CITY TREES AND URBAN FORESTS: **Understanding Inverse Condemnation Liability**

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On November 30, 2011, a severe windstorm struck the City of Pasadena and the surrounding areas. Wind gusts in Pasadena peaked at 101 mph – which is double hurricane force. The 2011 windstorm destroyed more than 2,200 of the 57,000 trees in Pasadena's urban forest.

Some of the City-owned trees that fell struck houses. One law firm representing five insurers filed lawsuits against Pasadena seeking approximately $2,000,000 in damages, plus attorney's fees. The Plaintiff insurance companies had paid that money to their insureds for damage caused by falling trees. The insurers then sued Pasadena to recover that money. The insurers claimed that they were entitled to recover under the doctrine of "inverse condemnation."

What is inverse condemnation? Article 1, Section 19 of the California Constitution allows a property owner to recover "just compensation" from public entities and utility companies when private property is damaged for public use. Thus, a public entity generally is strictly liable for any damage to private property caused by a "work of public improvement" as that improvement was deliberately designed and constructed. Typically, works of public improvement are things like storm drains, sewers, water mains, power lines, and other brick and mortar infrastructure.

As an example, there have been a number of cases recently filed against utilities seeking damages caused by wildfires. Those cases could give rise to inverse condemnation liability because power lines are works of public improvement. Plaintiffs in those cases usually argue that some design feature, such as the spacing of the power lines, caused sparks which caused a fire. Thus, they allege that the "deliberate design and construction" of the power lines caused the fire.

For many decades, plaintiffs have sued public entities for damage caused by falling trees based on a theory of dangerous condition of public property. That remedy is very different from inverse condemnation for a few reasons. First,

a plaintiff suing in inverse condemnation has three years from the date of injury to sue, and does not have to present a claim. Second, public entities in inverse condemnation cases cannot assert defenses under the Government Claims Act, like trivial defect and design immunity. Third, if a plaintiff prevails in an inverse condemnation case, it can recover attorney's fees.

Until 2017, no California appellate court decided whether a tree in a City's urban forest was a "work of public improvement" that could give rise to inverse condemnation liability. However, in 2017, in *Mercury Casualty Company v. City of Pasadena*, 14 Cal.App.5th 917 (2017) ("*Mercury Casualty*"), the California Court of Appeal decided whether a tree was a "work of public improvement" for purposes of inverse condemnation liability. *Mercury Casualty* was the first California appellate decision to examine that question in detail.

In *Mercury Casualty*, the Court considered a trial court ruling which held that Pasadena was liable for damage that a City-owned tree caused when it fell during the 2011 windstorm. The tree was planted around 1950, and there was no record of who planted it. The trial judge held that Pasadena was liable for damage simply because its tree was close enough to strike the adjacent house, and that the City was liable regardless of the reason it fell.

The trial court also found that Pasadena's Ordinance creating an urban forest was a "design" that satisfied the inverse condemnation requirement that damage be caused by a work of public improvement "as deliberately designed and constructed." In essence, the trial court found that Pasadena's urban forest was one large work of public improvement, and that (presumably) every tree in that forest could give rise to an inverse condemnation claim. Thus, according to the trial court, if a branch fell from one of the approximately 60,000 trees in its urban forest, the City would be liable *regardless of the cause*.

The trial court's ruling was troubling. It meant that the City was liable in inverse condemnation for all damage caused by every one of its trees that fell in the 2011 windstorm. Therefore, the City appealed. In *Mercury Casualty*, the Court was presented with novel questions regarding the scope of inverse condemnation liability. These questions included:

Whether a city tree in a public right of way is a work of public improvement even though there was no record of who planted it; and

Whether, in analyzing causation, a regulatory ordinance creating an urban forest is a "design of a public project."

The Court in *Mercury Casualty*, answered these questions in a manner favorable to public entities. It found:

In order for a tree to be a work of public improvement, it must be "deliberately planted by or at the direction of the government entity as part of a planned project or design serving a public purpose, such as to enhance the appearance of a public road."[1]

Pasadena's ordinance creating an urban forest "does not constitute a design for a public project or improvement, nor does it convert [the tree that fell] into a work of public improvement, that subjects the City to inverse condemnation liability."[2]

What does this decision mean for public entities? Most importantly, they do not have to worry that ordinances establishing urban forests result in inverse condemnation liability. However, if a tree is planted as part of a road improvement project it could possibly be a "work of public improvement" depending on the facts. Yet, if a tree falls, it will be difficult for a plaintiff to establish liability in inverse condemnation because a plaintiff would have to prove a causal link between the design and the tree falling. That is, something about the design of the road improvement project would have to cause the tree to fall. The fact that a tree fell due to an unprecedented windstorm would usually not give rise to inverse condemnation liability.

1 *Mercury Casualty, supra*, 15 Cal.App.5th at p. 928.

2 *Mercury Casualty, supra*, 15 Cal.App.5th at p. 930.