Comments

Indemnification Of A Nuisance Defendant For Costs Incurred By Complying With An Injunction

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A new twist has recently been added to the labyrinth of nuisance law. Traditionally, after a court determined that a nuisance existed, it would remedy the situation either by awarding the plaintiff damages or by enjoining the defendant's offensive conduct. In *Spur Industries, Inc. v. Del E. Webb Development Co.*,[1] however, the Supreme Court of Arizona went one step further. After enjoining the defendant's conduct because it was causing a nuisance to exist, the court went on to require the plaintiff to reimburse the defendant for a reasonable amount of the expense incurred in complying with the injunction.

Spur involved a nuisance action resulting from Spur Industries' operation of a cattle feedlot near the retirement community of Sun City, 15 miles west of Phoenix, Arizona. Spur's predecessor in interest had chosen this location in 1956 beause it was compatible with the surrounding agricultural pursuits.[2] By 1959 approximately 25 feedlot and dairy operations were situated within a 7 mile radius of Spur's place of business.[3] Prior to Spur's purchase of the feedlot in 1960, up to 13,000 cattle had been fed at the location.[4] After acquiring the feedlot, however, Spur initiated a remodeling and expansion program that resulted in an increase of the acreage used from 35 to 114 acres with a capacity of 20,000 to 30,000 cattle.[5]

1. 108 Ariz. 178, 494 P.2d 700 (1972).
2. *Id.*
3. *Id.* at 182, 494 P.2d at 704.
4. Brief for appellant at 8, Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 494 P.2d 700 (1972).
5. 108 Ariz. 183, 494 P.2d at 705.

It was in this vicinity that, in 1959, the Del E. Webb Development Company purchased 20,000 acres for the purpose of establishing a high-density retirement community known as Sun City.[6] Webb chose this location primarily because of the favorable climatic conditions and the reasonable price at which the raw land could be obtained.[7] By 1961 a conflict had arisen between retired homeowners seeking to enjoy outdoor living and Spur Industries' feedlot. As Sun City continued to expand towards Spur's operation, complaints about the feedlot's odors became more frequent.

In response to these complaints, and due to the detrimental effect these odors were having on sales, Webb initiated this action against Spur for the maintenance of a nuisance. The trial court, finding the feedlot to be a public nuisance, granted the injunction against Spur's operation and denied Spur's counterclaim seeking remuneration from Webb for the damage caused by the injunction. On appeal, the Supreme Court of Arizona initially determined that Webb, having alleged a special injury, had standing to seek redress for the alleged public nuisance created by Spur's feedlot.[8] The enjoining of Spur's operation was upheld "because of a proper and legitimate regard of the courts for the rights and interests of the public."[9] The court concluded, however, that Webb "[h]aving brought people to the nuisance to the foreseeable detriment of Spur . . . must indemnify Spur for a reasonable amount of the cost of moving or shutting down."[10]

The purpose of this comment is to explore the theory and implications of this novel addition to nuisance law. Initially the *Spur* deci-

6. *Id.* at 182, 494 P.2d at 704.

7. At the time of purchase, an acre of land around the perimeter of Phoenix cost approximately $2,000 per acre, while the land purchased by Webb cost $750 per acre. Webb also chose this property because of the success of nearby Youngtown, a retirement community like Sun City, emphasizing outdoor living. *Id.* at 182, 494 P.2d at 704.

8. Webb alleged that as a result of Spur's feedlots Webb was unable to sell lots in the southern portion of its property. 108 Ariz. at 183-84, 494 P.2d at 705-706.

9. 108 Ariz. at 186, 494 P.2d at 708. It might seem inconsistent to grant Webb standing because of an alleged special injury and then to explicitly base the decision upon an entirely different injury; the public's injury. This is, however, an accepted procedure in a "mixed" nuisance action. Having alleged the existence of a public nuisance and a unique or special injury therefrom, Webb has standing not only to seek redress for its own injuries, but Webb also has standing as a private attorney general to raise the issue of the public's injury from the nuisance. Mississippi & Mo. R.R. v. Ward, 67 U.S. (2 Black) 485, 492 (1863); Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 P. 465 (1909), *aff'd*, 230 U.S. 46 (1913).

10. The court's opinion is ambiguous as to the exact extent of Webb's liability. At one point the court asserts that Webb is liable to Spur for "a reasonable amount of the cost of moving or shutting down." 108 Ariz. at 186, 494 P.2d at 708. In the following paragraph, however, the opinion proclaims that it is "the decision of this court that the matter be remanded to the trial court for a hearing upon the damages sustained by the defendant Spur as a reasonable and direct result of the granting of the permanent injunction." *Id.* It is thus unclear whether the trial court is to assess Webb for *all* of the injuries Spur suffered as a direct and reasonable result of the injunction, or whether Webb is only to be held liable for a "reasonable amount" of the injuries flowing directly and reasonably from the injunction.

sion will be analyzed in terms of traditional nuisance theory. After examining theories justifying the indemnification remedy granted in *Spur*, the application of this new remedy to factual situations different from that presented in *Spur* will be discussed.

THE BASIS FOR THE NUISANCE ACTION

Legal Nature of the Nuisance Caused by Spur

The meaning of *Spur* and the utility of the remedy granted may be best understood by first examining the general nature of nuisance actions.[11] The Supreme Court of Arizona has observed that "[f]rom time out of mind, the term 'nuisance' has been regarded as incapable of precise definition, because the controlling facts are seldom alike, and each case stands on its own footing."[12] It may be said, nevertheless, that "nuisance" connotes the interference with the rights of others and not the conduct causing that interference.[13] Based upon the different rights that may infringed, nuisances are classified as private, public or mixed.

