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SEE REPOSE RUN: SETTING THE BOUNDARIES OF THE RULE OF REPOSE IN ENVIRONMENTAL TRESPASS AND NUISANCE CASES

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ABSTRACT

Application of the rule of repose to environmental contamination claims for trespass and nuisance will preclude recovery for plaintiffs who discover the harm or injury outside the repose period. The rule of repose is subject neither to the discovery rule or other equitable tolling devices and runs from the date of the defendant's culpable conduct.¹ As a consequence, the rule extinguishes claims regardless of accrual of the cause of action. Environmental plaintiffs suffering property damage are particularly vulnerable to the repose bar as harm can occur over many years through the migration of unseen contaminants. Operation of the rule of repose within the construct of trespass and nuisance law, which includes the doctrine of continuing trespass or nuisance, offers an opportunity for environmental plaintiffs who can demonstrate a continuing course of conduct to circumvent the repose bar without subverting the rule's primary purpose of bringing certainty to stale claims.² Key, however, is the identification of the defendant's act which will trigger the running of the rule.³ This Article analyzes several different points at which the defendant may be said to have acted in both singular and continuing conduct and the impact on both the plaintiff and the repose period. The Article proposes that continuing tort theory can help to rebalance the equities between plaintiffs and defendants, and opens the door to a more rational expansion of the pool of resources dedicated to the costs associated with environmental contamination.

The young man knows the rules, but the older man knows the exception.

—Oliver Wendell Holmes⁴

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¹ RESTATEMENT (SECOND) OF TORTS § 899(g) (1979).

² See Albert C. Lin, *Application of the Continuing Violation Doctrine to Environmental Law*, 23 ECOLOGY L.Q. 723, 729, 755–56 (1996).

³ *Id.* at 729.

⁴ *Across the Editor's Desk*, 2 AM. J. MED. JURIS. 140 (Feb. 1939).

INTRODUCTION

The rule of repose is a common law or statutory bar that precludes a plaintiff from bringing a claim for relief after a certain number of years following the harm or conduct giving rise to the action.⁵ The rule begins to run at the time of the defendant's act or conduct, and is independent of when the plaintiff may have suffered legally compensable harm.⁶ As a consequence, the rule can divest a plaintiff's right to bring a claim regardless of whether the action has accrued or the statute of limitations has run.⁷ In most jurisdictions, rules of repose are considered absolute bars.⁸ Once the repose period expires, the plaintiff has no further recourse against the defendant and any remedies that might have existed, either in the present or in the future, are extinguished.⁹

Unlike their statute of limitations cousin, rules of repose are not subject to tolling devices such as the discovery rule, which developed to ameliorate perceived unfairness surrounding statute of limitations bars.¹⁰ Instead, the rule of repose inexorably marches towards extinction of the plaintiff's claim even though the plaintiff might be unaware, through no fault of his own, of the facts giving rise to the cause of action or of the existence of any harm. The harshness of repose on the unknowing plaintiff is particularly apparent in trespass and nuisance cases involving environmental contamination, where the plaintiff's harm or injury may not occur

⁵ See RESTATEMENT (SECOND) OF TORTS § 899 (1979).

⁶ *Wayne v. Tenn. Valley Auth.*, 730 F.2d 392, 401–02 (5th Cir. 1984); *See v. Hartley*, 896 P.2d 1049, 1053 (Kan. 1995) (quoting *Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 967 (Kan. 1992)); *Cronin v. Howe*, 906 S.W.2d 910, 913 (Tenn. 1995) (stating that the statute of repose is “entirely unrelated to the accrual of a cause of action and can, in fact, bar a cause of action before it has accrued”). See also WILLIAM L. PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 168 (W. Page Keeton et. al. eds., 5th ed. 1984).

⁷ See, e.g., *Stirchak v. Shiley, Inc.*, 1996 WL 166958, at *2–3 (N.D. Ill. Apr. 5, 1996) (finding a plaintiff's right to bring a claim might be terminated before he or she even knows of the injury).

⁸ See, e.g., *Wayne v. Tenn. Valley Auth.*, 730 F.2d at 401–02.

⁹ See *Gray v. Daimler Chrysler Corp.*, 821 N.E.2d 431, 440–41 (Ind. Ct. App. 2005). “In distinguishing between a statute of limitations and a statute of repose, we have stated, ‘A statute of limitation extinguishes a remedy while a statute of repose may bar a cause of action even before it arises.’” *Id.* at 436 (quoting *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326 (Ind. Ct. App. 1991)).

¹⁰ The Limitation Act of 1623 was the forerunner to modern statutes of limitations on common law claims. See *Developments in the Law of Statutes of Limitations*, 63 HARV. L. REV. 1177 (1950) [hereinafter *Developments in the Law*]. The common law of adverse possession emerged from the Limitation Act of 1623. *Id.* at 1177. The Act precluded the recovery of property from someone who had been in open, notorious, and hostile possession adverse to the claimant's right for more than twenty years, and would vest title instead in the possessor. *Id.*

or be discovered for a number of years. The courts almost without exception have held that the operation of the rule is not dependent upon whether the plaintiff has the right to bring a claim.¹¹ Rather, analysis turns on the identification of some act or event caused by the defendant from which the rule is deemed to run.

This Article seeks to address whether the inequities created by the rule on the unknowing plaintiff can be alleviated in trespass and nuisance cases that allege harm to property due to environmental contamination. More specifically this Article examines when the rule of repose is—or should be—triggered in both traditional trespass and nuisance cases and also under theories of continuing tort. In doing so, this Article firmly states that while there is a valid societal need for rules that establish clear and concrete determinations of the outer bounds of a landowner’s liability, there is also a valid societal need to apportion risks relating to environmental contamination in a manner that promotes effective and meaningful environmental stewardship. This Article does not view these twin aims as irreconcilable. Rather than advocate abrogation or even reconstruction of the rule in environmental cases, it argues for a workable solution consistent with the rule’s framework, while also utilizing existing common law doctrine. In this way, the Article proposes an approach that tempers the rule’s execution in a world filled with economic and scientific complexities that neither could have been anticipated nor contemplated in early common law.¹² Part I of the Article discusses the common law development of nuisance, trespass, and the evolution of “entry” within the bounds of those torts. Part II examines the rule of repose and looks at its application to claims for environmental contamination in trespass and nuisance cases. The Article contends that it is imperative to identify the appropriate act by the defendant in assessing when the rule of repose is triggered and proposes that continuing tort theory in trespass and nuisance affords a vehicle

¹¹ See *id.* at 1187–88.

¹² By the end of World War II, the country experienced significant economic growth with the concomitant increase in systems designed to facilitate the efficient operation of business. See Matthew Hilton, *Consumers and the State Since the Second World War*, 611 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 70–71 (2007) (describing the rise of widespread consumerism and its evolving consumer protections in American society and the rest of the industrialized world). New technologies, mass manufacturing, and retail distribution of an increasing number and variety of products combined with increasing consumerism to eliminate the interplay between consumer and manufacturer, and replace it with impersonal transactions. *Id.* At the same time, those same consumers were becoming more and more aware that corporate profitability and shareholder approval drove decision-making and not the safety and welfare of the public. *Id.*

for alleviating the harshness of the rule in certain cases without either abrogating or applying the rule outside its existing operational parameters. The Article concludes that in overly protecting the interests of the defendant as well as certain societal imperatives, the rule of repose reduces the pool of monies available for remedial efforts and, at times, irrationally limits the economic costs of environmental contamination to the plaintiff. Continuing tort theory permits a rebalancing of the equities between plaintiffs that have not been dilatory and defendants' right to be free of stale claims and the attendant economic impact on both the defendant and society.

I. ENVIRONMENTAL CONTAMINATION AND THE LAW OF TRESPASS AND NUISANCE

A. *Common Law Development of Trespass and Nuisance Actions*

Both nuisance and trespass have roots in the English common law reverence for property rights whereby landowners were held entitled to the possession and quiet enjoyment of their property.¹³ American law took a similar view of the inviolability of individual property rights in cases such as *Pennoyer v. Allen*,¹⁴ upholding virtually any use of property by the title holder; including rendering it unfit, so long as that use did not spill onto neighboring lands.¹⁵ At that point, the offending landowner could be subject to liability, including strict liability.¹⁶ The court stated:

Title to land gives to the owner the right to impregnate the air upon and over the same with such smoke, vapor, and smells as he desires, provided he does not contaminate the atmosphere to such an extent as to substantially interfere with the comfort or enjoyment of others, or injure the use of their property.¹⁷

¹³ See 4 ST. GEORGE TUCKER BLACKSTONE, COMMENTARIES 218.

¹⁴ See generally *Pennoyer v. Allen*, 14 N.W. 609 (Wis. 1883).

¹⁵ *Id.* at 613.

¹⁶ See, e.g., *Rylands v. Fletcher*, [1866] 1 L.R. Exch. 265 (Eng.), *aff'd*, [1968] 3 H.L. 330. See also *Mowrer v. Ashland Oil & Ref. Co.*, 518 F.2d 659, 661–62 (7th Cir. 1975); *Indiana Harbor Belt R.R. v. Am. Cyanamid Co.*, 517 F. Supp. 314, 316–17 (N.D. Ill. 1981); *Clark-Aiken Co. v. Cromwell-Wright Co.*, 323 N.E.2d 876, 877–78 (Mass. 1975); G. Nelson Smith III, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 44 (1995).

¹⁷ *Pennoyer*, 14 N.W. at 613.

Although sharing common roots with trespass in early American jurisprudence, nuisance law began to retreat from its strict liability origins and entrenchment in private property rights to incorporate the concept of fault then emerging in tort law.¹⁸ Some suggest that this transformation resulted from the recognition that in addition to protecting an interest in property, nuisance also protected a person's interest in life, health, and well-being.¹⁹ Others argue that with the advent of the Industrial

¹⁸ “[W]ith respect to civil liability prior to circa 1800, fault was simply not an essential inquiry to the common law courts. The issue of cardinal importance was whether the facts alleged in the plaintiff’s complaint, if true, conformed to the form of action that was brought. . . . When the issue of fault was present, it was treated as merely incidental.” H. Marlow Green, *Common Law, Property Rights and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT’L L.J. 541, 546 (1997). See, e.g., *Dillon v. Acme Oil Co.*, 2 N.Y.S. 289, 290–91 (1888) (declining to find liability for contamination of plaintiff’s wells absent negligence or knowledge of subterranean stream where business was conducted with care and skill). Liability in nuisance can be based on theories of intentional tort, negligence or strict liability. The Restatement (Second) of Torts divides nuisance into invasions which are intentional and unreasonable and those which are unintentional but still actionable. See RESTATEMENT (SECOND) OF TORTS § 822 (1979).

¹⁹ See, e.g., *Carpenter v. Double R Cattle Co.*, 669 P.2d 643 (Id. Ct. App. 1983), *vacated*, 701 P.2d 222 (1985). (“Even those legal scholars who advocate the most limited role for injunctions as a remedy against nuisances acknowledge that damages may be inadequate, and injunctions may be necessary, where the harm in question relates to personal health and safety, or to one’s fundamental freedom of action within the boundaries of his property.”) A private nuisance involves the interference with private property rights. *Russell Corp. v. Sullivan*, 790 So. 2d 940, 951 (Ala. 2001). (Public nuisance, on the other hand, looks at the interference with public rights. Common law in most jurisdictions has long held that a private individual may sue to remedy a public nuisance where he or she demonstrates an individual and specific injury, different in kind from the injury suffered by the public as a whole. The Court notes that § 6-5-120 “is a codification of Alabama’s common-law nuisance principles”); *Dozier v. Troy Drive-In-Theatres, Inc.*, 89 So. 2d 537, 548 (Ala. 1956) (describing that states and cities may enjoin a public nuisance, but a private individual can only do so if “he shows irreparable injury and damage peculiar to him, and such damage must relate to the use and occupancy of property as distinguished from damage to market value or property not used or occupied”); *Stone Container Corp. v. Stapler*, 83 So. 2d 283, 287 (Ala. 1955) (stating that complainants were allowed to bring a claim under their own name to abate a public nuisance from which they suffered “inconvenience, annoyance, and injury not endured by the general public and, of consequence, they suffer a substantial damage peculiar to them”); *Rosser v. Randolph*, 7 Port. 238, 244–45 (Ala. 1838) (stating that an injunction may be enjoined for a public nuisance by a private individual if it can be shown that the proposed erection of a structure threatens “materially to impair the comfort of the existence of those living near it”). The injury does not have to be unique to the plaintiff. *Stone Container Corp.*, 83 So. 2d at 287 (noting that standing to bring public nuisance for an injury not endured by the general public did not depend on unique harm to each claimant but to the peculiar harm to the collective claimants). Statutes also can imbue plaintiffs to act as private attorneys general. See, e.g., PUBLIC NUISANCES—SPECIAL

Revolution, some balancing of competing property interests was required to ensure economic progress and stability.²⁰ The result, however, was that nuisance law shifted its inquiry to whether a substantial interference with the reasonable use and enjoyment of the property of another has occurred.²¹

DAMAGETO INDIVIDUAL, ALA. CODE § 6-5-123 (“If a public nuisance causes special damage to an individual in which the public does not participate, such special damage gives a right of action.”); *Arizona Copper Co. v. Gillespie*, 230 U.S. 46, 57 (1913) (affirming Arizona Supreme Court decision holding that individual riparian owner may bring nuisance action for polluting river, despite public nuisance to larger community of riparian owners using water for irrigation purposes). *See also* *Graceland Corp. v. Consolidated Laundries Corp.*, 180 N.Y.S.2d 644, 646 (App. Div. 1958) (stating that where there is a substantial obstruction of a public sidewalk, a plaintiff who suffers damage distinct from that of the general public may bring a nuisance action); *Surfside v. County Line Land Co.*, 340 So. 2d 1287, 1289 (Fla. App. 1977) (affirming nearby landowner’s standing to bring public nuisance action to enjoin town’s dump from accepting waste from outside entities); *Bishop Processing Co. v. Davis*, 132 A.2d 445, 449 (Md. 1957) (holding that plaintiffs were entitled to relief, despite whether defendant’s activity constituted a public or private nuisance, where they had established sufficient discomfort to themselves and injury to their properties); *Knierim v. Leatherwood*, 542 S.W.2d 806, 810–11 (Tenn. 1976) (holding that private plaintiff may bring suit to protect a public roadway where he has shown a special interest in the public road).

²⁰ *See* Samuel B. Clarke, *Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice*, 1 HARV. L. REV. 265, 276 (1888) (“The thing forgotten is this: the natural rights are not absolute, but as to every man are limited by the corresponding rights of other men.”). “Nineteenth century nuisance models based on natural property rights spawned a morass of doctrine incapable of rationalization within single internally inconsistent normative theory. . . . Courts drawn to a static absolute dominion model struggled to justify limited intrusions on absolute right for the sake of social and economic progress without permitting utility to swallow natural right.” Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1224 (1986). *See, e.g.*, *Boston Ferrule Co. v. Hills*, 34 N.E. 85, 86–87 (Mass. 1893) (while recognizing England instructs its juries that parties must not stand on “extreme rights” when engaged in industry, the Massachusetts court found that conflicting rights are subject to “a pure question of policy in the first instance” and that the line “must be drawn on practical grounds”).

²¹ *See, e.g.*, *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 872 (N.Y. 1970) (noting that an injunction is denied in some cases when consequences, especially economic, were unsubstantial to the plaintiff or when no benefit to the plaintiff could be contemplated). The plaintiff must prove intentional conduct (or the failure to exercise due care) on the part of the defendant to interfere with the plaintiff’s use or enjoyment of property and that the interference that resulted was of “such a nature, duration, or amount as to constitute unreasonable interference with the use and enjoyment of the land.” *Pagel v. Burlington N. Santa Fe Ry. Co.*, 316 F. Supp. 2d 984, 989 (D. Kan. 2004). *See also* Page Keeton, *Trespass, Nuisance, and Strict Liability* 59 COLUM. L. REV. 457, 460–61 (1959) (discussing the views of Prosser and others on the relationship between nuisance and strict liability for ultrahazardous activities and positing that “[w]hile I certainly am not here suggesting that ‘fault’ in the usual sense should be a prerequisite to liability in all cases, I do suggest that a distinction should be made between intentional and unintentional invasions, however caused and by whatever means.”).

Trespass remained focused on the actual invasion of the right to possession of property and, although the law of trespass also incorporates some aspects of fault (as reflected by the requirement that entry be intentional or negligent), the inquiry in trespass looks only to the defendant's act of entry, regardless of the defendant's knowledge as to the plaintiff's possessory interests.²²

In essence, an action for nuisance attempts to balance the rights of property owners to use and control their land as they see fit against the right of neighboring land owners to prevent impairment of the use of their own property.²³ It is the "unreasonable use" element of a nuisance action that determines when an invasion upsets this balance.²⁴ To proceed in nuisance, it is not enough that the plaintiff simply be occasionally inconvenienced or offended by the interference. As explained by the court in *Dixie Ice Cream Co. v. Blackwell*:

In general, home owners and occupants, as well as all others must endure, without legal recourse, all of those petty annoyances and discomforts ordinarily and necessarily incident to the conduct of those trades and businesses which

²² The Restatement recognizes negligent trespass as a tort to relieve parties who have sustained an injury when a cause of action does not lie under traditional claims of intentional trespass or nuisance. RESTATEMENT (SECOND) OF TORTS § 165 (1965). "One who recklessly or negligently, or as a result of an abnormally dangerous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor An important distinguishing element of negligent trespass is that the claim is not actionable if the entry is harmless . . . if, but only if, his presence of the presence of the thing or the third person upon the land causes harm to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest." *Id.* See also *id.* at cmt. c (elaborating on which injuries are protected under negligent trespass).

