Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2014 Issue

Jill S. Casselman

James P. Koelzer

Condemnation: Less complex than it sounds?

Demystifying inverse condemnation and holding public entities liable for damage to private property

While the government's power to take private property for public use through eminent domain is well understood, private citizens' right to sue the government for taking or damaging private property is less well understood. And yet, the right exists even when the public entity did not intend to take the property or cause the damage. Inverse condemnation is a powerful and often overlooked cause of action to assert this right.

Whether as a result of a fire, flood, landslide, noise, dust or fumes, and whether the damage is to a private residence or a blight on a commercial property, if a public work was a substantial factor in causing the damage, a plaintiff can recover damages, *including* attorneys' and experts' fees from the responsible public entity. This holds true for insurers who may either join, or stand in the shoes of, an insured in a subrogation action for damages.

While the claim is a powerful one, it is also nuanced, and may be subject to special defenses and exceptions in some unique but recurring factual circumstances. Thus, it is important that potential inverse-condemnation plaintiffs and their counsel fully understand the somewhat unique features of this claim.

Constitutional underpinnings

An inverse-condemnation claim is constitutional in nature. In fact, it is based upon the same constitutional provisions as eminent-domain actions.

The California Constitution's Article I, section 19 (formerly art. I, § 14) requires payment of just compensation when private property is taken for public use or damaged. The words "or damaged" were added to the Constitution in 1879 "to clarify that recovery of just compensation provision is not limited to physical invasions of property taken for

See Koelzer & Casselman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2014 Issue

'public use' in eminent domain, but also encompasses special and direct damage to adjacent property resulting from the construction of public improvements." (*Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 379-380.)

The policy underlying this concept is that the costs of a public improvement benefiting the community should be spread among those who benefited rather than allocated to a single person or entity within the community. (*Belair v. Riverside County Flood Control Dist*. (1988) 47 Cal.3d 550, 558; see also *Pacific Bell v. City of San Die*go (2000) 81 Cal.App.4th 596, 608.) Otherwise, one citizen would be disproportionately forced to bear the burden of a public work intended to benefit the public as a whole. (*Holtz v. Superior Court of San Francisco* (1970) 3 Cal.3d 296, 303.)

The constitutional nature of an inverse condemnation claim carries several important benefits to putative plaintiffs, and their counsel. First, because inverse plaintiffs vindicate constitutional rights, both experts' fees and attorneys' fees are recoverable as a matter of course. Second, unlike most other claims against government entities, a putative inverse plaintiff need not wade through the frequently treacherous waters of filing a government claim. Third, inverse-condemnation claims are typically decided on a plaintiff-friendly "no fault" standard, which does not require showing of negligence to recover. Additionally, because inverse condemnation is not a tort claim, traditional tort-based defenses, like comparative fault and contributory negligence, do not apply in ordinary inverse-condemnation cases. (*Ingram v. Redondo Beach* (1975) 45 Cal.App.3d 628, 633.) Prejudgment interest is also recoverable. These features can render an inverse claim, where available, vastly superior to alternative theories of recovery, such as nuisance or dangerous condition of public property.

In short, plaintiffs benefit from an overarching policy that we ought not put unwieldy restrictions upon plaintiffs' efforts to vindicate their constitutional rights.

Key elements of the claim

The elements of the cause of action are straightforward, but different than negligence and other more traditional tort claims. To prove a typical inverse-condemnation claim, a plaintiff must establish that a *public work* was a *substantial factor* in causing *damage to private property*.

The "public work," or "public use," requirement can be satisfied by showing that the damage was caused by a use for public purposes. This means a "use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government." (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 284.) A public-works project, such as the construction of a new freeway, which unintentionally triggers landsliding or flooding would be a prototypical example. (See, e.g., *Albers v. County of Los Angeles*, (1965) 62 Cal.2d 250, 263-264; *Akins v. State* (1998) 61 Cal.App.4th 1; *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722.)

In some cases, the person or entity who actually causes the damage need not even be a public entity for the use to be a public use. For example, the delivery of electricity has been held to be a public use, regardless of whether the electrical utility is privately owned. (*Barham v. Southern Cal. Edison Co*. (1999) 74 Cal.App.4th 744, 751.) But the plaintiff must demonstrate that the government entity substantially participated in "planning approval, construction or operation of the public project or improvement." (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.)

