the property. *Id.* at 149. *See also* Barbara Ann White, *Economizing on the Sins of Our Past: Cleaning Up Our Hazardous Wastes*, 25 HOUS. L. REV. 899, 916-17 (1988).

THE TERMINOLOGY OF FLORIDA'S NEW PROPERTY RIGHTS LAW: WILL IT ALLOW EQUITY TO PREVAIL OR GOVERNMENT TO BE "TAKEN" TO THE CLEANERS?

ELLEN AVERY*

I. INTRODUCTION

In May of 1995, Florida became one[1] of approximately three dozen states[2] to adopt legislation that compensates private property owners when the value of their land is diminished inordinately by government actions that fall short of a constitutional taking.[3] Even the United States Congress has jumped on the bandwagon with its Contract With America, vowing to force the federal government to pay for property unjustly taken from landowners through environmental, land use and other regulations.[4]

Florida's new private property rights law took effect on October 1, 1995,[5] and speculation continues about the extent to which the new legislation will affect local and state governments' ability to regulate.[6]

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1. 1995, Fla. Laws ch. 95-181. The text of the law is reprinted at the end of this c omment as Appendix 1. The law was adopted as Fla. CS for HB 863 (1995). The first section of the bill is entitled The Bert J. Harris, Jr., Private Property Rights Protection Act. 1995, Fla. Laws ch. 95-181, § 1. The second part of the bill creates the Florida Land Use and Environ mental Dispute Resolution Act. 1995, Fla. Laws ch. 95-181, § 2. Because the Florida Legislature did not intend for these two sections of Fla. CS for HB 863 to be construed *in pari materia*, this article will examine only the property rights act found in section one. *Id.* For the purposes of this article, the terms "property" and "land" will mean real property.

2. *See, e.g.*, Texas Private Real Property Rights Preservation Act, 1995 Tex. Sess. Law Serv. Ch. 517 (S.B. 14) (Vernon) (to be codified at TEX. GOV'T CODE § 2007); Protection of Private Property Act, WASH. REV. CODE § 36.70A.370 (Supp. 1992).

3. Larry Morandi, *Takings for Granted*, STATE LEGISLATURES, June 1995, at 22 (examining the conflicts between environmental protection and private property rights in states from coast to coast).

4. S. 503, 104th Cong., Reg. Sess. (1995); S. 145, 104th Cong., Reg. Sess. (1995); H.R. 490, 104th Cong., Reg. Sess. (1995). *See also* Bob Benenson, *GOP Sets the 104th Congress on New Regulatory Course*, 24 CONG. Q. WKLY. REP. 1693; Charles McCoy, *Private Matter: The Push to Expand Property Rights Stirs Both Hopes and Fears*, WALL ST. J., Apr. 4, 1995, at A1; Morandi, *supra* note 3.

5. 1995, Fla. Laws ch. 95-181, § 6.

6. *See, e.g.*, David Hackett, *Property Rights? Save Your Pity for Home Buyers*, ST. PETERSBURG TIMES, Mar. 12, 1995, at B2; Bob LaMendola, *Law Allows Suits Over Land Rules; Frivolous Claims for Government Compensation Ahead, Foes Say*, FT. LAUDERDALE SUN-SENTINEL, May 10, 1995, at B7.

One commentator has called the law a "bugaboo" for the "big boys," insinuating that it will benefit large landowners like mining, sugar and phosphate companies, while small property owners will see little of its merit.[7] Others have heralded the legislation as a shield for private property owners, regardless of wealth, to fend off excessive governmental regulation of their land.[8]

Regardless of the side of the issue on which people fall, no one, including the lawmakers who adopted the bill, knows how the new law will affect private property rights.[9] The text of the law provides a cause of action to any private property owner whose existing or vested land use is "inordinately burdened" by a local or state governmental regulation adopted or amended after the close of the 1995 legislative session.[10] The stated intention of the law is to provide a cause of action separate and distinct from a compensable taking.[11]

Under the new statute, government agencies are required to compensate private property owners for the loss in fair market value caused by a permanent inordinate burden[12] placed on their land by a government action.[13] However, regulations that seek to control

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7. Hackett, *supra* note 6, at B2. ("The property rights bugaboo is for the benefit of the big boys, the ones who don't need our help. Mining companies, pipeline companies, sugar producers and a host of bottom-liners would all cash in on this mindless regulatory rollback.").

8. *See* LaMendola, *supra* note 6, at B7.

9. *Id.*

10. 1995, Fla. Laws ch. 95-181, §1(12). The 1995 legislative session ended on May 11, 1995, and therefore the law applies to any new state or local regulation, or amendment to an existing regulation, adopted after that date. "A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended." *Id.* The law applies only to state, regional, and local actions that affect Florida landowners, thus excluding actions of federal agencies. *Id.* § 1(3)(c).

11. *Id*; *see infra* note 17. Takings causes of action are based on the Fifth Amendment of the United States Constitution. U.S. CONST. amend. V. The complexity of this constitutional litigation makes it less attractive to property owners than statutory causes of action such as that set out in the new private property rights act.

12. The governmental action must be such that "the property owner is permanently unable to attain the reasonable, investment-backed expectation" for the existing use or vest right in that property. 1995, Fla. Laws ch. 95-181, § 1(3)(e). Or the regulation must make the property owner bear a "disproportionate share of a burden imposed for the public good." *Id.* In takings analysis, if a taking is found by a court, and the government lifts the regulation, the government must still compensate the landowner for the time the property was taken. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). Apparently, the law would not provide similar compensation if the government lifts a regulation found to inordinately burden the landowner. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

13. Loss of fair market value is the difference between the market value of the property before imposition of the regulation and the market value of the property after application of the regulation. 1995, Fla. Laws 95-181, § 1(6)(b). "In determining the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental entity or entities . . . has restricted, limited, or prohibited."

activities that are public nuisances at common law, or noxious uses of private property, are exempt.[14]

In effect, the new law provides landowners with a remedy when they sustain some unacceptable burden due to a governmental action that may not constitute a constitutional taking. Fifth Amendment constitutional takings actions often are complex and present many obstacles for landowners seeking compensation.[15] It has been noted that:

> [T]he continuing misty nature of takings cases through the decades led Charles Haar to comment: "The attempt to distinguish 'regulation' from 'taking' is the most haunting problem in the field of contemporary land-use law—one that we have encountered many times already, one that may be the lawyer's equivalent of the physicist's hunt for the quark."[16]

The new law is an attempt to lessen the hardship on a landowner who wishes to bring suit over an alleged burden placed by government on his or her property,[17] and to expressly provide relief in those instances where a property owner has suffered an injury that falls short of a constitutional taking.[18] Although the new law provides a separate and presumably less burdensome cause of action for the landowner to prove than a taking, it borrows its language from takings cases. Given this, takings jurisprudence can provide foresight about how courts may interpret the language of the law. This is not to imply that the substance of takings jurisprudence will simply be substituted for the

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Id. The compensation award also must include prejudgment interest from the date the claim was filed to the conclusion of the matter. *Id.*

14. 1995, Fla. Laws ch. 95-181, § 1(3)(e). *Cf.* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992). The law also specifically exempts those regulations that relate to operation, maintenance, or expansion of transportation facilities and do not affect existing law regarding eminent domain actions involving transportation. 1995, Fla. Laws ch. 95-181, § 1(10).

15. As Supreme Court Justice Thomas explained, "[t]he lower courts should not have to struggle to make sense of this tension in our case law. In the past, the confused nature of some of our takings case law and the fact specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict." Parking Assoc. of Georgia v. City of Atlanta, 1995 WL 136847 (U.S. May 30, 1995) (Thomas, J. dissenting).

16. Richard J. Grosso & David J. Russ, *Takings Law in Florida: Ramifications of Lucas and Reahard*, 8 J. LAND USE & ENVTL. L. 431, 432-33 (1993) (quoting CHARLES M. HAAR, LAND-USE PLANNING 766 (3d ed. 1976), *cited in* Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 n.17 (1985) (Blackmun, J., concurring)).

17. The staff analysis of the bill discusses the law of takings and then concludes:

> In any case, the constitutional right to a jury trial in eminent domain cases is not available in inverse condemnation [regulatory takings] cases. In addition, a property owner must exhaust all administrative remedies before a takings claim will be ripe for judicial review.

Fla. H.R. Comm. on Judiciary, HB 863 (1995) Staff Analysis 3 (final May 23, 1995) (on file with comm.).

18. 1995, Fla. Laws ch. 95-181, § 1(1).

new law, but rather that an understanding of takings law can provide guidance for understanding the language of the new law and, subsequently, how courts will apply it.

Part II of this article will examine the statutory term "inordinate burden," using Florida cases and United States Supreme Court jurisprudence in an attempt to predict judicial interpretation of the language.[19] Part III will analyze the essential elements of nuisance in common law, as well as the requirements for a noxious use of private property under current Florida law, in an attempt to point to regulations that may be exempt from the new law.[20] Finally, Part IV will discuss the issue of burden of proof under the new law.[21] That section will explore the issue of who bears that burden and will examine the level of proof necessary in establishing whether an "inordinate burden" has been caused by a governmental action.

Although Florida's Private Property Rights Protection Act claims to create a cause of action distinct from a taking under the Florida and United States Constitutions,[22] it is not yet clear whether the law will be entirely distinct. While the Legislature has created a separate cause of action, its use of takings terminology may lead judicial interpretations and applications of the law to become intimately wed to the use of similar terms in takings cases.[23] Statutory interpretation will be the key element in determining how the new law is implemented. Under Florida law, if the language of a statute is clear on its face, courts must confine themselves to the plain meaning unless such an interpretation

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19. *See infra* notes 30-106 and accompanying text.