²³ *Tichenor v. Vore*, 953 S.W.2d 171, 176 (Mo. Ct. App. 1997) Under the Restatement, "[O]ne is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities." RESTATEMENT (SECOND) TORTS § 822 (1979).

²⁴ See *Pestey v. Cushman*, 788 A.2d 496 (Conn. 2002), *aff'd*, 788 A.2d 496 (Conn. 2002) (discussing the "unreasonableness" element of nuisance claim); *Boomer*, 257 N.E.2d at 872–74 (discussing the issue of injunctive relief even though a disparity exists in the economic consequences between the effect of the nuisance and the effect of the injunction). *But see Carpenter*, 701 P.2d at 277–78 (holding that the sparse population and economy were inextricably tied to agriculture, mining and industrial development and that whether a nuisance existed required consideration of the community interest and circumstances surrounding the parties move to the locale, among other factors).

are usually a part of municipal life, and which are more or less essential to the existence and comfort and progress of the people . . . But there are limits to this rule.²⁵

Thus, whether or not an interference is "appreciable" or "substantial," thereby constituting an unreasonable use, generally turns upon whether ordinary persons living in the community would find the invasion to be oppressive or intolerable.²⁶ The special sensitivities or idiosyncrasies of the plaintiff cannot convert otherwise reasonable conduct into a nuisance.²⁷

Trespass, on the other hand, protects the plaintiff's interest in the exclusive possession of his or her property.²⁸ Trespass imposes liability for the unauthorized, intentional entry onto the land of another either directly by the defendant or through an act that causes an object to enter the plaintiff's land.²⁹ Defendant liability does not require a specific intent

²⁵ *Dixie Ice Cream Co. v. Blackwell*, 116 So. 348, 349 (Ala. 1928). *See also* *Baldwin v. McClendon*, 288 So. 2d 761, 764 (Ala. 1974) (considering several factors to determine if defendant engaged in an actionable nuisance, including the reasonable manner the defendant's hog-parlor business was conducted, the approved plans and specifications of the hog-parlor facilities, the "location and proximity of the operation to the appellees' home, the intensity and volume of the odors, their interference, if any, with the appellees' own well-being and the enjoyment of their home, and any consequential depreciation in value of their home." Whether an interference is substantial, however, is a question of fact.).

²⁶ *But see* *Tichenor v. Vore*, 953 S.W.2d 171, 177-78 (Mo. Ct. App. 1997) (holding that a kennel of barking dogs did not constitute petty annoyances, and that plaintiffs were entitled to relief where they showed they were "substantially and unreasonably disturbed notwithstanding proof that others living in the vicinity are not annoyed") (quoting *Rae v. Flynn*, 690 So. 2d 1341, 1343 (Fla. Dist. Ct. App. 1997)).

²⁷ *See* *Frank v. Env'tl. Sanitation Mgt., Inc.*, 687 S.W.2d 876, 880-81 (Mo. 1985). "There is no exact rule or formula by which the existence of a nuisance or the nonexistence of a nuisance may be determined. 'Necessarily each case must stand upon its own special circumstances, and no definite rule can be given that is applicable in all cases, but when an appreciable interference with the ordinary enjoyment of property, physically, is clearly made out as the result of a nuisance, a court of equity will never refuse to interfere, . . .'" *Id.* at 881 (quoting *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801, 805 (Mo. 1943)).

²⁸ Trespass was originally a form of action at common law; over time trespass came to refer to intrusions upon either real or personal property. PROSSER & KEETON, *supra* note 6, at 67.

²⁹ *See* RESTATEMENT (SECOND) OF TORTS § 158 cmt. I (1965) (stating an "actor, without himself entering the land, may invade another's interest in its exclusive possession by . . . placing a thing either on or beneath the surface of the land"); *See also* RESTATEMENT (SECOND) OF TORTS § 159(1) (1965) (stating "[a] trespass may be committed on, beneath, or above the surface of the earth"). Intent in trespass actions can be shown either through purpose or design to cause a trespass, or substantial certainty that the entry will occur, even if the defendant did not intend to "trespass." *W. T. Ratliff Co. v. Henley*, 405 So. 2d 141, 146 (Ala. 1981) (stating that "intent [to do] the act which leads to the trespass is the requirement, not the intent to actually trespass").

to enter or invade the plaintiff's land. Rather, "[w]hat is required . . . is volition, i.e., a conscious intent to do the act that constitutes the entry upon someone else's real or personal property. An involuntary entry onto another's property is not a trespass."³⁰ Courts have found it sufficient to impose liability for trespass where the defendant sets in motion a course of events that would be substantially certain to result in the invasion of the plaintiff's exclusive right of possession.³¹ Although usually brought as an intentional tort, modern cases have permitted recovery for negligent trespass where the defendant "recklessly or negligently, or as a result of an abnormally dangerous activity, enters [the] land . . . of another or causes a thing or third person so to enter . . . if, but only if, his presence or the presence of the thing or the third person upon the land causes harm."³²

B. The Evolution of "Entry" Within Trespass and Nuisance

Environmental property invasions were historically categorized as either a trespass or a nuisance based upon whether the intruding agent was visible to the naked eye.³³ Trespass required some tangible physical entry upon the land.³⁴ Where the intruding agent was invisible, the trespass was considered indirect and the plaintiff was left to his remedy in

³⁰ *Baltimore Gas and Elec. Co. v. Flippo*, 684 A.2d 456, 461 (Md. Ct. Spec. App. 1996). *See also* RESTATEMENT (SECOND) OF TORTS § 158 cmt. I (1965) (stating "[i]t is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter").

³¹ *Rushing v. Hooper-McDonald, Inc.*, 300 So. 2d 94, 97 (Ala. 1974) (explaining that a property owner who knows to substantial certainty that a polluting substance will invade the property of another commits an indirect trespass); *Miller v. Carnation Co.*, 516 P.2d 661, 664 (Colo. App. 1973) (finding *prima facie* case for trespass could be established by evidence showing the defendant's failure to remove chicken manure resulted in "breeding and multiplication of flies and that the flies intruded upon plaintiff's property"). In *W.T. Ratliff Co.*, for example, the court found that a reasonable person could foresee that when it rained sand and gravel could wash onto the plaintiff's property, "[t]hus, when Ratliff placed the sand and gravel on its own leased property with knowledge to a substantial certainty that such action could lead to trespass when it rained, the element of intent was satisfied." *Ratliff*, 405 So. 2d at 146. *But see* *United Proteins Inc. v. Farmland Indus., Inc.*, 915 P.2d 80, 83 (Kan. 1996) (noting that common law trespass has sometimes permitted unintentional and nonnegligent acts and stating "Kansas follows the modern and near universal view that it is an intentional tort.").

³² RESTATEMENT (SECOND) OF TORTS § 165 (1965); *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 743 (W.D. Ky. 1998) (action for negligent trespass for polychlorinated biphenyl (PCB) contamination).

³³ *See, e.g., Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1539 (D. Kan. 1990).

³⁴ *Id.*

nuisance.³⁵ The traditional elements of trespass demanding a tangible entry eroded as courts began to acknowledge that the distinction between direct and indirect invasions failed to recognize that intrusions that were invisible to the naked eye were no less intrusive or invasive than those that could be seen.³⁶ In *Martin v. Reynolds Metals Co.*,³⁷ the court rejected the view that a trespass could not occur through unseen particulates, stating that the proper inquiry was whether the defendant's conduct violated a legally protected interest of the plaintiff.³⁸

We think that a possessor's interest in land as defined by the considerations recited above may, under the appropriate circumstances, be violated by a ray of light, by an atomic particle, or by a particulate of fluoride and, contrariwise, if such interest circumscribed by these considerations is not violated or endangered, the defendant's conduct, even though it may result in a physical intrusion, will not render him liable in an action of trespass.³⁹

Acknowledging that in some instances an action would lie for both trespass and nuisance, the court found the distinction turned on when the plaintiff had a protectable interest in exclusive possession, which was

³⁵ Common law distinguished forms of action for trespass and trespass on the case. See Elizabeth Jean Dix, *The Origins of the Action of Trespass on the Case*, 46 YALE L.J. 1142, 1147 (1937). A writ for trespass could be presented for invasions that were direct and required a tangible entry onto the land. *Id.* Trespass on the case was the repository for invasions or intrusions such as smoke, odors, or noise and other intangibles. *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 527 (Ala. 1979) ("The modern action for trespass to land stemmed inexorably from the common law action for trespass which lay when the injury was both direct and substantial. Nuisance, on the other hand, would lie when injuries were indirect and less substantial.").

³⁶ *Williams v. Oeder*, 659 N.E.2d 379, 383 (Ohio Ct. App. 1995) (recognizing a claim for trespass if plaintiff could prove substantial harm caused by airborne particulate matter from nearby plants); *Vulcan Materials Co.*, 737 F. Supp. 1528, 1540 (D. Kan. 1990) ("Only if the indirect and intangible invasion causes substantial damage to the plaintiff's property, thereby infringing his exclusive possessory interest in the property, will an action for trespass lie"). Some jurisdictions declined to follow the shift away from the requirement that an entry be by a tangible object. *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 220 (Mich. 1999). In *Adams*, the court was unwilling to relinquish the traditional distinction, finding that the modern trend effectively collapsed the torts of trespass and nuisance. *Id.* at 220 (stating "Accordingly, we decline plaintiff's invitation to strip the tort of trespass to land of its distinctive accouterments and commingle its identity with other causes of action.").

³⁷ *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959).

³⁸ *Id.* at 797.

³⁹ *Id.*

inextricably intertwined with an inquiry into the interference with the plaintiff's use and possession.⁴⁰ The court held it was irrelevant whether the intrusion was through visible or invisible particles, such as the fluoride particulates at issue before it, recognizing science had progressed to the point of making such distinctions meaningless.⁴¹

It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a direct invasion . . . and that our concept of 'things' must be reframed.⁴²

As a consequence, the relevant inquiry looked to whether the invasion violated a "protected interest in exclusive possession."⁴³

In 1979, the Alabama Supreme Court in *Borland v. Sanders Lead Co.*⁴⁴ similarly rejected reliance upon the visibility of the intruding agent as the test for when an action would lie in trespass as opposed to nuisance.⁴⁵ Relying in part on the Oregon decision in *Martin v. Reynolds Metals Co.*,⁴⁶ the *Borland* court also concluded that a trespass claim could be brought for intangible entry.⁴⁷ The court did not wholly abandon the direct/indirect

⁴⁰ *Id.* at 795. The *Martin* court discussed the historical underpinnings of trespass in criminal law noting that trespass was regarded as a breach of the peace, but also clearly incorporating notions of possession and ownership. *Id.* at 796. "If then, we find that . . . interfering with the plaintiff's possession, does, or is likely to result in arousing conflict between them, that act will characterize the tort as a trespass, assuming the other elements of the tort are made out." *Id.*

⁴¹ *Id.* at 793.

⁴² *Id.*

⁴³ *Id.* at 794.

⁴⁴ *Borland v. Sanders Lead Co.*, 369 So. 2d 523 (Ala. 1979).

⁴⁵ *Id.* at 527. A fictitious "dimensional" test arose, which obviated the necessity of determining whether the intrusion was "direct" and "substantial." *Id.* If the intruding agent could be seen by the naked eye, the intrusion was considered a trespass. *Id.* If the agent could not be seen, it was considered indirect and less substantial, hence, a nuisance. *Id.*

⁴⁶ *Id.* (noting that the *Borland* court characterized the *Martin* test as a "force and energy test.").

⁴⁷ *Borland*, 369 So. 2d at 529. The *Martin* court reasoned that:

It is quite possible that in an earlier day when science had not yet peered into the molecular and atomic world of small particles, the courts could not fit an invasion through unseen physical instrumentalities into the requirement that a trespass can result only from a *direct* invasion. But

distinction however. Rather, the court held that in order for an indirect invasion to rise to the level of trespass, the plaintiff must prove:

- 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could result in an invasion of plaintiff's possessory interest; and 4) substantial damage to the Res.⁴⁸

Borland cautions that there will be cases where the invasion is "so lacking in substance that the law will refuse to recognize it."⁴⁹ The court pointed as examples to invasions such as exhaust from passing cars, and similar *de minimis* entries that, although technically an invasion, are considered part of living in society and simply do not affect the right to exclusive possession and control.⁵⁰

Martin, *Borland*, and other cases rejecting the distinction between direct and indirect entry onto land as the demarcation between trespass and nuisance facilitated the ability to recover in cases of environmental

in this atomic age even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released . . . and that our concept of 'things' must be reframed.

Martin, 342 P.2d at 793.

⁴⁸ *Borland*, 369 So. 2d at 529. See *Smith v. Carbide & Chems. Corp.*, 298 F. Supp. 2d 561, 569 (W.D. Ky. 2004), *rev'd and remanded*, 507 F.3d 372 (holding that where invasion is by invisible particles it is "only when the substance actually damages the property does it intrude upon the landowner's right to exclusive possession.") (quoting *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 743 (W.D. Ky. 1998)); *Nat'l Tel. Coop. Ass'n v. Exxon Corp.*, 38 F. Supp. 2d 1, 15 (D.D.C. 1998) ("[T]he tort of trespass, when based on the invasion of gases or microscopic particles, has assumed similar dimensions of nuisance law by requiring an actual showing of harm or interference with land."); *Bradley v. Am. Smelting & Ref. Co.*, 635 F. Supp. 1154, 1156 (W.D. Wash. 1986) (noting that the plaintiff must show actual and substantial damage to property to recover for trespass arising out of presence of imperceptible particles).

⁴⁹ *Borland*, 369 So. 2d at 529.

⁵⁰ *Id.* "If the Court were to permit the landowners in this case to recover for mere presence of toxic substance on their land without proof of a resulting health or safety hazard, 'it would result in an allowance of recovery for alleged injury to property in instances in which individuals who have ingested a toxic substance may not recover.'" *Smith*, 298 F. Supp. 2d 561, 572 (W.D. Ky. 2004) (quoting *Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 623 (Ky. Ct. App. 2003)); see also *John Larkin, Inc. v. Marceau*, 959 A.2d 551, 555 (Vt. 2008) ("Because the ambient environment always contains particulate matter from many sources, such a technical reading of trespass would subject countless persons and entities to automatic liability for trespass absent any demonstrated injury.").

contamination.⁵¹ Decisions such as *New York v. Shore Realty Corp.*,⁵² *Chance v. BP Chemicals Inc.*,⁵³ *Kelly v. Para-Chem Southern, Inc.*,⁵⁴ and their brethren reflected recognition of the need for the law to adapt to the dangers imposed on society with the advent of industrialization—finding with little difficulty that chemical wastes discharged by companies into the environment have caused pollution and pose a threat to the health and welfare of the community.⁵⁵ In some instances, the intrusion onto the plaintiff's property was immediately apparent.⁵⁶ In others, pollution occurred over decades as corporations deposited untreated wastes and by-products from industrial operations directly into ground soil and waterways.⁵⁷ In *New Jersey Department of Environmental Protection v. Ventron Corp.*,⁵⁸ for example, operation of a mercury processing plant for more than 50 years resulted in more than 268 tons of mercury-laden toxic waste saturating the land and contaminating a long stretch of the nearby waterway.⁵⁹

⁵¹ “Hence the modern view ‘departs from traditional trespass rules by refusing to infer damages as a matter of law’ with respect to intangible invasions of property, as would be the case with direct, tangible invasions of property.” *John Larkin, Inc.*, 959 A.2d at 554. *But see, e.g.*, *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215 (Mich. 1999) (declining to discard the traditional requirements of trespass and holding that the intrusion must be by a person or tangible thing).

⁵² *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1051–52 (2d Cir. 1985) (“We have no doubt that the release or threat of release of hazardous waste into the environment unreasonably infringes upon a public right and thus is a public nuisance as a matter of New York law.”). *See also* *New York v. Schenectady Chems.*, 479 N.Y.S.2d 1010, 1013 (App. Div. 1984) (stating that it “[did] not hesitate in recognizing that the seepage of chemical wastes into a public water supply constitutes a public nuisance”).

⁵³ *Chance v. BP Chems., Inc.*, 670 N.E.2d 985, 992 (Ohio 1996) (“If appellee’s act of placing the injectate into the rock interferes with appellants’ reasonable and foreseeable use of their properties, appellee could be liable.”).

⁵⁴ *Kelly v. Pare-Chem S., Inc.*, 428 S.E.2d 703 (S.C. 1993) (permitting recovery for ground-water contamination).