"Damage" for purposes of an inverse claim is considered to be "any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed," and it is "compensable under … our Constitution whether foreseeable or not." (*Belair v. Riverside County Flood Control Dist*. at 558, *quoting Albers v. County of Los Angeles* at 263-264.) A taking or damage can occur when the public entity causes physical damage to the property with, or without, an actual invasion by the public entity. (*San Diego Gas & Electric* (1996) 13 Cal.4th 893, 940-41.) In fact, even an intangible intrusion onto the property can constitute "damage" so long as the intrusion places a burden on the property that is direct, substantial, and peculiar to the property itself. (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 530.)

Depending on the nature of the property damaged, recoverable damages may include diminution in value of the property or the cost of repair. However, where greater than the diminution in value, the cost of repair is not always recoverable.

No-fault liability

In *Albers v. County of Los Angeles*, *supra*, 62 Cal.2d 250, a case involving a landslide caused in part by public improvements, the California Supreme Court set forth the current standard of "no fault" inverse liability and established … the seminal rule for all strict liability inverse cases to follow. The *Albers* Court stated: "Any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not." (*Id.*, 62 Cal.2d at 263-264.)

Shortly thereafter, in *Holtz v. Superior Court* (1970) 3 Cal.3d 296, the Supreme Court expanded upon the *Albers* case, again finding that liability would attach, regardless of the "reasonableness" of the public entity's conduct. Thus, *even absent any fault* on the part of the public entity or public works, liability still follows so long as the damage was caused by the deliberately constructed and planned public improvements. The *Holtz* Court then established "substantial cause" rather than "proximate cause" as the threshold for inverse condemnation to apply. This has been the standard ever since.

The "substantial causation" test is extremely plaintiff friendly. It does not require a showing that the public use or improvement was the sole, or even the largest, cause of damage to private property. Rather, it merely requires that the

See Koelzer & Casselman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2014 Issue

public improvement be a *substantial* cause, even if it is only one of several concurrent causes. (*Bunch v. Coachella Valley Water Dist*. (1997) 15 Cal.4th 432, 440 [summarizing the holdings of *Albers* and *Holtz*].)

Thus, a public entity is liable in inverse condemnation, *without fault*, whenever its public work is simply one (potentially among many) "substantial factors" which cause damage to private property. (See *Marshall v. Dep't of Water & Power* (1990) 219 Cal.App.3d 1124, ["[A] governmental entity may be held strictly liable, irrespective of fault, where a public improvement constitutes a substantial cause of the plaintiff's damages even if only one of several concurrent causes."])

Moreover, tort-based defenses, like comparative fault and contributory negligence, do not apply in ordinary inverse-condemnation cases. Thus, except in the context of exceptional cases (below), any claim or argument regarding the plaintiffs' comparative fault – such as the unreasonable failure to protect their property is improper.

Who can sue?

Property owners are not the only ones who can avail themselves of the benefits of an inverse-condemnation claim. Insurance companies can also pursue a governmental entity for damages sustained by their insured through a subrogation claim. (*Kardly v. State Farm Mut. Auto. Ins. Co*. (1989) 207 Cal.App.3d 479, 488.) Once an insurer pays the amount of the loss on the insured's property, the insurer stands in the place of its insured to pursue his or her right of action against any other party responsible for that loss. (*Traveler's Indemnity Company v. Ingebretson* (1974) 38 Cal.App.3d 858, 864.) Where the insurer pays for only a portion of the damage, an insurer can join the insured in an action seeking recovery in inverse conversation to recover the amount of the insurance proceeds. (*McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 687; *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540.)

As a matter of policy, subrogation of inverse claims is a win-win for property owners and insurance companies alike, because it enables both to participate and be made whole through the vindication of the property owner's constitutional rights.

