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California public agencies that operate collection systems (cities, counties, sanitary districts) face potential liability for sewer backup ("SBU") claims, under several theories.

LEGAL BASIS FOR LIABILITY

1) Negligence

2) Dangerous Condition of Public Property

3) Nuisance [Trespass]

4) Inverse Condemnation

Generally, cities cannot be sued for general **negligence** under Civil Code § 1714 for conditions of public property, since the dangerous condition statute (Government Code § 830, et seq.) occupies the field. *Zelig v. County of Los Angeles (*2002) 27 Cal.4th 1112, 1127. Negligence liability might be available for damage caused by acts independent of the condition of property (acts during construction or maintenance procedures.)

For **dangerous condition of public property** liability to attach, a claimant must show the property created a substantial risk of injury when used with due care, and that the public entity either (1) had actual or constructive notice of the dangerous condition, or (2) created the dangerous condition through a negligent act. *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121. Also, design immunity provides a potential defense. For these reasons, and particularly because of the notice requirement, dangerous condition theories are often pleaded in SBU claims as an add-on, with the focus on the next two theories.

Nuisance liability is often asserted in SBU claims. Nuisance liability attaches to conduct that obstructs "the free use of property, so as to interfere with the comfortable enjoyment of life or property…." Cal. Civil Code § 3479. Public entities may be subject to nuisance liability. *Nestle v. County of Santa Monica* (1972) 6 Cal.3d 920 [airport noise]. However the case law is split on the application of nuisance theories in particular cases, as some cases indicate that a nuisance claim cannot be maintained where it is simply based on an identical theory and identical facts to a dangerous condition claim, where a claimant cannot satisfy the elements of the dangerous conditions statute. See *Avedon v. State of California* (2010) 186 Cal.App.4th 1336, 1345 [no nuisance claim for maintenance of open space area containing chaparral that carried fire] *Longfellow v. County of San Luis Obispo* (1983) 144 Cal.App.3d 379 [nuisance claim incompatible with dangerous condition statute limits]. Contrast this with *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104, a levee failure/flooding case, where the court held "[t]hat a given set of facts fortuitously supports liability on two legal theories is not a principled reason to deny a party the right to pursue each theory."

A Government Code claim must be filed as a condition precedent to maintenance of a nuisance claim. *State ex rel. Dept. of Transportation v. Superior Court* (1984) 159 Cal.App.3d 331. Defenses such

as design immunity apply. *Mikkelsen v. State* (1976) 59 Cal.App.3d 621. See *California Government Tort Liability Practice*, § 9.80 for a list of other defenses.

For nuisance liability to attach, there must be "some sort of conduct, i.e., intentional and unreasonable, reckless, negligent, or ultrahazardous, that unreasonably interferes with another's use and enjoyment of … property." *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 102 [timber, debris and water washed from District's land onto adjacent property, no liability found in absence of "affirmative intentional conduct"]. Thus to prevail on a nuisance theory for an SBU claim, the claimant generally must show negligence or some affirmative act of the entity that led to the backup.

Nuisance claims are most troublesome because the extraordinarily broad scope of the definition of nuisances. Negligence liability may be an minimum for such a claim. Where the nuisance cause of action does in no more than reallege the negligence duty, and is "merely a clone of the [negligence] cause of action using a different label," the nuisance cause of action may be disregarded. *El Escorial Owners' Association v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1348-1349.

Trespass liability is also common in backup claims because, again, it avoids the notice requirement of the dangerous condition of public property statutes. Like negligence and nuisance claims, it may be subject to attack as inconsistent with the statutory limits of the dangerous condition scheme. No case has explicitly ruled that trespass claims are barred, and we have experienced mixed results with trial courts on this issue.

Claimants sometimes argue that the public agency is vicariously liable for the "tort" (nuisance, negligence or trespass) of its employee under Government Code section 815.2, but this theory has been rejected. "Public entity liability for property defects is not governed by the general rule of vicarious liability provided in [Government Code] section 815.2, but instead by the specific provisions set forth in sections 830-835.4." *Van Kempen v. Hayward Area Park Dist.* (1972) 23 Cal.App.3d 822, 825; see also *Longfellow v. San Luis Obispbo* (1983) 144 Cal.App.3d 379, 383. Furthermore, such vicarious liability would ignore the limits of public employee liability in sections 840 *et seq*.

Inverse condemnation liability is based on the California Constitution, and not on the Tort Claims Act. As such it is governed by a three-year statute of limitations, and no Government Code claim needs to be filed. See Government Code §905.1. The State Constitution provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." *California Constitution*, Article I, Section 19. On the basis of this one sentence, an entire area of case law rests.

