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CONSEQUENCES of the West Explosion

“Ammonium nitrate: a dangerous nuisance—in need of disclosure ...”

The August 1, 2013 Executive Order signed by the President marks the first regulatory steps by the federal government addressing the tragic April 17 ammonium nitrate explosion in the small town of West, Texas.

This reaction primarily focuses the following issues:

1. Coordination between the various federal agencies with some type of regulatory authority for the storage, security and safety of dangerous chemicals;
2. Similar coordination between federal, state and local governments;
3. The locations where are these dangerous chemicals are being stored; and
4. Safer methods of storing ammonium nitrate at these locations.

In other words, “where are the locations where these dangerous chemicals are stored, and

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FEATURE ARTICLE

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how can these locations be made safer?”

A related inquiry might be “What is the adverse effect, if any, these storage facilities have on market values of surrounding real estate within the now-known ‘zone of danger?’” Please consider the following.

April 17, 2013, now joins April 16, 1947, and April 19, 1995, as dates highlighting the importance of knowing this lethal chemical's exact location.

The largest industrial accident in the history of the United States came on April 16, 1947, when several tons of ammonium nitrate exploded in two separate devastating blasts destroying Texas City, Texas, killing hundreds of people and injuring thousands more.

On April 19, 1995, a domestic terrorist used ammonium nitrate as the principal ingredient to take 168 lives in the blast

at the Alfred P. Murrah federal building in Oklahoma City.

Now, this most recent tragedy will ultimately provide the parameters of the zone of danger presented by the location of other existing storage facilities where deadly chemicals are stored. Preliminary forensics in West indicates blast damage as far away as a half mile—perhaps more. Those killed or maimed were within 1000 feet of the blast.

A May 3rd interactive Internet map published by the *Dallas Morning News* identifies 44 Texas ammonium nitrate fertilizer facilities reporting at least 10,000 pounds of ammonium nitrate onsite. The existence of these facilities could very well pose questions for the personal safety of individuals—and the diminution of property values resulting to homes and businesses located nearby.

Nuisance

For over a hundred years, a cause of action has existed, in Texas at least, for recovery of monetary damages caused by a permanent or temporary nuisance adversely affecting the use or enjoyment of real property.

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NUISANCE (from p.1)

“Nuisance” has been defined as “a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance of persons of ordinary sensibilities attempting to use and enjoy it.”¹

Texas juries are instructed that:

A nuisance may result from:

- (1) a negligent invasion of another’s interests;
- (2) an intentional invasion of another’s interest; or
- (3) other conduct which is culpable because it is abnormal and out of place with its surroundings that invades another’s interest.

A nuisance may occur in one of three different ways: (1) physical harm to the property, such as encroachment of a damaging substance or by the property’s destruction; (2) physical harm to a person on his or her property, such as by an assault to his or her senses or by other personal injuries; or (3) emotional harm to a person from the deprivation of the enjoyment of his or her property, such as by fear, apprehension, offense, or loss of peace of mind.²

A nuisance can be permanent “if it is sufficiently constant or regular (no matter how long between the occurrences) that future impact can be reasonably evaluated” – and that jurors would resolve “the extent [to

which] there is a dispute regarding what interference has occurred or whether it is likely to continue.”³

Damages Resulting From Nuisance

The Texas Supreme Court held only last year that, where a nuisance is permanent, the landowner may recover the property’s lost market value *measured by a comparison of market values with – and without the nuisance.*⁴

Under these standards the very existence of any Texas facility storing ammonium nitrate on an ongoing basis could result in diminution of property value for real property located within the blast zone, and perhaps even further, as demonstrated by the West explosion.

However, the landowner’s right to recover damages also has a “flip-side.”

Duty to Disclose

Back in 1995, the Texas Supreme Court held that there was no duty to disclose unknown facts in a commercial real estate transaction between sophisticated parties. The Court added that an “as is” provision in a contract between commercially sophisticated parties must be given effect against the purchaser.⁵

The Court left open the question of “disclosure” involving unsophisticated purchasers entering “boiler plate” contracts such as those commonly used in real estate transactions. There, the Court stated, “...the

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totality of the circumstances surrounding the agreement must be considered.”

After April 17, 2013, it is hard to imagine a sale involving real estate within a half mile of a fertilizer plant (the “blast” zone as defined by the West explosion) that would not be implicated by that dangerous circumstance.

Commencing in 1994, the Texas legislature mandated that certain matters relating to real property must be disclosed in single family dwelling residential transactions. The statute includes a mandated disclosure for “any condition on the property which materially affects the physical health or safety of an individual.” It is likely that

such information to most buyers would be material to the decision to buy—or at least to offer a lower price based upon an informed understanding of the safety risk being undertaken.

Conclusion

After April 17, 2013, given the now “known danger” presented by the storage of these lethal chemicals, it is not inconceivable that a failure to disclose such danger lurking within a half mile of one’s property could give rise to liability under common law and/or statutes relating to the sale and/or location of real estate. The disclosure or non-disclosure of the locations and proximity of high risk neighbors such as the West Fertilizer Plant is something that is likely to be the subject of future litigation involving alle-



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gations of property diminution—and the quantification of the amount of property diminution warrants further research. It is also possible that the events associated with the West Explosion will cause changes in Seller Disclosure Requirements in Texas as well as other states in order to inform willing buyers and make them knowledgeable of the risks & uncertainties of

living in close proximity of such facilities. ■

Footnotes:

¹Oil, Gas, and Energy Resources Council Pattern Jury Charge.

²*Id.*

³*Schneider Nat'l Carriers Inc. v. Bates.*

⁴*Natural Gas Pipeline v. Justiss.*

⁵*Prudential v. Jefferson Associates, LTD.*



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