

**American Bar Association  
Section of Environment, Energy, and Resources**

**Vapor Intrusion as an Emerging Basis for Toxic Torts Lawsuits**

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**I. Abstract**

The past few years have witnessed the emergence of toxic torts actions against companies and developers based, in whole or in part, on the existence of vapor intrusion issues affecting properties. Indeed, tort claims based on allegations of vapor intrusion are likely to become a standard part of lawsuits alleging personal injury and property damage in situations in which groundwater and/or soil contains volatile organic compounds (“VOCs”). This article explores this recent litigation phenomenon, provides an overview of the legal claims frequently asserted and the legal issues frequently raised, and discusses important strategic considerations for counsel litigating such actions.

**II. The Specter of Vapor Intrusion Litigation**

Imagine the following scenario. Several years ago, your corporate client purchased a site adjacent to an upscale residential development. Sixty years ago, the site was used as a manufacturing facility by the previous owner, a company that used certain industrial solvents, including trichloroethylene (“TCE”) and tetrachloroethylene (“PCE”). Those solvents seeped into the groundwater beneath the site, and, over time, migrated to the groundwater underneath the adjacent land, which was then used for agriculture. The groundwater contamination has been known for decades, and the state environmental agency has been working for years with successive owners – including your client, who has never used or stored TCE or PCE – to identify the boundaries of the plume of contaminated groundwater and to remediate the contamination. Although the levels of TCE and PCE in the groundwater exceed the safe-drinking-water thresholds, all of the buildings in the area – including those in the adjacent residential development – have been connected to city water lines, and there is no realistic prospect that anyone will ingest or otherwise come into contact with the contaminated groundwater. The state environmental agency determined that the only remediation needed for the off-site groundwater contamination was “monitored natural attenuation” – *i.e.*, waiting for the levels of TCE and PCE to diminish over time.

In every respect, then, the potential environmental liabilities seemed well-defined and contained. The extent of contamination, and the need for certain minimal monitoring, was known when your client purchased the site and reflected in the terms of the acquisition deal, whereby your client agreed to assume any environmental liabilities relating to the site. All of the relevant public entities understood the

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environmental conditions and signed off on the residential development project. Furthermore, the contract-of-sale documents disclosed the groundwater contamination to buyers in the development, noting that the public agencies had determined that “no further remedial action” was needed.

Then, fifteen years after the residential development was finished, environmental testing reveals TCE and PCE in soil gas underneath several of the residential properties. In some of those same properties, TCE and PCE are also detected in the indoor air. One of those properties is owned by a family with two small children. That family files suit against your client, alleging personal injury and loss of property value and seeking monetary damages, ongoing medical monitoring, and an injunction requiring extensive remediation. Other families in the development are reportedly considering either joining the suit or filing their own actions, and there has even been talk of a class action.

Reading the above paragraphs is likely to send a chill down the spine of even the most unflappable in-house counsel. But the reality is that the scenario described is far from fantastical.

### **III. The Context for Vapor Intrusion Toxic Torts**

There are literally thousands of properties across that country that contain residual VOC contamination, both in groundwater and in soils. Many of these properties were sold for redevelopment many years or decades ago. Moreover, even in situations where the properties that are the source of the VOCs have not been sold, groundwater containing VOCs has migrated offsite to other properties that have been developed or are likely candidates for development.

Years ago, when remedies for sites containing VOC contamination were developed, exposure scenarios did not consider vapor intrusion into buildings. The first question assessed was whether anyone was drinking VOC-contaminated groundwater (or perhaps being exposed to vapor through showering). Where that was a possibility, developers and corporations spent considerable sums to bring in public water supplies. The second question focused on whether there was any exposure to soils containing VOCs. In this instance, the focus was typically on shallow soils and the potential for direct contact. Where there was deeper soil contamination, the focus was on whether the VOCs would reach groundwater and cause water supply concerns.

