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Too Little or Too Much Water: Dealing With Climate Change

When Good Intentions Go Awry: Dealing With Inverse Condemnation and Tort Claims From Flood Control Projects

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1. Introduction

From El Nino on the West Coast, to Hurricane Sandy on the East Coast, to torrential rains in Texas, the entire Country faces risks of flooding from extreme weather conditions. Scientists tell us that this is the "new normal" because of climate change.

As lawyers representing public agencies, we must to dust off hornbooks and study legal doctrines that long precede our awareness of climate change: inverse condemnation and tort claims based on flood control projects that cannot restrain flood waters.

This presentation will briefly discuss cases from various states which appear to require government culpability for flood damages, explain California law which is less forgiving of public agencies and consider practical advice to reduce your clients exposure.

2. State Laws – Require Government Culpability?

Public agencies' liability for flood control improvements is governed by two legal concepts: (1) no private property may be taken or damaged for public use without just compensation to the owner; and (2) a person who negligently causes an injury to the property of another is accountable for the resulting damages. 5 A.L.R.2d 57, *2 (2014).

Although the states have applied these concepts differently, they all appear to require some level of government culpability:

- Utah – judgment dismissing landowner's lawsuit against Spanish Fork City for flood control measures which damaged real property, improvements and personal property affirmed because "riparian owners may embank and protect their lands against the overflow of extraordinary floods, even though damage to the lands of others is caused thereby." However, this privilege is "qualified to the extent that the owner who undertakes protective measures must not obstruct the flow of a natural water course, and he is liable for damage resulting to adjacent landowners if he is negligent in erecting his protective devices." McKell v. Spanish Fork City, 6 Utah 2d 92, 95,96 (1957) (emphasis in original)

- New York – City of Utica is not liable for the negligent design, maintenance and inspection of its flood control system because there was no evidence that the alleged negligence proximately caused plaintiffs' flood damages. Artessa v. City of Utica, 23 A.D.3d 1148, 1149 (2005).

- Virginia – action for flood damages caused by Fairfax County's

storm sewer system is not a tort claim, but may be a claim for taking or damaging property without just compensation. Burns v. Board of Supervisors, 218 Va. 625, 627-628 (1977).

- Texas – inverse condemnation requires that "a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result. In the case of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur." Tarrant Reg'l Water District v. Gragg, 151 S.W.3d 546, 555 (2004).

- Louisiana – plaintiffs are not entitled to lost income or lost profits under inverse condemnation for flood damages. Foret v. Bd. Of Levee Comm'rs, 169 La. 427, 437 (1929) (lost salary); Fabre v. Bd. of Comm'rs, 170 La. 210, 211-212 (1930) (lost profits).

- Florida – flood control district is liable to railroad for negligence, nuisance and trespass for flood damages resulting from its active participation in the design, construction and operation of a flood control project. Flordia E.C.R. Co. v. United States, 519 F.2d 1184, 1197-1198 (5th Cir. 1975).

- Illinois – City of Farmington's improvements to a culvert system increased surface waters causing damage to plaintiff's driveway during a rainstorm. Plaintiff properly stated claims for negligence and trespass because the increase in surface waters was beyond the policy of reasonableness of use. However, plaintiff did not state a claim for takings because two flood events were "neither so frequent nor permanent in nature as to constitute a 'taking.'" Starcevich v. Farmington, 110 Ill.App.3d 1074, 1079-1080 (1982).

- New Mexico – City of Hot Springs is liable for its negligent maintenance and repair of a dike to withhold flood waters from a flash flood. Hogan v. City of Hot Springs, 58 N.M. 220, 228-229 (1954).

The above cases suggest that their respective states will allow inverse condemnation and tort claims arising from flood damages caused by storm water control projects where there is an element of negligence or foreseeability of harm. As discussed next, the law in California is less forgiving of public agencies.

3. California Law – Plaintiff Friendly?

In California, if a public agency substantially participates in the planning, approval, construction or operation of a public project or improvement that causes injury to private property, it may liable for its involvement. It does not matter

whether an agency's involvement ended years ago or if another agency owns and has always been primarily responsible for the project. In California, this liability arises from inverse condemnation, dangerous condition of public property and nuisance. These claims differ in terms of the standard of liability and the remedies available to plaintiff.

For inverse condemnation, the California Constitution provides that: "Private property may be taken or damaged for public use only when just compensation has first been paid to the owner." Cal. Const. art. I, § 19. This same Constitutional provision underpins eminent domain actions, where the public agency decides to condemn property, and land use decisions, when an agency's actions constitute a regulatory takings. Unlike negligence, plaintiff need not show that his or her injury was foreseeable. Rather, plaintiff must only prove that an agency's public improvement substantially caused the property damage, even if it was only one of several concurrent causes. Belair v. Riverside County Flood Control District, 47 Cal.3d 550, 559 (1988).

