

We Didn't Start the Fire:

Extinguishing Public Entity Liability after a Fire

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Introduction

- In 2018, California had 8,054 wildfires with 1,823,153 acres burned
- California has all of the top 10 costliest wildfires in the U.S.
 - #1: Camp Fire (2018)
 - #2: Tubbs Fire (2017)
 - #3: Woolsey Fire (2018)
 - #4: Atlas Fire (2017)
 - #5: Thomas Fire (2017)
 - #6: Oakland Hills Fire (1991)
 - #7: Witch Fire (2007)
 - #8: Carr Fire (2018)
 - #9: Cedar Fire (2003)
 - #10: Old Fire (2003)
- Currently, the Mendocino Complex Fire is the largest fire in state history (459,123 acres burned)
- Causes: Drought? Global Warming? Others?



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Wildfires Then, Wildfires Now

- Growth of Wildland-Urban Interface – zone of transition between unoccupied land and human development
 - More people moving into wildland area
 - 90% of wildfires are started by human activity
- Weather Changes
 - Higher winds
 - No/lower humidity
- More fuel – dry, overgrown vegetation
- More severe fires – fire storms, fire tornadoes
- Less fire protection resources

Potential Parties

- Potential Plaintiffs: Homeowners, Businesses, Farmers, and Insurance Companies
- Potential Defendants: Public Entities; Public Utilities
 - BUT: Public Entities can also be plaintiffs
 - *E.g.* In Re California North Bay Fire Cases

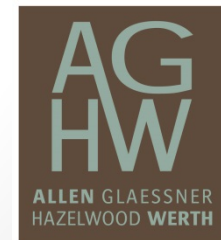
Theories of Liability

- Dangerous Condition (Government Code § 835)
- Breach of a Mandatory Duty (Government Code § 815.6)
- Employee Negligence (Government Code §§ 815.2/820)
 - Emergency Response
- Nuisance
- Trespass
- Inverse Condemnation

Dangerous Condition of Public Property

Government Code § 835

1. The public entity owned or controlled the property
2. The property was in a dangerous condition at the time of the incident
3. The dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred
4. The negligent or wrongful conduct of the public entity's employee acting within the scope of his or her employment created the dangerous condition OR the public entity had notice of the dangerous condition for a long enough time to have protected against it
5. Plaintiff was harmed
6. The dangerous condition was a substantial factor in causing Plaintiff's harm



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Definition of Dangerous Condition

Government Code § 830(a)

“Dangerous condition” means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

Breach of a Mandatory Duty

Government Code § 815.6

Judge decides whether:

- The enactment imposes a mandatory duty and whether it was designed to protect against the type of harm suffered. *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490; *Morris v. County of Marin* (1977) 18 Cal.3d 901
- **Government Code § 810.6:** Definition of enactment
 - “Constitutional provision, statute, charter provision, ordinance or regulation”
 - A contract cannot give rise to a mandatory duty imposed by an enactment *Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091-1092
 - Must be obligatory rather than discretionary – “must require, rather than merely authorize or permit, that a particular action be taken or not taken” *Haggis*, 22 Cal.4th at 498
 - If significant discretion is required to carry out any duty imposed, the duty will not be found to be mandatory despite the use of mandatory language (i.e. “shall”)
 - *Sutherland v. City of Fort Bragg* (2000) 86 Cal.App.4th 13

Breach of a Mandatory Duty

If YES, jury decides whether:

1. The public entity violated the enactment
2. The plaintiff was harmed
3. The public entity's failure to perform its duty was a substantial factor in causing plaintiff's harm

Employee Negligence

- **Government Code § 815.2:** A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would . . . have given rise to a cause of action against that employee or his personal representative.
- **Government Code § 820:** Except as otherwise provided by statute, a public employee is liable for injury caused by his act or omission to the same extent as a private person.
- **REMEMBER: 90% of wildfires caused by people**

Nuisance

Civil Code § 3479

Nuisance is "[a]nything which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."

1. Plaintiff owned/leased/occupied/controlled the property
2. Public entity, by acting or failing to act, created a condition or permitted a condition to exist that was a fire hazard (or other potentially dangerous condition) to plaintiff's property
3. The condition interfered with plaintiff's use or enjoyment of his/her land
4. Plaintiff did not consent to the public entity's conduct
5. An ordinary person would be reasonably annoyed or disturbed by the public entity's conduct
6. Plaintiff was harmed
7. Public entity's conduct was a substantial factor in causing plaintiff's harm; and
8. The seriousness of the harm outweighs the public benefit of the public entity's conduct

NOTE: Nuisance does not require property damage; proof of interference with the plaintiff's use and enjoyment of property is sufficient. *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937



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Nuisance

Civil Code § 3487

Nothing that is done or maintained under the express authority of a statute can be deemed a nuisance.