Seemingly safe in the belief that there was no exposure where public water had been secured and shallow soils did not contain VOCs, many developers and corporations allowed properties to be developed, oftentimes into residential properties. Ironically, given the push for brownfields redevelopment (leaving “greenfields” properties untouched), developing such properties was even viewed as environmentally beneficial.

### **IV. Vapor Intrusion Basics**

Vapor intrusion is generally defined as the migration of VOCs from contaminated groundwater or soils into overlying structures or buildings. That process occurs as a result of the natural tendency of VOC compounds, such as, but certainly not limited to, TCE and PCE, to volatilize and migrate up toward the surface of the ground. Where buildings have been constructed over such areas, the vapors may collect under the slab of the building, eventually finding their way into the building through cracks in the foundation or through openings in the foundation used for utilities (water, sewer, and electricity). In some cases, such migration can occur over relatively long distances as VOCs will travel in a preferential pathway along underground pipes.

As noted above, until relatively recently, vapor intrusion was not widely recognized as a source of environmental exposure in buildings. That is no longer the case. In fact, most states have begun to

address vapor intrusion issues. The vast majority of states currently address vapor intrusion issues in guidance documents or have vapor intrusion requirements in remediation programs. The United States Environmental Protection Agency has also begun to address vapor intrusion issues in the context of determining remedies at Superfund sites. This will undoubtedly continue. ASTM International has published standards incorporating vapor intrusion studies into due diligence.

While the current focus of vapor intrusion activities is likely to adequately address future remediation of sites containing VOC contamination in groundwater and soils, it is unlikely to address the thousands of sites across the country at which remedies have been completed and at which VOC contamination remains.

## **V. Types of Claims Based on Vapor Intrusion**

At the highest level, the claims asserted in lawsuits alleging vapor intrusion can be divided into common-law torts, on the one hand, and statutory claims under federal and/or state law, on the other hand.

### **A. Tort Claims for Personal Injury and Property Damage**

Like most toxic torts actions, lawsuits based on vapor intrusion are likely to seek damages for personal injury and/or diminution of property value under state common law. The specific causes of action typically asserted are negligence, nuisance (public and private), trespass, and strict liability. While these claims are not novel or surprising, the vapor intrusion basis for causation adds a level of complexity that is unusual.

In the case of personal injury, plaintiffs will likely allege that VOC vapors from underlying contaminated groundwater and/or soils have migrated into the home or workplace building and caused various health effects to the residents or workers. The extremely conservative screening levels for assessing the potential for vapor intrusion, and the relatively undeveloped science regarding the health effects of exposure to VOCs through inhalation of vapors, make addressing such claims complicated for both plaintiffs and defendants.

Moreover, because of the presence of building materials, furniture, paints, cleaners, scented candles, and even lawn mowers containing gasoline, testing of the interior of homes and buildings can often lead to false positive results. Sophisticated plaintiffs will likely find both an environmental expert willing to opine on the nexus between underlying environmental conditions and exposure, and a medical expert who is willing to opine that exposure to detected levels of VOCs (or any level of VOCs for that matter) has (or probably has) caused health effects. As a result, such claims may easily survive motions to dismiss and, if the expert testimony is deemed admissible, oftentimes may survive motions for summary judgment.

In the case of property damage claims, plaintiffs typically allege diminution of property value. Such allegations may be based on either the actual presence of vapor intrusion or the potential for future vapor intrusion given the presence of underlying contaminated groundwater and/or soils that contain VOCs. Plaintiffs may also allege damages based on “stigma.” Again, sophisticated plaintiffs will likely find an expert willing to opine that the presence or the potential for vapor intrusion has negatively affected property values. As in the case of personal injury claims, property damage claims may easily survive motions to dismiss, although as noted below, they may be more susceptible to motions for summary judgment and *Daubert* challenges.

## **B. Statutory Claims for Response Costs and Injunctive Relief**

Depending on the circumstances, plaintiffs may supplement their tort claims with statutory claims under federal and/or state law. For example, plaintiffs may seek to recover alleged response costs (*i.e.*, the costs of responding to and remediating the contamination) under CERCLA and/or its state-law equivalent. Plaintiffs may also seek an injunctive order requiring remediation under RCRA or its state-law equivalent, typically on the alleged grounds that the contamination may pose an “imminent and substantial endangerment” to health or the environment.