20. *See infra* notes 107-128 and accompanying text.

21. *See infra* notes 129-149 and accompanying text.

22. 1995, Fla. Laws ch. 95-181, § 1(1). "The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution." *Id.* The Fifth Amendment of the United States Constitution states that private property cannot be taken for public purposes without just compensation. U.S. CONST. amend. V. This amendment is applicable to the states through the Due Process Clause of the 14th Amendment. U.S. CONST. amend. XIV. The Florida Constitution has a provision similar to the Fifth Amendment of the United States Constitution. "No private property shall be taken except for a public purpose and with full compensation therefore paid to each owner . . . ." FLA. CONST. art. X, § 6. However, Article Two of the Florida Constitution also requires protection of the state's natural resources: "It shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provisions shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." FLA. CONST. art. II, § 7.

23. Although the law states that "[t]his section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking," it is uncertain to what level the courts will borrow from takings jurisprudence in interpreting the new law. 1995, Fla. Laws ch. 95-181, § 1(9). Even the above quoted section seems to suggest that courts can adopt the reasoning utilized in current takings jurisprudence and leaves open the possibility that they will do so.

would lead to a ridiculous result.[24] Consequently, if courts determine that the language of the property rights law is clear on its face, they will be confined to using the plain meaning of the law in deciding claims filed by affected private property owners for compensation.

However, the inherently vague terms used in the statute will inevitably lead courts to determine that the language of the property rights law is ambiguous,[25] and therefore requires judicial interpretation.[26] Any judicial interpretation is likely to borrow heavily from current takings jurisprudence, since the language of the statute itself reiterates many of the well-known phrases that have been established in this area of the law.[27] Under this scenario, the new property rights law could become intertwined with takings law—lost in the fog of uncertainty that currently engulfs that area of jurisprudence—rather than establishing a new cause of action as the Legislature intended. Alternately, if the courts choose to devise new tests for analyzing cases under the property rights law, it will be some time before such analyses become established as precedent.

In short, courts soon will be called upon to analyze claims under the new law. It will be several years before enough decisions have been rendered to determine whether Florida's private property rights act is an extension of current property law or just a rehashing of regulatory takings jurisprudence.[28]

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24. City of Miami Beach v. Galbut, 626 So. 2d 192, 193 (Fla. 1993) (holding that a statute's ordinary meaning must be used unless it would lead to a ridiculous or unreasonable result); Johnson v. Presbyterian Homes, Inc., 239 So. 2d 256, 262 (Fla. 1970) (holding that ordinary meaning must be given to statutory language unless such meaning would lead to a ridiculous or unreasonable result).

25. If the language of a statute is not so clear as to "fix the legislative intent and leave no room for interpretation and construction," then the statute is ambiguous. Osborne v. Simpson, 114 So. 543, 544 (Fla. 1927). "Where the language used in a statute has a definite and precise meaning, the courts are without power to restrict or extend that meaning." Graham v. State, 472 So. 2d 464 (Fla. 1985); *see also* Fine v. Moran, 77 So. 533 (Fla. 1917).

26. *Id.*

27. "The primary guide to statutory interpretation is to determine the purpose of the legislature." Tyson v. Lanier, 156 So. 2d 833, 836 (Fla. 1963). Legislative use of phrasing that appears in takings cases can by extension be interpreted as legislative approval of the rationales used in those cases. For an analysis of the language used in the bill, *see* discussion *infra* at part II; Sylvia R. Lazos, *Florida's Property Rights Act: A Political Quick Fix Results in a Mixed Bag of Tricks*, 23 FLA. ST. U. L. REV. (forthcoming 1996).

28. Although the law purports to provide a cause of action separate and distinct from constitutional takings, it adopts the terminology used in takings jurisprudence. *See* 1995, Fla. Laws ch. 95-181. Thus, the Legislature may have condemned landowners to litigation over the same terms disputed in takings claims.

II. WHEN IS A LANDOWNER "INORDINATELY BURDENED?"

Florida's property rights law allows landowners to be compensated when government regulations place "inordinate burdens" on their property.[29] The statute establishes a disjunctive definition of inordinate burden: a government action that keeps landowners from attaining their reasonable, investment-backed expectation for the existing or future use of the real property;[30] *or* an action that puts a "disproportionate share of a burden imposed for the good of the public" on landowners.[31] Since the statutory definition is disjunctive, each part alone constitutes an inordinate burden, and therefore, each part of the definition must be analyzed separately to determine the meaning of "inordinately burdened."

A. The Loss of Reasonable, Investment-Backed Expectations

The first inordinate burden definition contained in the property rights law states that government agencies cannot directly restrict or limit the use of real property in a way that permanently prevents the landowner from attaining "the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole."[32] The law defines "existing use" as an actual, present use or a reasonably foreseeable, nonspeculative use of the land that is suitable for the property and compatible with adjacent land uses;[33] and states that "vested rights" in land should be determined by applying principles of equitable estoppel or substantive due process under the common law or state statute.[34]

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29. 1995, Fla. Laws ch. 95-181, § 1(2).

30. 1995, Fla. Laws ch. 95-181, § 1(3)(e). The statute states that an existing use is "an actual, present use or activity on the real property; including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses . . . ." *Id.* § 1(3)(b). The existence of a vested use is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying Florida law. *Id.* § 1(3)(a). For an analysis of when rights vest in Florida, see Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10 (Fla. 1976); Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989); Smith v. City of Clearwater, 383 So. 2d 681 (Fla. 2d DCA 1980).

31. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

32. *Id.*

33. *Id.* § 1(3)(b). Although "existing uses of property" may be relatively easy to define, there can be several interpretations of the meaning of "reasonably foreseeable, nonspeculative land uses." Examining the varying interpretations the courts have put on this phrase is beyond the scope of this article.

34. *Id.* § 1(3)(a); *see also supra* note 30 for cases analyzing vested rights in Florida.

1. "Going Too Far:" Pennsylvania Coal Co. v. Mahon[35]

The United States Supreme Court first addressed the issue of investment-backed expectations in *Pennsylvania Coal Co. v. Mahon*,[36] when it attempted to determine to what extent land value must be diminished in order for a state regulation to constitute a regulatory taking.[37] The Court recognized the need for the exercise of police power by local or state governments in order to prevent certain undesirable activities, but it also held that these powers were limited.[38] "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[39]

Pennsylvania Coal offers very few specifics to aid a court in determining whether a regulation "goes too far."[40] "As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions."[41] The Private Property Rights Protection Act appears to remedy this problem by affording property owners a cause of action where land is inordinately burdened "without amounting to a taking."[42] Yet the same problems inherent in determining whether a regulation has gone "too far" may be found in determining if the same regulation places an "inordinate burden" on property. Thus the analysis enunciated in *Pennsylvania Coal* is useful in determining whether compensation is due when the land has lost some market value but no per se taking of private property has occurred.[43]

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35. 260 U.S. 393 (1922).

36. *Id.*

37. *Id.*

38. *Id.* at 415-16. The controversy arose when the state enacted legislation barring the mining of coal in such a way as would cause the subsidence of a house. *Id.* at 412-13; *see also* Peter F. Neronha, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs:* Nollan v. California Coastal Commission, 30 B.C.L. REV. 903 (1989). The coal company had sold the surface rights to a parcel of property, while retaining the mineral rights. Thus, if the company could not mine, it had no other use for the retained mining rights. Justice Holmes, writing for the majority, held that this regulation went "too far" and must be compensated. *Pennsylvania Coal*, 206 U.S. at 416.

39. *Id.* at 415 (holding that a government regulation that prohibited exploitation of mineral rights under certain circumstances went too far and constituted a diminution in value great enough to be a regulatory taking of land).

40. "[T]he question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought." *Id.* at 416.

41. *Id.*

42. 1995, Fla. Laws ch. 95-181, § 1(1).

43. The United States Supreme Court has identified two instances in which per se takings occur. The first is when there is a permanent, government-authorized, physical invasion of property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) (holding

2. "*Investment-Backed Expectations*:" Penn Central Transportation Co. v. New York City[44]

The language used in *Penn Central Transportation Co. v. New York City*[45] also is echoed in the Florida private property law. The "rational basis" test set forth in *Penn Central* requires courts to review three factors, in an *ad hoc* analysis, to determine if a taking has occurred: (1) the character of the government action; (2) the regulation's economic impact on the landowner; and (3) the extent to which the regulation interferes with distinct investment-backed expectations.[46]

The Court in *Penn Central* added an economic-based rationale to traditional nuisance and reciprocal public/private benefits tests to determine whether a regulatory taking had occurred.[47] The Court observed that the government regulation would still allow the landowners to use their property as it had been used for the past 65 years —as a railway terminal—and that Penn Central would still be able to obtain a "reasonable return" on its investment.[48] The Court also noted that the regulation's stated rationale would benefit the owners of the terminal in that it "benefit[s] all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."[49]

The language of Florida's property rights law owes a great deal to *Penn Central*. The "reasonable, investment-backed expectation" term was incorporated into the Florida law's definition of inordinate burden.[50] While *Penn Central* set out a three part inquiry, Florida's legislators apparently chose to use only the language of the third inquiry in defining what type of government action would violate the law: Property is inordinately burdened when government agencies directly restrict or limit the use of real property in a way that permanently prevents the landowner from attaining "the reasonable,

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that a government could not authorize a cable television company to permanently place cable lines on an apartment building without paying the owner compensation). The second is when a regulation deprives the landowner of all economically beneficial use of his or her prop erty. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (holding that a state commission could not completely prohibit development of a beachfront parcel without paying compensation for a taking).