⁵⁵ *See, e.g.*, *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 271 Cal. Rptr. 596 (Ct. App. 1990) (permitting indemnity claim grounded in nuisance by wood treatment company against contractor for installation of defective waste disposal system); *Schenectady Chems.*, 479 N.Y.S.2d at 1013–14 (holding that an action for public nuisance still existed where chemical waste had polluted surface and groundwater 15 to 30 years after disposal). *See also* *Mercer v. Rockwell Int’l Corp.*, 24 F. Supp. 2d 735, 735 (W.D. Ky. 1998) (action in negligent trespass for PCB contamination); *New Jersey Dep’t of Env’tl. Protection v. Ventron Corp.*, 468 A.2d 150 (N.J. 1983) (migration of toxic pollutants from mercury processing operations constitutes “abnormally dangerous” activity).

⁵⁶ *See, e.g.*, *United Fuel Gas Co. v. Sawyers*, 259 S.W.2d 466 (Ky. 1953) (denying liability absent negligence where three days after defendant began drilling a gas well on its property, plaintiff’s water cell was contaminated).

⁵⁷ *Ventron*, 468 A.2d at 154.

⁵⁸ *Id.*

⁵⁹ *Id.*

As a result, a number of environmental trespass and nuisance cases involve the unseen migration of pollutants through ground soil or groundwater onto adjoining property.⁶⁰ Unfortunately, despite the trespass by the defendant and the very real harm to property suffered by the plaintiff, recovery is not assured. Unlike tangible pollutants such as soot or contamination that cause discoloration of ground soil, unseen contaminants can be insidious and carry no obvious signs of their presence. Plaintiff property owners may have no knowledge of the contamination until vegetation dies, animals sicken, or family members fall ill.⁶¹ More significant, in many instances the environmental plaintiff may remain unaware of the contamination for a number of years. In such cases, the rule of repose will bar claims for recovery where the plaintiff does not discover the contamination until after the repose period has run.⁶² As a consequence, the rule of repose can present a significant obstacle to the redress of environmental damages to property.

II. THE FORM AND FUNCTION OF THE RULE OF REPOSE

Rules of repose have English antecedents in the doctrine of prescription, which presumed the acquisition of title to property by possession over time.⁶³ As in England, American courts adopted a common law rule establishing a 20-year period as sufficient time within which to bring a claim,

⁶⁰ See, e.g., *Artesian Water Co. v. Gov't of New Castle Cnty.*, 1983 WL 17986 (Del. Ch. Aug. 4, 1983) (holding that a privately owned public utility for supplying water was allowed to seek damages for contamination of groundwater from the County landfill but right was limited to the utility's reasonable use of groundwater); *Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824, 836-37 (Ill. 1981) (prospectively enjoining a chemical waste disposal from operating in the location and manner that created a high probability of causing a public nuisance by either "an explosive interaction, migration, subsidence, or the 'bathtub effect'").

⁶¹ See, e.g., *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 517 F. Supp. 314 (N.D. Ill. 1981), *rev'd and remanded*, 916 F.2d 1174 (7th Cir. 1990) (analyzing strict liability in toxic waste); *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969) (concerning gasoline seepage into adjoining well); *Martin v. Reynolds Metals Co.*, 342 P.2d 790 (Or. 1959) (alleging fluoride compounds rendered land unfit for raising livestock); *Branch v. Western Petroleum*, 657 P.2d 267 (Utah 1982) (finding contamination by defendant petroleum company's formation water, which caused rabbits and chickens to die and polluted potable water supply).

⁶² *Snodgrass v. Snodgrass*, 58 So. 201, 201-02 (Ala. 1912).

⁶³ Grants of title would be permitted where the claimant demonstrated possession for at least 20 years; the doctrine of prescription served a similar role in American law with courts applying presumptions of title in order to achieve finality and certainty to potential claims. *Glantz v. Gabel*, 212 P. 858, 860 (Mont. 1923) (quoting *Ricard v. Williams*, 20 U.S. 59, 109 (1822) where "They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing adverse title in, the party in possession.").

with certain narrowly prescribed exceptions.⁶⁴ This common law rule eventually was joined by statutory rules of repose enacted largely in response to the emergence of tort reform efforts and targeted towards protecting certain interest groups from the effects of extended periods of liability that might exist under the common law rule.⁶⁵ Indeed, statutes of repose have become the most prevalent form of repose rule.

Similar to statutes of limitation, the function of repose rules is to bring certainty and closure to stale claims, thereby reducing the burden on the judicial system,⁶⁶ as well as freeing commercial resources that would have been invested in the economy had they not remained set aside to cover outstanding contingent liabilities.⁶⁷ However, although rules of repose are

⁶⁴ See, e.g., *Matthews v. McDade*, 72 Ala. 377, 384–89 (1882); *McArthur v. Carrie*, 32 Ala. 75, 81 (1858); *In re Meyer's Estate*, 164 A.2d 633, 639–40 (N.J. App. 1960). In *Glantz v. Gabel*, the Montana Supreme Court noted that the period of time during which the adverse possession had been continuous and unmolested exceeded not only the ten-year statute of limitations, but exceeded the 20-year common law period necessary for the right to exist by prescription. *Glantz*, 212 P. at 860; see also *Black v. Pratt Coal & Coke Co.*, 5 So. 89, 94 (Ala. 1888) (“There is, however, a presumption that any and all claims or rights of property which have been permitted to slumber without assertion or recognition for 20 years have no legal existence or have been adjusted.”).

⁶⁵ The push for tort reform took various forms over the past century, reflected in both progressive and regressive shifts in the law. See Joseph A. Page, *Book Review: Deforming Tort Reform*, 78 GEO. L.J. 649, 654–55 (1990) (reviewing PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988)) (describing the origins of the ‘old tort reform’ as deriving from the “ideas of scholars,” having its most influence on the courts, while the ‘new tort reform’ is being influenced by the political process, “fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system”); see generally ‘*Common Sense*’ *Legislation: The Birth of Neoclassical Tort Reform*, 109 HARV. L. REV. 1765 (1996) (discussing progressive, classical, and modernist approaches to tort reform in American jurisprudence over the past century). The political support for recent tort reform efforts is underwritten by the manufacturers, employers, and professionals, such as doctors and architects who are opposed to the increasing duties embraced by and transforming the civil justice system.

⁶⁶ Stale claims do not simply burden defendants resources; they also lead to increased litigation and administrative costs as well as inefficiencies in case management and judicial resource allocation—a growing concern as court dockets continue to swell. See generally Tyler T. Ochoa & Andrew Wistrich, *Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 456–57, 460, 466–69, 480, 495 (1997) (discussing the purposes of limitation acts like statutes of repose and describing how those functions benefit public policy).

⁶⁷ Attendant to plaintiff’s right to seek redress was a defendant’s correlative right to defend. See *Snodgrass*, 58 So. 201. A plaintiff’s right to pursue a claim would, at some point, be outweighed by the prejudice to the defendant resulting from the disappearance of evidence and the unavailability of witnesses increasing not only the costs of litigation but the potential for fraud. *Id.* Thus, the rule sought to discourage a plaintiff from sitting on his or her rights, but also to deter frauds and “relieve[,] courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life that the attainment of truth and justice is next to impossible.” *Id.* at 202 (citing *Harrison v. Heflin*, 54 Ala. 552, 563–64

rooted in many of the same policies as statutes of limitations, the two serve very distinct functions.⁶⁸ Statutes of limitations have been held to be procedural devices, establishing limits to how long a claim can be brought once the cause of action has accrued.⁶⁹ More important, statutes of limitations are considered an affirmative defense, waived if not asserted by the defendant, and subject to tolling and exceptions arising out of a plaintiff's disability.⁷⁰ Rules of repose, on the other hand, eliminate the plaintiff's

(1875)); *see also* *Roach v. Cox*, 49 So. 578 (Ala. 1909); *Semple v. Glenn*, 9 So. 265 (Ala. 1891); *Garrett v. Garrett*, 69 Ala. 429, 430 (1881); *Nettles v. Nettles*, 67 Ala. 599, 602 (1880); *Greenlees v. Greenlees*, 62 Ala. 330, 332–33 (1878).

⁶⁸ *Myers v. Hayes Int'l Corp.*, 701 F. Supp. 618, 624 (M.D. Tenn. 1988).

⁶⁹ *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 722–28 (1988) (“There is no more reason to consider recharacterizing statutes of limitation as substantive under the Full Faith and Credit Clause than there is to consider recharacterizing a host of other matters generally treated as procedural under conflicts law, and hence generally regarded as within the forum State’s legislative jurisdiction.”); *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 627 (2d Cir. 1998); *Miller v. Stroud Twp.*, 804 A.2d 749, 752 (Pa. Commw. Ct. 2002); *Sch. Bd. of Norfolk v. U.S. Gypsum Co.*, 360 S.E.2d 325, 327–28 (Va. 1987). With the passing of the Limitations Act of 1623, the modern era of the statute of limitations was born and English law provided specific lengths of time for real property and personal property actions. *See* Gail L. Heriot, *A Study in the Choice of Form: Statutes of Limitation and the Doctrine of Laches*, 1992 B.Y.U. L. REV. 917 (1993). The Limitations Act of 1623 “is the model for statutes of limitation adopted by American legislatures.” *See also* *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitations are legislative enactments that give plaintiffs a “reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise”); *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (“[Statutes of limitations] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a ‘fundamental’ right or what used to be called a ‘natural’ right of the individual.”); Michael E. Baughman, Comment, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose For Corporate Directors?*, 143 U. PA. L. REV. 1065, 1069 (1995). “When the legislature prescribes time limits on the assertion of rights, it deprives one party of the opportunity, after a time, of invoking the public power in support of an otherwise valid claim.” *Developments in the Law*, *supra* note 10, at 1185.

⁷⁰ “[The] ‘pure’ or procedural statute of limitations . . . serves only to place a time limit upon assertion of a remedy and furnishes an affirmative defense that may be waived.” *Bell v. Schell*, 101 P.3d 465, 472 (Wyo. 2004) (quoting *Friends of Clark Mountain Found. Inc. v. Bd. of Supervisors of Orange Cnty.*, 406 S.E.2d 19, 21 (Va. 1991)). *See also* *Missouri v. St. Gemme’s Adm’r*, 23 Mo. 344, 346–47 (1856) (“It is a settled principle in the construction of the statute of limitations, that the statute does not begin to run until there be persons in being *capable of suing* and *being sued*, according to the maxim of the Roman law, ‘*contra non volentem agere non currit prescriptio.*’”); *Roldan v. Allstate Ins. Co.*, 149 A.D.2d 20, 33–34 (N.Y. App. Div. 1989) (citing cases recognizing tolling exceptions apart from provisions in statutes of limitations due to extraordinary circumstances that prevent the plaintiff from bringing an action).

substantive right to bring a claim at all.⁷¹ They neither are tied to any applicable statute of limitations nor waivable by the defendant. Once the rule begins to run the clock does not stop ticking until the designated time period—whether statutory or common law—expires and a plaintiff's right to bring an action is extinguished.⁷² Upon the loss of the substantive right, any attendant remedies are also extinguished, even those that may have accrued in the future.⁷³

Although rules of repose differ from statutes of limitations in other ways, it is the manner in which each begins to run that creates difficulties in claims for environmental contamination. Statutes of limitations are triggered on the date that the plaintiff's claim accrues.⁷⁴ Accrual occurs, and the limitations period begins, on the date that the plaintiff has suffered a legal injury.⁷⁵ Determining the point at which the plaintiff's legal interest may have been invaded is often difficult.⁷⁶ For example, the Ninth Circuit

⁷¹ *Myers*, 701 F. Supp. at 623–24 (citing *President & Dir. of Georgetown Coll. v. Madden*, 660 F.2d 91, 94 (4th Cir. 1981)); *Rittenhouse v. Tabor Grain Co.*, 561 N.E.2d 264, 273 (Ill. App. Ct. 1990) (distinguishing repose statutes from statutes of limitations by describing the former's substantive nature); *Nieman v. Press & Equip. Sales Co.*, 588 F. Supp. 650, 653–54 (S.D. Ohio 1984) (adopting repose statute in a diversity suit due to its substantive qualities over the forum state's statute of limitations).

⁷² *Myers*, 701 F. Supp. at 624.

⁷³ *Id.* As a result, there could no longer be an existing claim for the court to adjudicate or to which equitable estoppel could apply.

⁷⁴ *Garrett v. Raytheon Co.*, 368 So. 2d 516, 518–19 (Ala. 1979).

⁷⁵ *See, e.g., id.* at 519 *overruled by* *Griffin v. Unocal Corp.*, 990 So. 2d 291 (Ala. 2008) (stating that a “cause of action ‘accrues’ as soon as the party in whose favor it arises is entitled to maintain an action thereon.”); *Payton v. Monsanto Co.*, 801 So. 2d 829, 835 (Ala. 2001) (“It is only when the first legal injury occurs that the cause of action accrues and the limitations period begins to run.”). *But see* *Wright v. Eli Lilly & Co.*, 65 Va. Cir. 485, 490 (2004) (“A cause of action is the operative set of facts giving rise to a right of action. It accrues when a wrongful act or breach of duty occurs, even though actual damage may not occur until a later date. A right of action accrues to a person when he sustains damage or injury therefrom.”).

⁷⁶ *See* *United States v. Kubrick*, 444 U.S. 111, 117, 122 (1979) (finding that the cause of action had accrued, triggering the statute of limitations when the plaintiff suffered hearing loss resulting from ingestion of neomycin, and rejecting the plaintiff's claim that the limitations period should begin when he discovered he had suffered a “legal injury” from taking neomycin); *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) (“As a rule, we have held that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.”). The Alabama Court has recognized that while the rule regarding the invasion of a legal interest is rather simply stated, it is often more difficult in ascertaining exactly when accrual occurs, beginning the running of the statute of limitations:

There is a class of cases in which a different statement of the rule is necessary, though the basic principle is the same. They are cases in which the act complained of does not itself constitute a legal injury; that is, an injury giving rise to a cause of action because it is an invasion of some

concluded in *Soliman v. Philip Morris Inc.*,⁷⁷ that the statute of limitations began to run on a claim for injuries arising out of nicotine addiction at the time at which the plaintiff became addicted. The court stated:

[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date.⁷⁸

The Alabama Supreme court in *Kelley v. Shropshire*,⁷⁹ articulated a rule similar to the one followed in *Soliman*, finding that if the act from which injury flowed was itself a completed wrong regardless of how slight the damage was at the time, the statute of limitations would run on the occurrence of the act and bar recovery even for damages that might develop later or that might not have been actionable at the time the wrong occurred.⁸⁰ “[I]n such a case the subsequent increase in the damages resulting gives no new cause of action.”⁸¹ The *Kelley* court went on to state, however, that

legal right. In such cases, plaintiff's injury, the invasion of his rights, depends upon a further and subsequent development of what defendant has done, and the cause of action accrues and the statute begins to run when, and only when, the damages are sustained.

Kelley v. Shropshire, 75 So. 291, 292 (Ala. 1917). The challenge of pinpointing precisely when a cause of action accrues is especially difficult in continuous tort situations. See *Garrett*, 368 So. 2d at 520–21 (finding the injury occurred and the one-year statute of limitations “began to run when plaintiff was last exposed to radiation” and not when the injury “made itself manifest by its symptoms” twenty years later).

⁷⁷ *Soliman v. Philip Morris, Inc.*, 311 F.3d 966 (9th Cir. 2002).

⁷⁸ *Id.* at 972 (quoting *Nodine v. Shiley Inc.*, 240 F.3d 1149, 1153 (9th Cir. 2001)). Some courts have suggested that the harm must be appreciable before the limitations period will begin to run. “Until a patient ‘suffers appreciable harm’ as a consequence of [tortious conduct], he cannot establish a cause of action.” *Larcher v. Wanless*, 557 P.2d 507, 512 n.11 (Cal. 1976) (quoting *Budd v. Nixen*, 491 P.2d 433 (Cal. 1971)). See also *Davies v. Krasna*, 535 P.2d 1161, 1169 (Cal. 1975) (“[A]lthough a right to recover nominal damages will not trigger the running of the period of limitation, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period.”); *Budd v. Nixen*, 491 P.2d 433, 436 (Cal. 1971) (finding a mere breach of duty causing “only nominal damages, speculative harm, or the threat of future harm,” without causing appreciable damage did not create a cause of action in legal malpractice to trigger statute of limitations).

⁷⁹ *Kelley*, 75 So. at 292.