A nuisance is deemed to be private if the rights interfered with are the property rights of an individual or a small number of individuals.[14] Before a defendant's conduct may be viewed as giving rise to a private nuisance, however, that conduct must be unreasonable and cause substantial injury to the plaintiff.[15] In determining whether the defendant's conduct is reasonable, courts have considered the gravity and character of the harm involved, the utility of the defendant's conduct and the nature and locality of the surroundings.[16] In ascertaining whether the plaintiff suffered a substantial injury, Arizona courts look to the standard of a "normal person."[17] Thus,

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11. This comment will not attempt to define all the elusive parameters of nuisance law. For commentary focusing generally on nuisance law see Note, *Change of Neighborhood in Nuisance Cases*, 13 CLEV.-MAR. L. REV. 340 (1964); Note, *Zoning and the Law of Nuisance*, 29 FORDHAM L. REV. 749 (1961); Note, *Nuisance—As a "Taking of Property,"* 17 U. MIAMI L. REV. 537 (1963); Note, *Nuisance as a Modern Mode of Land Use Control*, 46 WASH. L. REV. 47 (1970).

12. Engle v. State, 53 Ariz. 458, 464, 90 P.2d 988, 991 (1939).

13. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 87, at 573 (4th ed. 1971).

14. Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 183, 494 P.2d 700, 705 (1972); City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938).

15. *See generally* Gainey v. Folkman, 114 F. Supp. 231, 233-34 (D. Ariz. 1953); Kubby v. Hammond, 68 Ariz. 17, 25-27, 198 P.2d 134, 140 (1948); MacDonald v. Perry, 32 Ariz. 39, 49-53, 255 P. 494, 497-98 (1927).

16. W. PROSSER, *supra* note 13, § 87, at 580-81.

17. *See* Kubby v. Hammond, 68 Ariz. 17, 26, 198 P.2d 134, 140 (1948), *citing* Murphy v. Cupp, 182 Ark. 334, 31 S.W.2d 396 (1930). *See also* W. PROSSER, *supra* note 13, § 87, at 578 ("the nuisance must affect the ordinary comfort of human existence as understood by the American people in their present state of enlightenment.").

when dealing with conflicting land uses, a private nuisance exists only when an individual employs his property in such an unreasonable manner as to cause a substantial interference with his neighbor's use and enjoyment of his land.

A public nuisance existed at common law when there was an unreasonable interference with a right or interest common to the general public.[18] The concept included any interference with the public health, safety, morals, peace, comfort or convenience.[19] Many activities which would have constituted a nuisance under common law are currently proscribed by statute in Arizona.[20] Arizona also views as a public nuisance "any act which, under the common law was construed as a public nuisance. . . ."[21] As a consequence, the public nuisance law of Arizona not only includes statutorily enumerated nuisances, but also all other property uses and conduct that at common law were deemed public nuisances.

When both public and private rights are infringed, a mixed nuisance exists. Not only must there be an invasion of a public right, but also the individual plaintiff must be harmed in a manner unique from the injury to the general public.[22] When this situation arises, redress for the nuisance may be sought either by the appropriate public official,[23] or by the private individual suffering a unique injury.[24] If an action is initiated by the individual, he may be considered to be proceeding as a private attorney general and may seek redress not only for his own unique injury but also for the injury sustained by the public.[25] *Spur* provides an excellent example of a mixed nuisance action. Spur's feedlot constituted a public nuisance as a result of the proximity of Sun City's residents.[26] Webb was granted standing to enjoin this public nuisance because it alleged a unique or special injury.[27] Thus, in seeking to enjoin the feedlot's continued operation, Webb was allowed to raise both its own unique injury and the injury to the general public.

18. City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938).
19. W. PROSSER, *supra* note 13, § 88, at 583-85.
20. Examples are found in statutes specifically proscribing as public nuisances such varied activities as the illegal sale of unshelled pecans, ARIZ. REV. STAT. ANN. § 3-537 (1956), and the use of buildings for the illegal storage or consumption of narcotics, *id.* § 36-1013.
21. Engle v. State, 53 Ariz. 458, 465, 90 P.2d 988, 991 (1939).
22. Engle v. Clark, 53 Ariz. 472, 90 P.2d 994 (1939); City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938); Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 P. 465 (1909), *aff'd*, 230 U.S. 46 (1913).
23. *See* Engle v. Clark, 53 Ariz. 472, 474, 90 P.2d 994, 995 (1939).
24. Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 201, 100 P. 465, 469 (1909), *aff'd*, 230 U.S. 46 (1913); *accord*, Engle v. Clark, 53 Ariz. 472, 90 P.2d 994 (1939).
25. Mississippi & Mo. R.R. v. Ward, 67 U.S. (2 Black) 485, 492 (1863); Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 P. 465 (1909), *aff'd*, 230 U.S. 46 (1913).
26. 108 Ariz. at 184, 494 P.2d at 706.
27. *Id.*

Coming to the Nuisance: A Question of Reasonable Use

After a nuisance action has been initiated, the question of whether the defendant is putting his property to a "reasonable use" is likely to receive the greatest consideration.[28] In determining whether the defendant's use is reasonable, courts will weigh the gravity of the plaintiff's injury against the utility of the defendant's conduct to the public.[29] If the scale tips in favor of the social utility of the defendant's conduct, his use is deemed to be reasonable and does not constitute a nuisance. On the other hand, if the plaintiff's injury outweighs the utility of the defendant's use, that use is deemed to be unreasonable.