44. 438 U.S. 104, 138 (1978) (holding that no taking occurred when New York City refused to approve a proposed addition to Grand Central Terminal, because the building's continued use as a railroad terminal would not be impaired and any financial burdens imposed on the owners were mitigated by a transferable development rights program).

45. *Id.*

46. *Id.* at 136-38.

47. *Id.*

48. *Id.* at 136.

49. *Id.* at 134.

50. 1995 Fla. Laws ch. 95-181, § 1(3)(e).

investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole."[51] Although takings cases use more inquiries than those required by this new law, *Penn Central*'s analysis of reasonable investment-backed expectations, the third inquiry, is instructive of how Florida courts may interpret "inordinate burden." Quite different from diminution of value analysis, which looks at the economic loss, reasonable investment-backed expectation analysis looks at what property rights, both economic and non-economic, the regulation takes away.[52] Florida's property rights law prohibits the award of business damages,[53] yet the idea of investment-backed expectations is generally the same as that established in *Penn Central*: property owners may have well-thought-out plans for their land that are thwarted by government regulation.

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51. 1995, Fla. Laws ch. 95-181, § 1(e).

52. Illustrative of this distinction is *Pennsylvania Coal*, where the property owner sold the surface rights to his property, *but expressly reserved the right to remove the coal thereunder*. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). *After* these transactions, the state passed a statute which forbade any mining of coal that caused the subsidence of a house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. *Id.* This statute was found invalid as effecting a taking without just compensation because the statute made it commercially impracticable to mine the coal, and thus had nearly the same effect as *the complete destruction of rights* the property owner had reserved from the owners of the surface land. *Id.* at 414-15.

A further illustration of the difference between the diminution in value analysis and the reasonable investment-backed expectation analysis is borne out in *Penn Central*, 438 U.S. 104 (1987), in which the landowner wanted to build a structure on top of Grand Central Station. The surrounding buildings were already built up, but these structures had been finished before the municipality extended its landmark preservation law to include the station and thus prohibited the landowner from further development.

The landowner argued that the municipality had taken his land because it deprived him of the economic viable use in the space above his existing structure, space which surrounding landowners were able to use in an economically beneficial manner. The Court stated that a landowner may not establish a taking *simply by showing* that he has been denied the ability to "exploit a property interest that [he] heretofore had believed was available for development." *Id.* at 130. In holding that no taking occurred, the Court stated that "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* The Court went on to state that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . *both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.*" *Id.* at 130-31 (emphasis added). However, in a footnote, the Court stated that to believe the landowner's argument would be to suggest that deprivation of investment-backed expectations, "irrespective of the impact of the restriction on the value of the parcel as a whole," is the sole inquiry of takings analysis. *Id.* at 130 n.27. Thus, if deprivation of investment-backed expectations was the sole inquiry in takings analysis, the government in *Penn Central* would have taken the landowner's land. Since this is the sole inquiry under "inordinate burden," a case similar to *Penn Central* under the property law would come out opposite to that of the famous case.

53. 1995, Fla. Laws ch. 95-181, § 1(6)(b).

Legislators have said that Florida's property rights law is aimed at easing the economic impacts of government regulations on private landowners whose reasonable expectations for the use of their property are thwarted by such regulations.[54] However, legislators made exceptions in the law to allow government regulation of nuisances and noxious uses.[55] It is apparent that Florida lawmakers borrowed key language and rationales from *Penn Central* for their property rights bill. Yet the law expressly addresses only one part of the Supreme Court's three part test. The maxim *expressio unius est exclusio alterius* dictates that the inclusion of one thing in a statute is the exclusion of another.[56] Hence, under the new law, if a governmental action has too great an impact on permanent reasonable investment-backed expectations, compensation is due, regardless of diminution in value.[57]

3. A Landowner's "Reasonable Expectations": Lucas v. South Carolina Coastal Council[58]

While *Lucas v. South Carolina Coastal Council*[59] centers around a taking of all economically beneficial use of land, which is not necessary under the property rights law, the case nonetheless provides instructive analogies for analyzing the language of the law. The *Lucas* Court recognized that compensation for a landowner may not be available where a valid use of the government police power does not take all of the property's value, or where a property owner did not have the right to undertake the proposed use.[60] "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property."[61]

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54. "Under this new remedy, you can receive compensation for regulatory actions which lessen your property values even if you retain some profitable uses." Rep. Ken Pruitt, (R., Port St. Lucie) (May 11, 1995) (on file with the Florida House of Representatives Judiciary Committee).

55. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

56. TVA v. Hill, 437 U.S. 153, 188 (1978).

57. Although not explicitly part of the test, courts may consider the diminution in value resulting from the regulation in order to further the equitable principles of the law; i.e., if a regulation interferes with a property owner's reasonable investment-backed expectations, but only diminishes the value of the property by one percent, the court may find the law not violated.

58. 112 S. Ct. 2886 (1992) (holding that a South Carolina statute deprived a landowner of all economically viable use of his ocean-front property).

59. *Id.*

60. *Id.* at 2894, n.7 & 2901-02.

61. *Id.* The Court defined this issue as "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land." *Id.* For further discussion of this issue, see notes 128-129 and accompanying text.

The "reasonable expectations" language of *Lucas* also is used in the definition of "inordinately burdened" in Florida's property rights law.[62] In the law, the term "existing use" means

> an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity to such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.[63]

In determining reasonably foreseeable, nonspeculative land uses, courts may look to those uses that "have been shaped by [Florida's] law of property."[64] Therefore, courts that hear cases under Florida's property rights law should use the same analysis hinted at in *Lucas*[65] to determine whether property has been inordinately burdened.

4. Florida's Take on Takings: Graham *and* Reahard

Lawmakers also apparently borrowed language from the landmark Florida case *Graham v. Estuary Properties, Inc.*[66] to draft the property rights law. The *Graham* court enunciated a six-part test to determine whether a taking had occurred: (1) whether there is a physical invasion of the property; (2) the degree to which there is a diminution in value of the property; (3) whether the regulation confers a public benefit or prevents a public harm; (4) whether the regulation promotes the health, safety, welfare, or morals of the public; (5) whether the regulation is arbitrarily and capriciously applied; and (6) the extent to which the regulation curtails investment-backed expectations.[67] Although the six-part test need not be applied for compensation under the new property rights law, the elements of public harm, i.e., nuisance and noxious uses, valid and invalid

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62. 1995, Fla. Laws ch. 95-181, § 1.

63. 1995, Fla. Laws ch. 95-181, § 1(3)(b).

64. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2894 n.7 (1992).

65. *Id.* at 2895, n.8. The Court noted that "restrictions that background principles of the State's law of property and nuisance already place upon land ownership" should be considered. *Id.* at 2900.

66. 399 So. 2d 1374 (Fla. 1981) (holding that a county commission's requirement that a developer not develop half of its property did not constitute a compensable taking).

67. *Id.* at 1380-81.

regulations, and investment-backed expectations set forth in *Graham*, are reflected in the law.[68]

The reasoning in *Graham*[69] and its subsequent application may be used in interpreting the property rights law to determine whether a government regulation deprives a property owner of a reasonable, investment-backed expectation. Therefore, courts that decide cases under the new law may borrow parts of the analysis used by the *Graham* court to determine whether a government agency must pay compensation.

Florida courts also may borrow from the eight-part test set forth in *Reahard v. Lee County*[70] in reviewing cases under the new law. The *Reahard* court said that a proper takings analysis should include the following factors: (1) the history of the property; (2) the history of the development; (3) the history of zoning and regulation; (4) how, if any, the development changed when title passed; (5) the present nature and extent of the property; (6) the reasonable expectations of the landowner under state common law; (7) the reasonable expectations of the neighboring landowners under state common law; and (8) the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation.[71]

The Legislature apparently borrowed many ideas and terms from *Reahard* in drafting the property rights law. The themes of investment-backed expectations, diminutions in value, and existing and vested uses of property and their relation to past, present, and future government regulations are interspersed throughout the law.[72] Therefore, the interpretation of such language under the new law is likely to be somewhat similar to the analysis in *Reahard*.

5. Summary

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68. 1995, Fla. Laws ch. 95-181. The law seeks to compensate landowners whose "investment-backed expectations" for their property are "inordinately burdened" by regulations. However, the law does not provide compensation for any diminution in property value caused by a government regulation that seeks to curb or eliminate a noxious use or public nuisance. *Id.* § 1(1)(e).

69. The Court held that where the landowner has only a subjective expectation that the land could be developed in the manner proposed, the landowner's expectations were not properly backed. 399 So. 2d at 1382. *Cf.* Zabel v. Pinellas County Water & Navigation Control Auth., 171 So. 2d 376 (Fla. 1965) (holding that a property owner's expectation to fill the lands in question was properly backed by a statutory right to fill).

70. 968 F.2d 1131, 1136 (11th Cir. 1992) (involving a challenge to a local government's decision to allow a landowner to build only one single-family home on a 40-acre tract comprised mostly of wetlands).

71. *Id.*

72. 1995, Fla. Laws ch. 95-181.

