TEMPORARY + PERMANENT NUISANCE

HON. SCOTT BRISTER
JUDGE, 234TH DISTRICT COURT
301 FANNIN ST.
HOUSTON, TEXAS 77002

July 30, 1999

To: All Counsel of Record
Re: 97-24399, *Gene Crye, et al. v. Reichold Chemicals, Inc., et al.*, in the 234th District Court

Thank you for your briefs and assistance on the Defendants' motions for summary judgment in the above-referenced cause. Your briefs and arguments were well done and very helpful. The amount of effort you have put into these proceedings deserves more than a summary ruling with no explanation. However, I want to make clear at the outset that the grounds for my decision are not necessarily limited to those set forth herein.

This is a private nuisance case filed by approximately 6,000 residents of the North Shore area in east Harris County. The Plaintiffs assert discomfort, inconvenience, and annoyance as well as property damage due to odors, noise, and "light pollution" caused by more than 30 defendants who own or operate petrochemical plants near the Houston Ship Channel and in the vicinity of Plaintiffs' residences. Ten similar cases with the same or even larger numbers of plaintiffs are pending in Harris County district courts, dealing with other neighborhoods located near different petrochemical plants in east Harris County.

Because these claims were filed not as a class action but as one suit with 6,000 individually-named claimants, discovery is not limited to class representatives but must be conducted as to each claimant. While the parties have (after some initial delay) worked diligently in starting this process, it is nowhere near completion. The sheer volume of answering 6,000 sets of interrogatories and taking 6,000 depositions (and that only considers discovery from the Plaintiffs) means that tens of thousands of hours and millions of dollars of fees and expenses will be incurred before discovery is complete.

While much discovery remains to be done, I am very sensitive to the waste involved where tremendous time and expense are put into discovery only to be made superfluous by a trial or appellate ruling on a discrete legal issue like limitations. *Cf. CBI Industries v. National Union Fire Ins. Co.*, 907 S.W.2d 517 (Tex.1995) (early summary judgment properly granted by 234th District Court where none of the extensive discovery proposed by plaintiff could create ambiguity in pollution exclusion clause), *with Deloitte & Touche v. Weller*, 976 S.W.2d 212 (Tex.App.—Amarillo 1998, writ denied) (reversing $80 million judgment in class action by 10,000 claimants where 234th District Court should have granted defendant's summary judgment based on limitations). Accordingly, I requested summary judgments and briefing on the issue of limitations at an early stage in this litigation.

It was my understanding from the comments of Plaintiffs' counsel—now confirmed by at least several hundred initial discovery responses—that the conditions of which Plaintiffs complain do not relate to new or changed conditions or a specific accident. Instead they related to conditions that have been affiliated with the industrial/petrochemical complexes of east Harris County for many years. Plaintiffs have repeatedly denied that they are suing for severe personal injuries (cancer, birth defects, or the like), but are suing only for the temporary symptoms, annoyance, and discomforts normally associated with a nuisance claim.

The parties agree that the limitations period for nuisance is two years. *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 435 (Tex.App.—Fort Worth 1997, writ denied). They also agree that the date of accrual in this case depends upon whether the nuisance alleged by Plaintiffs is "temporary" (as Plaintiffs have pled) or "permanent" (as Defendants contend).

Defining "Temporary" and "Permanent"

A "temporary" nuisance is one that is "sporadic and contingent upon some irregular force such as rain." A "permanent" nuisance is one that is "constant and continuous." *Bayouth v. Lion Oil*, 671 S.W.2d 867, 868 (Tex.1984). The difficulty is not in stating these definitions but in applying them. There is obviously a continuum between the two. Yet the law draws a sharp distinction between them. Temporary and permanent injuries are mutually exclusive; only one is recoverable in an action. *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978).