## **VI. Legal Issues Presented by Vapor Intrusion Toxic Torts Lawsuits**

Although toxic torts litigation based on vapor intrusion is a fairly recent phenomenon, the existing case law highlights several legal issues that are often raised by such actions. At the very least, the practitioner faced with a vapor intrusion lawsuit should carefully consider such issues as part of his or her basic analysis of the case.

### **A. Standing and Related Legal Requirements of Particular Tort Claims**

Because toxic torts actions involve state-law tort claims, counsel must be attentive to the specific elements and legal prerequisites of those causes of action, which often vary from jurisdiction to jurisdiction. Although some plaintiffs seem to treat nuisance, trespass, negligence, and strict liability as more or less interchangeable ways to recover for alleged personal injury or property damage resulting from vapor intrusion, each of these causes of action requires an independent legal analysis. Indeed, certain types of vapor intrusion allegations may be cognizable under only some of these legal theories and not others.

A fairly recent decision by New York’s intermediate appellate court, *Ivory v. International Business Machines Corp.*, 983 N.Y.S.2d 110 (N.Y. App. Div. 2014), illustrates the legal nuances that can arise when trying to fit vapor intrusion allegations into various tort theories. The facts in *Ivory* are representative of those giving rise to vapor intrusion toxic torts litigation. From 1935 through the mid-1980’s, the defendant used TCE to clean metal parts in degreasers and in the production of circuit cards and boards. In 1979, it was discovered that solvents, including TCE, had pooled in the groundwater beneath the facility, and that the contaminated groundwater appeared to be migrating. The defendant then began ongoing remediation efforts. In 2002, the defendant began investigating whether parts of the surrounding community were subject to vapor intrusion as a result of contaminated groundwater that had originated at the defendant’s facility. In 2008, a class action was filed asserting negligence, private nuisance, and trespass and seeking, among other things, medical monitoring damages. The claims of two families – comprising seven individuals – were then severed from the class action to be tried first. Two of the individuals alleged that they had developed cancer as a result of exposure to TCE. The other five did not allege any physical injury to date but sought to recover the costs of ongoing medical monitoring. *Id.* at 113-14.

The defendant sought summary judgment dismissing the claims for negligence, trespass, private nuisance, and medical monitoring damages. The trial court granted in part and denied in part the motion, and the parties filed cross-appeals. The Appellate Division held that although one of the plaintiffs had lived in his mother’s home from birth, he lacked standing to assert a private nuisance claim based on vapor intrusion at the home because he had no legal interest in the property. *Id.* at 116. The appellate court also explained that, under New York law, plaintiffs had no valid trespass claims based solely on vapor intrusion into indoor air, as New York law did not recognize trespass claims for “intangible intrusions.” *Id.* at 117. (Alleged soil contamination, by contrast, was held to be sufficient to support a trespass claim. *Id.*) Furthermore, groundwater contamination was, by itself, insufficient to support a

trespass claim because, under New York law, groundwater does not belong to the owners of real property but is a natural resource entrusted to the state. *Id.* In addition, to satisfy the intent requirement of a trespass claim under New York law, a defendant must have had good reason to know or expect that subterranean and other conditions were such that contaminants on the defendant's property would migrate to the plaintiff's property. *Id.* at 116.

Finally, with respect to the claim for medical monitoring damages, the Appellate Division clarified that such damages could not be recovered under New York law absent proof of a physical injury or property damage. *Id.* at 117-18.