Florida courts that hear cases under the new property rights law likely will borrow from the analyses that have been used in takings cases to determine whether a government regulation constitutes an inordinate burden under the first definition. In the cases discussed above, courts have borrowed language and rationales from one another in deciding takings claims. Florida courts will be hard-pressed to come up with alternate ways to sort out future claims under the property rights law than those laid out in takings jurisprudence. While Florida property owners are not required to jump through as many hoops under the new law as they would have with constitutional takings law, their cases will be decided in much the same way.[73]

B. The Disproportionate Share of a Public Burden

The second part of the disjunctive definition of "inordinate burden" states that a regulation imposes too great a burden on the land if the property owner is left with unreasonable uses and bears a "disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large."[74] To determine whether compensation should be paid under this section of the "inordinate burden" definition, courts will need to determine what a disproportionate share of a public burden is and what portion of an affected parcel should be used in deciding whether the landowner is bearing too great a public burden.

The underlying basis for this second prong of the test appears to be equity. The Legislature has mandated that property owners should only be responsible for bearing their "fair share" of the burden that regulatory limitations place on their property to promote the public good. Although there are a multitude of ways in which courts may engage in this balancing test, it is yet uncertain which method the courts will adopt. One issue that the courts may consider in

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73. Fla. H.R. Comm. on Judiciary, HB 863 (1995) Bill Analysis & Economic Impact Statement (final May 23, 1995) (on file with comm.). The committee report states: "In any case, the constitutional right to a jury trial in eminent domain cases is not available in inverse condemnation cases. In addition, a property owner must exhaust all administrative remedies before a takings claim will be ripe for judicial review. The theory underlying this condition precedent is that government must reach a final decision regarding the use of the property at issue before the courts may accurately assess whether a takings has occurred and the amount of compensation for that taking." *Id.* The property rights law deviates from the standing and ripeness problems of inverse condemnation cases by allowing landowners to file suit in circuit court without first exhausting administrative remedies and giving them a jury trial. 1995, Fla. Laws ch. 95-181.

74. 1995, Fla. Laws ch. 95-181. This prong will be referred to as the public burden definition.

determining if a landowner is bearing a disproportionate share is the essential nexus and rough proportionality requirements of takings jurisprudence. Another issue that may arise is whether to assess the entire property, or just a portion of the tract, in considering whether the property owner is bearing a disproportionate share. Accordingly, both of these issues will be explored below.

1. "Essential Nexus" and "Rough Proportionality"

To determine what a disproportionate share of a public burden would constitute under the property rights law, Florida courts might look to the rationales behind *Nollan v. California Coastal Commission*[75] and *Dolan v. City of Tigard*[76] to determine whether a regulatory condition placed on a landowner is a legitimate exercise of police power or an attempt to force a property owner to concede to an unfair demand for the public's benefit.

In *Nollan*, the Supreme Court held that in order for a government to make a permit approval contingent upon the granting of a public easement by a property owner, there must be an "essential nexus" between the condition placed on the landowner and the purpose of the restriction: that is, the condition must "further the end advanced as the justification for the prohibition."[77]

If no nexus exists, the regulation will be held invalid as an unreasonable exercise of police power. A regulation found to be invalid is void. However, the remedy for the property owner in such an instance is an order enjoining the governmental agency from enforcing the regulation. The result is that no property right or interest is lost by the property owner. Therefore, under *Nollan*, a governmental regulation that does not bear a rational nexus to advancing a legitimate governmental interest will entitle the property owner to compensation.[78] Alternately, if a nexus does exist, the regulation will be upheld.[79]

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75. 483 U.S. 825 (1987).

76. 114 S. Ct. 2309 (1994).

77. Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987).

78. However, under current takings jurisprudence, courts can order the government to pay compensation for temporary takings. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987) (holding that a government must pay for a temporary taking when a regulation deprived a church of the use of its property for a short period of time). The property rights bill does not allow compensation for temporary takings. However, it does allow local and state governments to make settlement offers to rescind or amend development orders or permits to avoid paying compensation under the new law. 1995, Fla. Laws ch. 95-181.

79. *Nollan*, 483 U.S. at 837.

The holding in *Nollan* was expanded seven years later. In *Dolan*, the Supreme Court held that in addition to an "essential nexus," a government must make some sort of individualized determination that the condition requested by the agency is related "in both nature and extent to the impact of the proposed development."[80] This determination need not be precise, but it must be sufficient to establish that the proposed development will occasion a need for the concessions required.[81]

The rationale behind the essential nexus[82] and rough proportionality[83] tests is the same as that of the property rights law: to prevent government agencies from demanding unreasonable concessions from private landowners for the public good.[84] However, a property owner filing suit under the Private Property Rights Protection Act still may be entitled to compensation where a governmental action, such as an exaction placed on a permit, bears a rational nexus to a legitimate governmental end and is roughly proportional to that end. Since the spirit of the new property law and that of takings jurisprudence is similar—to ensure that a private landowner is not forced to carry a disproportionately high burden—the analysis used in those takings cases may be utilized in determining whether compensation is due under the new law. Therefore, Florida courts hearing cases under the property rights law likely will look to the rationales of *Nollan* and *Dolan* to determine whether a property owner "bears permanently a disproportionate share of a burden imposed for the good of the public."[85]

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80. Dolan v. City of Tigard, 114 S. Ct. 2309, 2319 (1994).

81. *Id.* "'The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use of which the property is being made or is merely being used as an excuse for taking property simply because, at that particular moment, the landowner is asking the city for some license or permit.'" *Id.* at 2139, quoting Simpson v. North Platte, 292 N.W. 2d 297, 301 (Neb. 1980).

82. *Nollan*, 483 U.S. at 837. The Court said that unless the permit condition serves the same purpose as the requirement of the building restriction, the condition is nothing "but an out-and-out-plan of extortion." (quoting J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12, 14 -15 (N.H. 1981)).

83. Simpson v. North Platte, 292 N.W. 2d 297, 301 (Neb. 1980). To quantify a finding that an exaction is necessary to protect a public interest, the government must prove that:

> the requirement has some reasonable relationship or nexus to the use to which the property is being made [rather than that the requirement] is merely being used as an excuse for taxing property simply because at that particular moment the landowner is asking the city for some license or permit.

Id.

84. 1995, Fla. Laws ch. 95-181, 1651. "The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens." *Id.* at 1652.

85. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

2. The Denominator Problem

Florida's private property law affords landowners compensation if government restricts use of property such "that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of the burden imposed for the good of the public."[86] Although the basic consideration under this prong of the inordinate burden definition seems to be one of equity, balancing the burden of the regulation against the proportion of the burden that the landowner ought to bear, the law fails to indicate what portion of the property must be looked at in making such a determination. Other parts of the bill discuss the parcel "as a whole,"[87] yet this part of the definition offers no guidance.

The law defines "real property" as land and any improvements made to it, including any other relevant property in which the owner has an interest.[88] However, the public benefit section of the "inordinate burden" definition does not say whether courts assessing such governmental actions should look at the entire parcel or just the section affected by the regulation to determine whether the burden is disproportionate and, therefore, if compensation is due.[89] Federal and state courts have, in the last decade, sought to resolve this dilemma, which is often called the denominator problem.

The Supreme Court addressed the denominator problem in *Keystone Bituminous Coal Association v. DeBenedictis*.[90] "Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'"[91] The Court determined that the denominator in *Keystone* must be the entire quantity of coal owned by the association's members, not the two percent required by state statute to be left underground.[92]

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86. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

87. For example, the first prong of the inordinate burden definition instructs courts to look to the property as a whole, and yet the second prong of the definition is silent on that point.

88. 1995, Fla. Laws ch. 95-181, § 1(3)(e).

89. *Id.*

90. 480 U.S. 470 (1987) (holding that a state regulation that required coal mines to leave support pillars of coal in place to prevent subsidence did not constitute a taking because the pillars represented only two percent of the impacted coal).

91. *Id.* at 497 (quoting Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

92. *Id.* "When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and investment-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of their property." *Id.* at 499.

Although the decision in *Lucas v. South Carolina Coastal Council* involved a per se taking, the Court mentioned but failed to resolve the question of when the regulation of a portion of property that does not constitute a categorical taking either takes a section of the tract or, alternately, the entire tract.[93] "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."[94]

In *Graham v. Estuary Properties, Inc.*, the Florida Supreme Court held there was no taking when Lee County refused to permit the filling of 1800 acres of wetlands, forcing a developer to scale back a proposed project from 26,500 to 12,968 residences.[95] The court found that when Estuary bought the property, "it did so with no reason to believe that the conveyance carried with it a guarantee from the state that dredging and filling the property would be permitted."[96] Thus, the court based its takings decision on the entire tract, not just the portion affected by the county's regulation.[97]

Another Florida court stated that "the focus is on the nature and extent of the interference with the landowner's rights in the parcel *as a whole* in determining whether a taking of private property has occurred. Prohibition of development on certain *portions* of the tract does not in itself effect an unconstitutional taking."[98] In *Florida Department of Environmental Regulation v. Schindler*, the Second District Court of Appeal held that the entire 3.5-acre parcel should be considered in determining whether the DER's refusal to allow Schindler to develop a 1.85-acre portion of the tract, which contained wetlands, constituted a taking.[99]

Although many courts have held that all economically viable uses of an entire parcel should be considered in determining whether a

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93. 112 S. Ct. 2886, 2894-95 nn.7-8.