⁸⁰ *Id.*

⁸¹ *Id.*

a different statement of the rule may be necessary in cases where the defendant's act did not constitute a legal injury.⁸² "In such cases plaintiff's injury, the invasion of his rights, depends upon a further and subsequent development of what defendant has done, and the cause of action accrues and the statute begins to run when, and only when, the damages are sustained."⁸³

In most cases, when a cause of action will be deemed to accrue for statute of limitations purposes varies depending upon whether the trigger point is the defendant's conduct, the point at which the plaintiff suffered injury, or when the plaintiff first had a presently enforceable demand, and is entitled to sue.⁸⁴

This choice, unnecessary where the two events are simultaneous, becomes complex where considerable time intervenes; here the courts have generally looked to the substantive elements of the cause of action on which the suit is based. If the defendant's conduct in itself invades the plaintiff's rights, so that suit could be maintained regardless of damage—as with a breach of contract and most intentional torts—the statute commences upon completion of the conduct. But if harm is deemed the gist of the action, the occurrence of harm marks the beginning of the period.⁸⁵

The rule of repose affords no such latitude. While statutes of limitations are governed by when a cause of action accrues, application of the rule of repose is driven primarily by the tortious conduct of the defendant.⁸⁶ In general, the rule of repose begins to run "after the defendant acts in some way."⁸⁷ The focal point is not the harm itself, but rather, the harm-producing act of the defendant. Although both the harm and the harm-producing

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See, e.g.,* *Gazija v. Nicholas Jerns Co.*, 543 P.2d 338, 341 (Wash. 1975) (finding accrual occurs when there is "actual and appreciable damage" but not when there is "mere danger of future harm, unaccompanied by present damage" for the statute of limitations to be triggered); *Young v. Seattle*, 191 P.2d 273 (Wash. 1948) (discussing several cases where statute of limitations begins to run when the plaintiff is entitled to sue). *But see Developments in the Law*, *supra* note 10, at 1200 (noting that where the plaintiff has control over when an element necessary to bring an action occurs, such as the requirement that a demand be made on the defendant, the limitations period may begin before suit could have been filed).

⁸⁵ *Developments in the Law*, *supra* note 10, at 1200–01.

⁸⁶ *See* ANNE E. MELLEY, 50 TEX. JUR. 3d LIMITATIONS OF ACTIONS § 4 (2013).

⁸⁷ BLACK'S LAW DICTIONARY 1423 (7th ed. 1999). *See also* PROSSER & KEETON, *supra* note 6, at 168.

conduct can be simultaneous, the trigger for the rule of repose is not conditioned upon when harm occurs.⁸⁸ As a consequence, rules of repose can begin to run even where a cause of action has not yet accrued and they are neither subject to, nor affected by, concepts of accrual that govern the applicable statutory limitations period.⁸⁹

Interestingly, even in states such as Alabama, with a long-standing common law rule of repose, the case law generated no clear delineation as to its application, with the confusion exacerbated by seemingly conflicting statements as to when the rule would be triggered.⁹⁰ Regurgitation of language in older precedents, regardless of its ambiguity, only contributed to the murky depths within upon which the concept of repose has rested.⁹¹ Judicial findings that the rule of repose runs “from the moment that the actions giving rise to the claim occurred”⁹² or that “[repose] is not based on concepts of ‘accrual,’”⁹³ simply raised the question of whether the rule incorporates traditional concepts of accrual and just excluded application of equitable devices like the discovery rule.⁹⁴ Although several previous Alabama decisions suggested that the rule of repose *was* dependent upon the accrual of a cause of action,⁹⁵ recent decisions sought to address the

⁸⁸ See BLACK'S LAW DICTIONARY, *supra* note 87, at 1423.

⁸⁹ See, e.g., *id.*

⁹⁰ Compare *Moore v. Liberty Nat'l Ins. Co.*, 108 F. Supp. 2d 1266, 1275 (N.D. Ala. 2000), *aff'd sub nom. Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209 (11th Cir. 2001) (“Application of the rule of repose has only one element—the passage of twenty years time from the moment that the actions giving rise to the claim occurred—and if that time has elapsed, no claim can be pursued.”), and *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So. 2d 758 (Ala. 2002) (stating that “repose does not depend on ‘accrual,’ because the concept of accrual sometimes incorporates other factors, such as notice, knowledge, or discovery”), with *Willis v. Shadow Lawn Mem'l Park*, 709 So. 2d 1241, 1243 (Ala. Civ. App. 1998) (stating that “this 20-year period does not start to run until a plaintiff's cause of action has accrued”), and *Barrett v. Wedgeworth*, 518 So. 2d 1256, 1257 (Ala. 1987) (implying accrual depends on knowledge when the court rejected plaintiff's efforts to contest the validity of a divorce decree entered twenty-six years earlier, finding that the plaintiff “had knowledge of the divorce judgment shortly after it was entered . . . [and] could have filed a motion for relief from the judgment at that time, but did not.”).

⁹¹ *Id.*

⁹² *Moore*, 108 F. Supp. 2d at 1266.

⁹³ *Ex parte Liberty Nat'l Life Insurance Co.*, 825 So. 2d at 760.

⁹⁴ In one decision, the Alabama Supreme Court had commented in dicta that notice was requisite to the running of the rule, and certainly notice—or lack thereof—seemed to play a role in other decisions. See *Oehmig v. Johnson*, 638 So. 2d 846, 850–51 (Ala. 1994), *abrogated by Ex parte Liberty Nat'l Life Ins. Co.*, 825 So. 2d 758 (refusing to find the rule of repose had been activated to transfer mineral interest from owner of legal title to a party with only color of title without first having constructive notice of the potential claim).

⁹⁵ See, e.g., *Baughner v. Beaver Const. Co.*, 791 So. 2d 932, 934 n.1 (Ala. 2000) (distinguishing construction statute of repose from a statute of limitations, citing BLACK'S LAW DICTIONARY

confusion. *Ex parte Liberty National Life Insurance Co.*, to some extent reflected an effort by the Alabama Court to clarify the operation of the rule of repose to a plaintiff's claim distinct from statutes of limitations.⁹⁶ Nonetheless it remained unclear, at least in Alabama, whether by "claim" the court meant that there was a legal right to sue until recently. *Collins v. Scenic Homes*,⁹⁷ *American General Life and Accident Insurance Co. v. Underwood*,⁹⁸ and *Owens-Illinois v. Wells*,⁹⁹ decided subsequent to *Liberty National*, explicitly stated that the rule does not begin to run until the first date that the plaintiff suffered an actual injury, thereby helping to alleviate the ambiguity surrounding the rule of repose in earlier Alabama case law.¹⁰⁰

In other jurisdictions, however, the courts have held that operation of the rule of repose is not dependent upon whether the plaintiff does or does not have a right to bring a claim or even suffered an injury.¹⁰¹ The courts analysis stops upon identifying some act or event caused by the defendant from which the rule is deemed to run.¹⁰² The focus in repose cases,

in defining a statute of repose as one that "bars a suit a fixed number of years after the defendant acts in some way" and noting that the statute at issue began to "run upon the substantial completion of the improvements, rather than upon the injury to the plaintiff's person or property or upon accrual of the plaintiff's cause of action."); *Ex parte Grubbs*, 542 So. 2d 927, 930–31 (Ala. 1989) (court dismissed claim for racial discrimination in the denial of admission to law school over thirty years previously, noting that "[b]y failing to assert a claim for over a third of a century . . . after Grubbs knew of the discrimination, he is now absolutely barred by the rule of repose from asserting such a claim"); *Barrett*, 518 So. 2d at 1257 (court rejected plaintiff's efforts to contest the validity of a divorce decree entered 26 years earlier, finding that the plaintiff had "knowledge of the divorce judgment shortly after it was entered . . . [and] could have filed a motion for relief from the judgment at that time, but did not"); *Willis*, 709 So. 2d at 1243 (stating "this 20-year period does not start to run until a plaintiff's cause of action has accrued.").

⁹⁶ See *Ex parte Liberty Nat'l Life Ins. Co.*, 825 So. 2d at 764–65.

⁹⁷ *Collins v. Scenic Homes, Inc.*, 38 So. 3d 28 (Ala. 2009).

⁹⁸ *Am. Gen. Life & Acc. Ins. Co. v. Underwood*, 866 So. 2d 807 (Ala. 2004).

⁹⁹ *Owens-Illinois, Inc. v. Wells*, 50 So. 3d 413 (Ala. 2010).

¹⁰⁰ Earlier Alabama decisions provided little illumination on the role of accrual in repose cases, despite efforts by some courts to clarify the issue. See, e.g., *id.* at 417, ("Alabama's 20-year common-law rule of repose does not begin to run on a claim until all the essential elements of that claim, including an injury, coexist so that the plaintiff could validly file an action."). The federal district court in *Evans v. Walter Industries, Inc.*, 579 F. Supp. 2d 1349 (N.D. Al. 2008) concluded that the claim arose upon injury, regardless of notice to the plaintiff that injury had occurred. *Id.* at 1361.

¹⁰¹ See, e.g., *Stirchak v. Shiley, Inc.*, 1996 WL 166958, at *3 (N.D. Ill. Apr. 5, 1996) (finding a plaintiff's right to bring a claim might be terminated under the repose statute before he or she even knows of the injury).

¹⁰² See, e.g., *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 627–28 (2d Cir. 1998); *Miller v. Stroud Twp.*, 804 A.2d 749, 752 (Pa. Commw. Ct. 2002) (finding that product liability

at least as the operation of the rule is currently conceived, seems to center on the defendant's conduct regardless of when the plaintiff may have suffered legally compensable harm or even discovered that he or she had been harmed by the defendant.¹⁰³ More significantly, the discovery rule—which will toll the statute of limitations until the plaintiff either discovers the injury, or knows (or in the exercise of reasonable care should know) that the defendant is a culpable party—will not stop the rule of repose from running.¹⁰⁴ Thus, crucial to the operation of a rule of repose is identification of the “act” which triggers the running of the rule.¹⁰⁵

Statutory rules of repose, particularly those directed toward protecting certain interests groups such as the construction industry or medical professionals, will often contain a trigger date within the statutory provisions in an effort to avoid any ambiguity as to when the limitations period begins.¹⁰⁶ Thus in cases involving architects, builders, and contractors, for example, the statute may run from the date the work was substantially completed.¹⁰⁷ Although some ambiguity may surround terms such

statute of repose which provided that it began to “run when the product ‘is first sold or leased for consumption’” was triggered on the date plaintiff was inoculated with vaccine) (citing NEB. REV. STAT. § 25-244(2) (1995)). *See also* Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1218 (11th Cir. 2001) (“A defining characteristic of the rule of repose is that its time period does not begin to run when the action accrues, but rather when the relevant action occurs.”).

¹⁰³ *Ex parte* Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 764 n.2 (Ala. 2002) (stating that “repose does not depend on ‘accrual,’ because the concept of accrual sometimes incorporates other factors, such as notice, knowledge, or discovery”).

¹⁰⁴ Comstock v. Collier, 737 P.2d 845, 848–49 (noting that the General Assembly passed the statute or repose in part to “reduce the . . . ‘long tail’ of liability occasioned by the discovery rule . . .”); Reynolds v. Porter, 760 P.2d 816, 819–20 (Okla. 1988) (explaining that legislatures responded to the application of the discovery rule by courts to modify statutes of limitation, by enacting absolute statutes of repose).

¹⁰⁵ Statutory rules of repose, unlike their common law counterpart, typically contain a trigger date within the statutory provisions in an effort to avoid any ambiguity as to when the limitations period begins. *See, e.g., Reynolds*, 760 P.2d at 819–20. Thus in cases involving architects, builders and contractors, for example, the statute may run from the date the work was substantially completed. *See* Baugher v. Beaver Const. Co., 791 So. 2d 932, 934 n.1 (Ala. 2000) (statute began to run “upon the substantial completion of the improvements, rather than upon the injury to the plaintiff's person or property or upon accrual of the plaintiff's cause of action.”); Nichols v. R.R. Beaufort & Assocs., 727 A.2d 174, 176–77 (R.I. 1999) (citing statute of repose protecting contractors and others providing real property improvements from claims not brought within ten years of the improvement's substantial completion).

¹⁰⁶ *See Baugher*, 791 So. 2d at 934 n.1.

¹⁰⁷ *See Yarbrow v. Hilton Hotels Corp.*, 655 P.2d 822, 825–26 (Colo. 1982) (explaining the conduct that triggers the running of the construction rule of repose as a “legislative judgment . . . [and] construction or design defects are likely to be discovered within a reasonable

as “substantial completion,” custom in the industry as to the meaning of “substantial completion” is sufficient to allow the fixation of a certain time.¹⁰⁸ The common law rule and more general statutes of repose, which usually will govern claims for trespass and nuisance damages, often lack such certainty, providing instead, for example, “except that no such action may be brought more than three years from the date of the act or omission complained of.”¹⁰⁹ In environmental contamination cases, identifying the point at which the rule of repose is triggered presents particular challenges.¹¹⁰ Even with the conduct-oriented focus of the triggering act as contemplated by the rule, trespass and nuisance law does not easily yield a clearly identifiable time at which the clock begins to tick.¹¹¹

A. *Identifying the Defendant’s “Act” in Environmental Contamination Cases for Purposes of Repose*

In assessing the defendant’s conduct in environmental trespass and nuisance cases, establishing when the defendant acts for purposes of the rule of repose can be complex. In its simplest form, the defendant’s act would be calculated from the first action or conduct of the defendant that

period after substantial completion of the building.” *Id.* at 825); *McDonough v. Marr Scaffolding Co.*, 591 N.E.2d 1079, 1081 (Mass. 1992) (applying substantial completion standard for statute of repose to improvements to real property); *Baldwin Carpet Linoleum & Carpet, Inc. v. Builders, Inc.*, 523 N.W.2d 33, 38 (Neb. Ct. App. 1994) (noting Nebraska Supreme Court’s rule that statutory repose period begins to run from the date construction is complete for architects with a duty to inspect for the duration of the project); *Monson v. Paramount Homes, Inc.*, 515 S.E.2d 445, 447 (N.C. Ct. App. 1999) (citing North Carolina statute that defines substantial completion as “[the] degree of completion of a project, improvement or specified area or portion thereof . . . upon attainment of which the owner can use the same for the purpose for which it was intended”).

¹⁰⁸ For medical malpractice claims, see *Bonin v. Vannaman*, 929 P.2d 754, 765–66 (Kan. 1996) (stating statute of repose for medical malpractice cases runs from the time of the act giving rise to the cause of action, despite whether plaintiff has discovered the injury); *Tomlinson v. George*, 116 P.3d 105, 111–12 (N.M. 2005) (stating statute of repose begins to run from date of malpractice, not from date of plaintiff’s discovery); *Landis v. Physicians Ins. Co. of Wisconsin*, 628 N.W.2d 893, 910 (Wis. 2001) (stating that statute of repose runs from date of act or omission).

¹⁰⁹ CONN. GEN. STAT. ANN. § 52-584 (West 2013).

¹¹⁰ See Anne M. Payne & Amy Elizabeth Hanigan, *Pollution of Underground Water Sources—Common Law Liability and Private Rights of Action*, 94 AM. JUR. TRIALS 1–210, 35 (C. Joseph Mills, et al., eds., 2004) (stating that there are multiple causation problems at issue with contaminated ground water).

¹¹¹ See generally DAN B. DOBBS, ET AL., *DOBBS’ LAW OF TORTS* § 244 (2d ed. 2013) (demonstrating the different types of triggering events, and thus the complexity of the issue).

causes harm.¹¹² Two potential scenarios emerge.¹¹³ In one scenario, a defendant acts at the time the defendant actually engages in the harm-producing conduct—such as directly emitting pollutants into the air, pouring toxic chemicals onto the ground, or burying hazardous waste.¹¹⁴ The plaintiff's claim would be inchoate until the pollutant or chemicals reached the plaintiff's property, but the rule of repose—which is unconcerned with accrual—would run from the moment the emission or discharge occurred.¹¹⁵ Under this articulation of the act the identification of the trigger point for the rule of repose, disregarding for the moment any implications that may be created by continuing tort theory, is uncomplicated.¹¹⁶ The spotlight is squarely upon the actual conduct of the defendant at its origin.¹¹⁷ Thus, the point of discharge, in whatever form it takes, serves to trigger the rule and the clock would count down from that point forward. There is, of course, potential for confusion if discharge or disposal is not narrowly restricted to the defendant's affirmative act in initially introducing pollutants into the environment, whether or not actual contamination occurred at that time.¹¹⁸

¹¹² See BLACK'S LAW DICTIONARY, *supra* note 87, at 1423.

¹¹³ Although defendant presumably could also act by failing to abate the trespass or nuisance, this effectively would conflate with the point of first migration as the day the pollutants migrate onto the property creates a corollary obligation on the defendant to abate the same day. Christopher M. Rhymes, *Environmental Contamination as Continuing Trespass*, 42 ENVTL. L. 1381, 1389 (2012).

¹¹⁴ See BLACK'S LAW DICTIONARY, *supra* note 87, at 1423.

¹¹⁵ See *id.*

¹¹⁶ See generally *id.* (showing that the only concern for triggering date is when an event occurs).