*Ivory* thus teases out some of the nuances that arise from the interplay between traditional tort theories and the unique factual circumstances presented by toxic torts claims generally and toxic torts claims based on vapor intrusion specifically. A key point, however, is that the precise nature of this interplay depends on the particulars of state tort law. For example, and by way of contrast to the New York law that was applied in *Ivory*, the federal district court in *Trujillo v. Ametek, Inc.* explained that "California permits a claim for damages for medical monitoring costs in toxic torts cases even where there is no present physical injury," so long as the plaintiff can "establish that the need for monitoring is a reasonably certain consequence of the exposure." No. 3:15-1394, 2015 WL 7313408, at \*5 (S.D. Cal. Nov. 18, 2015).<sup>2</sup>

*Trujillo* arose out of the alleged dumping of toxic waste – including TCE and PCE – by the defendants and their predecessors into a temporary waste storage tank over a period of more than twenty years. The plaintiffs alleged that the waste seeped out of the storage tank, creating a massive waste plume that ran directly under an elementary school immediately adjacent to the defendant's property. Environmental testing by the state allegedly showed vapor intrusion and cancer risk. The district court held that the facts alleged by plaintiff were sufficient for their medical monitoring claims to survive a motion to dismiss. *Id.* at \*6.

Although the district court allowed much of the plaintiffs' complaint to proceed, it did dismiss their strict liability claim. *Id.* at \*8. The court concluded that "the act of using solvents such as TCE and PCE to clean metal parts in an industrial site is not an ultrahazardous activity" because the risks associated with the use of such solvents "can be avoided through the exercise of reasonable care." *Id.* As the court noted, this conclusion was consistent with the holdings of other courts in various jurisdictions. Thus, although the question will ultimately turn on the specific state law governing the claim, it will often be the case that a vapor intrusion plaintiff alleging the escape into the environment of industrial solvents must rely on legal theories of negligence, nuisance, and trespass rather than strict liability.

## **B. Statute of Limitations**

Because of their facts, toxic torts cases often raise knotty statute of limitations questions. The addition of vapor intrusion to the fact pattern only intensifies the complexity. For example, it is often the case that although the specific risk of vapor intrusion was learned only recently, the groundwater or soil contamination giving rise to that risk has long been known. How does the discovery rule operate in such circumstances? In a situation where ongoing contamination on the plaintiff's property is the result of a single negligent act by the defendant in the past, does the limitations period run differently with respect to a negligence claim than it does with respect to a trespass or nuisance claim? With respect to a nuisance claim, does the statute of limitations run differently depending on whether the alleged nuisance is deemed permanent or temporary? How does the continuing tort doctrine apply to toxic torts claims based on vapor intrusion?

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<sup>2</sup> As the district court explained, the California Court of Appeal has set forth a five-factor test to determine when this standard is met. *Id.* (quoting *Miranda v. Shell Oil Co.*, 17 Cal. App. 4th 1651, 1656 (Cal. Ct. App. 1993)).

As with standing and the other legal issues discussed above, answering these statute of limitations questions in the context of a particular case will require careful study of the law of the state that governs the tort claims. Two recent decisions illustrate the kind of analysis required. One is *Trujillo*, the California federal court case discussed above. There, the defendant argued that the plaintiffs could not satisfy California's two-year statute of limitations for toxic torts actions. Under California law, that two-year period begins to run once the plaintiff becomes aware of, or reasonably should have become aware of, (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another." *Trujillo*, 2015 WL 7313408, at \*9 (quoting Cal. Civ. Proc. Code § 340.8(a)). The defendant contended that the plaintiff's claims were untimely because their cause of action accrued no later than 2004, when the state had advised of the risks revealed by the 2004 round of vapor monitoring at the elementary school. The plaintiffs argued that they did not have notice of the waste plume until a community meeting held by the state on May 7, 2015, well within the two-year limitations period. The court rejected the defendant's argument because, even if there was information available in the public domain that would have put a reader on inquiry notice, the plaintiffs alleged that they had not been aware of that information. Because the plaintiffs "allege[d] that they had no awareness of the risk posed by the toxic vapor intrusion until May 7, 2015, and they filed suit less than a month later," the court found the plaintiffs were entitled "to avail themselves" of California's discovery rule and refused to dismiss their claims on statute of limitations grounds. *Id.* at \*11.