94. *Id.* at 2894 n.7. The Court continued: "When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole . . . ." *Id.*

95. 399 So. 2d 1374, 1382 (Fla. 1981).

96. *Id.* at 1379 (footnote omitted). The court also said that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." *Id.* at 1382 (quoting Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972)).

97. *Id.*

98. Florida Dep't of Envtl. Regulation v. Schindler, 604 So. 2d 565, 568 (Fla. 2d DCA 1992) (quoting Fox v. Treasure Coast Regional Planning Council, 442 So. 2d 221, 225 (Fla. 1st DCA 1983)) (emphasis added).

99. 604 So. 2d 565, 568 (Fla. 2d DCA 1992).

regulatory taking has occurred,[100] some have ruled otherwise.[101] In *Loveladies Harbor, Inc. v. United States*, the court held that only the portion of Loveladies' property affected by a federal government regulation should be considered in determining whether a taking had occurred.[102]

> It would seem ungrateful in the extreme to require Loveladies to convey to the public the rights in the 38.5 acres in exchange for the right to develop 12.5 acres, and then to include the value of the grant [to the public] as a charge against the givers. This leaves the conclusion that the relevant property for the takings analysis is the 12.5 acres . . . .[103]

Florida courts have come to similar conclusions. In *Vatalaro v. Florida Department of Environmental Regulation*, the court held that denial of a permit took all economically viable use of Vatalaro's land because virtually *no* use could be made of the property.[104] "Generally, the denial [of a permit] will not render the land useless in the economic sense. Although development of one segment of rights or uses has been precluded, other uses may continue to exist . . . . On the other hand, where the owner is left with no viable economic use of the land, a taking has occurred."[105]

While the denominator problem has yet to be resolved, it seems that courts consider all economically viable uses of the whole tract as

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100. *See* Deltona Corp. v. United States, 657 F.2d 1184, 1193 (1981), *cert. denied*, 455 U.S. 1017 (1982) (holding that a developer did not suffer an uncompensated taking when the U.S. Army Corps of Engineers refused to grant permits for the company to develop two of its three tracts); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla. 1981); Florida Game and Fresh Water Fish Comm'n v. Flotilla, Inc., 636 So. 2d 761, 765 (Fla. 2d DCA 1994) (holding that restriction on development of 48 acres of a 173-acre parcel to protect bald eagle nesting sites did not constitute a compensable taking); Florida Dep't of Envtl. Regulation v. Schindler, 604 So. 2d 565, 568 (Fla. 2d DCA 1992); Namon v. Florida Dep't of Envtl. Regulation, 558 So. 2d 504 (Fla. 3d DCA 1990) (holding that a person who purchases land that cannot be built upon without approval under state regulations that existed at the time of the purchase cannot claim a taking based on a permit denial under the regulation).

101. *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (D.C. Cir. 1994) (holding that a federal government regulation constituted a taking because the landowner had been deprived of all economically beneficial use of a portion of the land); Vatalaro v. Florida Dep't of Envtl. Regulation, 601 So. 2d 1223 (Fla. 5th DCA 1992) (holding that a government regulation deprived a landowner of all economically viable use of her property).

102. 28 F.3d 1171, 1180 (D.C. Cir. 1994) (holding that a portion of the land that would be deeded to the government could not be included in the denominator used in the takings analysis).

103. *Id.* at 1181.

104. 601 So. 2d 1223, 1229 (Fla. 5th DCA 1992) (holding that because the permit denial meant Vatalaro could not build anything other than a boardwalk on her land, she was entitled to compensation for a regulatory taking). For a discussion of *Vatalaro* see Valerie A. Collins, Vatalaro v. Department of Environmental Regulation: *The Mysterious Takings Rule*; 8 J. LAND USE & ENVTL. L. 612 (1993).

105. *Id.* (construing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985)).

the base of the takings fraction unless: (1) the government has required some portion of the property be deeded to the public in exchange for a permit;[106] or (2) there is a per se taking of all economically viable use of the land. Florida courts are likely to follow precedent and use the whole parcel as the denominator in analyzing most claims made under the state's new property rights law. If courts use the entire tract as the denominator of the fraction, they are less likely to find that a regulation has "inordinately burdened" a landowner than if the denominator were only a portion of the tract. Therefore, there will be fewer successful claims under the property rights law if the entire parcel is used as the denominator.

3. Summary

The second section of the definition of inordinate burden in the Private Property Rights Protection Act is first and foremost a balancing test, under which the court should employ notions of equity and fairness. Although the approach courts will take in answering the question of how to determine whether a landowner has been called upon to bear a disproportionate share of the burden caused by a regulation that seeks to promote the public good is yet uncertain, several issues may be considered. First courts may look to the essential nexus and rough proportionality standards set out by the United States Supreme Court to determine if such a burden placed on a landowner is disproportionate. Second, courts may grapple with the issue of whether to look at the property as a whole to determine if the burden is disproportionate.

Hence, Florida courts are likely to look to the rationales behind two distinct types of takings analyses in deciding whether a regulation inordinately burdens private property for the public good. For the last eight years, courts have reviewed cases in which government agencies imposed conditions on property owners for the public good with an eye toward whether those contingencies were closely and logically related to the impact of the proposed development. Because regulations that benefit the public at large often help affected landowners as well, courts are likely to determine that if there is a logical relationship between the imposed condition and the development impact, the condition does not cause a disproportionate burden

106. For discussion of the constitutionality of governments' power to put conditions on issuance of permits for land development, see *supra* notes 75-82 and accompanying text; *see also* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515 (1988).

on the property owner. If, however, courts find no nexus between the condition and the impact, they are likely to find an inordinate burden and award compensation.

The public burden portion of the definition does not state whether courts must look at the entire parcel or just the portion impacted by a regulation in determining whether there is an inordinate burden. Most courts that have dealt with the denominator problem in takings cases have used the entire parcel as the denominator of the takings fraction because the whole tract was impacted by a regulation. Florida courts are likely to do the same in suits filed under the property rights law, especially given that other language in the law indicates that the property should be looked at as a whole. For instance, the first portion of the "inordinate burden" definition explicitly states that courts should look at the parcel "as a whole" in determining whether to award compensation. The public burden portion of the definition contains no such language. Although the sections of the "inordinate burden" definition are disjunctive, courts likely will construe the public benefit portion of the definition to include the entire parcel as well. Therefore, decisions made under the second part of the "inordinate burden" definition are likely to be based on the whole parcel, not just the portion affected by an ordinance or regulation.

III. WHAT ARE NOXIOUS USES AND PUBLIC NUISANCES UNDER FLORIDA'S COMMON LAW?

The property rights law does not provide compensation for land that is inordinately burdened by local or state regulations aimed at abating common law public nuisances or noxious uses of private property.[107] A nuisance is an unprivileged interference with a person's use of his or her land.[108] Nuisances that interfere with the private enjoyment of land are private nuisances. Nuisances that interfere with a common right general to the public are public nuisances.[109] There are two types of nuisances that are premised on the amount of harm they create. A nuisance per se is a nuisance no matter

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107. 1995, Fla. Laws ch. 95-181.

108. RICHARD R. POWELL, POWELL ON REAL PROPERTY 64-40 (Patrick R. Rohan et al. eds., 1993); Jacobs v. City of Jacksonville, 762 F. Supp. 327 (M.D. Fla. 1991) (holding that a public nuisance is an activity which violates public rights, subverts public order, decency or morals, or causes inconvenience or damage to the public generally); Beckman v. Marshall, 85 So. 2d 552 (Fla. 1956) (holding that a nuisance in law consists in so using one's property as to injure the land or some incorporeal right of one's neighbor).

109. POWELL, *supra* note 108 at 40-64; *Beckman*, 85 So. 2d 552.

how reasonable the defendant's conduct.[110] A nuisance per accidens, or a nuisance in fact, is an activity that is unreasonable under certain circumstances.[111] The issue is to determine what activities constitute public nuisances and noxious uses under Florida's common law.

Courts nationwide have long held that states have the authority, under their police powers, to protect their populations from harm by prohibiting public nuisances and noxious uses.[112] Even the Supreme Court reaffirmed recently that states can control or abate certain actions as common law nuisances, even if they deprive a landowner of all economically viable use of his or her property.[113]

Florida common law has, for nearly eighty years, given state and local governments police powers to regulate private property to prevent public harm.[114] One of the earliest cases to discuss the theory behind Florida's nuisance law was *Cason v. Florida Power Co.*[115] "All property is owned and used subject to the laws of the land. Under our system of government property may be used as its owner desires within the limitations imposed by law for the protection of the public and private rights of others."[116]

Some 25 years later, the Florida Supreme Court provided some examples of a state's police powers:

> Organic rights "to acquire, possess and protect property" are subject to the lawful exercise of the inherent sovereign police power of the State to provide for and to conserve the safety, health, morals, comfort and general well being of human life and activities. Private rights may be regulated and restricted for the public welfare and without compensation when not done arbitrarily, needlessly or oppressively. Nuisances caused by the possession or use of property may be abated as provided by valid law without violating organic

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110. POWELL, *supra* note 108, at 40-64; *Jacobs*, 762 F. Supp. 327.

111. *Id.*

112. *See* Hadacheck v. Sebastian, 239 U.S. 394, 414 (1915) (holding that the city of Los Angeles had the right, under its police powers, to prohibit the operation of an existing brick yard in a residential neighborhood); Mugler v. Kansas, 123 U.S. 623 (1887) (holding that the state could prohibit the operation of a brewery because it was a public nuisance).

113. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2901 (1992) (holding that states must identify background principles of nuisance and property law to prohibit all economically viable uses of land).

114. *See* Hav-A-Tampa Cigar Co. v. Johnson, 5 So. 2d 433 (Fla. 1941); Sheip Co. v. Amos, 130 So. 699 (Fla. 1930); Pompano Horse Club, Inc. v. Bryan, 111 So. 801 (Fla. 1927).

115. 76 So. 535 (Fla. 1917) (recognizing that one landowner cannot interfere with another landowner's property by creating a nuisance).

116. *Id.* at 536.

> property rights, when that remedy is necessary to protect public welfare.[117]

Similar language was used in a more modern case, *Graham v. Estuary Properties, Inc.*,[118] to explain why both public harms and benefits may legitimately be controlled by state and local governments:

> As previously stated, the line between the prevention of a public harm and the creation of a public benefit is not often clear. It is a necessary result that the public benefits whenever a harm is prevented. However, it does not necessarily follow that the public is safe from harm when a benefit is created.[119]

The court in *Graham* also reaffirmed the rule that exercise of the state's police power must relate to the health, safety, welfare or morals of the public and may not be arbitrarily and capriciously applied.[120]

The rationales of the cases stated above lay a firm foundation for the state to regulate and abate a gamut of public nuisances and noxious uses at common law. In *National Container Corp. v. State ex rel. Stockton*, one of the state's earliest environmental cases, the Florida Supreme Court stopped a paper mill from polluting a local river.[121] In *Pompano Horse Club, Inc. v. Bryan*, the court enjoined the operation of a horse track and betting parlor because it was a nuisance to surrounding residents.[122] The court upheld the Legislature's ability to tax the storage of gasoline because of its noxious and highly flammable properties in *Sheip Co. v. Amos*.[123] In *Philbrick v. City of Miami Beach*, the court upheld the enjoining of the operation of a funeral parlor in a residential district in violation of a zoning ordinance as a public nuisance.[124] In *Demetree v. State ex rel. Marsh*, the court enjoined a house of prostitution as a public nuisance.[125] There are

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117. *Hav-A-Tampa Cigar*, 5 So. 2d at 437 (holding that the state's prohibition of advertising billboards near highways was a valid exercise of its police power because the statute was aimed at motor vehicle safety).

118. 399 So. 2d 1374 (Fla. 1981).

119. *Id.* at 1382.

120. *Id.* at 1381.

121. 189 So. 4, 10 (Fla. 1939) (recognizing a citizen's right to bring suit based on private and public nuisance law theories to prevent an environmental nuisance from a paper mill polluting the St. Johns River).

122. 111 So. 801 (Fla. 1927) (recognizing the state Legislature has great leeway in declaring certain activities or uses that were not nuisances at common law to nevertheless be public nuisances).

123. 130 So. 699, 708 (Fla. 1930) (recognizing that there is no inherent right to use property if the use is adverse to the public welfare).

124. 3 So. 2d 144 (Fla. 1941).

125. 89 So. 2d 498 (Fla. 1956).

dozens more cases decided by Florida courts in the last eight decades that have upheld the state's power to regulate and abate nuisances.[126]

The United States Supreme Court said recently in *Lucas v. South Carolina Coastal Council* that if a state could prove that a particular use of property was a nuisance under background principles of state nuisance law, then the state could regulate the use, regardless of whether it worked a taking of all economically viable use of the property.[127] Therefore, it could be argued that Florida has the right, under its police powers, to regulate as public nuisances new activities or practices that courts have never specifically determined were noxious uses of property. However, the state will likely be required to prove that the common law nuisance principle existed prior to the enactment of the property rights act.[128] If that is the case, then agencies could regulate new technologies or activities as public nuisances, even though they have never been deemed public nuisances by courts.

Although it will be up to Florida courts to ultimately decide what state and local governmental actions can be justified as legitimate exercises of police power under the property rights law, clearly a wide variety of activities have been regulated as nuisances and noxious uses. Because the Legislature excluded regulations that seek to control public nuisances at common law and noxious uses of private property from the purview of the private property rights law, lawmakers must have intended that the state retain its traditional police powers to control some uses of private property. Ultimately, it will be up to the courts to decide how liberally or conservatively they will construe common law nuisance cases in reviewing compensation claims under the new law.

IV. WHO MUST PROVE THAT A REGULATION IMPOSES AN "INORDINATE BURDEN" AND BY WHAT EVIDENCE?

The property rights law allows landowners to be compensated for the loss of fair market value if government regulations "inordinately burden" their property.[129] The law requires a property owner who files an action in circuit court to also provide the court with a "bona fide, valid appraisal that supports the claim and demonstrates the loss

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126. *See, e.g.*, Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla. 1981); Orlando Sports Stadium, Inc. v. State *ex rel.* Powell, 262 So. 2d 881 (Fla. 1972); Cason v. Florida Power Co., 76 So. 535 (Fla. 1917).

127. 112 S. Ct. 2886 (1992) ("Any limitation so severe cannot be newly legislated or decreed [without compensation], but must inhere in the title itself, in the restrictions and background principles of the State's law of property and nuisance already in place upon land ownership.").

128. *Id.*

129. 1995, Fla. Laws ch. 95-181.

in fair market value to the real property."[130] The law then allows the government to issue a ripeness decision identifying allowable uses of the property under the contested regulation[131] and to make an offer of settlement to the property owner.[132] The law lists eleven possible settlement offers: (1) adjustments of land development or permit standards controlling the development or use of land; (2) increases or modifications in the density, intensity, or use of areas of development; (3) transfers of development rights; (4) land swaps or exchanges; (5) mitigation, including payments in lieu of on-site mitigation; (6) location on the least sensitive portion of the property; (7) conditions on the amount of development or use permitted; (8) requirements that issues be addressed on a more comprehensive basis than a single proposed use or development; (9) issuance of a development order, a variance, special exception or other extraordinary relief; (10) purchase of the real property, or an interest therein, by an appropriate government agency; and (11) no changes to the action of the government agency.[133]

If one of the parties rejects the settlement offer or a counter-offer, then the claim goes to circuit court in the county in which the property that is the subject of the suit is located.[134] During the hearing, both the landowner and the government present evidence.[135] This is when the issue of which party will bear the burden of proof becomes a factor.

In most Florida civil trials, the plaintiff bears the burden of proof, or in other words, has the duty of establishing the truth of a given proposition.[136] The term "burden of proof," however, also means the duty of a party to produce evidence at the beginning or a subsequent

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130. *Id.* § 1(4)(a).

131. *Id.* § 1(5)(a). If the government agency fails to issue a ripeness decision within 180 days of the landowner filing the action, the issue automatically becomes ripe for judicial review, notwithstanding the availability of other administrative remedies. *Id.*

132. *Id.* § 1(4)(c). If there is a settlement agreement, the relief granted "shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property." *Id.* § 1(4)(d)(1).

133. *Id.* § 1(4)(c).

134. *Id.* § 1(5)(b). If the court determines that a regulation has inordinately burdened the property that is the subject of the suit, the court must empanel a jury to determine how much compensation is to be awarded. Compensation is limited to the difference in the fair market value of the property before and after enactment of the regulation. *Id.* §§ 1(6)(a)-(c)

135. *Id.* The law allows for the party who prevails in court to collect attorney's fees if the losing party's reason for going to court is unreasonable. *Id.* §§ 1(6)(c)(1)-(2).

136. *See* Estate of Ziy v. Bowen, 223 So. 2d 42, 43 (Fla. 1969) (holding that "burden of proof" can mean both the plaintiff's duty of establishing the truth and the shifting duty of producing evidence at certain stages of the a trial, which can shift from plaintiff to defendant and back).

stage of the trial.[137] Under the second definition of burden of proof, the burden can shift from plaintiff to defendant and back again.[138]

Both uses of the term "burden of proof" were addressed by the Florida Supreme Court in *Board of County Commissioners of Brevard County v. Snyder*.[139] In *Snyder*, the court held that a landowner who seeks to rezone property has the burden of proving that the proposal is consistent with the comprehensive plan and complies with all procedural requirements of the zoning ordinance. Once the plaintiff establishes that the proposed rezoning is consistent with the comprehensive plan, the burden shifts to the government to show with competent substantial evidence that maintaining the existing zoning classification with respect to the property accomplishes "a legitimate public purpose" and is not "arbitrary, discriminatory, or unreasonable."[140] If the government carries its burden, then the application should be denied.[141]

Prior to *Snyder*, the property owner bore the burden of proof throughout a trial.[142]

> In order to sustain its zoning decision, the local government need only present enough substantial competent evidence to place the validity of its decision in reasonable dispute or controversy. On the other hand, the rule places a heavy burden on the challenger of a local zoning decision. In order to show that the zoning decision is not fairly debatable, the challenger must "conclusively" show or present clear and convincing evidence that the zoning decision is not valid.[143]

While the *Snyder* decision applies to zoning matters, it is instructive as to what burden of proof courts might require in cases heard under the property rights law. Florida courts may determine that a property owner should bear the entire burden of proof in showing that a regulation or ordinance "inordinately burdened" land because it is the landowner who is seeking compensation for a loss in market value of his or her property. Under that scenario, the government would not carry a heavy burden of proving that its regulations do not

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137. *Id.*

138. *Id.*

139. 627 So. 2d 469 (Fla. 1993) (involving an application to rezone a one-half acre tract on Merritt Island from zoning that permitted one single-family residence to zoning that allowed a density of fifteen units per acre).