Often the nature and use of the surrounding area will be determinative of whether the defendant's use is considered reasonable.[30] Courts will attempt to determine both the primary use to which the surrounding land is put[31] and the sequence in which the conflicting uses were established.[32]

In the context of this inquiry a defendant frequently will defend his use as reasonable by contending that the plaintiff came to the area after the defendant had put his property to its present use. By making this contention the defendant is asserting that because he was putting his property to its present offensive use before the plaintiff moved into the vicinity, the plaintiff cannot now complain that the defendant's use is a nuisance.

Courts differ as to the effect of the plaintiff's "coming to the nuisance."[33] Some courts subscribe to the view that if the plaintiff came into the area after the defendant had established his offensive use, the plaintiff is barred from relief.[34] The underlying rationale of this approach appears to be that an individual who comes to a nuisance "cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it."[35]

Apparently, however, the majority of courts do not accept the coming to the nuisance doctrine as a per se rule.[36] The majority posi-

28. W. PROSSER, *supra* note 13, § 87, at 581.
29. *Id.* § 89, at 596-98.
30. *Id.* § 89, at 599; 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.28, at 83 (1956).
31. MacDonald v. Perry, 32 Ariz. 39, 49-50, 255 P. 494, 497 (1927).
32. 1 F. HARPER & F. JAMES, *supra* note 30, § 1.28, at 83.
33. *Compare* Dill v. Excel Packing Co., 183 Kan. 513, 331 P.2d 539 (1959) *with* Curry v. Farmers Livestock Market, 343 S.W.2d 134 (Ky. 1961).
34. Dill v. Excel Packing Co., 183 Kan. 513, 331 P.2d 539 (1959). These courts frequently base their position upon the maxim *volenti non fit injuria.* ("He who consents cannot receive an injury." BLACK'S LAW DICTIONARY 1746 (Rev. 4th ed. 1968)) It has been said, however, that this maxim has absolutely no application to nuisance actions. 1 F. HARPER & F. JAMES, *supra* note 30, § 1.28, at 83.
35. Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 185, 494 P.2d 700, 707, *citing* Gilbert v. Showerman, 23 Mich. 448 (1871).
36. W. PROSSER, *supra* note 13, § 91, at 611; 41 CALIF. L. REV. 148 (1953); 32 ORE. L. REV. 264 (1953).

tion simply views priority of occupation as one factor to consider in determining whether the defendant's use of his property is reasonable.[37] In rejecting the minority view, these courts frequently point to two problems caused by allowing priority of occupation to be a defense to a nuisance action.[38] First, the minority position would allow an individual to commence the operation of an offensive use in an uninhabited area and thereby condemn large surrounding areas of land to perpetually endure the effects of the offensive use. Second, an individual could, through the maintenance of an offensive use, permanently reduce the value of surrounding land since a purchaser likely would pay less for property burdened by the effects of a nearby nuisance than he would for property free from such a burden.[39]

In *Spur*, the court distinguished between the effect of Webb's "coming to the nuisance" and of the public's "coming to the nuisance." If Webb had been the only injured party the court noted it would have felt justified in following the minority view and barring Webb from relief by the doctrine of "coming to the nuisance."[40] But the court viewed the doctrine as inapplicable to the public—the Sun City residents. Spur's feedlot was enjoined to protect the public from injury even though, like Webb, each individual member of the public came to the nuisance.[41] As a result, it can be argued that in Arizona although an individual may be barred from a remedy by coming to a private nuisance, when a public nuisance is involved, the public's coming to the nuisance does not bar relief.[42]

37. W. PROSSER, *supra* note 13, § 91, at 611; 1 F. HARPER & F. JAMES, *supra* note 30, § 1.28, at 83.

38. *See* 41 CALIF. L. REV. 148 (1953); 32 ORE. L. REV. 264 (1953).

39. The prevailing view applies with even greater force to a public nuisance. To follow the minority position with respect to a public nuisance would be to grant a single individual the power to subject an entire community to discomfort and inconvenience. For example, if A built and began to operate a piggery in a sufficiently isolated rural area, no nuisance problem would exist. Such a problem would arise, however, if the nature of the surrounding area was transformed from rural to residential by the growth of a nearby town. In such a situation, to subject the entire community to the indignity of enduring the piggery's offensive stench would clearly be improper. *See* Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963). The right of an individual to use his land as he sees fit must yield, in this instance, to the public good. *See* Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Eaton v. Klimm, 217 Cal. 362, 18 P.2d 678 (1933); People v. Detroit White Lead Works, 82 Mich. 471, 46 N.W. 735 (1890).

40. 108 Ariz. at 185, 494 P.2d at 707.

41. *Id.* at 186, 494 P.2d at 708.