By contrast, the defendant in *Lajim, LLC v. General Electric Co.*, No. 13-50348, 2015 WL 9259918 (N.D. Ill. Dec. 18, 2015), successfully obtained summary judgment on the plaintiff's state-law tort claims based on the statute of limitations. In that case, the defendant had operated a manufacturing plant from 1949 through 2010 that used chlorinated organic solvents – including TCE and PCE – to remove oil from parts. Starting in the 1980's, chlorinated solvents were found in three municipal supply wells, including TCE in excess of the Maximum Contaminant Level (MCL) for drinking water established by the EPA. In 2007, the plaintiff purchased a then-closed golf course and moved into a home next to the course. The course and the home are hydrologically downgradient from the plant. During negotiations regarding the sale of the golf course, a representative of the seller told the plaintiff that "the golf course has contamination on the first hole," which "was caused by [the defendant]," but that "[n]o further remediation was needed." During this same time, the plaintiff admitted that he was aware of monitoring wells on the golf course and knew that their purpose was to monitor "how much stuff was coming out of [the defendant]." In August 2012, following the sale, a test of groundwater under the golf course detected TCE at a level one-thousand times the MCL. Another VOC was detected in indoor air at the plaintiff's home, in excess of the residential standard. Plaintiff filed suit in November 2013. *Id.* at \*1-4.

Under the applicable Illinois discovery rule, the limitations period does not begin to run until "the injured person becomes possessed of sufficient information concerning his injury and its cause to put a reasonable person on inquiry to determine whether actionable conduct is involved." *Id.* at \*15. The court found that the record showed that the plaintiff was on inquiry notice no later than the date of the sale in 2007 because the seller had told him that a portion of the golf course was contaminated as a result of defendant's actions and "information publicly available to the plaintiffs [at the time] should have further alerted them to the contamination." *Id.* at \*18. Interestingly, and in contrast to *Trujillo*, the court did not require the defendant to prove that the plaintiff was actually aware of this publicly available information. Nor did the court explicitly analyze whether, even if the plaintiff was aware of groundwater contamination in 2007, he was also on inquiry notice of vapor intrusion – the clear implication, however, was that he was.

The *LAJIM* court also rejected the plaintiff's appeal with respect to the continuing tort doctrine. Under Illinois' version of that doctrine, "when a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease." *Id.* at \*16 (internal quotation marks omitted). But the court explained that the doctrine applies only "for the duration of the tortious conduct, as distinguished from the duration of the damages that continue after the conduct ends." *Id.* It was undisputed that the defendant's use of such solvents had ended in 1994. This was not a case, the court emphasized, where contaminants were continuing to leak out into the environment from an underground storage tank. *Id.* at \*17. Accordingly, the court held that the continuing tort doctrine was inapplicable and the plaintiff's state-law tort claims were barred by the statute of limitations. *Id.* at \*18.

### **C. Causation and Expert Testimony**

Although legal obstacles may eliminate certain specific claims, and a statute-of-limitations bar may take down the occasional case, most vapor intrusion cases will ultimately be won or lost on the issue of causation. The causation questions are manifold and typically include the following: (1) Is the defendant responsible for the contaminants to which the plaintiff was allegedly exposed or which allegedly contaminated the plaintiff's property? (2) Could the type and levels of contamination to which the plaintiff was exposed have caused the type of injuries the plaintiff allegedly sustained (general causation), and did that contamination *in fact* cause the specific injuries allegedly suffered (specific causation)? (3) Did contamination for which the defendant is responsible diminish the plaintiff's property value, and if so, by how much?

Needless to say, these causation issues are beyond the understanding of the average lay juror and require expert testimony. Indeed, typically, multiple experts are required: (1) an environmental expert to address whether the specific contamination alleged by the plaintiff is attributable to the defendant; (2) a medical expert and/or toxicologist to opine on whether the contamination could and did cause the plaintiff's alleged injuries; and (3) a valuation expert qualified to opine on whether, and to what extent, the contamination at issue diminished the plaintiff's property value. Failure to proffer an expert on these issues, or a court's decision to exclude an expert's opinions under *Daubert* or its state-law equivalent, often proves fatal to a plaintiff's case.