140. *Id.* at 476.

141. *Id.*

142. Thomas G. Pelham, *Quasi-judicial Rezonings: A Commentary on the* Snyder *Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L. 243 (1994).

143. *Id.* at 258 (construing Watson v. Mayflower Property, Inc., 177 So. 2d 355, 372 (Fla. 2d DCA 1965)).

"inordinately burden" a landowner's property. The government would only have to rebut the landowner's evidence.

However, courts might determine that property owners should bear only the initial burden of showing that their land has been affected in some way by a governmental action. Then the courts could shift the burden of proof to the government to prove that such action was not unfair or unreasonable. Under that scenario, the government would bear the heavy burden of proving that its regulations did not "inordinately burden" the landowner's property.

The property rights law seems to give deference to landowners in deciding if compensation is due. The law begins with a statement about the existence of an important state function in "protecting the interests of private property owners" from "inordinate burdens" placed upon them by local or state government regulations.[144] It continues by stating that:

> it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity of the state, *as applied*, unfairly affects real property.[145]

In its discussion of judicial review of settlement offers, the law states "the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property."[146]

The Florida House of Representatives Judiciary Committee's fiscal analysis of the property rights bill is telling of what impact lawmakers think the property rights law will have. The analysis states:

> Section 1 [the government regulation portion] of the bill may have a significant fiscal impact upon state agencies and state funds and on local governments on both a non-recurring and recurring basis. Whether the government's response to the bill is to halt all actions which could possibly affect property values, to grant all requests for the use of property, or to take a middle position and deny some and grant others, it may have to pay compensation to the property owners. In addition, section 1 of the bill would likely have a fiscal impact upon the judicial branch. The bill would increase the class of cases for which there must be jury trial. The cost to the state and

144. 1995, Fla. Laws ch. 95-181, § 1(1).
145. *Id.* (emphasis added).
146. *Id.*

local governments as a result of the increased jury trials and potential increase in litigation is unknown.[147]

Based on the discussion above, Florida courts are likely to shift the burden of proof to local and state government agencies, requiring them to prove that their regulations are not inordinately burdensome.[148] That shifting of the burden of proof may make government agencies more wary of going to court under the new law, thereby forcing them to make settlement offers they might not otherwise have made to avoid a lawsuit. On the other hand, government agencies could begin amassing evidence in every action they take under regulations enacted or amended after May 11, 1995,[149] thereby preparing in advance for any court challenge to their decisions filed under the new law. Either way, agency officials will have to change the way they conduct day-to-day business in anticipation of being sued under the property rights law.

V. CONCLUSION

Florida's new private property rights law will have a mixed impact on local and state governments' ability to regulate land use. Courts that hear cases under the law likely will borrow from takings analysis to determine whether private property has been "inordinately burdened" by a regulation. Although the Legislature intended the law to provide a separate cause of action from present takings jurisprudence, it is unlikely that courts will be able to draw a bright line between the new cause of action and takings jurisprudence. Takings jurisprudence has evolved a great deal over the last 70 years, and while it is still fairly muddy, it is clearer than decades ago. The age and logic of takings jurisprudence will make it impossible for courts hearing cases under the property rights law to ignore when determining whether property has been "inordinately burdened" by government regulations.

The courts also have grappled with the denominator problem of takings law for years, and Florida judges will be hard-pressed to ignore such precedent in deciding cases under the public benefit part of the "inordinate burden" definition. In most cases, courts will look at the entire parcel in deciding whether property has been "inordinately burdened" by a regulation. As a result, there may be fewer successful

147. Fla. H.R. Comm. on Judiciary, HB 863 (1995) Staff Analysis 10 (final May 23, 1995).

148. Board of County Comm'rs of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993).

149. 1995, Fla. Laws ch. 95-181, § 1(12). The law applies to any regulation adopted or amended after the last day of the 1995 legislative session, which ended May 11, 1995.

claims under the new law than if courts looked only at portions of a parcel in making their judgments.

The state's wide and varied history of regulating and abating nuisances and noxious uses also will allow state courts to refuse to award compensation for many claims under the property rights law. The wording of the law suggests that the Legislature intended for the state to be allowed to continue using its traditional police powers to regulate uses of property that are public nuisances at common law and noxious uses of private property. Lawmakers specifically prohibited landowners from being compensated for regulation of nuisances and noxious uses under the new law, and courts likely will defer to the state's extensive nuisance abatement precedent in deciding cases under the law.

Agencies will likely be required to bear the substantial burden of proof in cases filed under the property rights law. They will deal with that burden either by succumbing to property owners' settlement demands or by amassing large quantities of evidence in every action they take in anticipation of fighting lawsuits filed under the new law.

In summary, Florida's new private property rights law will have a moderate impact on local and state government regulation of land. The courts will use established takings analyses to determine whether a regulation is inordinately burdensome and compensation should be awarded. However, a heavy burden may be placed on governments to prove that regulations do not "inordinately burden" real property. The courts' decision regarding which party will bear the burden of proof ultimately will determine how great an impact the law will have on environmental, land use and other types of private property regulations.

APPENDIX 1

CHAPTER 95-181

Committee Substitute for House Bill No. 863

An act relating to real property; creating the "Bert J. Harris, Jr., Private Property Rights Protection Act"; providing legislative intent; providing remedies for real property owners whose property has been inordinately burdened by governmental action; providing definitions; providing requirements for a property owner who seeks compensation; requiring the governmental entity to provide notice of the claim; authorizing certain settlement offers; requiring that the governmental entity and property owner file a court action if a settlement agreement contravenes the application of state law; providing for judicial review, notwithstanding the availability of administrative remedies; authorizing the property owner to file a claim of compensation upon rejection of a settlement offer; requiring the court to determine the percentage of responsibility for an inordinate burden imposed by multiple governmental entities; providing for a jury to determine the amount of compensation to the property owner; providing for costs and attorney fees; providing that the right for which compensation is paid is a transferrable development right; providing exceptions; providing application of the act; creating the Florida Land Use and Environmental Dispute Resolution Act; providing definitions; providing procedures that a property owner may take when the property owner believes that a development order has inordinately burdened use of the property; providing for a special master to conduct a hearing on the request for relief; specifying parties that may participate in the proceeding; authorizing the special master to subpoena witnesses; providing notice requirements; providing for the conduct of the hearing; requiring the special master to file a recommendation; providing for a governmental entity to accept, modify, or reject the recommendation; requiring governmental entities to adopt rules; providing for construction of the act; providing application; amending s. 163.3181, F.S.; providing for mediation or other dispute resolution upon denial by a local government of an owner's request for an amendment to a comprehensive plan; amending s. 163.3184, F.S.; providing for mediation or other dispute resolution upon issuance of a notice by the state land planning agency that a comprehensive plan or plan amendment is not in compliance with the Local Government Comprehensive Planning and Land Development Regulation Act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. (1) This act may be cited as the "Bert J. Harris, Jr., Private Property Rights Protection Act." The Legislature recognizes that some laws, regulations, and ordinances of the state and political entities in the state, as applied, may inordinately burden, restrict, or limit private property rights without amounting to a taking under the State Constitution or the United States Constitution. The Legislature determines that there is an important state interest in protecting the interests of private property owners from such inordinate burdens. Therefore, it is the intent of the Legislature that, as a separate and distinct cause of action from the law of takings, the Legislature herein provides for relief, or payment of compensation, when a new law, rule, regulation, or ordinance of the state or a political entity in the state, as applied, unfairly affects real property.

(2) When a specific action of a governmental entity has inordinately burdened an existing use of real property or a vested right to a specific use of real property, the property owner of that real property is entitled to relief, which may include compensation for the actual loss to the fair market value of the real property caused by the action of government, as provided in this section.

(3) For purposes of this section:

(a) The existence of a "vested right" is to be determined by applying the principles of equitable estoppel or substantive due process under the common law or by applying the statutory law of this state.

(b) The term "existing use" means an actual, present use or activity on the real property, including periods of inactivity which are normally associated with, or are incidental to, the nature or type of use or activity or such reasonably foreseeable, nonspeculative land uses which are suitable for the subject real property and compatible with adjacent land uses and which have created an existing fair market value in the property greater than the fair market value of the actual, present use or activity on the real property.

(c) The term "governmental entity" includes an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority. The term does not include the United States or any of its agencies, or an agency of the state, a regional or a local government created by the State Constitution or by general or special act, any county or municipality, or any other entity that independently exercises governmental authority, when exercising the powers of the United States or any of its agencies through a formal delegation of Federal authority.

(d) The term "action of a governmental entity" means a specific action of a governmental entity which affects real property, including action on an application or permit.

(e) The terms "inordinate burden" or "inordinately burdened" mean that an action of one or more governmental entities has directly restricted or limited the use of real property such that the property owner is permanently unable to attain the reasonable, investment-backed expectation for the existing use of the real property or a vested right to a specific use of the real property with respect to the real property as a whole, or that the property owner is left with existing or vested uses that are unreasonable such that the property owner bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large. The terms "inordinate burden" or "inordinately burdened" do not include temporary impacts to real property; impacts to real property occasioned by governmental abatement, prohibition, prevention, or remediation of a public nuisance at common law or a noxious use of private property; or impacts to real property caused by an action of a governmental entity taken to grant relief to a property owner under this section.

(f) The term "property owner" means the person who holds legal title to the real property at issue. The term does not include a governmental entity.