42. If accepted this distinction between the effect of the public "coming to the nuisance" and an individual "coming to the nuisance" may have interesting ramifications. The first example of this may be in the presently pending private nuisance action brought by the Sun City residents against Spur. Andras v. Spur Feeding Co., Civil No. C-207025 (Super. Ct., Maricopa County, Ariz., filed Dec. 8, 1967). If the court adheres to its distinction between an individual and the public coming to a nuisance, the individual Sun City residents should be barred from recovering damages for the injurious effects of Spur's feedlot. Like Webb, each individual resident came to the nuisance. Thus, viewing their injuries individually they too should be barred from relief by the doctrine of "coming to the nuisance." This result seems interesting in light of the

The Nuisance Remedy: A Balancing of the Conveniences

Traditionally, there have existed only two possible remedies in a nuisance action—damages at law and equitable relief by injunction. As a rule of thumb, upon a finding of nuisance, the plaintiff can always recover damages,[43] while injunctive relief is granted only in those exceptional cases in which damages at law are inadequate.[44] In ascertaining the proper remedy in any given instance, courts often employ an equitable procedure denoted the "balancing of the conveniences" doctrine.[45]

The purpose of balancing the conveniences is to determine which remedy will produce the lesser harm—enjoining the defendant's use or permitting the nuisance to continue but awarding compensatory damages. If the damage caused to the plaintiff by the defendant's use would be the lesser, the plaintiff is forced to endure the nuisance and his remedy is limited to damages.[46] On the other hand, if the damage resulting from an injunction would be the lesser of the two harms, the defendant's offensive use of his land may be enjoined.

Before enjoining a nuisance, however, the court must be persuaded by the plaintiff that he is suffering irreparable injury from the de-

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court's decision in *Spur* requiring the feedlot to cease its present operation *because* of the injury to the public. Thus, it appears that in Arizona the public's right to be free from the adverse affects of a nuisance is greater than the sum of the individual rights to that freedom of all the members of the public.

In the action by the Sun City residents, the Supreme Court of Arizona recently allowed Spur to join Webb as a third-party defendant on the theory that Webb may be required to indemnify Spur for damages awarded to the Sun City residents. Spur Feeding Co. v. Superior Court of Maricopa County, 109 Ariz. 105, 505 P.2d 1377 (1973).

43. *See, e.g.*, City of Tucson v. Apache Motors, 74 Ariz. 98, 245 P.2d 255 (1952); Pinkerton v. Pritchard, 71 Ariz. 117, 223 P.2d 933 (1950); United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 296 P. 262 (1931). Although the amount of damages to be received by the plaintiff is dictated primarily by the extent of the injury sustained, the nature of the nuisance involved also affects the amount recoverable. In this respect, nuisances are divided into two types: permanent and continuing. A nuisance is permanent if its injurious characteristic cannot be eliminated without terminating the entire operation. In such a case, the plaintiff has only one cause of action and must recover damages for past, present and future injuries. On the other hand, if the nuisance is such that its injurious quality may be eliminated without terminating the entire operation, it is deemed a continuing nuisance and one cause of action does not exhaust the plaintiff's remedies. Thus, a party injured by a continuing nuisance may only recover for injuries sustained up to the momemt of judgment and must initiate new litigation for any injury occurring after that time. *See* City of Phoenix v. Johnson, 51 Ariz. 115, 75 P.2d 30 (1938); 1 F. HARPER & F. JAMES, *supra* note 30, § 1.30, at 91-92.

44. Kubby v. Hammond, 68 Ariz. 17, 198 P.2d 134 (1948); MacDonald v. Perry, 32 Ariz. 39, 255 P. 494 (1927).

45. *See, e.g.*, Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); Antonik v. Chamberlain, 81 Ohio App. 465, 78 N.E.2d 752 (1947). This doctrine is also referred to as the comparative injury test. *See* Note, *Enjoining Private Nuisances: Consideration of the Public Interest*, 43 U. COLO. L. REV. 225 (1971).

46. *See* Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N.E. 992 (1913).

fendant's use.[47] Having found such an injury, courts will then consider all the surrounding circumstances in ascertaining the proper remedy. Those circumstances include the public necessity or convenience of the defendant's operation,[48] the economic burden to the defendant of an injunction,[49] the nature of the surrounding locality,[50] the substantiality of the plaintiff's rights that have been infringed,[51] and the adequacy of damages.[52] After viewing all of these circumstances, courts then balance those in favor of the plaintiff against those favoring the defendant to determine whether an injunction should issue.[53]

In *Spur*, however, the supreme court did not utilize the balancing of the conveniences test.[54] Rather the court appears to have enjoined the feedlot operation solely on the basis that it constituted a statutory public nuisance.[55] In fact, once the court had determined

47. 1 F. HARPER & F. JAMES, *supra* note 30, § 1.30, at 89-90. The term "irreparable injury" refers to an injury that is certain, great and may not be adequately compensated for by the award of money damages. Washington Capitols Basketball Club, Inc. v. Barry, 304 F. Supp. 1193, 1197 (N.D. Cal. 1969); Southwest Chemical & Gas Corp. v. Southeastern Pipe Line Co., 369 S.W.2d 489 (Tex. Civ. App. 1963).

48. Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); Busby v. International Paper Co., 95 F. Supp. 596 (D. La. 1951); Antonik v. Chamberlain, 81 Ohio App. 456, 78 N.E.2d 752 (1947).

49. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970); York v. Stallings, 217 Ore. 13, 341 P.2d 529 (1959).

50. *See, e.g.*, McCarty v. Macy & Co., 167 Cal. App. 2d 164, 334 P.2d 156 (1959); Roy v. Chevrolet Motor Car Co., 262 Mich. 663, 247 N.W. 774 (1933).

51. McCarty v. Macy & Co., 167 Cal. App. 2d 164, 334 P.2d 156 (1959); Pendoley v. Ferreira, 345 Mass. 309, 187 N.E.2d 142 (1963).

52. Harrisonville v. W.S. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); McCarty v. Macy & Co., 167 Cal. App. 2d 164, 334 P.2d 156 (1959).