Once again, recent cases underscore this point. In *Leese v. Lockheed Martin Corp.*, No. 11-5091 (D.N.J.), the plaintiff failed to proffer any medical or toxicological expert opinion that the levels of VOCs to which the plaintiffs could plausibly have been exposed could have caused any injury, *see* 2013 WL 5476415 (D.N.J. Sept. 30, 2013), and the court granted the defendant's motion to exclude the opinions of plaintiff's property-value expert, *see* 6 F. Supp. 3d 546 (D.N.J. 2014). As a result, the federal district court found there was insufficient evidence to support the plaintiff's personal injury and property damage claims and granted summary judgment to the defendant.

In *Aguirre v. Rippy*, the California Court of Appeals rejected plaintiffs' attempt to exclude the defendant's toxicologist, who opined that "it was highly unlikely that Plaintiffs' potential exposures to [the chemical of concern]" at the relevant locations "could have caused or actually caused their claimed health effects or could cause adverse health effects in the future." No. B257260, 2015 WL 6442537, at \*6 (Cal. Ct. App. Oct. 23, 2015). At the same time, the appellate court affirmed the trial court's decision to exclude the plaintiffs' medical expert, who opined on the alleged causal connection between the plaintiffs' alleged exposure and "plaintiffs' asserted maladies." *Id.* at \*8. Accordingly, the appellate court held that plaintiff had failed to demonstrate a triable issue of material fact as to causation and affirmed the trial court's grant of summary judgment to the defendant. *Id.*

In a similar vein is *Hall v. ConocoPhillips*, 248 F. Supp. 3d 1177 (W.D. Ok. 2017). The *Hall* plaintiff sought to recover against the defendant for allegedly causing the plaintiff's acute myelocytic leukemia by exposing the victim to benzene emitted from the company's refinery. The defendant, however, filed a *Daubert* motion that resulted in the exclusion of opinions by the plaintiff's experts that were crucial to the plaintiff's claims. The defendant persuaded the district court that, under the *Daubert* standard, the opinions by the plaintiff's experts regarding (1) the calculation of the "dose" of benzene to which the plaintiff was exposed; (2) whether exposure to benzene could cause the plaintiff's specific type of leukemia; and (3) whether the plaintiff's exposure to benzene did, in fact, cause the plaintiff's leukemia, were unreliable and should be excluded. *See id.* at 1182-94. As the court recognized, without admissible expert testimony on these questions, "plaintiff cannot establish the causation element of her negligence, negligence per se and strict liability claims." *Id.* at 1194.

#### **D. The Appropriateness of Mandatory Injunctive Relief**

In addition to monetary damages, plaintiffs in vapor intrusion cases often seek injunctive orders requiring the defendant(s) to remediate the alleged environmental hazard. This relief is often sought in conjunction with statutory claims, but it is often available under state common-law theories as well. Because judges in federal courts and in state courts of general jurisdiction are typically not experts in environmental science, they often reluctant to fashion an mandatory injunctive remedy specifying what are often highly technical details of environmental remediation. This hesitancy is generally heightened where administrative agencies that *do* have that expertise are already involved with the contaminated site(s) at issue. In such cases, courts may decline to issue an injunction even where they believe they have authority to do so.

The *LAJIM* case discussed above is a case in point. There, the federal court initially granted summary judgment *to the plaintiff* as to the defendant's liability under RCRA, holding that the undisputed evidence established as a matter of law that the contamination at issue "may present a substantial and imminent threat" to health or the environment. 2015 WL 9259918, at \*9-14. But when the court later turned to the question of the scope of an injunctive remedy, it concluded that "based on the facts presented and in the exercise of its discretion, [it] will not grant a mandatory permanent injunction." *LAJIM*, 2017 WL 3922139, at \*1 (N.D. Ill. Sept. 7, 2017). A primary factor behind this decision was the involvement of the Illinois Environmental Protection Agency (IEPA) in addressing the contamination at issue. Although the court "recognize[d] that the IEPA is not seeking every aspect of relief Plaintiffs desire," the court felt that it was "not in a position to second guess the well-reasoned decisions of [the defendant] and the IEPA with respect to the site investigation." *Id.* at \*8-9. The facts showed, the court believed, that IEPA was exercising diligent regulatory oversight of the investigation and remediation of the site, and the court should not issue an injunction "that would disrupt the actions taken" by the defendant and the IEPA. *Id.* at \*9.