(g) The term "real property" means land and includes any appurtenances and improvements to the land, including any other relevant real property in which the property owner had a relevant interest.

(4)(a) Not less than 180 days prior to filing an action under this section against a governmental entity, a property owner who seeks compensation under this section must present the claim in writing to the head of the governmental entity. The property owner must submit, along with the claim, a bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property. If the action of government is the culmination of a process that involves more than one governmental entity, or if a complete resolution of all relevant issues, in the view of the property owner or in the view of a governmental entity to whom a claim is presented, requires the active participation of more than one governmental entity, the property owner shall present the claim as provided in this section to each of the governmental entities.

(b) The governmental entity shall provide written notice of the claim to all parties to any administrative action that gave rise to the claim, and to owners of real property contiguous to the owner's property at the addresses listed on the most recent county tax rolls. Within 15 days after the claim being presented, the governmental entity shall report the claim in writing to the Department of Legal Affairs, and shall provide the department with the name, address, and telephone number of the employee of the governmental entity from whom additional information may be obtained about the claim during the pendency of the claim and any subsequent judicial action.

(c) During the 180-day-notice period, unless extended by agreement of the parties, the governmental entity shall make a written settlement offer to effectuate:

1. An adjustment of land development or permit standards or other provisions controlling the development or use of land.

2. Increases or modifications in the density, intensity, or use of areas of development.

3. The transfer of developmental rights.

4. Land swaps or exchanges.

5. Mitigation, including payments in lieu of onsite mitigation.

6. Location on the least sensitive portion of the property.

7. Conditioning the amount of development or use permitted.

8. A requirement that issues be addressed on a more comprehensive basis than a single proposed use or development.

9. Issuance of the development order, a variance, special exception, or other extraordinary relief.

10. Purchase of the real property, or an interest therein, by an appropriate governmental entity.

11. No changes to the action of the governmental entity.

If the property owner accepts the settlement offer, the governmental entity may implement the settlement offer by appropriate development agreement; by issuing a variance, special exception, or other extraordinary relief; or by other appropriate method, subject to paragraph (d).

(d)1. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of a modification, variance, or a special exception to the application of a rule, regulation, or ordinance as it would otherwise apply to the subject real property, the relief granted shall protect the public interest served by the regulations at issue and be the appropriate relief necessary to

prevent the governmental regulatory effort from inordinately burdening the real property.

2. Whenever a governmental entity enters into a settlement agreement under this section which would have the effect of contravening the application of a statute as it would otherwise apply to the subject real property, the governmental entity and the property owner shall jointly file an action in the circuit court where the real property is located for approval of the settlement agreement by the court to ensure that the relief granted protects the public interest served by the statute at issue and is the appropriate relief necessary to prevent the governmental regulatory effort from inordinately burdening the real property.

(5)(a) During the 180-day-notice period, unless a settlement offer is accepted by the property owner, each of the governmental entities provided notice pursuant to paragraph (4)(a) shall issue a written ripeness decision identifying the allowable uses to which the subject property may be put. The failure of the governmental entity to issue a written ripeness decision during the 180-day-notice period shall be deemed to ripen the prior action of the governmental entity, and shall operate as a ripeness decision that has been rejected by the property owner. The ripeness decision, as a matter of law, constitutes the last prerequisite to judicial review, and the matter shall be deemed ripe or final for the purposes of the judicial proceeding created by this section, notwithstanding the availability of other administrative remedies.

(b) If the property owner rejects the settlement offer and the ripeness decision of the governmental entity or entities, the property owner may file a claim for compensation in the circuit court, a copy of which shall be served contemporaneously on the head of each of the governmental entities that made a settlement offer and a ripeness decision that was rejected by the property owner. Actions under this section shall be brought only in the county where the real property is located.

(6)(a) The circuit court shall determine whether an existing use of the real property or a vested right to a specific use of the real property existed and, if so, whether, considering the settlement offer and ripeness decision, the governmental entity or entities have inordinately burdened the real property. If the actions of more than one governmental entity, considering any settlement offers and ripeness decisions, are responsible for the action that imposed the inordinate burden on the real property of the property owner, the court shall

determine the percentage of responsibility each such governmental entity bears with respect to the inordinate burden. A governmental entity may take an interlocutory appeal of the court's determination that the action of the governmental entity has resulted in an inordinate burden. An interlocutory appeal does not automatically stay the proceedings; however, the court may stay the proceedings during the pendency of the interlocutory appeal. If the governmental entity does not prevail in the interlocutory appeal, the court shall award to the prevailing property owner the costs and a reasonable attorney fee incurred by the property owner in the interlocutory appeal.

(b) Following its determination of the percentage of responsibility of each governmental entity, and following the resolution of any interlocutory appeal, the court shall impanel a jury to determine the total amount of compensation to the property owner for the loss in value due to the inordinate burden to the real property. The award of compensation shall be determined by calculating the difference in the fair market value of the real property, as it existed at the time of the governmental action at issue, as though the owner had the ability to attain the reasonable investment-backed expectation or was not left with uses that are unreasonable, whichever the case may be, and the fair market value of the real property, as it existed at the time of the governmental action at issue, as inordinately burdened, considering the settlement offer together with the ripeness decision, of the governmental entity or entities. In determining the award of compensation, consideration may not be given to business damages relative to any development, activity, or use that the action of the governmental entity or entities, considering the settlement offer together with the ripeness decision has restricted, limited, or prohibited. The award of compensation shall include a reasonable award of prejudgment interest from the date the claim was presented to the governmental entity or entities as provided in subsection (4).

(c)1. In any action filed pursuant to this section, the property owner is entitled to recover reasonable costs and attorney fees incurred by the property owner, from the governmental entity or entities, according to their proportionate share as determined by the court, from the date of the filing of the circuit court action, if the property owner prevails in the action and the court determines that the settlement offer, including the ripeness decision, of the governmental entity or entities did not constitute a bona fide offer to the property owner which reasonably would have resolved the claim, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day-notice period.

2. In any action filed pursuant to this section, the governmental entity or entities are entitled to recover reasonable costs and attorney fees incurred by the governmental entity or entities from the date of the filing of the circuit court action, if the governmental entity or entities prevail in the action and the court determines that the property owner did not accept a bona fide settlement offer, including the ripeness decision, which reasonably would have resolved the claim fairly to the property owner if the settlement offer had been accepted by the property owner, based upon the knowledge available to the governmental entity or entities and the property owner during the 180-day-notice period.

3. The determination of total reasonable costs and attorney fees pursuant to this paragraph shall be made by the court and not by the jury. Any proposed settlement offer or any proposed ripeness decision, except for the final written settlement offer or the final written ripeness decision, and any negotiations or rejections in regard to the formulation either of the settlement offer or the ripeness decision, are inadmissible in the subsequent proceeding established by this section except for the purposes of the determination pursuant to this paragraph.

(d) Within 15 days after the execution of any settlement pursuant to this section, or the issuance of any judgment pursuant to this section, the governmental entity shall provide a copy of the settlement or judgment to the Department of Legal Affairs.

(7)(a) The circuit court may enter any orders necessary to effectuate the purposes of this section and to make final determinations to effectuate relief available under this section.

(b) An award or payment of compensation pursuant to this section shall operate to grant to and vest in any governmental entity by whom compensation is paid the right, title, and interest in rights of use for which the compensation has been paid, which rights may become transferrable development rights to be held, sold, or otherwise disposed of by the governmental entity. When there is an award of compensation, the court shall determine the form and the recipient of the right, title, and interest, as well as the terms of their acquisition.

(8) This section does not supplant methods agreed to by the parties and lawfully available for arbitration, mediation, or other forms of alternative dispute resolution, and governmental entities are encouraged to utilize such methods to augment or facilitate the processes and actions contemplated by this section.

(9) This section provides a cause of action for governmental actions that may not rise to the level of a taking under the State Constitution or the United States Constitution. This section may not necessarily be construed under the case law regarding takings if the governmental action does not rise to the level of a taking. The provisions of this section are cumulative, and do not abrogate any other remedy lawfully available, including any remedy lawfully available for governmental actions that rise to the level of a taking. However, a governmental entity shall not be liable for compensation for an action of a governmental entity applicable to, or for the loss in value to, a subject real property more than once.

(10) This section does not apply to any actions taken by a governmental entity which relate to the operation, maintenance, or expansion of transportation facilities, and this section does not affect existing law regarding eminent domain relating to transportation.

(11) A cause of action may not be commenced under this section if the claim is presented more than 1 year after a law or regulation is first applied by the governmental entity to the property at issue. If an owner seeks relief from the governmental action through lawfully available administrative or judicial proceedings, the time for bringing an action under this section is tolled until the conclusion of such proceedings.

(12) No cause of action exists under this section as to the application of any law enacted on or before the date of adjournment sine die of the 1995 Regular Session of the Legislature, or as to the application of any rule, regulation, or ordinance adopted, or formally noticed for adoption, on or before that date. A subsequent amendment to any such law, rule, regulation, or ordinance gives rise to a cause of action under this section only to the extent that the application of the amendatory language imposes an inordinate burden apart from the law, rule, regulation, or ordinance being amended.

(13) This section does not affect the sovereign immunity of government.

[Section 2, the "Florida Land Use and Environmental Dispute Resolution Act," and Sections 3-5 omitted].

Section 6. This act shall take effect October 1, 1995.

Approved by the Governor May 18, 1995.

Filed in Office Secretary of State May 18, 1995.