53. The recent New York case of Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970) provides an excellent example of implementing the balancing of the conveniences test. The case involved a nuisance action by residential landowners against a neighboring cement plant. After finding that a nuisance clearly existed, the New York court refused to enjoin the plant because of the economic ramifications of such an action. The defendant cement company employed 300 people and involved a capital investment of $45,000,000 in the plant alone. The court, weighing this against the total estimated damage to the plaintiffs of $185,000, refused to enjoin the defendant and merely required the payment of damages.

For a more comprehensive discussion of this case see, Note, *Private Nuisances: Abatement of Air Pollution in Boomer v. Atlantic Cement Company Inc.*, 54 MARQ. L. REV. 392 (1971); Note, *No Injunctive Relief in New York Against a Private Nuisance When Defendant's Comparative Financial Hardship Outweighs the Injury to Complainant*, 21 SYRACUSE L. REV. 1243 (1970); Note, *Enjoining Private Nuisances: Consideration of the Public Interest*, 43 U. COLO. L. REV. 225 (1971); Note, *Judicially Licensed Pollution: Condemnation of Private Property for Private Use*, 1970 WASH. U.L.Q. 367 (1970).

54. There appears to be some judicial hostility in Arizona towards the doctrine of balancing the conveniences. This hostility was best expressed by Justice Campbell in Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 100 P. 465 (1909), *aff'd*, 230 U.S. 46 (1913) where he asserted that it "seems to us that to withhold relief where irreparable injury is, and will continue to be suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence." *Id.* at 204, 100 P. at 470.

55. ARIZ. REV. STAT. ANN. § 36-601 (Supp. Pam. 1973) provides in pertinent part:

> The following conditions are specifically declared public nuisances dangerous to the public health:
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> 1. Any condition or place in populous areas which constitutes a breeding place for flies, rodents, mosquitoes and other insects which are capable of carrying and transmitting disease-causing organisms to any person or persons.

that Spur's operation came within the purview of section 36-601 of the *Arizona Revised Statutes Annotated*, the enjoining of Spur was virtually mandated by the statutory language.[56]

The court, however, apparently viewed a simple injunction of the feedlot as an inadequate resolution of the conflict between Webb and Spur. To do nothing more would have resulted in Spur bearing the entire burden of the conflict's resolution. Such a result seems unfair because Webb, when it developed Sun City and brought 14,000 new residents into the area, should have foreseen this land use conflict.[57] Spur, on the other hand, could not have foreseen the conflict because there "was no indication . . . at the time Spur and its predecessors located in western Maricopa County that a new city would spring up full-blown alongside the feeding operation."[58] Thus, any injury to Spur Industries as a result of the injunction may be traced directly to Webb's lack of foresight in selecting this particular location for the development of a retirement community. On this basis, the Supreme Court of Arizona concluded it would have been unfair to require Spur, the party that had no reason to foresee the conflict, to bear the entire burden of its resolution.[59]

The *Spur* court attempted to alleviate this unfairness by promulgating an additional step for the resolution of nuisance problems.[60] The new step is employed to determine whether the complainant must reimburse the enjoined party for all or part of the injury resulting from the enjoinder of the nuisance. As stated by the court, if "a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business and for which the business has no adequate relief," then the developer must reimburse that business "for a reasonable amount of the cost of moving or shutting down."[61]

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56. ARIZ. REV. STAT. ANN. §§ 36-601(B), (C) (Supp. Pam. 1973), -602 (1956). These public health menace statutes clearly indicate that any operation which is dangerous to the public health *shall* be terminated. Although the statues refer primarily to actions initiated by a public health officer, the legislative intent of requiring the termination of all public nuisances dangerous to the public health is aptly illustrated by the mandatory language. For example, if the commissioner of public health believes that any operation constitutes a dangerous public nuisance "he shall forthwith serve . . . a cease and desist order . . . ." *Id.* § 36-601(B). In view of the evident legislative intent in these statutory proscriptions, the *Spur* court had little choice but to enjoin the feedlot.

57. 108 Ariz. at 186, 494 P.2d at 707.

58. *Id.* at 185, 494 P.2d at 706.

59. *Id.* at 186, 494 P.2d at 707.

60. Traditionally there are two primary steps for the court to resolve a nuisance problem. First, it must be determined whether a nuisance does exist, and secondly, whether damages or an injunction are the proper remedy. See text & notes 14-17 & 28-29 *supra*.

61. 108 Ariz. at 186, 494 P.2d at 708.

In *Spur*, the consequences of this remedy aptly illustrate its propriety. The public health was protected by shutting down the feedlot. Spur, which had to terminate its feedlot only because Webb had brought the public into this agricultural area, will be reimbursed for the injury resulting from this termination. Finally, Webb, who in fact will profit from the closure, and whose actions were the primary cause of this nuisance situation must bear the burden of its actions by reimbursing Spur.

THEORIES SUPPORTING THE INDEMNIFICATION OF SPUR

The Arizona supreme court failed to articulate an adequate basis for the novel remedy it created in *Spur*. At least three distinct theories, however, seem appropriate to support the decision; unjust enrichment, active-passive negligence and indemnification.