The difficulty comes in determining where one leaves off and the other begins. An injury that occurs every day except Christmas would no doubt still be considered "constant and continuous." But what about an injury that occurs not every day but several times a week? The courts apparently disagree. For example, one court of appeals has held that odors that vary with the wind are permanent because they occur regularly and not at long intervals. *City of Lubbock v. Tice*, 517 S.W.2d 428, 431 (Tex.App.—Amarillo 1974, no writ). Another has held that they are temporary even if they occur three or more times a week. *Gulf Coast Sailboats, Inc. v. McGuire*, 616 S.W.2d 385, 387 (Tex.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

In this case, Plaintiffs admit that Defendants' operate their plants on a continuous basis seven days a week. For purposes of Plaintiffs' allegations of noise and light pollution, this judicial admission is dispositive. There are no allegations that the noise or bright lights from Defendants' plants are dependent upon some irregular force such as the weather. Accordingly, I find as a matter of law that these complaints allege a permanent nuisance. Plaintiffs are granted leave to replead within 20 days any circumstances that would make them temporary in nature.

With regard to the main issue of Plaintiffs' case— the air pollution and odors emanating from the Defendants' plants— it appears to me that most Texas courts hold that air pollution from a source in constant operation is treated as a permanent nuisance:

- *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406 (Tex.App.—Dallas 1972, writ ref'd n.r.e.) (odors from cattle-feeding yard constitute permanent nuisance)
- *City of Lubbock v. Tice*, 517 S.W.2d 428 (Tex.App.—Amarillo 1974, no writ) (odors from sanitary landfill constitute permanent nuisance)

- *City of Abilene v. Downs*, 367 S.W.2d 153(Tex.1963) (odors from sewage treatment plant constitute permanent nuisance)
- *Contra: Gulf Coast Sailboats, Inc. v. McGuire*, 616 S.W.2d 385, 387 (Tex.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (odors and particles from fiberglass plant constitute temporary nuisance)

Of course, odors also may constitute a temporary nuisance where the source itself operates on a sporadic or temporary basis. *See, e.g., Youngblood's v. Goebel*, 404 S.W.2d 617 (Tex.App.—Waco 1966, writ ref'd n.r.e.) (odors from chicken rendering plant that only escaped when cooking was occurring and wind direction was right constitute temporary nuisance); *see also Wales Trucking Co. v. Stallcup*, 474 S.W.2d 184 (Tex.1971) (dust from lawful use of unpaved road during temporary pipeline construction project was not a nuisance).

Effects of "Temporary" or "Permanent" Classification

Laying aside for a moment the definitions of temporary and permanent nuisance, there appear to be three results that occur from finding a nuisance to be one or the other:

1. **Damages.** In cases of temporary nuisance, only past damages incurred from two years before filing up to the time of trial may be recovered. In cases of permanent nuisance, past and future damages are recoverable. *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 411 (Tex.App.—Dallas 1972, writ ref'd n.r.e.); *Restatement (Second) of Torts* § 930(1).
2. **Limitations.** Cases of temporary nuisance may be brought for damages incurred in the previous two years, regardless of when the first injury occurred or was noted. Cases of permanent nuisance must be brought within two years of first discovery, or they are barred *forever*. *Bayouth v. Lion Oil*, 671 S.W.2d 867, 868 (Tex.1984).
3. **Injunctions.** A temporary nuisance may be abated by an injunction. A permanent nuisance cannot be enjoined, either because of the circumstances involved or for public policy reasons. *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978); *Restatement (Second) of Torts* § 930(2).

It is clear to me that the distinctions thus drawn are not arbitrary, but relate to the very nature of temporary or permanent nuisances. I believe an analysis of each in this case sheds light on whether the odors alleged by Plaintiffs constitute a temporary or permanent nuisance.