#### **E. Class Actions**

Given that vapor intrusion cases often involve expansive contamination plumes that run under multiple properties, one might imagine that they would often take the form of class actions. In reality, however, the nature of the claims does not lend itself well to class litigation. The seminal case on this issue is the Eighth Circuit's 2016 decision in *Ebert v. General Mills*, 823 F.3d 472 (8th Cir. 2016). *Ebert* was a putative class action brought by residential property owners against the former owner of an industrial facility for property damages and injunctive relief. The plaintiffs alleged that the former owner had caused TCE to be released into the ground and to migrate into the surrounding residential area in the form of vapor from shallow groundwater. The claims asserted included violation of CERCLA, negligence, private nuisance, willful and wanton misconduct, and violation of RCRA. *Id.* at 475-76.

The district court initially certified a class. “In its certification order the district court took painstaking steps to delineate ... the issues to be determined” as a class, focusing on “the fact and extent of [the defendant’s] role in the contamination,” which was purportedly an issue common to the whole class. *Id.* at 476, 479. On appeal, the defendant “contend[ed] that the exceedingly complex issues of injury and causation unique to each of the proposed plaintiffs in this class defeat considerations required for class certification (*e.g.*, commonality, numerosity, typicality, adequacy, predominance, fairness) under [Federal] Rule [of Civil Procedure] 23.” *Id.* at 477.

The Eighth Circuit agreed and reversed the certification order. Significantly, it held that certification was improper both with respect to damages and with respect to injunctive relief. Certification of a damages class requires satisfaction of Rule 23’s predominance requirement, which mandates that “issues common to the class predominate over issues that differ among the individual class members.” *Id.* at 478. As the Eighth Circuit explained, the district court’s proposal to certify for class treatment only the questions common to the class “ultimately unravels and undoes any efficiencies gained by the class proceeding because many individual issues will require trial.” *Id.* at 479. For example:

To resolve liability there must be a determination as to whether vapor contamination, if any, threatens or exists on each individual property as a result of [the defendant’s] actions, and if so, whether that contamination is wholly, or actually, attributable to [the defendant] in each instance. Accordingly, accompanying a determination of [the defendant’s] actions, there likely will be a property-by-property assessment of additional upgradient (or other) sources of contamination, whether unique conditions and features of the property create the potential for vapor intrusion, whether (and to what extent) the groundwater beneath a property is contaminated, whether mitigation has occurred at the property, or whether each individual plaintiff acquired the property prior to or after the alleged diminution in value. This action is directed at TCE in breathable air, where both its presence and effect differ by property.... Although there may be common matters in this litigation that can be decided on a class-wide basis, we think it is clear that individual issues predominate the analysis of causation and damages that must be litigated to resolve the plaintiffs’ claims.

*Id.* at 479-80. Accordingly, the district court’s certification of a damages class was an abuse of discretion.

The Eighth Circuit also reversed the certification of the injunctive-relief class. That class is not subject to the predominance requirement applicable to damages classes. But such classes must still be “cohesive,” and the Court of Appeals found that cohesiveness critically lacking:

The remediation sought is not even universal .... Remediation efforts on each of the affected properties, should they be awarded, will be unique. This is most easily exemplified by the fact that some class members ... have received customized [vapor mitigation] systems and some have not, some tested properties evidenced the existence of TCE soil vapors at widely varying levels and some did not—these matters cannot be tried separately in order to justify the certification of a class if any semblance of efficiency is to be touted in these proceedings.