Unjust Enrichment

Arguably, the basis for the remedy granted in *Spur* is unjust enrichment. Generally stated this theory provides that a "person who has been unjustly enriched at the expense of another is required to make restitution to the other."[62] Three conditions must be satisfied, however, before this theory may be used as a basis for Webb's required restitution of Spur. First, it must appear that Webb has been enriched by the cessation of Spur's feedlot. Second, Webb's enrichment must have been at the expense of Spur. Third, it must be unjust for Webb to retain the benefit received.[63]

One "is enriched if he has received a benefit,"[64] and a benefit is "any form of advantage."[65] As a result, for Webb to be enriched it must appear that Spur's termination has been to Webb's advantage. When the feedlot was operating adjacent to Sun City, Webb was unable to sell some of its land.[66] This land became free for residential development and sale, however, after the feedlot ceased operation. Consequently, Webb will receive the advantage of increased profits through the sale of additional residential property. It is apparent, therefore, that, as a result of the feedlot being enjoined, Webb received a benefit at Spur's expense.

Before unjust enrichment could provide the basis for the remedy adopted in *Spur*, it must also appear unjust for Webb to retain the

62. RESTATEMENT OF RESTITUTION § 1 (1937).
63. *Id.*
64. *Id.* Comment *a.*
65. *Id.* Comment *b.*
66. 108 Ariz. at 183, 494 P.2d at 705.

benefit it received at the expense of Spur. Although there is no definite standard for determining whether the retention of any benefit is unjust, the general rule defines unjust retention as the keeping of a benefit that in good conscience should not be retained.[67] The open land adjacent to Spur's feedlot, upon which Webb intended to build Sun City, was purchased due to its low cost in an effort to maximize profits.[68] Webb's subsequent construction of Sun City "brought people to the nuisance to the foreseeable detriment of Spur."[69] Thus, Webb's desire to maximize profits foreseeably caused the loss to Spur by which Webb received a benefit. It consequently would be unjust for Webb to retain the benefit that it received by foreseeaby injuring Spur.

Although the facts in *Spur* clearly meet preliminary requisites for a finding of unjust enrichment, if unjust enrichment is accepted as the basis for the *Spur* remedy, certain requirements will limit future application of the remedy.[70] Initially, the remedy would be inapplicable to a situation in which a developer had already sold all of his available lots since there would be no further benefit to be received. Moreover, the party seeking to invoke the doctrine of unjust enrichment should be free from any wrongful conduct. This requirement, however, is not always strictly applied.[71] Finally, if unjust enrichment is employed, the amount of restitution may be limited by the value of the unjustly retained benefit.[72] Nevertheless, this limitation is not recognized in all situations.[73]

Active-Passive Negligence

Because the *Spur* court emphasized that Webb should have foreseen the injury its choice of property was going to cause Spur, the active-passive negligence dichotomy may also be employed as a basis for the *Spur* remedy. Applying this dichotomy, a party whose liability is ascribable to mere passive conduct may be reimbursed by an active wrongdoer.[74] Although "no one explanation can be found which will

67. Lipinski v. Columbus Plaza, Inc., 4 Conn. Cir. 24, 225 A.2d 36 (1966); Straube v. Bowling Green Gas Co., 360 Mo. 132, 227 S.W.2d 666 (1950); *cf.* Hummel v. Hummel, 133 Ohio St. 520, 14 N.E.2d 923 (1938).

68. See note 7 *supra.*

69. 108 Ariz. at 186, 494 P.2d at 708.

70. The greatest limitations on the *Spur* remedy, however, are not those imposed by any of the underlying theories which may support the outcome of the case, but rather the specific holding of the court limiting the remedy to the facts of the case. See text accompanying note 89 *infra.*

71. *See* McClanahan v. McClanahan, 79 Ohio App. 231, 72 N.E.2d 798 (1946).

72. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 4.1, 4.5 (1973).

73. RESTATEMENT OF RESTITUTION § 1, Comment *e* (1937).

74. *See generally* Busy Bee Buffet v. Ferrell, 82 Ariz. 192, 310 P.2d 817 (1957);

cover all of the cases,"[75] this theory is applicable "when one is liable because of a duty imposed by law although he had not actively participated in the wrong which was the immediate cause of the injury."[76] Thus, the distinction between active and passive negligence focuses inquiry upon the comparative culpability of all the participants whose conduct coalesced to proximately cause the injury.

One of the injuries involved in *Spur* was the dangerous public health conditions created by Sun City's proximity to Spur's feedlot. This injury resulted from the conduct of both Spur and Webb. Spur's conduct consisted of maintaining a reasonably sanitary, though intrinsically offensive, feedlot in an area previously devoted solely to agricultural pursuits. Webb contributed to the creation of the nuisance first by purchasing the land adjacent to Spur and then by building Sun City and bringing the public into this previously agricultural area even though this conduct was foreseeably going to necessitate the cessation of Spur's operation. Thus, it appears that even though Spur was required to eliminate the nuisance, it was Webb's conduct of inducing the public into this area to the foreseeable detriment of Spur that was the immediate cause of the nuisance. Consequently, in terms of comparative fault, Webb was the active wrongdoer and could be required to indemnify Spur according to the active-passive negligence dichotomy.[77]

While this theory might appropriately support the remedy adopted in *Spur*, there are certain requirements that might restrict its future application. Probably the greatest obstacle to the future application of this theory would be the requirement that the passive-party must be without personal fault. Although not always strictly applied,[78] this requirement would preclude courts from any universal application of the *Spur* remedy. Further, inasmuch as the active-passive negli-

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Employers Mut. Liability Ins. Co. v. Advance Transformer Co., 15 Ariz. App. 1, 485 P.2d 591 (1971); Thornton v. Marsico, 5 Ariz. App. 299, 425 P.2d 869 (1967).