Damages Available

Where an injury is so constant and continuous that it can be presumed to continue, it makes sense to allow a jury to estimate future damages by finding the total lost market value of the property. Where the injury is occasional and intermittent, varying widely from year to year and perhaps disappearing in the future, a jury cannot reasonably estimate these amounts. It may estimate wrongly, thereby overcompensating or undercompensating the plaintiff. *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 412 (Tex.App.—Dallas 1972, writ ref'd n.r.e.). As the Restatement puts it, damages become certain and fixed (and thus a permanent nuisance) "when the injurious situation has become complete and comparatively enduring." *Restatement (2d) of Torts* § 930, comment d.

Most Plaintiffs in this case allege exposures from (at most) daily to (at least) two or three times a month for many years. This evidence is not indicative of injuries that vary widely from year to year. There is no evidence or allegation of any variation in exposure levels for many years in the past, nor of any variation likely to occur in the future. As Defendants point out, even the Plaintiffs' expert Jim Tarr assumes that exposure was constant and continuous by asserting hourly and annual average levels of exposure. Based on such consistent exposure, a jury would be able to estimate future damages reasonably.

It is true that in such circumstances, the Restatement rule allows a plaintiff to elect to sue for either temporary or permanent damages. *Restatement (2d) of Torts* § 930(1). On that aspect, Texas law clearly does not follow the Restatement, holding instead that the distinction between temporary and permanent nuisance depends upon the underlying facts rather than the plaintiff's election. *See, e.g., Bayouth v. Lion Oil*, 671 S.W.2d 867, 868 (Tex.1984) (character of injury determines whether nuisance is temporary or permanent, not plaintiff's election).

Limitations and Acts of the Defendants

The "continuing tort" doctrine forms the basis for the special limitations rule applicable to a temporary nuisance. Although limitations periods normally accrue upon the date a legal injury begins, in some torts each day of repetition is separately actionable. *See, e.g., Two Pesos v. Gulf Ins.*, 901 S.W.2d 495, 500-501 (Tex.App.—Houston [14th Dist.] 1995, no writ) (trademark infringement accrues anew each day). The distinctions drawn in these case sometimes approach the metaphysical. But in general, wrongful conduct by a defendant that is repeated constitutes a continuing tort, while wrongful conduct by a defendant consisting only of failing to "undo" a previous wrong does not. Thus, where the tort alleged is a water district's *continuing* to provide water while *refusing to add* corrosion inhibitors, any nuisance created thereby is permanent rather than temporary. *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 127 (Tex.App.—Houston [14th Dist.] 1997, no pet.). Similarly in this case, Plaintiffs allege no new actions or changes by Defendants in recent years. The tortious acts alleged are that Defendants *continue* to operate their plants while *refusing to add* new, improved, or "state-of-the-are" pollution control devices.

The nature of a defendant's actions may be relevant to the temporary/permanent distinction in another way. Although a nuisance may not cause injury for a discrete period due to economic or business disruptions, a defendant's intention to continue the business for the indefinite future has been held to create a permanent nuisance. *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 411-12 (Tex.App.—Dallas 1972, writ ref'd n.r.e.) ("a permanent nuisance may be presumed to result in permanent damage"). Plaintiffs admit in their petition that Defendants operate their plants seven days a week and have done so for many years.

Availability of Injunctive Relief

"An injury which can be terminated cannot be a permanent injury." *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978). In cases of temporary injunction, this rule compensates the victim of a temporary nuisance by awarding damages for lost use and annoyance up to the time of trial, and an injunction preventing future annoyance. But where a nuisance cannot be

enjoined, either because of the circumstances involved or for public policy reasons, the plaintiff is entitled to the permanent damages that are related to future losses as well.

Plaintiffs have requested permanent injunctions against Defendants requiring them to cease operations until less polluting fuel, effective pollution control devices, and other steps are taken. *Plaintiffs' Seventeenth Amended Original Petition* at 29-32. The propriety of a permanent injunction is not involved directly in Defendants' motions, but it seems patent that one is unlikely to issue in the circumstances presented in this case.