¹¹⁷ In *Cereghino v. Boeing Co.*, the district court explained that under Oregon law, "it is clear that the 'act or omission' referred to in the statute of ultimate repose is an act or omission of a person, not the act of objects such as hazardous substances." *Cereghino v. Boeing Co.*, 826 F. Supp. 1243, 1248 (D. Or. 1993) (referencing *Josephs v. Burns*, 491 P.2d 203 (Or. 1971)). Further, "the statute begins to run at the time of an *initial* negligent act or omission, and does not refer to any *ongoing* duty to correct the initial wrong." *Id.*

¹¹⁸ For example, hazardous or toxic waste that has been stored or landfilled at a hazardous waste storage facility may not begin leaking until sometime subsequent to being deposited in the landfill. See generally Payne & Hanigan, *supra* note 110 (providing a thorough analysis of issues relating to groundwater contaminant migration and water contamination issues in general). If the act of discharge or disposal is tied to the date on which the waste began to leak, then identification of when the repose period is triggered is obscured. *Id.* And, even with the identification of discharge for purposes of repose as the date the waste was deposited—i.e., disposed of—the commingling of wastes deposited over time could create similar difficulties as, once again, it would be difficult to pinpoint when the deposit of the culpable material occurred. *Id.* To the extent the landfill is no longer in operation the last deposit could be pinpointed and presumably used as the trigger date. *Id.* Where there is an ongoing operation, however, absent a unique waste identifier or marker (or generator) then

Nonetheless, the point of discharge or disposal will, as a practical matter, be reasonably ascertainable.¹¹⁹

Alternatively, a defendant can also be said to first act as the contaminants migrate onto the plaintiff's property. In other words, the relevant conduct would not be limited to the initial discharge but include the separate act of *permitting* the migration or intrusion as well.¹²⁰ Under this construction of 'act,' it would be akin to the storage or piling of material onsite that the defendant subsequently fails to keep contained as, for example, in *Rylands* or in the water percolation cases.¹²¹ The action causing the harm is not the deposit or the storage, but the failure to stop the movement or migration of the contaminations onto the plaintiff's property.¹²² In tort law, "[t]he word 'actor' is used merely for convenience, and is used not only in its primary sense of denoting one who acts, but also as denoting one who deliberately or inadvertently fails to act."¹²³ Here, the plaintiff's claim would vest immediately upon migration, regardless of plaintiff's knowledge of the contamination.¹²⁴ While accrual for statute of limitations purposes might be subject to equitable tolling, the rule of repose would begin to run at the point the migration across the property line first occurs.¹²⁵ This latter approach to the question of when the defendant acts

the date on which the last deposit of the specific waste causing plaintiff's damage, in other words the waste that began the contamination, would remain obscured. *Id.*

¹¹⁹ See *id.* at 104 (describing the ease of ascertaining such discharge or disposal points through aerial photography).

¹²⁰ See, e.g., *United Proteins, Inc. v. Farmland Indus., Inc.*, 915 P.2d 80, 83 (Kan. 1996) ("Although the original trespass was outside the limitations period, if UPI could prove that Farmland permitted the contamination to remain on UPI's property within the limitations period and that the original intrusion was tortious, there might be culpable conduct on which recovery could be based."); *O'Neill v. Dunham*, 203 P.3d 68, 72–73 (Kan. Ct. Ap. 2009) (noting that if defendants' failure to install a handrail the day after purchasing building was negligent then the claim would be barred by the repose statute); *O'Brien Energy Sys., Inc. v. Am. Emp'rs Ins. Co.*, 629 A.2d 957, 963 (Pa. Super. Ct. 1993) (interpreting the language of insurance policy exclusions to exclude coverage for all injuries resulting from pollution, even passive polluters, especially when the complaint alleges guilt for "acts and omissions that flatly resulted in the migration of landfill gas.").

¹²¹ See *Rylands v. Fletcher*, [1866] 1 L.R. Exch. 265 (Eng.).

¹²² See, e.g., *Joseph v. S & J Operating Co.*, 2012 WL 1535172, at *5 (D. Kan. May 1, 2012) ("There is no trespass until the entry is accomplished *and* the damage occurs (or has begun to occur, as in the case of continuing trespass).") (citing *Nida v. American Rock Crusher Co.*, 855 P.2d 81 (Kan. 1993)).

¹²³ RESTATEMENT (SECOND) OF TORTS § 3 cmt. a (1965).

¹²⁴ See *id.* See also *Joseph*, 2012 WL 1535172, at *5.

¹²⁵ Running repose from the point at which the contaminants first migrate across the plaintiff's property renders any subsequent migration as irrelevant and simply part of a single act. See *Soo Line R.R. v. B.J. Carney & Co.*, 982 F. Supp. 1365, 1368 (D. Minn.

reduces the ability to pinpoint a time certain that the intrusion—or act—occurred and, as a consequence, also interferes with the ability to fix a trigger date for repose purposes.¹²⁶ However, whether through modeling or other means that examine soil permeability, dispersion rates, migration patterns, and related factors affecting the movement of contaminants, some conclusions can be reached in a given case as to when contamination likely began.¹²⁷ Similar modeling or engineering analysis may also be able to predict how long contaminants will continue to migrate onto a plaintiff's property.¹²⁸ Nonetheless, absent scientific modeling taking into account the various factors that impact flow rate and movement, a discrete event or events from which migration occurred can be traced or, alternatively, some contamination that is either clearly visible or has an immediate effect on health, livestock or plants, and therefore migration affords less certainty than where the relevant act is the date of discharge.¹²⁹

Neither approach is a panacea for the environmental plaintiff. Under either construction, the unaware plaintiff may be precluded from bringing an action for the harm to his or her property.¹³⁰ Where the defendant's act is construed as occurring at the time of discharge or disposal, the contaminants may not cross over the plaintiff's property line for some years and easily well outside the repose period, depending upon the location of the plaintiff's property in relation to the discharge point.¹³¹ Migration

1997) (finding repose period in Minnesota Environmental Response and Liability Act prevented liability for continuing migration of contaminants because to find otherwise would defeat the purpose of the statute to protect those parties whose actions occurred prior to July 1, 1983). *But see* Cereghino v. Boeing Co., 826 F. Supp. 1243, 1248 (D. Or. 1993) ("In the present action, plaintiffs' contentions that the 'acts' complained of are the invasion of contaminants, and that the omission was the failure to prevent the migration after disposal, therefore fail. The Oregon Supreme Court left no doubt in *Josephs* that potential plaintiffs such as the Cereghinos can be barred from recovery even before they have been harmed.").

¹²⁶ See *Soo Line R.R. Co.*, 982 F. Supp. at 1368 (addressing this issue by treating continuing contamination as a single act for repose purposes).

¹²⁷ See *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 10 F. Supp. 2d 771, 772 (E.D. Mich. 1998).

¹²⁸ See, e.g., *id.* at 794 (using modeling methods to determine liability for groundwater contamination from pollutants in the soil).

¹²⁹ Defendants regardless should not be able to absolve themselves of their responsibility for acting simply because the act is passive. See generally Peter N. Davis, *Groundwater Pollution: Case Law Theories for Relief*, 39 MO. L. REV. 117 (1974). As noted by Professor Davis, "Although a particular polluter might still legitimately claim he could not predict particular injurious consequences of his activity, he can no longer claim legitimately that the polluting material vanished from the earth once it seeped beneath the surface. He knows it will go somewhere." *Id.* at 145–46.

¹³⁰ See *id.* at 146.

¹³¹ See *Payne & Hanigan*, *supra* note 110, at 31 (stating that contaminants can migrate significant distances, thus implying the difficulty of a successful trespass suit).

of contaminants is impacted by a number of factors such as soil permeability, rainfall, and viscosity of the contaminant (light liquids move faster than heavy oils).¹³² Soil contamination tends to be significantly slower than groundwater contamination given geologic or geographic factors.¹³³ However, even with groundwater contamination migratory paths are not static.¹³⁴ Additional years may pass before the plaintiff is even aware that contamination has occurred. A similar outcome occurs where the act is the point at which migration across the property line first occurs. The plaintiff remains equally ignorant of its consequences until such time as the harm or damage manifests or is discovered. Consequently, the potential for the rule to run before the plaintiff can sue is heightened, leaving the plaintiff forced to bear the burden of the cost of remediation.¹³⁵

1. Continuing Tort Theory in Trespass and Nuisance Cases

Complicating matters, however, is the question of whether the continuing tort doctrine does or should impact when the defendant's act triggers the rule of repose, or if it is applicable only to statutes of limitations. Trespass and nuisance include as part of the gravamen of the claim the recognition that a continuing invasion of the plaintiff's interest is a new trespass or nuisance for each day that the conduct continues or the harm remains unabated.¹³⁶

Decisions dating back to the 1500s have recognized that a nuisance or trespass claim does not arise once and for all when the offensive activity at issue first manifests itself. . . . Blackstone regarded this 'well established' rule as

¹³² See *id.* at 35 (stating that proving contamination causation depends on a variety of factors).

¹³³ Zones of clay would, for example, prohibit downward migration. See *id.* at 30 (discussing the transmission of water, but noting that it is not entirely dependent on porosity). Alternatively substrate disturbances, excavations or drilling could create conduits for contaminants to reach groundwater and exacerbate the spread of pollutants. *Id.* Porosity and permeability impact not only soil contamination levels but also the ability of the medium to transmit groundwater. *Id.*

¹³⁴ Thus while groundwater in more shallow aquifers generally follow topography, heavy periods of rainfall could cause a shift in flow direction, which can move laterally as well as vertically. For a general outline, see *id.* at 34.

¹³⁵ Alternative remedies such as through government action under CERCLA or other federal or state environmental statutes might provide some relief.

¹³⁶ Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271, 308 (2008–2009).

axiomatic in his Commentaries, stating that 'every continuance of a nuisance is [considered] a fresh one.'¹³⁷

A defendant who has engaged in a single tortious act resulting in continuing invasion of the plaintiff's interest or in multiple tortious acts closely related in time or character and causing harm or accumulating harm to the plaintiff's property remains liable.¹³⁸ Plaintiffs can elect to bring successive suits as the harm accumulates or to bring a single claim for all harm suffered.¹³⁹ As a consequence, a finding that a nuisance or trespass is continuing will impact both statute of limitations considerations as well as the amount of damages recoverable.¹⁴⁰ Its impact on the rule of repose, however, is less settled.

Trespass and nuisance theories recognize that the nature and scope of an invasion could impact the extent of the defendant's liability.¹⁴¹ In *Russo Farms, Inc. v. Vineland Bd. of Educ.*,¹⁴² the New Jersey Supreme Court explained the continuing tort doctrine using nuisance as an example, stating:

When a court finds that a continuing nuisance has been committed, it implicitly holds that the defendant is committing a new tort, including a new breach of duty, each

¹³⁷ *Id.*

¹³⁸ *Id.*; Smith III, *supra* note 16, at 57–58 (1995). In *Rosato v. Mascardo*, the court noted that the doctrines of continuing course of treatment and continuing course of conduct shared common policies. *Rosato v. Mascardo*, 844 A.2d 893, 898 (Conn. App. Ct. 2004). "The continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortious acts or omissions may be difficult to identify and may yet be remedied . . . For example, *the doctrine is generally applicable under circumstances where [i]t may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury* or where the negligence consists of a series of acts or omissions and it is appropriate to allow the course of [action] to terminate before allowing the repose section of the statute of limitations to run . . ." *Id.* at 898.

¹³⁹ Smith III, *supra* note 16, at 58.

¹⁴⁰ *See, e.g., Miller v. Cudahy Co.*, 858 F.2d 1449, 1456 (10th Cir. 1988) ("The temporary-permanent distinction which is determinative in regard to the running of the statute of limitations is also relevant to the question of the proper measure of damages resulting from an actionable nuisance."). The Restatement (Second) of Torts notes, "When there is a series of continuing harms the plaintiff, . . . has an election to recover or is permitted to recover damages only for harm to the use of the land up to the time of trial. In cases of this type, the statute does not run from the time of the first harm except for the harm then caused." RESTATEMENT (SECOND) OF TORTS § 899 cmt. d (1979).

¹⁴¹ "A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it." RESTATEMENT (SECOND) OF TORTS § 161(1) (1965).

¹⁴² *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077 (N.J. 1996).

day, triggering a new statute of limitations. That new tort is an ‘alleged present failure’ to remove the nuisance and ‘[s]ince this failure occurs each day that [defendant] does not act, the . . . alleged tortious inaction constitutes a continuous nuisance for which a cause of action accrues anew each day.’¹⁴³

In some circumstances, however, the invasion was characterized as permanent, despite the fact that the harm was unabated, limiting the plaintiff’s remedy to a single action.¹⁴⁴ The determination that the invasion is permanent does not absolve the defendant of responsibility.¹⁴⁵ It is simply recognition that “through subsequent conduct on his part it has now become impossible or impracticable for him to terminate the intrusion on the other’s land.”¹⁴⁶ Factors utilized by the courts to determine whether an invasion was temporary (and therefore continuing) or permanent have varied.¹⁴⁷ Some jurisdictions simply adhere to the plain meaning of the words.¹⁴⁸ Thus the Texas Supreme Court, in *Schneider Nat’l Carrier Inc.*

¹⁴³ *Id.* at 1084 (quoting *Rapf v. Suffolk County*, 755 F.2d 282 (2nd Cir. 1985)).

¹⁴⁴ *See also Dombrowski v. Gould Elecs., Inc.*, 954 F. Supp. 1006 (M.D. Pa. 1996) (applying the discovery rule to find trespass and nuisance claims barred by statute of limitations by distinguishing continuing trespass with the continuing harm of a permanent trespass of property contamination). *See also Smith III, supra* note 16, at 57 (stating “[h]istorically, however, there was a presumption that all nuisances and trespasses were not continuing and the remedy for a continuing nuisance or trespass was either a suit for injunctive relief or successive actions for damages as new injuries occurred.”).

¹⁴⁵ *Dombrowski*, 954 F. Supp at 1013–14.

¹⁴⁶ RESTATEMENT (SECOND) OF TORTS § 161 cmt. c (1965).

¹⁴⁷ *See generally In re WorldCom, Inc.*, 320 B.R. 772 (Bankr. S.D.N.Y. 2005); *Kentland-Elkhorn Coal Co. v. Charles*, 514 S.W.2d 659 (Ky. Ct. App. 1974); *Schneider Nat’l Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004).

¹⁴⁸ *See Schneider Nat’l Carriers, Inc.*, 147 S.W.3d 264 (using the “plain meaning” of the terms as decided by Texas courts over the past century to determine if nuisance injuries were permanent or temporary). Cases abound with elaborations of the temporary-permanent distinction in nuisance and trespass claims. *See, e.g., Gates ex rel. Triumph Mortg., Inc. v. Sprint Spectrum, L.P.*, 349 Fed. Appx. 257 (10th Cir. 2009) (discussing trespass); *Stevenson v. E.I. DuPont De Nemours & Co.*, 327 F.3d 400, 408–10 (5th Cir. 2003) (concerning trespass damages); *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1122–24 (D.C. Cir. 1988) (discussing nuisance); *In re WorldCom, Inc.*, 320 B.R. 772, 775–82 (analyzing trespass); *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, 63 Cal. Rptr. 3d 165, 170–71, 174 (Cal. Ct. App. 2007) (discussing various forms of permanent trespasses); *Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985) (concerning nuisance); *Kentland-Elkhorn Coal Co.*, 514 S.W.2d at 664 (analyzing nuisance). For more cases defining the temporary-permanent distinction along different lines than the Texas courts, see *Schneider Nat’l Carriers, Inc.*, 147 S.W.3d at 271 nn. 14–18.

v. Bates,¹⁴⁹ explained that “Texas courts have defined temporary and permanent nuisances along lines that are somewhat closer to the plain meaning of the words. We define a permanent nuisance as one that involves ‘an activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely.’”¹⁵⁰

The *Schneider* court similarly defined a temporary nuisance as one that was “of limited duration”¹⁵¹ or “occasional”¹⁵² and “sporadic and contingent upon some irregular force such as rain,”¹⁵³ again consistent with its conclusion that the terms carried their plain meaning.¹⁵⁴ The Tenth Circuit in *Miller v. Cudahy Co.*,¹⁵⁵ commented on the inconsistent use of the terms “temporary” and “permanent” in the Kansas case law in an appeal involving the pollution of an aquifer by a salt mining company.¹⁵⁶ Quoting the district court’s efforts to synthesize Kansas law in the area, the court summarized:

When realty is damaged by pollution, the terms “temporary” and “permanent” can be applied to three quite distinct facets of the situation. First, the *pollution itself*, or the causal chemistry of the injury to the land, may be either temporary or permanent. Second, the *damage or loss* caused by the injury may be temporary or permanent. Last, the *source or origin of the pollution*, be it a sewage plant, an oil well, or a salt mine, may be temporary or permanent.¹⁵⁷

In most states, however, the determination that a tort is continuing or permanent has been dictated in part by whether the analysis centered

¹⁴⁹ *Schneider Nat’l Carriers, Inc.*, 147 S.W.3d at 272.

¹⁵⁰ *Id.* The court went on to state that a permanent nuisance was “constant and continuous.” *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* (explaining that the *Schneider* court rejected abatability as a relevant consideration).

¹⁵⁴ *See id.* at 270–73 (recognizing the unique nature Texas courts use to determine the temporary or permanent nature of a nuisance by applying the “plain meaning” of the terms to the specific fact scenarios of each claim while other jurisdictions draw the distinction on other more nuanced tests).

¹⁵⁵ *Miller v. Cudahy Co.*, 858 F.2d 1449, 1453–54 (10th Cir. 1988).

¹⁵⁶ *Kentland-Elkhorn Coal Co. v. Charles*, 514 S.W.2d 659 (Ky. 1974).