75. W. PROSSER, *supra* note 13, § 51, at 313.

76. Employers Mut. Liability Ins. Co. v. Advance Transformer Co., 15 Ariz. App. 1, 3, 485 P.2d 591, 593 (1971).

77. It might be argued that Spur's conduct was not very passive in that Spur expanded its facilities after Webb had purchased the Sun City property. It is equally arguable, however, that the *immediate* cause of the public's injury was Webb's introduction of the public into this agricultural area and thus, in the context of the active-passive negligence dichotomy, Webb's conduct was active while Spur's was passive. *See* Employers Mut. Liability Ins. Co. v. Advance Transformer Co., 15 Ariz. App. 1, 485 P.2d 591 (1971).

For another view of *Spur* in light of the active-passive negligence dichotomy see Comment, *Plaintiff Required to Indemnify Defendant for Losses Resulting From Permanent Injunction in a Nuisance Case: Spur Industries Inc. v. Del E. Webb Development Co.*, 1973 UTAH. L. REV. 55.

78. *See* Sherk, *Common Law Indemnity Among Joint Tortfeasors*, 7 ARIZ. L. REV. 59 (1965).

gence dichotomy is an "expansion of the law of indemnity,"[79] its use as a foundation for the *Spur* remedy would prohibit courts from granting only "partial indemnification."[80]

Indemnification

Although both the theory of unjust enrichment and the active-passive negligence dichotomy might be used to support the *Spur* remedy, the court apparently rested its decision on a theory of indemnification.[81] The general rule of indemnity is that a "person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."[82] In addition to numerous other contexts, indemnification is applicable whenever there "is a duty owed to the public" as well as "where the duty to pay is based upon tort. . . ."[83] If this is so, indemnification may properly support the *Spur* remedy.

The duty involved in *Spur* was of statutory origin. The statute prescribed as a public nuisance the creation and maintenance of conditions dangerous to the public health.[84] Although the duty does not arise until there is a public to endanger,[85] when the public is present the duty to avoid health hazards falls upon everyone. Consequently, both Spur and Webb had a duty to avoid the creation and maintenance of a nuisance injurious to the public health.

Although Spur discharged this duty to avoid public health hazards by terminating its feedlot operation, as between Webb and Spur, Webb should have discharged the duty. Prior to Webb's creation of Sun City no duty to avoid public nuisances existed because there was no public to endanger. The duty arose only because Webb, through the construction of Sun City, brought the public into this previously agricultural area. Thus, inasmuch as Spur's duty to discontinue a public nuisance arose only as a foreseeable result of Webb's conduct,[86]

79. Thornton v. Marisco, 5 Ariz. App. 299, 302, 425 P.2d 869, 871 (1967).
80. *See* W. PROSSER, *supra* note 13, § 51, at 310; Sherk, *supra* note 78, at 59.
81. The question of whether Webb was liable to Spur for the damage caused by the injunction was posed by the court: "Must Del Webb Indemnify Spur?" 108 Ariz. at 184, 494 P.2d at 706. After discussing this issue, the court couched its decision in similar terms indicating that indemnity was the theory on which it was based.
82. RESTATEMENT OF RESTITUTION § 76 (1937).
83. *Id.* Comment *b.*
84. ARIZ. REV. STAT. ANN. § 36-601 (Supp. Pam. 1973).
85. Before "an otherwise lawful (and necessary) business may be declared a public nuisance there must be a 'populous' area in which people are injured." Spur Industries, Inc. v. Del E. Webb Development Co., 108 Ariz. 178, 184, 494 P.2d 700, 706 (1972).
86. *Id.* at 185-86, 494 P.2d at 707-08.

as between Webb and Spur, Webb should indemnify Spur for the expenses involved in discharging this duty.

Even though this indemnification theory applies to the facts in *Spur*, there are requirements which could restrict its use in other situations. For example, indemnification may only be used in a situation where the party initially discharging the duty is innocent of any wrongful conduct. Further it may only be applied where there is a common duty owed by the indemnator and the indemnatee to a third party.[87] In addition, if the theory of indemnification is accepted as the basis for the *Spur* remedy it prohibits a court from granting "partial indemnity." A court would not be permitted to engage in allocating the loss according to a theory of comparative fault, but rather indemnification would require a shift from one party to another of the entire loss involved.[88]

FUTURE APPLICATIONS OF THE SPUR REMEDY

The *Spur* court severely restricted possible future applications of the remedy granted by declaring:

> this relief to Spur is limited to a case wherein a developer has, with foreseeability, brought into a previously agricultural or industrial area the population which makes necessary the granting of an injunction against a lawful business. . . .[89]

This restriction, though possibly unnecessary, is understandable since the *Spur* remedy had never been employed before. The court was simply being cautious. It would appear, however, that the theoretical bases for this remedy would support its application beyond the unique facts present in *Spur*.[90]

A major reason for the court's decision requiring Webb to reimburse Spur, was that Spur's required termination of its operation was foreseeable when Webb began building Sun City.[91] Whether the

87. *See* RESTATEMENT OF RESTITUTION § 76 (1937).

88. *See* note 80 *supra*. Therefore, if indemnification is the basis for the remedy in *Spur*, the ambiguity of the court's opinion with respect to the extent of Webb's liability, see note 10 *supra*, must be resolved in favor of the view that Webb is to be held liable for all of the injuries sustained by Spur as a direct and reasonable result of the permanent injunction.

89. 108 Ariz. at 186, 494 P.2d at 708.