*Id.* at 481. In sum, *Ebert* is a stark illustration of the formidable, if not insuperable, obstacles confronting a plaintiff attempting to bring a vapor intrusion toxic torts case as a class action.

## VII. Strategic Considerations in Defending a Toxic Torts Case Based on Alleged Vapor Intrusion

For a company confronted with vapor intrusion issues and the prospect of a toxic torts lawsuit, the future can seem daunting. The potential damages exposure is often very significant and difficult to predict with any precision. Nonetheless, there is plenty that a skilled lawyer can do to mitigate the risk. The advice might helpfully be distilled into five points:

1. *Consider the forum.* As a general matter, a defendant is likely to prefer a federal forum because of the more hands-on case management and scrutiny of summary judgment and *Daubert* motions that federal cases receive. By contrast, it may be in a plaintiff's interest to structure the lawsuit to avoid providing a basis for removal to federal court, including by refraining from asserting claims under federal statutes such as RCRA and CERCLA.

2. *Be proactive.* Thorough investigation and appropriate engagement with the relevant regulatory authorities is essential even before a case is filed. It is critical to conduct testing to determine the extent of any contamination and the extent of, or the potential for, migration off-site. Where migration off-site may have already occurred, it is also important to conduct testing at the affected off-site properties. But the proper protocol should be adhered to. Generally, this means that groundwater and soil should first be testing and compared with the established "screening levels." Where the test results exceed the "screening levels," testing should next be conducted in the existing soils under the basement slab of a building. Where the results of such testing do not indicate likely vapor intrusion into the building, there may be no basis to test the indoor air. Any indoor-air testing must control for and remove any materials that could possibly contribute to VOC vapors. Indoor air testing that does not conform to these procedures can be a very big mistake. By contrast, documentation of careful testing, as well as of the specific protocol followed, can provide crucial evidence to rebut claims of vapor intrusion.

3. *Thoroughly research the law.* As noted above, a defendant in a toxic torts lawsuit should research the details of the particular state law that is applicable. That law may furnish a basis for weeding out certain claims at an early stage, and, depending on the facts, may also support a motion to dismiss or for summary judgment on statute of limitations grounds.

4. *Experts, experts, experts.* The importance of engaging qualified experts at any early stage cannot be overstated. As noted above, it will often be the case that at least three different experts are needed: (1) an environmental expert to opine on whether the contamination affecting the plaintiff is attributable to the defendant, and the extent of the remedy needed, if any; (2) a medical expert and/or toxicologist to address claims for personal injury; and (3) a valuation expert to address property damage claims. The purpose of such experts is not only to provide testimony supporting your defenses, but also to help you identify flaws in the plaintiff's experts' opinions that could serve as the basis for a successful *Daubert* motion.

In this regard, the complexity of toxic torts lawsuits works to a defendant's advantage. The plaintiff bears the burden of proof, and carrying that burden in a vapor intrusion case is difficult – and expensive. For example, it may be very challenging, if not impossible, to arrive at a reliable conclusion regarding a plaintiff's actual exposure to the contaminants at issue. Without a reliable measure of exposure, it is difficult if not impossible to offer a reliable opinion regarding personal-injury causation.<sup>3</sup>

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<sup>3</sup> As another example, consider the valuation difficulties presented by the fact that, even though a plaintiff may plausibly claim not to have been aware of the risk of vapor intrusion at the time he or she bought his property, he or she may well have been aware of groundwater contamination. Any expert opinion that attempts to calculate the plaintiff's loss-of-value damages by comparing the current value of the property to the value of the property "as

5. *Have a settlement strategy.* Of course, taking a toxic torts case – let alone a vapor intrusion case – in front of a jury is a prospect most large corporate defendants will find unattractive. Accordingly, it is important for defendants to have a settlement strategy in place early on in case the plaintiff’s case survives pre-trial motion practice.

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if clean” is thus vulnerable to the argument that it does not reflect the proper measure of damages and does not “fit” the circumstances of the case. Such arguments may be the basis for a successful *Daubert* motion. *See, e.g., Leese*, 6 F. Supp. 3d at 553-54, 556-57.