In the first place, I will take judicial notice that the kind of industrial air pollution alleged by Plaintiffs occurs in the context of apparently lawful operation in a highly-regulated field. While I agree with Plaintiffs that compliance with regulatory standards does not exempt the Defendants from an action for damages or an injunction to stop a nuisance, *Manchester Terminal Corp. v. Texas TX TX Marine Transportation, Inc.*, 781 S.W.2d 646 (Tex.App.—Houston [1st Dist.] 1989, writ denied), it would be another matter for a trial court to shut down a plant that is in compliance with all federal and state regulations. To the extent that Plaintiffs' injunction attempts only to enforce current regulations, they allege no statutory basis giving them standing to bring such an action as private individuals. To the extent that Plaintiffs' injunction would exceed current air pollution regulations, the balancing of private and public interests—of costs and benefits—represented in those regulations might be frustrated by this court's interference. *See Restatement (2d) of Torts* § 930, comment b (injunctive relief is discretionary, and "the burden of convincing the court that an enterprise, perhaps economically beneficial to the community, should be closed down, is a difficult one").

Additionally, the injunctive relief requested by Plaintiffs extends to all aspects of Defendants' plants, from the fuel that goes into them to the gases that come out. Where nuisance is caused by a "substantial and relatively enduring feature" of the lawful operation of a defendant's enterprise, then an injunction usually will not issue. *Restatement (2d) of Torts* § 930, comment c.

The broad sweep of the litigation brought by Plaintiffs in this and the ten related cases in Harris County also makes injunctive relief unlikely. The balance of equities tips against Plaintiffs, who allege only discomfort, inconvenience, and annoyance. On the other side of the equation, I will take judicial notice that shutting down major petrochemical plants along the Houston Ship Channel would result in the loss of thousands of jobs, severe disruption of the region's economy, and either the disappearance or sharp increase in price of materials and products relied upon by millions of individuals in this nation and throughout the world. Where a continuing nuisance "will not be enjoined because the defendant's enterprise is affected with a public interest, the court in its discretion may rule that the plaintiff must recover for both past and future invasions in the single action." *Restatement (2d) of Torts* § 930(2); *see, e.g., Provident Mut. Life Ins. Co. of Philadelphia v. City of Atlanta*, 938 S.W.2d 829 (N.D. Ga. 1995) (where nuisance alleging noise and fumes from airport operations could not be enjoined due to public interest, it constituted a permanent nuisance and was barred by limitations).

Finally, I will take judicial notice as well that the petrochemical industries of which Plaintiffs complain are concentrated around the Houston Ship Channel, and have been so for

many years. Plaintiffs have admitted as much in their pleadings and initial discovery responses. While this concentration makes sense for the transportation needs of the Defendants, it also serves the public interest by limiting the effects of odors, noise, and bright lights to one area.

Jury or Legal Issue?

The question of when a claim accrues is normally for the court. *Loyd v. ECO Resources, Inc.*, 956 S.W.2d 110, 126 (Tex.App.—Houston [14th Dist.] 1997, no pet.); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 436 (Tex.App.—Fort Worth 1997, writ denied). Although most of the cases discussing the temporary/permanent distinction hold one way or the other as a matter of law, several appear to suggest that it is a fact question for the jury:

- *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 436 (Tex.App.—Fort Worth 1997, writ denied) (jury found injury to property was "ongoing and continuous")
- *Bayouth v. Lion Oil*, 671 S.W.2d 867, 868 (Tex.1984) (fact issue for jury whether saltwater migration was temporary or permanent injury)
- *Gulf Coast Sailboats, Inc. v. McGuire*, 616 S.W.2d 385, 387 (Tex.App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (jury found nuisance occurred "at various times")
- *Meat Producers, Inc. v. McFarland*, 476 S.W.2d 406, 409 (Tex.App.—Dallas 1972, writ ref'd n.r.e.) (jury found nuisance was permanent)

