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**AN INTRODUCTION TO INVERSE CONDEMNATION**

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**INTRODUCTION**

Within the past year, Cozen O'Connor has resolved numerous high exposure cases through the use of the theory of liability known as "Inverse Condemnation." To many attorneys, and even judges, this cause of action is shrouded in mystery, misunderstood, and underutilized. However, to those attorneys who often litigate against public entities, it is an increasingly important concept.

This subrogation alert will introduce Inverse Condemnation, specifically by using examples from California, and discuss its benefits and limitations. As always, make sure to check your own state's laws as they relate to Inverse Condemnation.

**WHAT IS INVERSE CONDEMNATION?**

Inverse Condemnation is one of the two basic procedural devices for enforcing the rule of the Takings Clause existing in Article I, Section 19 of the California Constitution<sup>1</sup> that private property may not be taken or damaged for public use without just compensation having first been made to the owner—the other device is the more familiar action known as "eminent domain." The difference between these two actions boils down to who initiates it: In eminent domain, the public authority takes the initiative, while in Inverse Condemnation proceedings, litigation is commenced by the property owner. Inverse Condemnation is sometimes referred to as an "unintended" eminent domain.

The typical example for eminent domain proceedings is where a government entity wants to build a public access system, such as a highway, as a benefit to the public. To do so, it needs access to land owned by a private owner. The government gets the land, regardless of whether the private owner objects, because it is being obtained for a public benefit; however, the government has to pay reasonable compensation for the land and what was built upon it.

An example of Inverse Condemnation would be a public distribution system, such as a sewage system, electric system, or water system, that fails and causes damage to private property. The property owner can claim damages because the government "took" his property for the public benefit of creating a sewage system.

1. Also in the 5th Amendment of the United States Constitution.

The fundamental policy underlying the concept of Inverse Condemnation is that the costs of a public improvement benefiting the community should be spread among those benefited rather than allocated to a single member of the community. *Pacific Bell v. City of San Diego*, (2000) 81 Cal. App. 4th 596, at 602. Thus, where a public improvement (such as a sewage system) damages the property of another, then compensation is to be given. *Id.* (a public works pipe that burst and caused damage to plaintiff's property entitled plaintiff to compensation).

## ELEMENTS OF INVERSE CONDEMNATION

Inverse Condemnation is a form of "strict liability" that requires proving that a public agency has: 1) taken or damaged; 2) the claimant's property; 3) for a public use. It is unnecessary to establish negligence or fault in order to impose Inverse Condemnation against a public agency. Any actual physical injury to property proximately caused by a public improvement as deliberately designed and constructed is compensable under the Takings Clause, whether or not the injury was foreseeable. See, e.g., *Aetna Life & Cas. Co. v. City of Los Angeles*, (1985) 170 Cal. App. 3d 865, at 873; *Pacific Bell v. City of San Diego*, (2000) 81 Cal. App. 4th 596, 607. A governmental agency is, therefore, strictly liable, irrespective of fault, where a public improvement constitutes a substantial cause of plaintiff's damages. See, e.g., *Marshall v. Department of Water and Power of the City of Los Angeles*, (1990) 219 Cal.App.3d 1124, 1139.

## WHAT IS A TAKING?

A taking or damaging is simply the appropriation of a valuable property right. *Selby Realty Co. v. City of San Buenaventura*, (1973) 10 Cal. 3d 110. This is not a difficult standard to meet, as both damage to personal property and real property have been deemed appropriations of a valuable property right. *Eli v. State of California*, (1975) 46 Cal. App. 3d 233, at 235 (cigarette lighter and a padlock); *Sutfin v. State*, (1968) 261 Cal. App. 2d 50 (automobiles), *Pacific Bell, supra.*, 81 Cal. App. 4th 596 (plaintiff's facilities). The "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 Co. v. Superior Court*, (1996) 13 Cal. 4th 893.

## WHAT CONSTITUTES PROPERTY?

"Property" in the Inverse Condemnation context simply refers to the group of rights inherent in the citizen's relation to a physical thing, such as the right to possess, dispose, and use it. *Agins v. City of Tiburon*, (1979) 24 Cal. 3d 266, 273. This can range from personal property to an actual building or land. Inverse Condemnation is commonly misunderstood to apply only to real property, but it applies just as equally to personal property such as a cigarette lighter, a padlock, or automobiles. See *Eli*, 46 Cal. App. 3d at 235; *Sutfin* 261 Cal. App. 2d 50.