¹⁵⁷ *Miller*, 858 F.2d at 1456 n.7 (citing *Miller*, 567 F. Supp. at 899–900). The court then observed “[t]he possibilities for inconsistencies are, of course, multiplied when different labels are applied to these facets, such as, for example, calling the source of the pollution a nuisance and then characterizing the nuisance as temporary or permanent.” *Id.*

on the defendant's tortious *conduct* or on the recurring or continuing *harm* caused by conduct that may or may not be ongoing.¹⁵⁸ To the extent the jurisdiction follows a conduct-centered approach, the invasion would be deemed permanent upon the last act of the defendant.¹⁵⁹ Where the jurisdiction adopts a harm-based approach, however, the continued existence of harm or injury resulting from the invasion will give rise to a continuing tort.¹⁶⁰ According to one commentator:

¹⁵⁸ *Id.* at 1457.

¹⁵⁹ See *Hogg v. Chevron USA, Inc.*, 45 So. 3d 991, 1006 (La. 2010) (refusing to classify damage to land caused by gasoline deposits prior to 1996 as a continuing tort because "the operating cause of the injury—the damage-causing conduct—is not continuing."). "When a trespass which permanently changes the physical condition of the land is concluded, no additional causes of action accrue merely because the damage continues to exist or even progressively worsens." *Id.* at 1003. See also *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 933 (6th Cir. 2004) ("A continuing wrong is established by continuing tortious acts, not by continual harmful effects from an original, completed act.") (quoting *Horvath v. Delida*, 540 N.W.2d 760, 763 (Mich. Ct. App. 1995)); *Page v. United States*, 729 F.2d 818, 821 (D.C. Cir. 1984) ("It is well-settled that '[w]hen a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases.'") (quoting *Donaldson v. O'Connor*, 493 F.2d 507, 529 (5th Cir. 1974)), *vacated on other grounds*, 422 U.S. 563 (1975); *LaBauve v. Olin Corps.*, 231 F.R.D. 632, 656 (S.D. Ala. 2005) ("Alabama courts have clarified that the 'continuous tort' doctrine is not available in instances where a single act is followed by multiple consequences, but rather requires 'repetitive acts or ongoing wrongdoing.'") (quoting *Payton v. Monsanto Co.*, 801 So. 2d 829, 835, n.2 (Ala. 2001)). The court in *Horvath v. Delida* points out that in situations involving permanent property damage resulting from "flooding, overflow, or seepage" the majority of jurisdictions find that a cause of action accrues "at the time the land is first visibly damaged." *Horvath*, 540 N.W.2d at 762.

¹⁶⁰ "A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortuously placed there, whether or not the actor has the ability to remove it." RESTATEMENT (SECOND) OF TORTS § 161(1) (1965). The Restatement (Second) of Torts states:

Activities that create a physical condition differ from other activities in that they may cause an invasion of another's interest in the use and enjoyment of land after the activity itself ceases. When the invasion continues only so long as the activity is carried on, a person who ceases to have any part in the activity is not liable for the continuance of the invasion by others. But if the activity has resulted in the creation of a physical condition that is of itself harmful after the activity that created it has ceased, a person who carried on the activity that created the condition or who participated to a substantial extent in the activity is subject to the liability for a nuisance, for the continuing harm. His active conduct has been a substantial factor in creating the harmful condition and so long as his condition continues the harm is traceable to him. This is true even though he is no longer in a position to abate the condition and to stop the harm. If he creates the condition upon land in his possession and thereafter sells or leases it to another, he is subject to liability for

Widespread acceptance of the thrust, if not the precise terms, of these approaches means that a condition that might cause the plaintiff damage and which the defendant can inexpensively remove or render harmless will more often than not be deemed a continuing source of harm. Meanwhile, a situation that obviously will cause the plaintiff harm, and prove exceedingly costly for the defendant or anyone else to abate, will more often be labeled a permanent nuisance or trespass.¹⁶¹

In *Breiggar Properties, L.C. v. H.E. Davis & Sons, Inc.*,¹⁶² for example, a trespass case involving road debris that had been deposited on adjoining property, the Utah court reiterated its ruling in previous decisions that the focus in characterizing a trespass as permanent or continuing looked “solely to the *act* constituting the trespass, and not to the *harm* resulting from the act.”¹⁶³ A trespass would be permanent where the act of trespass had ceased and would be considered a continuing trespass

invasions caused by the condition after the sale or lease as well as for those occurring before.

RESTATEMENT (SECOND) OF TORTS § 834 cmt. e (1979) (continuing liability for harmful physical conditions). See *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 801 (7th Cir. 2008) (noting the purpose of “continuing violations” torts is to “allow suit to be delayed until a series of wrongful acts blossoms into an injury” because the torts are focused on “cumulative” rather than a “continuing” violation); *Tiberi v. Cigna Corp.*, 89 F.3d 1423, 1430 (10th Cir. 1996) (“Under the continuing wrong doctrine, however, ‘where a tort involves a continuing or repeated injury, the cause of action accrues at, and limitations begin to run from, the date of the last injury.’”) (quoting 54 C.J.S. Limitation of Actions § 177 (1987)). “This continuing-tort doctrine, which becomes relevant only when the tortious conduct is ongoing, is to be distinguished from the rule applicable when the plaintiff’s injury continues or is manifested after the tortious conduct has ceased.” *Page*, 729 F.2d at 821, n.23 (D.C. Cir. 1984) (citing *Urie v. Thompson*, 337 U.S. 163 (1949); *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111 (D.C. Cir. 1982)). See also *Mangini v. Aerojet-Gen. Corp.*, 281 Cal. Rptr. 827, 841 (Cal. Ct. App. 1991) (“[T]he ‘continuing’ nature of the nuisance refers to the continuing damage caused by the offensive condition, not to the acts causing the offensive condition to occur.”); *State Dept. of Env’tl. Prot. v. Fleet Credit Corp.*, 691 So. 2d 512, 514 (Fla. Dist. Ct. App. 1997) (“[I]t is the ongoing contamination, not the initial disposal of wastes, that constitutes a continuing but abatable, nuisance.”).

¹⁶¹ *Graham*, *supra* note 136, at 310–31.

¹⁶² *Breiggar Properties v. H.E. Davis & Sons*, 52 P.3d 1133, 1135 (Utah 2002).

¹⁶³ *Id.* See also *Castellani v. Bailey*, 578 N.W.2d 166, 179 (Wis. 1998) (rejecting plaintiff’s argument that maintenance of surveyor’s stake in ground constituted a continuing tort and stating that the “mere fact that the monument remains in the ground does not somehow transform that single act into a series of continuing events such that the limitations period can be tolled.”).

where there was more than one trespass that continued to occur.¹⁶⁴ Similarly, the Sixth Circuit in *Vill. of Milford v. K-H Holding Corp.*,¹⁶⁵ found Michigan law barred the town's claim for trespass arising from the contamination of the municipal water supply due to migration of pollution off the defendant's property.¹⁶⁶ In holding that the defendant was not liable for pollution damages despite the continued seepage of water onto the plaintiff's property, the court stated "[e]ven if further migration occurred, it was not a new act of trespass . . . the seepage of more water without further acts by the defendant does not constitute an additional tort. In the absence of further acts by K-H there was no continuing trespass."¹⁶⁷ The Massachusetts Supreme Court adopted a conduct-centered approach in *Carpenter v. Texaco, Inc.*¹⁶⁸ Although the court rejected the plaintiff's argument that a continuing trespass resulted from the seepage onto his property from gasoline from an underground storage tank which had been maintained by the defendant, the plaintiff had not alleged either additional acts by the defendant or additional seepage once the storage tank had been removed, well outside of the limitations period.¹⁶⁹ The court stated that "a continuing trespass . . . must be based on recurring tortious or unlawful conduct and is not established by the continuation of harm caused by previous but terminated tortious or unlawful conduct."¹⁷⁰ Despite acknowledging that plaintiff's property remained contaminated, the court concluded that the defendant had engaged in a single encroachment resulting in a permanent trespass and the claim was barred by the statute of limitations.¹⁷¹

Neiman v. NLO Inc.,¹⁷² reflects a case adopting a harm-centered approach where the Sixth Circuit, applying Ohio law, considered whether

¹⁶⁴ Breiggar, 52 P.3d at 1135–36.

¹⁶⁵ *Vill. of Milford v. K-H Holding Corp.*, 390 F.3d 926, 932 (6th Cir. 2004).

¹⁶⁶ *Id.* at 932–33.

¹⁶⁷ *Id.* at 933 (citations omitted).

¹⁶⁸ *Carpenter v. Texaco, Inc.*, 646 N.E.2d 398 (Mass. 1995).

¹⁶⁹ *Id.* at 399–400.

¹⁷⁰ *Id.* at 399.

¹⁷¹ *Id.* at 399–400. *See also* *Kohler v. Germaine Inv. Co.*, 934 P.2d 867, 869 (Colo. App. 1996) (finding limitations period began upon disclosure of contamination present on property and when evidence was provided that the cause of the contamination had ceased for a number of years before reoccurring gave rise to separate causes of actions). In a subsequent decision in *Taygeta Corp. v. Varian Assoc. Inc.*, 763 N.E.2d 1053, 1065 (Mass. 2002), the Massachusetts court distinguished *Carpenter* on the basis that although the defendant's dumping of hazardous material on its property had ceased a number of years earlier, unlike *Carpenter*, migration of contaminants off the property was continuing such that the plaintiff had stated a claim for a continuing nuisance. *Id.* at 1065.

¹⁷² *Nieman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997).

the plaintiff was required to allege a course of continuing conduct in order to show a continuing trespass.¹⁷³ The court held the plaintiff would establish a continuing trespass where the plaintiff could show the existence of continuing harm or damage, even though the conduct leading to the injury had occurred outside the limitations period.¹⁷⁴ The Colorado Supreme Court, in *Hoery v. United States*,¹⁷⁵ also recognized that the continued presence of contaminants on the plaintiffs' property would constitute a continuing tort so long as the contamination could be abated.¹⁷⁶ "We decline to hold, as urged by the United States, that its wrongful conduct has ceased and that the contamination of Hoery's property represents only the product of that prior conduct."¹⁷⁷

Within the framework of conduct-centered or harm-centered analysis, other factors have also played a role.¹⁷⁸ A number of courts generally have considered a continuing nuisance or trespass as one that was easily abatable,¹⁷⁹ a determination often influenced by whether the intrusion

¹⁷³ See *id.* at 1554–60. The district court had granted the motion to dismiss on the basis that the complaint reflected a permanent trespass and was outside the limitations period. *Id.*

¹⁷⁴ *Id.* at 1559.

¹⁷⁵ *Hoery v. United States*, 64 P.3d 214 (Colo. 2003).

¹⁷⁶ *Id.* at 218.

¹⁷⁷ *Id.* at 222.

¹⁷⁸ See also Ronald G. Aronovsky, *Back from the Margins: An Environmental Nuisance Paradigm for Private Cleanup Cost Disputes*, 84 DENV. U. L. REV. 395 (2006), discussing the various approaches adopted by the courts and noting that "[g]iven the wide range of tests applied by courts across the country, it is not surprising that some courts have concluded that no one factor should be determinative of whether a nuisance is continuing or permanent. Instead, a number of courts have employed a multi-factored balancing test." *Id.* at 454.

¹⁷⁹ In *Arcade Water Dist. v. United States*, for example, the Ninth Circuit rejected the district court's finding that the alleged nuisance, which involved toxic contamination leaching into plaintiff's well, was permanent, finding instead that even if the contamination lasted a number of years, it might ultimately abate. 940 F.2d 1265, 1268 (9th Cir. 1991). As such, the plaintiff had alleged a continuing nuisance and the lower court's dismissal of the complaint as barred by the statute of limitations was improper. *Id.* at 1269. See also *Morsey v. Chevron*, 94 F.3d 1470, 1476 (10th Cir. 1996) (discussing the distinction between temporary or continuing damages, recoverable where the cause of damages are "remediable, removable, or abatable" and permanent damages "given on the theory that the cause of injury is fixed and that the property will always remain subject to that injury") (quoting *McAlister v. Atlantic Richfield Co.*, 662 P.2d 1203, 1212 (Kan. 1983)); *Mangini v. Aerojet-Gen. Corp.*, 281 Cal. Rptr. 827, 840 (Ct. App. 1991) ("[T]he crucial distinction between a permanent and continuing nuisance is whether the nuisance may be discontinued or abated."); *Hedgepath v. Am. Tel. and Tel. Co.*, 559 S.E.2d 327, 337 (S.C. Ct. App. 2001) (characterizing a continuing nuisance as one where the "abatement is reasonably and practically possible," triggering a new statute of limitations with each new property invasion); *City of Sioux*

resulted from or was caused by a permanent structure.¹⁸⁰ California, for example, attempts to distinguish the “true nature of a trespass” by determining whether, among other things, it “can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible.”¹⁸¹ In addition, courts have looked at whether the source of the offending activity continued to operate or had been shut down,¹⁸² as well as the duration of the offending activity.¹⁸³ Key in the analysis is whether the activity was of such a character and existed under such circumstances that it was constant, as opposed to occasional or intermittent.¹⁸⁴

Falls v. Miller, 492 N.W.2d 116 (S.D. 1992) (finding that if the nuisance is not reasonably abatable due to the necessity of the structure causing the nuisance in the operation of a public utility, it will be considered permanent, triggering the statute of limitations when the injury first occurred).

¹⁸⁰ In *Nugent v. Pilgrim's Pride Corp.*, for example, the Texas Court of Appeals commented that in most cases where the invasion has been held to be permanent, “a permanent facility or structure was the culprit, and the damage causing activity was continuous and presumably would have continued indefinitely.” 30 S.W.3d 562, 570 (Tex. App. 2000).

¹⁸¹ *Starrh & Starrh Cotton Growers v. Aera Energy LLC*, 63 Cal. Rptr. 165, 172 (Cal. App. 4th 2007) (citing 8 MILLER & STARR, CAL. REAL ESTATE § 22.39). See also *Arcade*, 940 F.2d at 1268–69.

¹⁸² See, e.g., *McAlister*, 662 P.2d at 1211–12 (finding nuisance was permanent where defendant's oil operations that had discontinued in the 1940s and had polluted plaintiff's water well and, for all practical purposes, there was no indication the pollution was abatable in the foreseeable future).

¹⁸³ The court in *Beck Dev. Co. v. S. Pac. Transp. Co.*, balanced multiple factors derived from several tests applied by previous courts to determine if a nuisance was continuing or permanent, including: the duration of the offending activities; the likelihood of the nuisance changing over time; the probability the contaminants would create new damage by continuing to migrate; the ability to abate the nuisance at any moment; and whether the costs of abatement was the best choice, considering several factors. 52 Cal. Rptr. 2d 518, 557–60 (Cal. Ct. App. 1996).

¹⁸⁴ See, e.g., *Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex. 1984) (“Temporary injuries, however, have been found where the injury is not continuous, but is sporadic and contingent upon some irregular force such as rain.”) disapproved of by *Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004) (“[A] nuisance should be deemed a ‘temporary nuisance’ . . . only if the nuisance is so irregular or intermittent over the period leading up to filing and trial that future injury cannot be estimated with reasonable certainty.”); *Cate v. Transcon. Gas Pipe Line Corp.*, 904 F. Supp. 526, 539 (W.D.Va. 1995) (finding defendant's facility that “pepper[ed]” plaintiffs' homes with noise and vibrations were intermittent but occurred with enough frequency to be a continuous nuisance and the health hazards created were not permanent because “the existence of such nuisances will tend to fluctuate with prevailing winds, weather patterns, and industrial activity.”). See also 54 C.J.S. LIMITATION OF ACTIONS § 236 (2005) (“A nuisance may be considered temporary if it is uncertain whether any future injury will occur, if future injury is liable to occur only at long intervals, or if the nuisance is occasional, intermittent, or recurrent, or is sporadic and contingent upon some irregular force such as rain.”).

Other courts have gone so far as to weigh the social utility of the defendant's conduct. For example, in *Denver & Santa Fe R.R. v. Hannegan*,¹⁸⁵ the Colorado Supreme Court rejected the plaintiff's argument that a railway line running next to the plaintiff's property was a continuing trespass, holding instead that the trespass was permanent.¹⁸⁶ The court based its ruling principally on the grounds that the defendant had lawful authority to build the railway line and that the defendant's activity was "vital" to the state's future.¹⁸⁷ In *In re Hoery*,¹⁸⁸ the Colorado Supreme Court reiterated that social utility was a relevant consideration, stating that Colorado law recognized continuing tort theory in trespass and nuisance cases and "[t]he only exception is a factual situation—such as an irrigation ditch or a railway line—where the property invasion will and should continue indefinitely because defendants, with lawful authority, constructed a socially beneficial structure intended to be permanent."¹⁸⁹

The Colorado cases reflect that extending the analysis into the social utility of the defendant's conduct can have a significant effect on the outcome.¹⁹⁰ In general, however, while there is some general consistency overall among jurisdictions as to the factors that are relevant in determining the applicability of continuing tort theory, there is nonetheless clearly variation in application.¹⁹¹

¹⁸⁵ *Denver & Santa Fe R.R. Co. v. Hannegan*, 95 P. 343 (Colo. 1908).

¹⁸⁶ *Id.* at 346.