However, this strict liability rule is balanced by the reasonableness rule which requires plaintiff to prove that the pubic agency's design, construction or maintenance of a flood control project posed an unreasonable risk of harm. Id. at 565. Reasonableness is based on several factors:

- The overall public purpose being served by the improvement project. In other words, how necessary was the project for the public?
- The degree to which plaintiff's loss is offset by reciprocal benefits.
- The availability to the public entity of feasible alternatives with lower risks. Put another way, was there an alternative that cost more, but risked less?
- The severity of plaintiff's damages in relation to risk-bearing capabilities. Or are the damages too severe to impose on plaintiff?
- The extent to which damage of the kind plaintiff sustained is generally considered as normal risk of land ownership.
- The degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to plaintiff. This asks whether plaintiff is contributing more than his or her fair share for the public benefit?

Locklin v. City of Lafayette, 7 Cal.4th, 327, 368-369 (1994).

For plaintiffs, inverse condemnation is useful because they do not have to prove negligence, and they are entitled to attorney's fees if they prevail.

Unfortunately, the public agency cannot recover fees even if it prevails. Cal. Civ. Proc. Code § 1036; Aetna Life & Casualty Co. v. City of L.A., 170 Cal.App.3d 865, 876-877 (1985). A plaintiff can also recover lost income and profits from the property damage. Pacific Gas & Electric Co. v. County of San Mateo, 233 Cal.App.2d 268, 274 (1965). On the other hand, because these claims are damages to real or personal property, plaintiff is not entitled to damages for personal injuries. 5 California Forms of Jury Instructions § 35A, instr. MB3500A (Matthew Bender 2015); Cal. Civ. Proc. Code § 1260.230.

Although plaintiff is not entitled to personal injury damages for inverse condemnation, a plaintiff may obtain personal injury damages with a claim for dangerous condition of public property. This is a form of negligence that makes a public agency liable for property it owns or controls if there was: a dangerous condition that created a reasonably foreseeable risk of the injury that occurred; the agency created the dangerous condition or was aware of the condition in time to prevent it; and the condition caused plaintiff's harm. Cal. Gov. Code § 835.

A plaintiff may also recover personal injury damages for a nuisance claim. A nuisance is anything that "is injurious to health . . . offensive to the senses . . . or [interference] with the comfortable enjoyment of life or property." Cal. Civ. Code § 3479. Plaintiff may bring a civil action for an injunction, damages or both.

Because inverse condemnation, dangerous condition of public property and nuisance each have their advantages and disadvantages, plaintiff's counsel will often sue the public agency for flood damages under all three counts. Unfortunately, these cases present significant risk to the public agency because the damage claims are large, and the attorney's fees will be high. Avoiding and defending these claims is discussed next.

4. Practical Considerations – It's Better to Avoid Than Defend

As public agencies are all too aware, avoiding litigation is always preferable and almost always cheaper. Here are some steps to avoid litigation:

- Preventative maintenance – if it has not already done so, an agency should develop and follow a maintenance plan. This could include an inspection schedule, clearing channel obstructions, repairing weak spots in levees and dams, and making sure that flood control gates, grates and other facilities are in proper working order.

- Analyze the performance of the flood improvement - a consultant can inspect the agency's facilities to ensure they are up to standard. Also, with computer modeling, the consultant can evaluate the structures ability to perform under different rain events.

- Insurance policies – the agency may purchase insurance for inverse condemnation claims and flood damages and may have kept old

general liability policies. Although recent liability policies exclude inverse condemnation and flood damages, older policies may not have exclusions and may apply to old facilities that fail.

- Flooding easements – some agencies have paid property owners for easements that allow them to flood the owners properties. However, the courts have severely limited their effectiveness so this should be used with caution, if at all. Salton Bay Marina, Inc. v. Imperial Irrigation District, 172 Cal.App.3d 914, 935-936 (1985).

When faced with litigation, an agency should consider several approaches:

- Timing - early preparation forces the public agency to incur defense costs up front when the agency may be hoping for settlement to defer these costs. However, this preparation allows the agency to more realistically evaluate its settlement position and strengthen the agency's position if the case must be tried.

- Experts - it is important to involve experts at the outset to avoid missteps in discovery and assess whether early settlement is advisable. This may involve hydrologists to evaluate the movement of the flood waters and performance of the flood protections, engineers to consider the reasonableness of the public agency's design, construction and maintenance of its facilities, and architects or contractors to measure the harm to plaintiff's property. If personal injuries are involved, the agency will need medical professionals to examine the alleged injuries.

- Insurance coverage counsel - insurance coverage attorneys can see whether the claim is insured. If the agency has flood insurance, those attorneys can make sure the insurer steps up, and defense counsel does not make decisions in litigation that bar coverage. As mentioned above, old insurance policies that pre-date the flood may provide coverage.

- Organizing plaintiffs into classes - cases with a large number of plaintiffs can be a logistical challenge. Typically, the plaintiffs will fall into different classes according to how they were affected by the flood water and the nature and extent of their damages. Defense counsel should consider these classes as he or she frames pre-trial motions and discovery.

Flood control improvements serve a vital public service, but laws protect residents from unreasonable risk or defects from those improvements. For the public agencies, trying to help their residents, flood claims may seem unfair. However, knowing the requirements and remedies enable the agencies to manage the risks. With all the extremes in weather, it is worth thinking about these issues.