See Farmers Insurance Exchange v. State of Cal.
(1985) 175 Cal.App.3d 494

Trespass

1. Plaintiff owned/leased/occupied/controlled the property
2. The public entity intentionally, although not intending to do so, recklessly, or negligently entered plaintiff's property **OR** intentionally, although not intended to do so, recklessly, or negligently caused another person to enter plaintiff's property
3. Plaintiff did not give permission for the entry or defendant exceeded plaintiff's permission
4. Plaintiff was harmed
5. Public entity's entry/conduct was a substantial factor in causing Plaintiff's harm

NOTE: Government Code § 821.8 provides immunity for authorized trespass on private property to carry out legal duties.

See also Bettencourt v. State (1975) 51 Cal.App.3d 892 (entries onto private property to fight a brushfire in nearby hills is ordinarily, absent other negligent or wrongful acts, nonactionable)

Dangerous Condition/Tort Defenses

- Claim Requirements
- Comparative Negligence
- **Govt. Code § 835(b)**: Reasonable Time to Take Protective Measures
 - If the Public Entity did not create the condition, the Public Entity is not liable if it did not have sufficient time to protect the public from the danger. The jury may consider all the surrounding circumstances including what measures would have been appropriate to remedy the condition and the time necessary to have done so.
- **Govt. Code § 835.4(a)**: Dangerous Condition Created by Reasonable Act
 - The Public Entity is not liable if the act or omission of its employee creating the condition was reasonable. The jury may weigh the foreseeability of the injury against the practicability and cost to have taken other action.
- **Govt. Code § 835.4(b)**: Reasonable Action to Protect Against Dangerous Condition
 - The Public Entity is not liable if its failure to remedy the condition was reasonable. The jury may weigh the time and opportunity available to the Public Entity to have alleviated the condition, and the cost of doing so, against the foreseeability of the injury.
- **Govt. Code § 830.6**: Design Immunity
- **Govt. Code § 820.2**: Discretionary Immunity
- **Govt. Code § 831.2**: Natural Condition Immunity
- **Govt. Code § 830.2**: Trivial Defect

Emergency Response Defenses

- **Government Code § 850:** “Neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service.”
- **Government Code § 850.2:** “Neither a public entity that has undertaken to provide fire protection service, nor an employee of such a public entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment or other fire protection facilities.”
- **Government Code § 850.4:** Neither a public entity, nor a public employee acting in the scope of his employment, is liable for any injury resulting from the condition of fire protection or firefighting equipment or facilities or for any injury caused in fighting fires.
 - Exception: Violations of Vehicle Code § 17001 (public entity liable for operation of motor vehicle)

Emergency Response Defenses

- **Vehicle Code § 17004:** “A public employee is not liable for personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.”
- **Vehicle Code § 17004.5:** Applies the above immunity to private fire departments
- **Civil Code § 1714.9:** Firefighter Rule

Emergency Response Defenses

- **Government § 8655-8660:** Emergency Services Act
- **Government Code § 8655:** “The state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of [the California Emergency Services Act]”
 - Immunity is broad and specifically extended to encompass not only discretionary actions, but also the performance of or failure to perform those discretionary actions
 - *See Thousand Trails v. Cal. Reclamation Dist.* (2004) 124 Cal.App. 4th 450; *LaBadie v. State of California* (1984) 208 Cal.App.3d 1366

Inverse Condemnation

- **United States Constitution – Fifth Amendment**
 - “... nor shall private property be taken for public use, without just compensation.”
- **California Constitution, Article I, Section 19**
 - Property may not be taken or damaged for the public without just compensation to the owner

Differences from Tort Causes of Action

- No tort claim necessary
- Three year statute of limitations
- Strict liability for public entities if plaintiff establishes elements
- California Code of Civil Procedure § 1260.040 permits a party to move for a ruling on a legal issue affecting the determination of compensation (a.k.a. liability)
 - Not entitled to a jury trial on any other determinations other than the issue of compensation
 - **BUT:** *Weiss v. People ex rel. Dept. of Transportation, et al.* (2018) 20 Cal.App.5th 1156 held that C.C.P. § 1260.040 did not apply to inverse condemnation
 - California Supreme Court agreed to review
- California Code of Civil Procedure § 1036: Attorney's fees and expert fees may be awarded

Inverse Condemnation

A property owner may recover from a public entity for any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed ... whether foreseeable or not. *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263–264