¹⁸⁷ *In re Hoery*, 64 P.3d 214, 220–21 (Colo. 2003); *see generally Hannegan*, 95 P. 343 (Colo. 1908). *But see* *Meyers v. Kissner*, 594 N.E.2d 336, 340 (Ill. 1992) ("While a lawful act will not constitute a public nuisance, it can nonetheless constitute a private nuisance.").

¹⁸⁸ *Hoery*, 64 P.3d 214.

¹⁸⁹ *Id.* at 220. Irrigation ditches, for example, were considered to be a permanent improvement and to "seep by necessity" for an indefinite period. *Id.* at 219. *See, e.g., Middelkamp v. Bessemer Irrigating Ditch Co.*, 103 P. 280, 282 (Colo. 1909) (finding a permanent injury where a ditch that was properly constructed will necessarily continue to seep due to the quality of the land). Since they were also considered by the court to be a significant social utility, the court found that the ditch was a permanent, rather than a continuing, nuisance. *Hoery*, 64 P.3d at 220. The *Hoery* court relied heavily upon the Restatement (Second) of Torts in its discussion. The court ultimately concluded, among other things, that the contamination migrated continuously onto Hoery's property and as a consequence amounted to a continuing tort, that it was abatable, and that the pollution carried with it no economic or social benefit. *Id.* at 222–23. The court also considered the public policy of incentivizing the prevention and remediation of hazardous contaminants afforded by the continuing tort doctrine. *Id.* at 229.

¹⁹⁰ *Hoery*, 64 P.3d at 220.

¹⁹¹ The divergence in treatment of the different factors has been noted by a number of commentators. *See, e.g., Aronovsky, supra* note 178; Christopher M. Rhymes, Comment,

2. Environmental Contamination as a Continuing Tort

Injuries arising out of pollution or contamination to land have been found to be a continuing trespass or nuisance, depending on whether the jurisdiction adopts a harm-centered or conduct-centered approach and whether a trespass or nuisance will be deemed temporary, i.e., abatable, versus permanent.¹⁹² In *Hoery v. United States*,¹⁹³ the plaintiff alleged that his land had been contaminated by toxic chemicals which had migrated onto his property from the former Lowry Air Force Base nearby.¹⁹⁴ The United States had ceased operations at the base in 1994.¹⁹⁵ Hoery filed suit in 1998 and the district court held that the last act by the defendant (United States) occurred in 1994 upon the cessation of operations at the U.S. base and Hoery's claim was barred by the statute of limitations despite Hoery's claim that the migration of contaminants onto his property constituted a continuing tort and therefore rendering his action timely.¹⁹⁶ Finding there was no Colorado precedent, the Tenth Circuit certified to the Colorado Supreme Court the question of whether 1) the continued migration of contaminants constituted a continuing trespass and/or nuisance and 2) whether the ongoing presence of contaminants was a continuing trespass and/or nuisance.¹⁹⁷ The Colorado court answered both questions

Environmental Contamination As Continuing Trespass, 42 ENVTL. L. 1381 (2012); Graham, *supra* note 136, at 271.

¹⁹² See *Arcade Water Dist. v. United States*, 940 F.2d 1265, 1267–69 (9th Cir. 1991) (in a nuisance claim for the contamination of a well, while its continuing nature was determined by the ongoing “harm suffered,” the nuisance was still characterized as temporary due to potential for abatement); *Employers Inc. of Ala. v. Rives*, 87 So. 2d 653, 656–57 (Ala. 1955) (finding that a bolt improperly tightened resulting in a gas leak that continuously contaminated a nearby well can still be regarded as an “accidental injury” under the terms of an insurance policy even though it may be difficult “to separate the amount of damage done within the period of the statute of limitations from that occurring in the period preceding.”); *Howell v. City of Dothan*, 174 So. 624, 627–29 (Ala. 1937) (finding claims for damages to trees and land resulting from sewage contamination of a creek were time-barred under limitations statute because they were sufficiently “separable” from other damages and the time of their destruction was inadequately proven to justify relief); *Burley v. Burlington N. & Santa Fe RR. Co.*, 273 P.3d 825, 839 (Mont. 2012) (a “nuisance of a continuing temporary nature includes migrating pollution”); see also Rhymes, *supra* note 191, (discussing the conduct-based and injury-based approaches to continuing tort theory and migration as a continuing trespass).

¹⁹³ *Hoery*, 64 P.3d 214.

¹⁹⁴ *Id.* at 215.

¹⁹⁵ *Id.* at 216.

¹⁹⁶ *Id.* at 216–17.

¹⁹⁷ *Id.* at 215.

in the affirmative, holding that the defendant's failure to remove the pollution constituted a continuing invasion and that as the pollutants continued to migrate onto the property, "[t]he failure of the United States to stop the toxic pollution plume that it created from entering Hoery's property also constitutes a continuing property invasion."¹⁹⁸

Maine similarly rejected arguments that continuing tort theory did not embrace environmental contamination in *Jacques v. Pioneer Plastics, Inc.*¹⁹⁹

We see no reason why our long-standing rule of what constitutes a continuing nuisance or trespass should contain an exception for environmental waste . . . If we were to exclude from this test environmental contamination cases the effect would be to grant defendants the equivalent of an easement, thereby reducing significantly the changes that the hazardous materials would be cleaned up.²⁰⁰

And in *Miller v. Cudahy Co.*, the Tenth Circuit affirmed the district court finding that the salt water contamination of an underground aquifer that flowed beneath the plaintiffs' property was a continuing nuisance.²⁰¹ The court held that the harm to the aquifer was remediable once the pollution was abated, and noted that there was no contention that the salt mining operations could not be altered or discontinued.²⁰²

Some courts are less certain that continuing tort theory is the proper framework within which to analyze trespass claims for environmental harm. Looking to precedents developed to address injuries caused by the intrusion of water onto neighboring property, these courts have concluded that injury due to migration or seepage of contaminants are comparable and should follow a similar approach. Thus, in *Wilson v. McLeod Oil Company*,²⁰³ the court stated "[a]s with the cases where the diversion of water caused water to accumulate on another's property, the ongoing seepage of the gasoline into Ms. White's water creates, in the language of *Duval*, 'a renewing rather than a continuing trespass.'"²⁰⁴ Under North Carolina precedent, a continuing trespass accrued from a completed act

¹⁹⁸ *Hoery*, 64 P.3d at 222.

¹⁹⁹ *Jacques v. Pioneer Plastics, Inc.*, 676 A.2d 504 (Me. 1996).

²⁰⁰ *Id.* at 508.

²⁰¹ *Miller v. Cudahy Co.*, 858 F.2d 1449 (10th Cir. 1988).

²⁰² *Id.* at 1455.

²⁰³ *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586 (N.C. 1990).

²⁰⁴ *Id.* at 596 (citing *Duval v. Atlantic Coast Line R.R.*, 77 S.E. 311 (1913)).

rather than continuous acts. The seepage of gasoline was akin to the repeated floodings discussed in prior precedent such as *Roberts v. Baldwin*²⁰⁵ and *Spilman v. Navigation Co.*²⁰⁶ The end result is the same however, with the successive acts constituting a new trespass for each occurrence.

For the environmental plaintiff, the assertion of a trespass or nuisance claim as continuing can have a pronounced impact on whether the claim can overcome prescriptive bars, particularly where that harm is latent.²⁰⁷ Where a trespass or nuisance is considered “continuing,” each repetition or day upon which the intrusion continues means that a new cause of action will accrue until the offending condition has abated or been removed.²⁰⁸ As a result, the plaintiff could bring successive actions for damages, although recovery usually would be limited to injury suffered within the limitations period prior to the commencement of the action.²⁰⁹ In continuing trespass and nuisance cases, most jurisdictions hold that the statute of limitations will not run until the date of the last act giving rise to the harm.²¹⁰ The “last act” requirement is typically construed as the last

²⁰⁵ *Roberts v. Baldwin*, 66 S.E. 346 (N.C. 1909).

²⁰⁶ *Spilman v. Roanoke Nav. Co.*, 74 N.C. 675 (1876).

²⁰⁷ See *Mangini v. Aerojet-General Corp.*, 912 P.2d 1220, 1221 (Cal. 1996).

²⁰⁸ See PROSSER & KEETON, *supra* note 6, at 83. Damages are limited to injuries sustained up to the time of suit. *Id.*

²⁰⁹ See *Neiman v. NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997) (plaintiff can only seek damages incurred within the four years prior to commencement of the action); *Meyers v. Kissner*, 594 N.E.2d 336 (Ill. 1992) (plaintiff could recover damages for five-year period before complaint was filed). A plaintiff who claims injury as the result of a continuing tort is generally held to have the right to elect whether to bring successive actions for immediately ascertainable damages, or to wait and seek damages once the harm has ceased. See, e.g., DAN B. DOBBS, DOBBS LAW OF REMEDIES, § 5.11(1) (1993) (If a “trespass is ‘temporary’ or ‘continuous,’ a new cause of action arises day by day or injury by injury, with the result that the plaintiff in such a case can always recover for such damages as have accrued within the statutory period immediately prior to suit.”); RESTATEMENT (SECOND) OF TORTS § 161 cmt. b (1965) (When possessor of land has been injured by a continuing trespass, he has the “option to maintain a succession of actions” due to the continuous nature of the injuries.); *Taygeta Corp. v. Varian Assoc., Inc.*, 763 N.E.2d 1053, 1064 (Mass. 2002) (“An action for a continuing nuisance allows a plaintiff whose claim otherwise would be untimely to sue where its property rights are invaded from time to time because of repeated or recurring wrongs, resulting in new harm to the property on each occasion.”).

²¹⁰ See *Leonhard v. Unites States*, 633 F.2d 599, 613 (2d Cir. 1980) (stating in New York, “[d]espite the general principle that a cause of action accrues when the wrong is done, regardless of when it is discovered, certain wrongs are considered to be continuing wrongs, and the statute of limitations, therefore, runs from the commission of the last wrongful act.”) (quoting N.Y. Civ. Prac. Law § 203 (McKinney 1972)); *Reynolds Metals Co. v. Yturbide*, 258 F.2d 321, 333 (9th Cir. 1958) (“The rule that the statute runs from the last date of the continuous negligent treatment is just and equitable”) (quoting *Hotelling v. Walther*, 130 P.2d 944, 946 (Or. 1942)); *McCoy v. Foss Mar. Co.*, 2006 WL 829109, *2 (W.D.

act of *actual* intrusion (as opposed to the act that may have caused the intrusion) and usually is commensurate with the point at which the intrusion is abated.²¹¹ Although damages traditionally have been limited to

Wash. Mar. 24, 2006) (citing cases finding “where the plaintiff is injured progressively and where no single event is identified as the cause of the harm, plaintiff can seek redress for the cumulative effect on the injury within three years of the cessation of the harm”); *see, e.g., State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 488 S.E.2d 901, 925 (W. Va. 1997) (stating statute of limitations do not accrue for public nuisances because they are, by their nature, continuing due to the continuing need to protect against harms to the “public health, safety, and the environment.”) *Id.* at 914. In *Walton v. City of Bozeman*, the court found an owner of property still had a cause of action for flooding and pollution that resulted from city’s repair of a sewer drain seven years earlier. 588 P.2d 518 (Mont. 1978). While the city claimed the cause of action was time-barred by the two-year statute of limitations, the court found otherwise based on the continuing nature of the injuries caused by the act:

... Where the injury is not complete so that the damages can be measured at the time of the creation of the nuisance in one action, but depends upon its continuance and the uncertain operation of the seasons or of the forces set in motion by it, the statute will not begin to run until actual damage has resulted therefrom. Thus, where the nuisance is temporary and continuous in character, and gives rise to separate causes of action, a recovery may be had for damages accruing within the statutory period next preceding the commencement of the action

Id. at 521 (quoting *Nelson v. C & C Plywood Corp.*, 465 P.2d 314, 324–25 (Mont. 1970)). *But see Rygg v. United States*, 334 F. Supp. 219 (D.N.D. 1971) (finding flooding that resulted from government excavations did not constitute a continuing tort and accrued “no later than month when flooding occurred”) *Id.* at 221.

²¹¹ In *Garrett v. Raytheon Co., Inc.*, the court held that where the tort is continuing, the statute of limitations does not begin to run until after the “last day on which the plaintiff was exposed to the dangerous conditions which caused the injury.” 368 So. 2d 516, 521 (Ala. 1979), *overruled by* *Griffin v. Unocal Corp.*, 990 So. 2d 291 (Ala. 2008) (citing *Minyard v. Woodward Iron Co.*, 81 F. Supp. 414 (N.D. Ala. 1948), *aff’d*, 170 F.2d 508 (5th Cir. 1948)). *See, e.g., Rapf v. Suffolk County of N.Y.*, 755 F.2d 282, 284 (2d Cir. 1985) (finding cities’ inaction by failing to maintain groins on beach constituted a continuing nuisance “for which the cause of action accrues anew each day”); *Roark v. Macoupin Creek Drainage Dist.*, 738 N.E.2d 574, 584–85 (Ill. 2000) (finding drainage district’s continuous failure to inspect and keep drainage system functional violated their duty under the law, resulting in an ongoing injury that triggered the statute of limitations from the time of the last injury). *But see Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d 264 (Tex. 2004) (providing a thorough explanation of the distinguishing characteristics of a temporary and permanent nuisance as they have been defined and applied in American and Texas law). *See, e.g., James R. MacAyeal, The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL L. J. 589, 620–21 (1966) (discussing rules of accrual for continuing trespass violations by pointing out the “rule of separate accrual” is usually applied in limited circumstances to avoid awarding huge damages). This approach permits the plaintiff to aggregate prior acts which, if viewed individually, would be barred by the statute—in effect treating them as a single “act.” *Id.*

the statutory period immediately preceding the commencement of the action, where the accumulated harm is indivisible the distinction is at best simply one of form.²¹² On the other hand, where the trespass or nuisance is deemed permanent, the claim accrues and the limitations period begins to run when the injury first occurs (or in jurisdictions following a discovery rule, when the plaintiff discovers the harm), even if the plaintiff does not yet know the full extent of the injury.²¹³ Damages for a permanent nuisance assume that the property will always be subject to the injury and include past as well as prospective harm.²¹⁴

For purposes of the statute of limitations, then, characterizing claims involving migration of contaminants across land as a continuing trespass or nuisance presumably results in a new cause of action vesting in the plaintiff each day that the migration continues or the pollution remains unabated.²¹⁵ For the purposes of the rule of repose, however, the analysis runs parallel to its cousin and then diverges at the equitable point—or other devices might operate to toll the statute of limitations period.²¹⁶

²¹² See *Starrh & Starrh Cotton Growers v. Aera Energy LLC.*, 63 Cal. Rptr. 3d 165 (Ct. App. 2007).

²¹³ *Id.* at 170–76 (discussing statute of limitations in the context of distinguishable forms of permanent trespasses).

²¹⁴ *Miller v. Cudahy Co.*, 858 F.2d 1449 (10th Cir. 1988) (polluters of an aquifer unsuccessfully argued the damages were permanent and thus, time-barred by the statute of limitations).

²¹⁵ See RESTATEMENT (SECOND) OF TORTS § 899 cmt. d (1979) (discussing the continuing harms of nuisance as they effect the statute of limitations). *Burley v. Burlington N. & Santa Fe R.R.*, 364 P.3d 825 (Mont. 2012), examines the tolling of statutes of limitations based on two theories that have evolved “with respect to the effect of stabilization, migration, and abatability” of pollutants. One theory treats the last day of dumping as the date the statute of limitations is triggered, while the other theory focuses on the continuing migration resulting from the dumped pollution to determine when the statute of limitations should be triggered. *Id.* The court in *State, Dept. of Envtl. Prot. v. Fleet Credit Corp.*, 691 So. 2d 512, 514 (Fla. Dist. Ct. App. 1997), recognized that in cases involving groundwater contamination, most jurisdictions have generally treated the “ongoing contamination, not the initial disposal of wastes, that constitutes a continuing, but abatable, nuisance” as the event that triggers the limitations period. Consequently, the statute of limitations begins when “the wrongful invasion of rights that constitutes the violation ceases.” *Id.* The court continued to elaborate why environmental contamination cases are treated this way by stating “[w]ere this not the case, then the Legislature’s stated intention to abate pollution that threatens human, animal, aquatic, and plant life as well as property interests would be wholly frustrated.” *Id.* (citing FLA. STAT. § 403.021(5)–(6), (1995)). See also Rhymes, *supra* note 191 (arguing that the conduct-based approach avoids the creation of the imprescriptible trespass).

²¹⁶ RESTATEMENT (SECOND) OF TORTS § 899 cmt. g. (1979).