I am not sure how to resolve these differences. But at least it can be said that if the issue is sometimes one for the jury, where the facts are undisputed it frequently becomes one for the court. *See, e.g., Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex.1978) (court erred in submitting jury issue as to permanent damages where only evidence showed that nuisance was temporary); *Youngblood's v. Goebel*, 404 S.W.2d 617 (Tex.App.—Waco 1966, writ ref'd n.r.e.) (whether nuisance was temporary or permanent was not an issue for jury where facts established its temporary nature as a matter of law). For purposes of summary judgment, there is no fact issue as to frequency of exposure, as Plaintiffs' evidence must be taken as true. Whether exposure occurring at least weekly constitutes a permanent nuisance seems to me a question of law.

The Discovery Rule and Permanent Nuisance

The discovery rule may still apply to delay accrual even in cases of permanent nuisance. *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 435 (Tex.App.—Fort Worth 1997, writ denied). But the discovery rule is only applied in cases where the plaintiff's injury is inherently undiscoverable and objectively verifiable. *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex.1996). As in the *Mitchell* case, the requirements for application of the discovery rule are not present here. The very nature of the annoyance that underlies a nuisance complaint, especially those related to the unpleasant odors alleged in this case, are not inherently undiscoverable. Further, as the injuries recoverable in nuisance are discomfort, annoyance, and inconvenience, they are primarily of a subjective nature and thus are not objectively verifiable.

Conclusion

I confess that I agree with Plaintiffs that the *Gulf Coast Sailboats* case is the closest on point. I also confess that I believe the *Gulf Coast Sailboats* case is wrongly decided, and that an exposure of several times a week over an indefinite period of time is a permanent nuisance as a

matter of law. But assuming that *Gulf Coast Sailboats* is rightly decided, the scope and reach of the Plaintiffs' claims in this case is far greater than that in *Gulf Coast Sailboats*. In that case, the operation of only one plant was at issue. Considering the number of operations affected by Plaintiffs' claims in this case, not to mention the ten others on file in Harris County, the injunctive relief requested could well require a complete restructuring of a major portion of the petrochemical industry in the United States.

Moreover, in the same situation with one plaintiff and one defendant, I can see the wisdom of letting a jury decide the case where little extra expense or delay would be at risk. But that is not what is at risk here. If in fact the temporary/permanent question is for a jury, I do not see how it can be determined on anything other than a one-by-one basis. Where the nature and frequency of each Plaintiff's exposure differs, each would have to be determined individually. Besides the burden of such an undertaking, I am concerned that this will lead to conflicting results—one jury may feel that twice weekly is continuous while another does not—so that similarly-situated Plaintiffs (perhaps even neighbors) suffer sharply different outcomes.

In sum, I am happy to conduct hundreds or even thousands of jury trials on the issue of whether the Plaintiffs' claims constitute a temporary or permanent nuisance, but I am not going to do so only to find out years later that it was all a waste. Accordingly, I am granting the Defendants' motions in part and holding as a matter of law that the causes of action alleged by the Plaintiffs constitute a permanent nuisance.

My finding, of course, does not necessarily affect Plaintiffs who have first been exposed to the conditions alleged after May 7, 1995 (two years prior to the filing of this suit), or who allege exposure on a basis that is less frequent than several times each month. However, it would defeat the purposes behind new Tex. R. Civ. P. 166a(i) to require the Defendants to conduct 6,000 depositions to find out which few Plaintiffs, if any, are within these categories. Thus, I will allow Defendants to file no evidence summary judgments directed to these issues, and require the Plaintiffs to establish any members who are not excluded by these criteria. I will also expect some explanation if any Plaintiffs have lived in the area before May 7, 1995 but allege exposure only after that date.

In light of this ruling, I would suggest the suspension of the deposition schedule previously ordered, and will consider other suggestions you may have for altering the ongoing discovery proceedings. Thanks again for your assistance.

Very truly yours,

Hon. Scott A. Brister
Judge, 234th District Court