Exceptional cases: Exceptions to no-fault liability

• ***The emergency exception***

The so-called "police power" or "emergency exception" to the inverse-condemnation compensation requirement bars recovery to a plaintiff whose property is damaged during the legitimate exercise of police power. (*House v. L.A. County Flood Control Dist*. (1944) 25 Cal.2d 384, 391.) Courts reason that in such cases where immediate action is necessary to prevent impending peril, the emergency circumstances constitute "full justification for the measures taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety." (*Ibid*.) Nevertheless, courts have carefully circumscribed the types of emergencies that will shield a public entity from inverse-condemnation liability. (*Odello Bros. v. County of Monterey* (1998) 63 Cal.App.4th 778, 789, citing *Holtz v. Superior Court, supra,* 3 Cal.3d at p. 305 [explaining that "[i]nstances of this character are the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, or rotten fruit, or infected trees where life or health is jeopardized."]) Accordingly, this exception is little used and not likely to bar inverse claims absent extreme circumstances.

• ***The natural watercourse and flood-control exceptions***

The more popular exceptions invoked by governmental entities in defense to inverse claims are the "natural watercourse" and "flood-control" exceptions. These exceptions, where applicable, change the standard a plaintiff must meet from the no-fault "substantial factor" test to the more onerous "rule of reasonableness."

The rule of reasonableness was set forth by the California Supreme Court in *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, and *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, and requires a balancing of various factors to determine whether or not the public entity acted unreasonably. These factors include: the purpose served by the project, offsetting reciprocal benefits, feasible alternatives, risk-bearing capabilities, whether the damage is a normal risk of land ownership, and distribution of damages across the project. (*Locklin*, 7 Cal.4th at pp. 368-69.)

In order to come within the natural watercourse exception, a public entity must show that the damage occurred as a result of discharging flow into a natural watercourse. A natural watercourse "is a channel with defined bed and banks made and habitually used by water passing down as a collected body or stream in those seasons of the year and at those times when the streams in the region are accustomed to flow." (*Id*. at p. 345.)

To invoke the flood-control exception, a defendant must demonstrate that the public work that caused the damage was a flood-control improvement, that the flood-control improvement failed to function as intended, and that the damage done was done to properties historically subject to flooding. (*Yamagiwa v. City of Half Moon Bay* (N.D. Cal. 2007) 523 F. Supp. 2d 1036, 1093-94.) Flood-control works include dams, levees, and other public works designed to prevent naturally recurring floods.

These exceptions to the *Albers* strict-liability rule were rooted in the common law, and have now been expressly adopted by the California Supreme Court in *Belair* and *Locklin*. *Belair* was a flood-control case involving a suit by a large group of plaintiffs whose properties were damaged by the failure of a flood control levee that gave way in heavy storms. The levee had been built by the flood-control district to protect the plaintiffs' land from periodic flooding to which it had been subject prior to construction of the levee. *Locklin* involved a claim for damages to properties adjoining a natural watercourse allegedly caused by defendants'

See Koelzer & Casselman, Next Page

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
January 2014 Issue

discharge into the creek which substantially increased the flow. The policy considerations motivating both of these exceptions are the same: Where the public work did not *cause* the damage, but merely failed to prevent or ameliorate damage which would have occurred naturally in the absence of the public work, it would be unjust to allow plaintiffs to recover without demonstrating that the public entity behaved unreasonably.

Thus, in matters coming within the natural watercourse or flood-control exceptions, a public entity will be liable in inverse condemnation only if the design, construction, or maintenance of a public improvement poses an unreasonable risk of harm to the plaintiffs' property, and the unreasonable aspect of the improvement is a substantial cause of damage. (*Arreola v. County of Monterey*, 99 Cal.App.4th at p. 722.)

Although the California Supreme Court's rulings in *Locklin* and *Belair* are well-settled, much inverse-condemnation litigation involves a dispute over whether or not their holdings apply. While some public entities will push for a more sweeping pronouncement of reasonableness in all inverse cases, courts have repeatedly affirmed that the *Albers'* strict-liability rules still apply where the exceptions do not.

Conclusion

Inverse-condemnation law can be a highly advantageous, plaintiff-friendly claim, which plaintiffs and their counsel should keep in mind before filing suits involving damage to private property. However, its generous standards do not apply in all instances, and potential inverse claims should be evaluated carefully.

James P. Koelzer is with Robins, Kaplan, Miller & Ciresi L.L.P. *where he litigates and tries inverse-condemnation claims, as well as other disputes involving damage to real and personal property, as well as complex contract disputes.*

Jill Casselman is with Robins Kaplan, Miller & Ciresi L.L.P. *where she practices property and complex business litigation. She has represented property owners in multiple inverse condemnation actions, up through and including trial.*