B. *Using Continuing Tort Theory to Navigate the Rule of Repose in Environmental Trespass and Nuisance Actions*

The case law provides little guidance on how the rule of repose applies or should apply in continuing trespass and nuisance cases where the conduct involves the release of contaminants or the ongoing migration from a previous release.²¹⁷ At least one court has held that the continuing tort theory does not impact the rule of repose. In *Chevron U.S.A. Inc. v. Superior Court*,²¹⁸ the court stated in a case involving a construction defect statute of repose “[n]either theory or [the discovery] rule may override the statute of repose created by the Legislature’s fixed starting point and outer limit for latent construction defects.”²¹⁹ Connecticut courts took a different position, finding that the doctrine applies to toll the statute of repose, stating it “naturally applies to the repose section of the statute, with its ‘act or omission language’” and the action would be timely where the “endpoint of the conduct” occurred within the repose period.²²⁰ In *Rivera v. Fairbanks Management Properties*,²²¹ the court explained:

[T]he doctrine is generally applicable under circumstances where it may be impossible to pinpoint the exact date of a particular negligent act or omission that caused injury or where the negligence consists of a series of acts or omissions and it is appropriate to allow the course of [action] to terminate before allowing the repose section of the statute of limitations to run.²²²

While on their face the rulings in *Chevron* and *Rivera* appear to be at odds, they ask and answer different questions. While both posit an end point to a defendant’s actions in ascertaining whether a cause of action

²¹⁷ At least one court has held that the continuing tort theory does not impact the rule of repose in a construction defect case, stating “[t]he continuing nuisance or trespass theory allows for deferral of the starting date of the statute of limitations in much the same way as does the discovery rule. Neither theory or rule may override the statute of repose created by the Legislature’s fixed starting point and outer limit for latent construction defects.” *Chevron U.S.A. Inc. v. Superior Court*, 54 Cal. Rptr. 2d 324, 328 (1st Cir. 1994).

²¹⁸ *Id.*

²¹⁹ *Id.* at 328. See also other California cases citing *Chevron e.g.*, *San Diego Unified School Dist. v. Cnty. of San Diego*, 87 Cal. Rptr. 3d 796 (2009); *Inco Dev. Corp. v. Superior Court*, 31 Cal. Rptr. 3d 872, 875 (2005); *Gagerro v. Cnty. of San Diego*, 21 Cal. Rptr. 3d 388 (2004).

²²⁰ See, e.g., *Rosato v. Mascardo*, 844 A.2d 893 (Conn. 2004); *Rivera v. Fairbanks Mgmt. Properties*, 703 A.2d 808, 812 (Conn. 1997).

²²¹ *Rivera*, 703 A.2d 808.

²²² *Id.* at 812.

could be pursued, their starting points, and thus their conclusions, are not the same. It is clear that the *Chevron* court's analysis begins and ends with an interpretation of legislative intent with respect to a specific, special interest statute of limitations that also included a repose period and refused to go further.²²³ The California courts construed the statute as applying to all causes of action, including contract and products liability to the extent those actions arose out of a latent construction defect. Accordingly in *Chevron*, the court found that including trespass and nuisance claims within its ambit not only was consistent with the "no action" mandate of the statute, but "also furthers the Legislature's goal of setting an outside limit to protect contractors from extended liability."²²⁴ The statute clearly identified a fixed starting point (the substantial completion of construction) and the repose period would run from that date, regardless of the theory under which relief was sought. In contrast, the *Rivera* court examined the defendant's actions and sought to determine whether on balance a cause of action could be pursued with the established doctrines of tort law.²²⁵

It is within the context of the *Rivera* court's reasoning that this Article circles back to a consideration of when a defendant's act is no longer a singular construct. As a starting point, the gravamen of the law of trespass and the law of nuisance include within their bounds the concept of continuing harm.²²⁶ Unlike the static analysis given to the doctrines of trespass and nuisance where the intrusion is singular, the parameters associated with their continuing-harm brethren recognize that a new cause of action or new harm comes to fruition with each measurable intrusion, whether that harm was initiated by a single act or by multiple acts.²²⁷ Simply put, while there are wide variations to this theme, continuous harms posit a discernible chain reaction of separate, discrete, and measurable events that initially flow from a single act or set of actions of a defendant. Thus, the continuing tort doctrines of trespass and nuisance are not overlays to established tort doctrine. Rather, they are logical corollaries subsumed within the base doctrines that provide an analytical framework meant to justly measure and apportion harm and liability.²²⁸ For environmental plaintiffs to succeed in overcoming the bar of repose, the approach adopted by the

²²³ *Chevron*, 54 Cal. Rptr. 2d 324.

²²⁴ *Id.* at 329. The statutory provision at issue provided that no action arising out of damages for any latent construction defect or resulting injury to real property could be brought outside the stated ten year period. *Id.*

²²⁵ *Rivera*, 703 A.2d 808.

²²⁶ See RESTATEMENT (SECOND) TORTS § 161 cmt. b. (1965).

²²⁷ See PROSSER & KEETON, *supra* note 6.

²²⁸ See DOBBS, *supra* note 209.

courts needs to recognize that just as the analytical framework associated with nuisance and trespass expands within its natural bounds to balance measurable events, so this analytical framework should extend to and be reflected in the application of rules of repose.²²⁹ As a consequence, the dispositive issue centers on establishing at what measurable point in a continuing trespass or nuisance a defendant acts for purposes of the rule of repose. Here, the analysis would shift from a focus on the first act of the defendant to encompass all of the defendant's harmful conduct.²³⁰ To some extent, whether the approach to continuing trespass or nuisance is conduct-centered or harm-centered will impact the analysis.

In placing the rule of repose within this framework, several conclusions become apparent. Where the relevant act of the defendant is identified as the date of discharge, the continuing tort doctrine would command that each day of discharge is a new 'act' by the defendant, resulting in a new invasion of the plaintiff's interest. It is not until the last date of discharge—or, for simplification, the cessation of operations—that the intrusion would cease. Where the rule is triggered by the cessation of operations, application within the context of continuing tort theory is fairly straightforward.²³¹ The continuing nature of the trespass ends with the termination of the defendant's harm-causing activities and the rule simply runs from that point forward.²³² Designation of the tort as continuing, then, does not change the focus on the defendant's tortious act and only shifts the point at which the defendant has certainty as to the outer limit of his liability for the last act of which the plaintiff could complain. This result fits squarely within the conduct-centered approach, assessing whether a trespass or nuisance is continuing with a focus solely on the defendant's wrongful affirmative acts. Since the rule is not tied to accrual, when the pollutants actually enter the plaintiff's property or whether the plaintiff has notice of the entry are irrelevant and there is no obfuscation of the date the clock begins to tick.²³³

²²⁹ To the extent the jurisdiction doesn't recognize continuing trespass or nuisance, of course, plaintiffs would be forced to rely on traditional trespass and nuisance theories. *See, e.g.,* Aronovsky, *supra* note 178, at 445 (noting that the continuing tort theory had been rejected in Georgia and New York for property damage caused by contamination).

²³⁰ *See generally* Schneider Nat. Carriers, Inc. v. Bates, 147 S.W.3d 264 (Tex. 2004).

²³¹ In the case of a permanent trespass or nuisance, subsequent migration would simply increase the damages suffered by the plaintiff. *See generally* Aronovsky, *supra* note 178, at 455.

²³² At that point either the tortious conduct has ended or, alternatively the nuisance or trespass has been deemed permanent. Under either scenario the rule would be triggered. *Id.* at 454.

²³³ *Id.* at 452–53.

Continuing tort theory also introduces the potential for abatement to play a greater role than when the trespass or nuisance was singular.²³⁴ Trespass and nuisance permit the extension of liability for the defendant's failure to abate the harm caused by their tortious activity. Thus, conceivably the defendant could still be considered to act through omission by failing to abate the pollution, which would result in the rule beginning to run concomitantly with the statute of limitations—on the day the contamination is abated. However, despite the Restatement's position and that of cases such as *Hoery* that the failure to remove (here, abate) the offending invasion is a continuing trespass for the entirety of the time it remains present on the plaintiff's land, most courts as well as the repose statutes clearly tie the running of the rule of repose to some affirmative conduct by the defendant rather than a failure to remedy the *harm* created by that conduct once it has occurred. The "act by omission" theory in this circumstance, while certainly plausible, is nonetheless an unlikely choice for adoption even in a harm-centered jurisdiction.²³⁵

It is not immediately apparent that the act of migration (allowing the contaminants to cross onto the plaintiff's property without impediment) escapes a similar fate. As with the failure to abate, the defendant arguably again acts by omission. Affirmative conduct in the traditional sense is absent and consistency would demand that as with the failure to abate pollution, the failure to preclude migration would not extend the defendant's conduct beyond the act of discharge. Here, however, the defendant's failure to prevent contaminants from migrating offsite and onto the plaintiff's land affirmatively causes a new invasion rather than simply allowing a previous invasion to continue unabated. The defendant actively causes the entry not by the discharge of contaminants on the defendant's own property *ab initio*, in itself not tortious, but by not preventing their entry, which is. For torts such as trespass and nuisance, it is this affirmative entry onto the land or interference with use and enjoyment that forms the basis for the tort and would preclude reliance upon a cessation of operations, or active discharge, as the only tortious conduct that could raise the prescriptive bar.

Under this characterization of the defendant's conduct, the continuing tort doctrine would suggest that the rule of repose could be triggered anew each day that migration occurs as each day there would be a new entry, thus continuously restarting the repose period until migration ended. Whether utilizing traditional continuing tort concepts that construe the separate events of migration as one single act or alternatively

²³⁴ *In re Hoery*, 64 P.3d 214 (Colo. 2003).

²³⁵ *Chevron U.S.A. Inc. v. Superior Court*, 54 Cal. Rptr. 2d 324, 328 (1st Cir. 1994).

as a continuous act, defendant liability would be calculated from the last date contaminants migrated onto plaintiff's property.²³⁶ Indeed, whether conceptualized as a continuing tort or as even as a renewing tort as posited by the North Carolina court in *Wilson v. McLeod Oil Co.*,²³⁷ migration would fix the actual entry on to the property as the operative point for triggering the running of the rule as each entry, standing alone and regardless of any prior conduct, is a trespass.²³⁸ Thus, continuing tort theory would benefit the plaintiff who was unaware of the invasion until well after migration began, but discovered the contamination before migration ended or the repose period expired. The challenge for plaintiffs—and a not inconsiderable one—would be to prove either when 1) contaminants began migrating onto their property, or 2) contaminants in fact continue to migrate. Although perhaps comparable in form to statute of limitations rationales under a harm-based “last act” approach, viewed in terms of failure to abate, with repose, the focus remains on migration rather than abatement as the determinative conduct trigger.

The recognition of a continuing harm framework in evaluating rules of repose and their application in land contamination cases does not provide plaintiffs with a new or unanticipated cause of action. The rule remains unchanged both in form and function and is applied consistently within the framework of the law of trespass and nuisance.²³⁹ At the same time, plaintiffs who were initially unaware of the defendants' tortious actions or of the harm to their property are not prevented by the rule from maintaining a claim where they can demonstrate the defendant has created a continuing trespass.²⁴⁰ The rule operates as intended; the continuing nature of the tort serves to construe multiple individual acts—whether discharge or migration—as a single instance of tortious conduct on the date of the last act in the series. As noted by Graham in his exploration of the limits of the continuing violations doctrine, the doctrine is not a tolling device or discovery rule:

[W]hile both the discovery rule and equitable tolling simply manipulate when the statute of limitations begins or

²³⁶ See, e.g., *Graham v. Beverage*, 566 S.E.2d 603, 614 (W. Va. 2002).

²³⁷ *Wilson v. McLeod Oil Co.*, 398 S.E.2d 586 (N.C. 1990).

²³⁸ See, e.g., *J & P Dickey Real Estate Family Ltd. P'ship v. Northrop Grumman Guidance & Elecs. Co.*, 2012 WL 925015 (W.D.N.C. Mar. 19, 2012) (noting on motion to dismiss that it was unclear from the allegations that the last act or omission occurred outside of the repose period and the complaint alleged migration was still ongoing).

²³⁹ *Graham*, *supra* note 136, at 283–96.

²⁴⁰ *Id.* at 288–91.

continues to run on a cause of action, the continuing violations doctrine takes the more drastic step of redefining the very claim or claims as to which the limitations period or periods apply.²⁴¹

There may indeed be areas where courts as well as legislatures conclude that the goals underlying repose rules should take precedence over those served by other doctrines, including the continuing tort doctrine.²⁴² For example the *Rivera* court declined to extend the continuing course of conduct doctrine to apply to accrual of the plaintiff's cause of action out of concerns that it would push the accrual point indefinitely as well as "allow the plaintiff to acquiesce in the defendant's conduct for as long as convenient to the plaintiff" thereby undermining the purpose of the statute of limitations to prevent the defendant from being surprised by stale claims.²⁴³ However, one commentator discussing the apparent abandonment of equitable tolling principles for undiscovered fraud in securities litigation cautioned:

Doctrine doesn't matter because it is some primeval source of authority, but because it is the outcome of authority's exercise. It is the condensed language in which a decision-maker's enforceable opinion is described. That language—the "rule"—is carried forward into subsequent cases and is itself cited as the basis for a decision. This is proper and useful so long as the rule serves a redintegrative function, a calling up of the earlier normative reckoning and a reaffirmation of it. If, however, the rule is mechanically cited as sufficient unto itself, as a kind of conduit drawing on an invisible noumenal realm, then, once again, we begin the dangerous cycle of ascribing an "out there" authority to rules, rather than probing for the normative commitment underpinning the rules.²⁴⁴

²⁴¹ *Id.* at 279–80.

²⁴² Lyman Johnson, *Securities Fraud and the Mirage of Repose*, 1992 WIS. L. REV. 607, 615–16 (1992). The legislature making that determination can, and should, draft repose rules that clearly identify when and how it applies. *Id.*

²⁴³ *Rivera v. Fairbanks Mgmt. Properties*, 703 A.2d 808, 812 (Conn. 1997). *See also McCoy v. Foss Mar. Co.*, 2006 WL 829109, at *3 (W.D. Wash. Mar. 24, 2006) (noting that application of the continuing tort doctrine did "not undermine the public policy that is served by a statute of limitations. Statutes of limitations exist to keep stale claims out of court. If [defendant] perpetrate the tort within the last three years, the cause of action is not stale.").

²⁴⁴ *See Johnson, supra* note 242, at 615–16.

Crucial is the need to discourage blind adherence to rules or policies that are no longer normative.²⁴⁵ Foremost among those policies was to provide certainty to defendants from liability for stale claims where evidence and witnesses might no longer be available, and at the same time free up economic resources which by extension benefited society. At first blush the goal of repose—putting a finite limit on stale claims—would seem deserved through the adoption of migration or abatement as the relevant trigger, suggesting an imprescriptible liability. MacAyeal explains that courts did not perceive the continuing violations doctrine as undermining the policies behind statutes of limitations (to prevent litigation of stale claims), since “at least some of the evidence relating to events within the limitations period is still fresh and subject to investigation.”²⁴⁶ MacAyeal also notes that both trespass and nuisance claims, whether under a continuing tort theory or in their traditional form, in essence allow the defendant to control when the last act occurs either through remediation of the defendant’s property, thereby ending future migration, or by abatement.²⁴⁷ The continuing tort doctrine simply permits the plaintiff the opportunity to present the bill to the defendant for the costs associated with defendant’s activities, which defendant had externalized onto the plaintiff.

Nonetheless, the challenges facing environmental plaintiffs in responding to the specter of repose are not inconsiderable, should the jurisdiction adopt either migration or abatement as the defendant’s act. The costs associated with ascertaining when migration began can be significant and will need to be juxtaposed against the economic burden facing the plaintiff who undertakes the cost of remediation, should the repose bar apply.

CONCLUSION

The relevant case law suggests that irrespective of the divide, policy makers and jurists have struggled with the absolutism of the rule of repose. While rooted in sentiments of equity and justice, this struggle also acknowledges that in overly protecting the interests of the defendant as well as certain societal imperatives, the rule reduces the pool of monies available for remediation efforts and, at times, irrationally places the economic costs of environmental contamination on the plaintiff. Continuing tort theory permits a rebalancing of the equities between plaintiffs who have not been dilatory and defendants’ right to be free of stale claims and their

²⁴⁵ *Id.*

²⁴⁶ MacAyeal, *supra* note 211, at 631.

²⁴⁷ *Id.*

attendant economic impact on both defendants and society. Within this construct, plaintiffs are no longer forced to bear the costs of a defendant's risk-producing activities and the incentives for defendants to externalize those costs are reduced. Certainly, application of continuing tort theory would encourage defendants to remediate contamination and at minimum, defendants are not granted a proverbial free pass to pollute and, fingers crossed, walk away.

Concededly, characterization of the defendant's conduct as a continuing tort can result in pushing back the outside date beyond which the defendant would have no further exposure to potential claims by the plaintiff and concerns attendant to the litigation of stale claims—including witness recollection or discarded evidence—remain. However, it may simply mean that a plaintiff must think carefully before embarking upon a path where success might be unlikely and lawyers should seriously consider the obstacles presented by the passage of time before agreeing to representation. Indeed, the increasing use of technology and ability to preserve and record information, including digital storage, may even lessen the importance of some of these concerns going forward. Regardless, they should not, however, be the primary considerations in any discourse on repose. More troubling is the economic impact not only on defendant but on societal resources resulting from a shift in the outer temporal boundary of liability, concerns frequently at the forefront of any rhetoric regarding repose. Unnoticed, however, in assessments of economic impact is the simultaneous financial benefit realized by the defendants by paying claims in future rather than present dollars. In short, the case law and analysis associated with continuing tort theory permit a more balanced approach to liability in this area. Such an approach opens the door to a more rational expansion of the pool of resources dedicated to the costs associated with environmental contamination.