## WHAT IS A PUBLIC USE?

Public use is defined as "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. For example, public distribution systems, such as those for electricity, water, or sewage, are obvious examples. See generally *Pacific Bell*, 81 Cal. App. 4th 596, *supra.*; see also *Ambrosini v. Alisal Sanitary District*, (1957), 154

Cal. App. 2d 720. There is no bright line demarcation as to what “public use” applies to; if it can be fit within the definition of public use, and follows common sense, then it is likely for a public use.

### **CAN A PRIVATELY OWNED PUBLIC UTILITY BE LIABLE UNDER INVERSE CONDEMNATION?**

Yes. If the private utility is providing a service to the public that falls within the definition of a “public use”, then it is potentially responsible under Inverse Condemnation for damages caused by “taking” another’s property. *Barham v. Southern California Edison*, (1999) 74 Cal. App 4<sup>th</sup> 744 (Southern California Edison found to be a “public entity” in providing electricity to the public). These types of cases tend to be limited to their facts because courts do not want to stray too far from traditional notions of public use when applying Inverse Condemnation to a private entity.

### **CAN A SUBROGATING INSURER USE INVERSE CONDEMNATION?**

Yes. The protections afforded by Inverse Condemnation are also available to subrogees of property owners. *See Aetna Life & Cas. Co. v. City of Los Angeles*, (1985) 170 Cal.App.3d 865.

### **BENEFITS OF AN INVERSE CONDEMNATION ACTION**

There are a number of reasons why Inverse Condemnation may be a tactically superior cause of action than most when litigating against a public entity:

1. It is a constitutionally based action, thus it is not controlled by deadlines that typically regulate government tort claims. In California, there is no standard negligence action against a government entity; instead, a claimant must rely upon statutorily recognized causes of action against a government entity. These have fairly stringent notice requirements, typically six months to notify the government of the claim from the date of occurrence. With Inverse Condemnation, there is no such statutory notice requirement because it is a constitutional action. The only limitation to it being brought is the statute of limitations that applies to any property damage claim.
2. It provides for the recovery of attorney’s fees and expert fees. In California, the *Code of Civil Procedure*, Section 1036, provides for such a recovery to a prevailing Plaintiff. This can push a settlement to occur more quickly than normal as the government entity attempts to put a stop to incurring such fees.
3. It is a strict liability action: e.g. all that needs to be proven is that the government’s sewage system spilled sewage into the claimant’s home. Proving Inverse Condemnation is far easier than any negligence standard.
4. In California, assuming Inverse Condemnation is your sole cause of action, the liability phase of an Inverse Condemnation case is tried by the court only. *See Marshall v. Department of Water & Power of the City of Los Angeles*, (1990) 219 Cal.App.3d 1124. This can help protect against the typical bias that is present in juries against insurance companies in a subrogation action.

### **LIMITATIONS TO INVERSE CONDEMNATION**

While Inverse Condemnation is a powerful cause of action that can provide your client with a great litigation tool, it has limitations:

1. The statute of limitations for the type of case you’re bringing (e.g. property) still apply. In California, this is currently three years from the date of loss;

2. It is only available against a public agency;
3. It requires the taking to be for a “public use” – not all takings are a result of a “public use.” By way of example, in the very same case where a cigarette lighter was deemed property for purposes of Inverse Condemnation, its taking did not result from a public use. *Eli v. State of California*, 46 Cal. App. at 235. The taking was the failure of prison guards to return property to an inmate, which was potentially negligence on their behalf or conversion, but not a part of the prison’s use as a public improvement.

### CLOSING COMMENTS

Inverse Condemnation can be a practical and invaluable tool in handling losses that involve a public entity defendant. Because of the specter of attorney’s fees being awarded, it impels responsible parties to meaningfully analyze their positions, and if warranted, to attempt to resolve the case earlier than otherwise might occur. For additional research materials regarding this important theory of liability, please feel free to contact any Subrogation attorney at Cozen O’Connor.

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