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Environmental Law: Private Nuisance: Abatement of Air Pollution in Boomer v. Atlantic Cement Company, Inc.

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injury."[7] Therefore, the court found that the exclusion of evidence of the social significance of the defendant's activity was proper.[8] However, it was noted that, where injunctive relief is sought, the court will consider the comparative hardships which will result from the issuance or denial of the injunction.[9]

CONCLUSION

In *Jost*, the Wisconsin Supreme Court reaffirmed the principle that in actions for damages only, the issue of whether or not the defendant has committed a wrongful act will in no way depend on the utility of his activity.[10] Evidence of the social importance of the offending conduct could contribute to the danger that the jury will be influenced by extraneous matters such as the effect their decision will have on the community's electric rates. While not a radical departure from existing law in Wisconsin, the clear decision in *Jost*—that in nuisance actions solely for damages the plaintiff will be compensated for injuries by the pollution-nuisance without regard for the social utility of the defendant's conduct—should provide some measure of relief to injured parties and some comfort to the environmentalists.

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Private Nuisance: Abatement of Air Pollution In Boomer v. Atlantic Cement Company, Inc:[1] Landowners brought a private nuisance action to enjoin the operation of a neighboring cement plant from polluting the air through the emission of dust and raw materials and the conducting of excessive blasting in the operation of its plant. The landowners also sought damages for the nuisance. The lower court found that a private nuisance did exist and that it had caused the plaintiffs substantial injury. The Court of Appeals accepted both findings.[2] The heart of the appeal was the contention by the cement company that an award of permanent damages, and not an abatement order, was the proper remedy. Noting the Cement Company represented an invest-

[7] *Id.* at 177, 172 N.W.2d at 654.
[8] *Id.* at 176, 172 N.W.2d at 653.
[9] *Id.* at 177, 172 N.W.2d at 654. See Dolata v. Berthelet Fuel Supply Co., *supra* note 4, at198-199, 36 N.W.2d at 99; Holman v. Mineral Point Zinc Co., *supra* note 4, at 137, 115 N.W. at 329; Abdella v. Smith, *supra* note 4, at 398-400, 149 N.W.2d at 539-540.
[10] 45 Wis. 2d at 177, 172 N.W.2d at 654. The rule was first propounded in Wisconsin in 1883 in Pennoyer v. Allen, *supra* note 3.

[1] 309 N.Y.S.2d 312 (1970).
[2] *Id.*, at 315.
[3] The court found that the rate of technical advances in the reduction of particulate contamination was beyond the control of the defendant, and in fact depended on the total resources of the industry. To demand that this defendant either discover a technical solution within a short time or cease operation, reasoned the court, would be both unrealistic and unfair. Accordingly, the court ordered the trial to issue an injunction which was to be vacated upon payment by the defendant of such permanent damages as the lower court would find.

ment in excess of 45 million dollars and employed over 300 people, and that the pollution was unlikely to be eliminated by any technical advances which could be made by the defendant if an injunction was merely delayed for a short period, the court declined to order a permanent injunction, on the condition that the defendant pay damages to the plaintiffs in compensation for this servitude on their land.[3] According to the weight of authority, once it is found that a private nuisance exists and is causing substantial damage, the activity should be enjoined despite the fact that the resulting benefit to the plaintiff is small in comparison to the economic harm to the defendant.[4] The leading New York case applying this rule was *Whalen v. Union Paper Bag & Paper Co.*[5] There a pulp mill which employed 500 and represented an investment of more than one million dollars was found to have wrongfully polluted a stream, causing a lower riparian owner damages amounting to one hundred dollars per year. The court issued an unconditional injunction and stated "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction."[6] It was this long-standing New York precedent which the Court of Appeals in Boomer was specifically overruling in adoption of the "disparity of economic consequences" approach.[7]

The court was careful to note that the scope of its decision was limited to "within the four corners of these actions and does not foreclose public health or other public agencies from seeking proper relief in a proper court."[8] The court was perhaps saying that with the burgeoning interest in the prevention of air pollution, the proper method of weighing the competing interest involved was not the case-by-case application of traditional nuisance law, but rather the increased activity by local, state and federal agencies to establish guidelines for the enforcement of statutes enacted by Congress[9] and by state legislatures. For example, under the Air Pollution Control Act of 1957,[10] New York set up its Air Pollution Control Board within its Department of Health

[4] AM. JUR. *Nuisances* § 159 (1942).
[5] 101 N.E. 805 (1913).
[6] *Id.* at 806.
[7] 309 N.Y.S.2d at 315.
[8] *Id.* at 317.
[9] The public concern over air pollution gave birth to several federal acts, the last of which is the Air Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485. With this act Congress established a procedure whereby State standards for air pollution are subject to review and rejection by the Department of Health, Education and Welfare. A review of the statutory procedure reveals that Congress intended to mount a comprehensive, systematic, and ultimately effective attack on the largely unexplored problem of proper air pollution control. This act was preceded by the Air Pollution Control Act of 1955, Pub. L. 84-159, 69 Stat. 322, which was significantly amended and expanded both by the Clean Air Act of 1963, Pub. L. 88-206, 77 Stat. 392, and by the 1967 Act.
[10] N.Y. Public Health Law §§ 1264-1299 (McKinney Supp. 1970).

(now administered by the Department of Environmental Conservation) with power to "Formulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution,"[11] and to "Prepare and develop a general comprehensive plan for the control or abatement of existing air pollution . . ."[12] But whether or not executive and administrative authorities such as this one are able to effectively combat the type of air pollution found in the *Boomer* case, it is clear that a potentially significant antipollution weapon has been lost in New York—the weapon of the private nuisance abatement action.

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[11] *Id.*, § 1271(1)(a).
[12] *Id.*, § 1271(2)(a). The Air Pollution Control Board formulated standards for the prevention of particulate contamination in 1969. See *Environment Reporter*: *State Air Laws* at 461:0661 (1970).