

Inverse Condemnation: A Primer And Reminder For Insurers



Law360, New York (June 07, 2013, 11:50 AM ET) -- Insurers may not normally be concerned with governmental takings, or how to allocate the cost of public improvements, but they should not overlook an inverse condemnation cause of action in California because that claim also allows the recovery of damages when property is damaged because of a public use.

The claim can be a useful tool to a property insurer that is considering a subrogation action against a public entity that damaged insured property because, in addition to the cost of the damage, the cause of action also permits prejudgment interest and attorneys' fees as damages.

Similarly, a liability insurer that covers an entity which serves a public purpose (such as a privately owned utility company) should be aware of the cause of action because a plaintiff does not need to prove that a standard of care was breached in order to recover under inverse condemnation, thus potentially increasing the exposure to an insured.

In that context, insurers should be aware of the cause of action and how it may affect a particular situation. This article will provide an overview of the claim and note some of the key considerations when your situation may be affected by an inverse condemnation claim.

Background on Inverse Condemnation in California

In California, inverse condemnation is a cause of action to recover when private property is taken or damaged due to public use.[1] Generally, the policy consideration is that the cost of a public improvement should be spread among the community rather than allocated to a single person or entity within the community.[2]

Often, one thinks of inverse condemnation as a reverse, offensive eminent domain action. That is to say, property owners may file an inverse condemnation claim (as opposed to being a defendant in an eminent domain action) when property has been taken for public use.

A "taking" may occur when installing a utility cable, gas line, train tracks or other public right of way across private property. Normally, a property or liability insurer would provide limited or no coverage for such a taking and consequently not be concerned with it.

However, inverse condemnation also allows for recovery when property has been damaged due to public use. Some sort of property damage coverage is almost always afforded in property and liability insurance policies, and so, an inverse condemnation claim has the potential to affect insurers.

The damage may occur in any number of circumstances. For instance, an electrical power line owned by a private utility may spark a wildfire that damages thousands of homes. Or, a surge in a utility line may cause damage to equipment in an office tower building. Or, a leak in a public water line could cause water damage to private property. Any of these circumstances has the potential to affect both property and liability insurers.

Summary of the Elements of the Claim

The elements of the cause of action are straightforward but different than a negligence or other perhaps more traditional tort claim.

To prove a cause of action, a plaintiff must first establish that a public entity has taken or damaged property.[3] Damage is considered to be “any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable under ... our Constitution whether foreseeable or not.”[4] Damage can occur when the public entity causes physical damage to the property with, or without, an actual invasion by the public entity.[5]

The plaintiff must also establish that the damage was for public use. The cause of action is not limited only to defendants who are government entities. Instead, one must look to whether the damage was caused by a use for public purposes, meaning a “use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.”[6]

For example, the delivery of electricity has been held to be a public use, regardless of whether the electrical utility is privately owned.[7] However, the plaintiff must demonstrate that the government entity substantially participated in “planning approval, construction or operation of the public project or improvement.”[8]

Once these initial hurdles are met, the plaintiff must show that the public use was a substantial cause of the damage. In order to establish a causal connection between the public improvement and the plaintiff’s damages, there must be a showing of “a substantial cause-and-effect relationship which excludes the probability that other forces alone produced the injury.”[9]

Unlike negligence actions, an inverse condemnation action “does not require any breach of a standard of care, nor foreseeability of the harm.”[10]

“[A]ny actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable under [Cal.Const Article I, §19] whether or not the injury was foreseeable.”[11]

Additional Considerations Regarding Inverse Condemnation

Inverse condemnation can impact property and liability insurers alike because it presents at least three issues that are out of the ordinary from a run of the mill tort claim.

Perhaps most importantly, inverse condemnation does not require a breach of a standard of care.[12] As such, it operates as something like a strict liability cause of action. This can be an important consideration when evaluating the potential exposure to a tortfeasor.

Often, the issue of whether or not there was a breach of a standard of care is an important defense to liability in a tort action. In that context, inverse condemnation can be a powerful tool for a subrogated insurer who is on the offensive and seeks to recover for damage to insured property.

Similarly, the fact that the defense is not available could be an important consideration to a liability insurer that is negotiating terms of coverage before issuing a policy or considering a covered claim after coverage has been bound.

Another important consideration is the recoverability of attorneys' fees and prejudgment interest. Attorney fees are considered damages in an inverse condemnation cause of action.[13] Similarly, prejudgment interest is recoverable.[14] These two items can boost the damages considerably — potentially benefiting the subrogated property insurer or possibly creating additional considerations for the liability insurer.

A third consideration is that the issue of liability — that is, whether or not there was damage caused by a public use — will be decided by the court in an inverse condemnation trial.[15] Conversely, the amount of any compensation — that is, the amount of damages recoverable — will be decided by a jury.[16]

This may cause the parties to try to bifurcate the case into different phases or otherwise consider the best way to present their cases to two different triers of fact.

Conclusion

Inasmuch as inverse condemnation causes of action allow recovery for damage, it is worthwhile for insurers to consider whether such a claim could apply to a particular situation. When the claim may apply, an insurer should also consider whether the claim would change its analysis for evaluating liability, establishing damages or how the case will be presented at trial.

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[1] Cal. Const. Art. I. §19.

[2] See *Belair v. Riverside County Flood Control Dist.*, 47 Cal.3d 550, 558 (1988).

[3] *San Diego Gas & Elec. v. Superior Court*, 13 Cal.4th 893, 940 (1996).

[4] See *Belair*, 47 Cal.3d at 558 (quoting *Albers v. County of Los Angeles*, 62 Cal.2d 250, 263-264 (1965)).

[5] *San Diego Gas & Electric*, 13 Cal.4th at 940.

[6] *Bauer v. County of Ventura*, 45 Cal. 2d 276, 284 (1955).

[7] See *Barham v. Southern Cal. Edison Co.*, 74 Cal.App. 4th 744, 755 (1999).

[8] DiMartino v. City of Orinda, 80 Cal.App. 4th 329, 336 (2000).

[9] See Belair, 47 Cal.3d at 559 (quoting Van Alstyne, Inverse Condemnation: Unintended Physical Damage (1969) 20 Hastings L.J. 431, 435-438.).

[10] See Aetna Life & Cas. Co. v. City of Los Angeles, 170 Cal.App. 3d 865, 873 (1985). See also Yee v. Sausalito, 141 Cal.App.3d 917, 921 (1983) (“the focus of judicial inquiry is not whether the injury was expected or foreseeable, but whether that injury was proximately caused by the use of the public improvement for its intended public purpose.”).

[11] Aetna Life & Cas. Co., 170 Cal. App. 3d at 873.

[12] Aetna Life & Cas. Co., 170 Cal. App. 3d at 873.

[13] See CCP §1036.

[14] See Marshall v. Department of Water & Power, 219 Cal. App. 3d 1124, 1149 (1990) (citing Aetna Life and Cas, 170 Cal.App.3d 878-79).

[15] See Marshall, 219 Cal. App. 3d at 1140.

[16] Id.