Also applies to public utilities

- *Barham v. Southern California Edison Co.* (1999) 74 Cal.App.4th 744: A privately-owned public utility is a “public agency,” for purposes of inverse condemnation claim

Permits recovery for fire damage

- *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865: “The California Constitution’s eminent domain clause makes no exception for fire damage”

Public Project or Improvement

A public improvement is a project or use that involves:

1. A deliberate action by the state
 - Requires deliberation by a public entity (a policy decision), not by an employee. *Paterno v. State of California* (1999) 74 Cal.App.4th 75, 88
2. Taken in furtherance of public purposes
 - 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

Inverse Condemnation Causation

- The damage must be caused by the public improvement as deliberately conceived, altered, or maintained. *Cal. State Auto. Ass'n Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474, 479; *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 383.
- Plaintiff must prove that the public improvement which, as designed, constructed and maintained, presents an inherent risk of damage to private property, and the inherent risks materialize to cause damage. *Cal. State Auto. Ass'n*, 138 Cal.App.4th at 480.
- Plaintiff must prove “substantial cause and effect relationship”. *Bel Air v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550.

Inverse Condemnation Limitations

- *Wildensten v. East Bay Regional Park District (1991) 231 Cal.App.3d 976*: Mere ownership and management of undeveloped property cannot be considered a government taking.
- *Hayashi v. Alameda Cty. Flood Control & Water Conservation Dist. (1959) 167 Cal.App.2d 584*: Inverse condemnation liability cannot be predicated on general tort liability or a claim of negligence in the operation and maintenance of the public improvement.
- *Mercury Casualty Co. v. City of Pasadena (2017) 14 Cal.App.5th 917*: A tree constitutes a work of public improvement for purposes of inverse condemnation liability if the tree is deliberately planted by or at the direction of the government entity as part of a planned project or design serving a public purpose or use, such as to enhance the appearance of a public road
- *Farmers Ins. Exchange v. State of Cal. (1985) 175 Cal.App.3d 494*: Exercise of government's police power is noncompensable

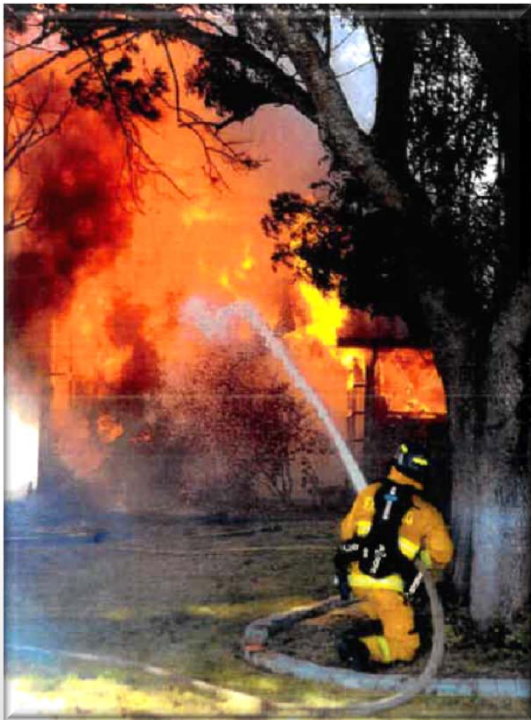
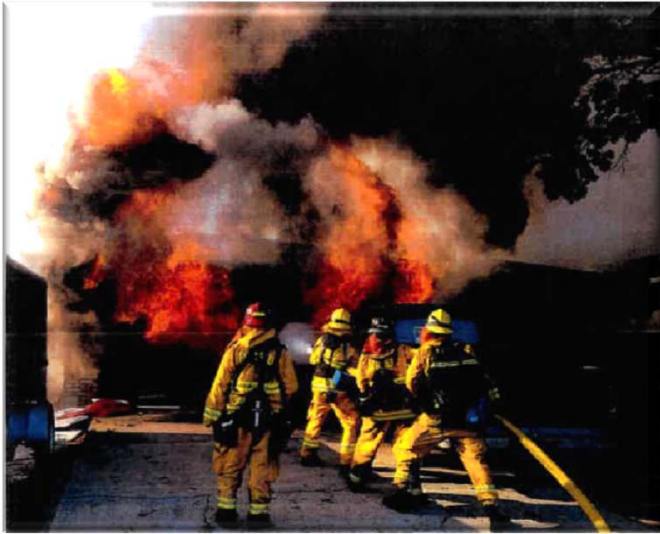
Case Study: State Farm, et al. v. City of Fairfield

Facts:

- Subrogation action arising out of a fire that occurred in the Round Hill subdivision of the City of Fairfield on August 27, 2013
- Fire originated along the roadside of eastbound I-80, west of the Manual Campos Parkway exit
- Fire went over a sound wall and heavy winds carried flying embers onto the homes along the 2800 and 2900 block of Marigold Street
- City had an easement over a 50 foot strip of land between the sound wall and the backs of the residences along the 2800 block of Marigold
- 50 foot strip of land belonged to homeowners
- Approximately 15 homes were damaged







Case Study: State Farm, et al. v. City of Fairfield

Parties

- Plaintiffs: State Farm General Insurance Company, Fire Insurance Exchange/Mid-Century Insurance Company, and Travelers Insurance Company
- Defendants: City of Fairfield, Department of Water Resources (eventually dismissed), and California Department of Transportation (CalTrans)

Case Study: State Farm, et al. v. City of Fairfield



Allegations against the City of Fairfield:

- City failed to maintain a 50 foot strip of land between the sound wall to the backside of the residences along the 2800 block of Marigold Drive
- Dry brush in this strip of land fueled the fire and contributed to its spread
- City restricted access to the strip of land with a locked gate and chain linked fence, which prohibited Marigold residents from accessing and entering the land for any reason, including brush clearance and maintenance.

Case Study: State Farm, et al. v. City of Fairfield

Causes of Action:

- Inverse Condemnation
- Dangerous Condition of Public Property
- Breach of a Mandatory Duty

Case Study: State Farm, et al. v. City of Fairfield

Damage Claims:

- State Farm: Insured five homes that were damaged in the fire totaling \$542,408.15
- Fire Insurance Exchange: Insured five homes that were damaged in the fire totaling \$580,465.03
- Travelers: One home that was damaged and additional living expenses totaling \$505,232.30
- Attorney's fees and interest as part of the inverse condemnation claim

Case Study: State Farm, et al. v. City of Fairfield

Issues/Problems:

- Determining who owned/maintained land
 - City had an easement over the 50 foot strip of land for an underground drainage channel/pipe that directed seasonal creek water
 - 50 foot strip of land was owned by homeowners
 - Evidence that City had maintained the 50 foot strip of land in the past, including mowing, up until 2010/2011
 - City stopped maintaining the land when a city employee saw a DWR crew mowing; assumed DWR had taken over maintenance
- Communication
- Whether the City's maintenance constituted a taking
- Causation
 - Whether the property damage was the result of a risk inherent to the drainage channel/pipe
 - Whether the ground fire on the 50 foot strip of land caused the damage to the homes

Case Study: State Farm, et al. v. City of Fairfield

Determining Causation – helpful evidence:

- Solano County Fire Investigation Report
 - Documented the events/conditions day of the fire
 - Identified close area of origin
- Helmet camera – showed fire
- Photographs – showed burning palm fronds

Case Study: State Farm, et al. v. City of Fairfield

Resolution:

- \$800,000 funded equally by the City of Fairfield and CalTrans
- The City of Fairfield's portion was divided as follows:
 - \$145,000 to State Farm
 - \$155,000 to Fire Insurance Exchange
 - \$100,000 to Travelers

Case Study: State Farm, et al. v. City of Fairfield

Lessons Learned:

- Insurance company plaintiffs will find some hook to bring public entity into the litigation
- High cost of defense
 - A lot of discovery
 - Expert costs
 - Significant motion work
- Know what property the public entity owns and controls
 - Maintenance procedures and schedules
 - Record retention
 - Procedures for when maintenance ceases
- Early resolution is wise
 - Make a pre-litigation offer for a reasonable amount and include estimated attorney's fees/costs
 - If in litigation, consider CCP 998 offer to compromise

Risk Management Advice

PREVENTION

- Be proactive in preventing fires
 - Establish clear inspection schedules and abatement programs, including who is responsible for those inspections and maintenance
 - All public employees should be instructed to say something if they see something – not limited to just fire department or public works
 - Enforce fire and other relevant codes including but not limited to nuisance actions, fines, and liens
- Communicate and educate residents to fight against complacency and encourage vigilance and accountability
 - Provide reminders regarding property owner responsibility to create defensible space
 - Consider doing public service announcements (radio, mailings, local news, etc.) when fire season approaches
 - The goal should be to change attitudes so that residents partner with public entities to take preventative measures

Risk Management Advice

WHEN THERE IS A FIRE

- Mutual Aid
- First responders should also document their observations
 - Photographs, including aerial photographs
 - Video
 - Reports
- Investigate

QUESTIONS?

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