

## **INVERSE CONDEMNATION**

### **I.**

#### **INTRODUCTION**

Article I, Section 19 of The California Constitution provides the basis for recovery against government entities and public utilities via the theory of inverse condemnation. That section requires that *just compensation be paid when private property is taken or damaged for public use*. The policy underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those receiving the benefit, as opposed to being allocated to a single person within a community. Belair v. Riverside County Flood Control Dist., (1988) 47, Cal.3d 550, 558.

### **II.**

#### **BACKGROUND**

Unlike other causes of action against government entities, inverse condemnation does not require a plaintiff to file a claim with the government entity. Instead, there is a three (3) year statute of limitations to file an inverse condemnation cause of action. Hence, if a claim form is not filed within six (6) months of a loss, a plaintiff would generally forfeit its ability to file a lawsuit alleging a cause of action against a government entity for dangerous condition of public property. However, an inverse condemnation cause of action could still be alleged as there is no requirement to exhaust potential administrative remedies prior to bringing such a cause of action.

Inverse condemnation is available to a subrogating insurance carrier. Courts have held that subrogating insurers of private property owners have an interest in property taken by a government entity and are thus entitled to seek recovery in inverse condemnation. Aetna Life &

Cas. Co. v. City of Los Angeles, (1985) 170 Cal.App.3d 865; Traveler's Indem. Co. v. Ingebretsen, (1974) 38 Cal.App.3d 858, 864.

The courts have expanded inverse condemnation liability to *include* privately owned public utility companies transmitting power. Barham v. Southern Cal. Edison Co., (1999) 74 Cal.App.4th 744, 751. Other forms of inverse condemnation have also been recognized and include the following: (1) damage to homes caused by a brush fire started from sparks from defendant's electrical power transmission, Aetna Life & Cas. Co. v. City of Los Angeles, *supra*; (2) damage caused by a burst pipe to a fire hydrant that was a part of a water delivery system with no monitoring system in place, Pacific Bell v. City of San Diego, (2000) 81 Cal.App.4th 596; and (3) noxious sewer odors, Varjabedian v. City of Madera, (1977) 20 Cal.3d 711.

Unlike negligence, inverse condemnation does not require a showing of fault, the breach of a standard of care or foreseeability of harm. Aetna Life & Cas. Co. v. City of Los Angeles, *supra*, at 873; Yee v. Sausalito, (1983) 141 Cal.App.3d 917. Instead, any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable under the California Constitution, Art. I, §19, whether or not the injury was foreseeable. Aetna Life & Cas. Co. v. City of Los Angeles, *supra*; Pacific Bell v. City of San Diego, *supra*, at 607; DiMartino v. City of Orinda, (2000) 80 Cal.App.4th 329. Thus, a governmental agency is *strictly liable*, irrespective of fault, where a public improvement constitutes a substantial cause of plaintiff's damages. Marshall v. Department of Water & Power of the City of Los Angeles, (1990) 219 Cal.App.3d 1124; Belair v. Riverside County Flood Control Dist., *supra*, at 558-559.

Finally, pursuant to Code of Civil Procedure §1036, reasonable attorneys' fees and expert costs are recoverable in an inverse condemnation cause of action. Further, proof of negligence is not required to prevail on this theory.

### **III.**

#### **NEW DEVELOPMENTS: CANTU**

Recently, in cases involving electrical failures, a growing number of government entities and public utilities have been challenging inverse condemnation causes of action by arguing that there was a lack of "public use". Absent this required element, a cause of action for inverse condemnation will fail. The facts of a typical case are as follows: A fire occurs at a residential or commercial structure and the area of fire origin is a public utility such as a power pole, transformer or meter panel. Once the matter is placed into litigation, defendant attacks the inverse condemnation cause of action by arguing that it alleges a loss at a public utility supplying power to an individual customer and, as such, is not for the benefit of the general public. The principal case relied upon by the government entities and public utilities in arguing against public use is Cantu v. Pacific Gas & Electric Company, (1987) 189 Cal.App.3d 160.

In Cantu, pursuant to a contract with a private developer, PG&E dug a trench on a hillside extending electrical service to 16 homes within a housing subdivision. Heavy rain subsequently saturated the hillside, causing it to collapse and making plaintiff's house uninhabitable. Plaintiff's soil engineer testified that the PG&E trench contributed to the landslide. Geological reports prepared at the time the subdivision was approved had noted that the area was geologically unstable and that plaintiff's lot rested on top of a landslide area. The trial court found PG&E liable in inverse condemnation for plaintiff's damage. Id. at 162.

On appeal, PG&E argued that the installation of the trench for line extension service was a private project rather than a public use. The appellate court agreed, holding that no viable inverse claim existed because the trench was not for public use but, instead, was a private project that did not benefit the general public. Id. at 164. Instead, the Court concluded that the trench was designed to fulfill an individual need.

Defendant utility companies and government entities are erroneously applying Cantu by focusing on the *area of damage*, rather than the *cause of the damage*, in an effort to narrow the use of the utility to an individual customer. Hence, a court may be misled into believing that a fire at a power pole, transformer or meter panel supplying power to an individual customer does not constitute public use. In fact, an alarming number of courts are concluding the same. However, the erroneous application and interpretation of Cantu may be avoided if anticipated and addressed at the pleading stage of the litigation.

In order to survive a Cantu attack on the complaint, the focus of an inverse condemnation cause of action resulting from an electrical failure must be on the *transmission of electrical power* as the cause of the loss. In fact, one need look no further than the analysis by the Cantu court which distinguished the trench from the construction of permanent power lines. Id. Emphasizing this distinction, the Cantu court acknowledged a well established line of cases holding that permanent power lines are public improvements devoted to public use. Id. The Court stated:

The trench installed here was designed to fulfill an individual need. This is unlike the construction of permanent transmissions towers or power lines...which are designed to transmit electricity over a *much greater area* and which exist even if these particular plaintiffs were not customers. Id. at 164. Moreover, the transmission of electrical power has been held to be a public use. Barham v.

Southern Cal. Edison Co., (1999) 74 Cal.App.4th 744, 751; Slemons v. Southern Cal. Edison Co., (1967) 252 Cal.App.2d 1022.

The facts alleged in an inverse condemnation cause of action are crucial to withstanding a Cantu attack. The complaint should focus on the distribution of power over a broad area, as opposed to isolating the area of damage, i.e. public use versus private use. In fact, even though the filing of a government claim form is not required for inverse condemnation, care should be taken in drafting the same to preserve a dangerous condition of public property cause of action as the facts alleged can be used by a defendant to isolate plaintiff's argument. If Cantu is raised despite a streamlined pleading, counsel must educate the court, generally with additional facts, to prevent the case from early disposition. Unfortunately, these additional facts are, more often than not, inaccessible absent formal discovery. Thus, until a case is decided either overruling or better distinguishing or explaining Cantu, the misapplication will persevere and plaintiffs should be prepared for the same.

#### IV.

#### CONCLUSION

When available, inverse condemnation should always be alleged in a complaint against a government entity or public utility. If the facts support the cause of action, the burden of proof required of a plaintiff is much less stringent than that of negligence or dangerous condition of public property causes of action. Further, a plaintiff who prevails under inverse condemnation is entitled to recovery attorneys' fees and reasonable costs. Given the hard line positions of most government entities and public utilities in defending themselves, said costs and fees could amount to a great deal of money. Finally, as set forth in the Cantu discussion above, it is crucial that the court understand and/or be educated in inverse condemnation as this cause of action is a question of law and, as such, will be decided upon by the judge and not a jury.

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