COMMENTARY

BY DAVID G. MANDELBAUM
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MANDELBAUMD@GTLAW.COM

Lessons in Claims for Common Law Waste

The common law doctrine of waste protects remaindermen against tenants. Last month, Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit wrote a useful opinion addressing a claim for common law waste arising out of a series of underground storage tank removals. Waste claims, especially claims that succeed, are reasonably rare, therefore *Bitler Investment Venture II v. Marathon Petroleum*, No. 12-3722 (7th Cir. Jan. 27, 2014), may provide occasion to consider waste.

Waste is an English common law doctrine that assures the owner of a reversion or remainder that a tenant—the owner of a life estate, a term of years, or some other period—will not unreasonably harm the remainder interest. For example, as Posner suggests in *Bitler*, if someone leases forest land for a term of years, he or she has an incentive to harvest timber during that term. If some of the trees will not mature until after the term, the tenant nevertheless may want to cut them down in order to sell the immature timber, leaving the owner of the reversion with no timber at all.

More subtly, a tenant near the end of its term may have no incentive to invest in erosion and sediment control when it harvests the timber, allowing the activity to harm the long-term value of streams on the property. A tenant may have an incentive to mine coal as quickly as possible, without suitable regard for maintaining the value of the surface. Accordingly, at common law, the owner of the remainder or the reversion could sue the tenant for an injunction or restitution if the tenant did not reasonably manage both the renewable and nonrenewable resources on the property. Some would say that management would be reasonable if a prudent owner of the fee simple interest would have behaved in the same way.

David G. Mandelbaum is national co-chair of the environmental practice group of Greenberg Traurig. His principal office is in Philadelphia. He teaches "Oil and Gas Law" and "Environmental Litigation: Superfund" in rotation at Temple University's Beasley School of Law, and serves as vice chair of the Pennsylvania Statewide Water Resources Committee. Follow him on Twitter @mandelbaumd.

At some level, then, waste is a common law analog to more modern notions of sustainability. In traditional England, one had to manage land so that it would maintain value forever, or at least for a long time, rather than exploiting it as fast as possible to the detriment of later owners.

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But that sort of doctrine did not fit well in this country. As described in Jedediah Purdy's "The American Transformation of Waste Doctrine: A Pluralist Interpretation," which was cited in *Bitler*, American law developed somewhat more skeptically to encourage what amounts to rapid and, in modern terms unsustainable, development of new land and resources. So, for example, in Pennsylvania a life tenant of property may mine the coal during his or her life even to exhaustion, at least if there were open pits on the property at the time he or she took the property, as in *Neel v. Neel*, 19 Pa. 323 (1852).

Nevertheless, Pennsylvania courts have seen actions for waste. Most of them turn on the language of the instrument granting the tenancy. So, in *Schuylkill Trust v. Schuylkill Mining*, 57 A.2d 833 (Pa. 1948), the mortgagee could not enjoin coal mining because that was clearly contemplated in the mortgage. In contrast, *Trustees of the Proprietors of Kingston v. Lehigh Valley Coal*, 84 A. 820 (Pa. 1912), concerned a lease for farming, and that did not convey the right to mine coal, and coal mining could be enjoined. So if you have the right to mine, to take timber or otherwise to use land, you can use that right however you like, but only if you have it.

If the contract—or, in the *Neel* case, the will—defines the right, contract remedies ought to suffice. The claim for waste ought to be redundant of a claim under the contract.

Indeed, *Bitler* involved a contract claim and a waste claim that, apparently, exactly overlapped. Bitler Investment Venture owned properties that it leased to Marathon for use as gasoline service stations. When the federal underground storage tank (UST) rules came into effect in the late 1980s, the USTs at six gas stations had to be removed. Marathon and Bitler entered into a modification to their leases that transferred ownership of the tanks and piping to Marathon and under which Marathon agreed to remove the tanks and piping and to restore the properties so they would be suitable for commercial use. The properties took a long time to restore, some were allowed to deteriorate and two were condemned.

The court allowed some of Bitler's contract claims. In addition, it observed that the agreements did not disclaim liability for waste, and therefore the court did not reverse judgments in Bitler's favor on that theory as well. For the properties in Michigan, a statute provided for, in effect, punitive damages of double the actual waste.

Unlike the Pennsylvania cases, the *Bitler* plaintiff sought money damages rather than an injunction. Injunctions against prospective waste require a showing of the inadequacy of remedies at law. *Bitler* does tend to suggest that an adequate remedy will generally exist. After all, damages compensated the plaintiff in that case. It is not clear why damages would not compensate for improper mining or timbering.

The *Bitler* court also specifically endorsed parallel and overlapping contract and the tort theory even though the tort allowed enhanced damages. Torts can also be attractive when the lessee is a failed or failing business entity. Damages may be unrecoverable from the lessee, but responsible individuals may have assets. Those individuals will not be responsible for the contractual liabilities of the lessee, but they may be liable directly in tort.

Notice also that while *Bitler*'s facts begin with a tank removal, the waste is not connected to soil or groundwater contamination; it arose because the buildings were damaged or allowed to deteriorate. We do not know whether making or allowing an environmental problem would constitute waste. Leaving hazardous materials at the end of a tenancy did not constitute waste in Maryland in *Hanna v. ARE Acquisitions*, 929 A.2d 892 (Md. 2007), which described summary judgment in favor of the defendants on the waste claim below. Soil or groundwater contamination, significant damage to a stream or wetland, or destruction of some other important habitat, however, might be said to be waste.

Most leases, particularly leases between businesses, will contain provisions allocating responsibility for such things. Those leases will set out what the parties must do to maintain the environmental condition of property, which party must maintain insurance against loss, and who will bear the loss if one occurs. *Bitler*'s most important teaching may be that that contractual allocation may not govern unless tort or statutory claims are disclaimed in the agreement. •