90. In fact, the Supreme Court of Arizona has already indicated the direction of one possible expansion of the *Spur* remedy. In the private action brought by the Sun City residents against Spur for damages, Andras v. Spur Feeding Co., Civil No. C-207025 (Super. Ct., Maricopa County, Ariz., filed Dec. 8, 1967), the court has allowed Spur to join Webb as a third-party defendant on the theory that Webb may be required to indemnify Spur for damages awarded to the Sun City residents. Spur Feeding Co. v. Superior Court of Maricopa County, 109 Ariz. 105, 505 P.2d 1377 (1973).

91. 108 Ariz. at 186, 494 P.2d at 708.

court felt that Webb actually foresaw the impending injury to Spur or whether it simply felt that Webb should have foreseen it is unclear.

Assuming all of the facts in *Spur* except the foreseeability of Spur's injury, the question of whether Webb should be required to reimburse Spur becomes more difficult. Without the element of foreseeability, the active-passive negligence dichotomy could hardly be said to dictate Webb's restitution to Spur. It would be difficult to find Webb guilty of negligence without this element of foreseeability. Both the theory of unjust enrichment and indemnification, however, could arguably support a decision requiring Webb to reimburse Spur in such a situation.

As has been shown, simply enjoining Spur results in Webb's enrichment through profits from the sale of additional land.[92] To allow Webb to retain this entire benefit, it could be argued, would be unjust. In seeking to maximize profits, Webb chose to create Sun City and bring the public into this agricultural area because the land was relatively inexpensive.[93] Enjoining the operation of Spur's feedlot was necessary only to protect the interests of the public that Webb brought into the vicinity.[94] Thus, to do nothing more than enjoin the operation of Spur's feedlot would be to allow Webb to benefit from the harm its development had caused Spur Industries. Certainly the retention of a benefit obtained in this manner could reasonably be considered to be unjust and consequently restitution should be required even in the absence of foreseeability of the harm.

The theory of indemnification could also be used to require Webb's reimbursement of Spur in a situation where Webb could not have foreseen the injury its conduct would cause Spur. This result is reached because, like the theory of unjust enrichment, the theory of indemnification does not depend on a concept of fault or negligence. The fulfillment of a duty owed by another is the basis for relief and foreseeability is not, therefore, an element of this remedy.

The nuisance in *Spur* was a mixed nuisance.[95] If Spur's operation had constituted only a private nuisance as to Webb, however, the court would not have enjoined the feedlot. In such a situation, the court stated in dictum that it would have felt justified in barring Webb from the relief it sought by the "coming to the nuisance" doctrine.[96] Thus, when an individual moves into a previously industrial or agricul-

92. See text accompanying note 66 *supra*.
93. 108 Ariz. at 182, 494 P.2d at 704.
94. *Id.* at 186, 494 P.2d at 708.
95. See text accompanying notes 22-27 *supra*.
96. 108 Ariz. at 185, 494 P.2d at 707.

tural area within the reach of the effects of offensive conduct, the *Spur* remedy may well be inapplicable since no injunction would seem to be warranted.[97]

Arguably, the court also limited use of the *Spur* remedy to situations in which an injunction is statutorily necessary.[98] It would appear likely, however, that even if the enjoining of Spur's feedlot had not been statutorily required, the court would have determined whether to award damages or an injunction by implementing the "balancing of the conveniences" doctrine. If this were the case, it is probable that Spur would still have been enjoined in light of the harm its feedlot was causing the public. Thus, there would seem to be no reason not to use the *Spur* remedy, since the injunction of Spur's operation would still be a foreseeable result of Webb's bringing the public into this previously agricultural area. Further, failure to employ the *Spur* remedy in such a case would result in Webb's unjust enrichment at the expense of Spur.

The *Spur* remedy could thus have a number of applications beyond the unique circumstances of the *Spur* case. It appears to be a versatile tool for the equitable resolution of varied nuisance situations and it would be retrogressive to over-restrict its implementation.

CONCLUSION

Spur will not be the last time the Supreme Court of Arizona is forced to grapple with the law of nuisance in attempting to resolve the difficult questions raised by conflicting land uses. Arizona is one of the nation's fastest growing states[99] and vast expanses of desert and farmland have been transformed into sprawling metropolia.[100] As this growth continues, so grows the likelihood of conflicts similar to that present in *Spur*.

Whether these future conflicts will be met and resolved with the ingenuity and imagination employed by the *Spur* court is unclear. What is clear, however, is that the Supreme Court of Arizona has demonstrated that it will use broad discretion in exercising its equity powers. In *Spur* the court illustrated that an absence of precedent,

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97. *But cf.* note 90 *supra.*

98. See note 56 *supra. But see* note 90 *supra.*

99. The growth rate in Arizona was the fourth highest in the nation between 1950 and 1960, and the third highest between 1960 and 1970. *See* 1960 U.S. CENSUS, NUMBER OF INHABITANTS at S-33; 1970 U.S. CENSUS, NUMBER OF INHABITANTS at I-59.

100. The percentage of Arizona's total population residing in urban areas has increased from 55.5% in 1950 to 79.6% in 1970—an increase of 24.1%. During this same period the total number of urban places increased from 32 in 1950 to 49 in 1970. See 1970 U.S. CENSUS, NUMBER OF INHABITANTS at 4-8.

at least in the area of nuisance law, will not prohibit it from doing what it deems to be just. Although such an attitude could cause problems in predicting results, it seems a desirable, if not a necessary attribute in a rapidly growing state that is likely to face continuing conflicts as its burgeoning population expands into lands previously dedicated to agricultural or mining uses. The Supreme Court of Arizona recognized this in *Spur* and should be commended for its decision not to be shackled by the lack of precedent.