In 2006 the Court of Appeals decided a major case, *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474, that greatly expanded liability for public entities in SBU cases, when it decided that inverse condemnation liability can be applied to such claims.

> "Inverse condemnation lies where damages are caused by the deliberate design or construction of the public work; but the cause of action is distinguished from, and cannot be predicated on, general tort liability or a claim of negligence in the maintenance of a public improvement. (Citations.) But damage caused by the public improvement as deliberately conceived, altered or maintained may be recovered."

> "While the trial court found that neither tree roots nor inadequate slope caused the sewage backup into the McKennas' home, and that the City had a regular program of maintenance for the sewer, it also found that the *blockage occurred in the main owned and operated by the City*. The purpose of the sanitary sewer is to carry wastewater *away* from the residence. The City's sanitary sewer failed to carry wastewater away from the McKennas' residence *because* of a blockage in the City's main, and therefore, failed to function as intended."
>
> "We believe that where, as here, there were three substantial factors in causing the sewage backup, namely, tree roots invading the porous clay pipe of the sewer main, inadequate slope, and standing water in the main, the burden should shift to the public entity to produce evidence that would show other forces alone produced the injury."

Some of the language in this case is, we believe, overbroad. Other cases confirm that for liability to attach, the cause of the SBU must be the collection system functioning as deliberately designed and constructed, including consideration of the plan of maintenance deliberately adopted; simple negligence, or negligent failure to follow the maintenance plan, is not sufficient to give rise to inverse condemnation liability.

> "We conclude that in order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action – or inaction – in the face of that known risk." "Knowing that failure to properly maintain the Project channel posed a significant risk of flooding, Counties nevertheless permitted the channel to deteriorate over a long period of years by failing to take effective action to overcome the fiscal, regulatory, and environmental impediments to keeping the Project channel clear. This is sufficient evidence to support the trial court's finding of a deliberate and unreasonable plan of maintenance." *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722 [liability for flooding from channel obstructed by vegetation].

> "[I]nverse condemnation does not involve ordinary acts of carelessness in the carrying out of the public entity's program." "[S]imple negligence cannot support the constitutional claim." "[A]lthough there may be liability in inverse condemnation where levee failures are integrally connected with a flawed plan for those levees and/or flawed construction, there is no such liability where similar failures are the result of negligent or inadequate operation and maintenance." *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App. 848 [distinguishing *Arreola*, no liability for levee failure].

Under this theory, inverse condemnation liability can apply where a plan of maintenance as deliberately adopted is inadequate. The prime example would be adopting a "fix it when it breaks" policy with respect to older, underground water mains. See *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 607. Applied to SBUs, the issue would be whether the public entity had an inspection program reasonably calculated to spot blockages in the sewer mains.

In *Pacific Bell*, the evidence showed the City's water delivery system was deliberately designed, constructed, and maintained without any method or program for monitoring the inevitable deterioration of

cast-iron pipes other than waiting for a pipe to break. The City had a program, motivated by cost savings, to "replace it when it breaks" as the method of maintenance, turning down numerous rate increases necessary to fund a different, more proactive approach to replacing the deteriorating pipes. (*Ibid.*) In *Pacific Bell*, the deliberateness element was met by showing that the City made a decision to install a system without monitoring capabilities. (At p. 608.) The *Pacific Bell* court cited *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, a case involving badly deteriorated city waterlines, where the water main was severely weakened by corrosive soil conditions, and burst. "*McMahan's* recognized inverse condemnation is the remedy only for an injury to private property caused by a deliberate act for the purpose of fulfilling one of the public objects of a project as a whole. It also recognized that negligent acts committed during the routine day-to-day operation of the public improvement or negligence in the routine operation having no relation to the functioning of the project as conceived, does not create a claim in inverse condemnation. (*Pacific Bell*, *supra*, 81 Cal.App.4th at 608-609.) Liability turned on the "deliberate policy decision to shift the risk of future loss to private property owners rather than to absorb such risk as a part of the cost of the improvement paid for by the community at large." (*Ibid*., citing *McMahan's*, *supra*, at pp. 696-698.)

All of this discussion in *Pacific Bell* and *McMahan's* would be superfluous if deliberateness was not a necessary element in the claim for inverse condemnation. It is simply not true that any sewer backup, even one caused by negligent maintenance and daily operations, results in inverse condemnation liability to the City.

Absence of Required Backflow Prevention Device as a Defense

There are two unpublished Court of Appeal cases indicating a public entity will not be liable under an inverse condemnation or nuisance theory where the property owner, by ordinance, was required to have a backflow prevention device ("BPD"), but did not do so; the theory is that the public improvement as deliberately designed and planned would have included a BPD, and therefore the backup was not a result of the entity's collection system as deliberately designed and constructed. *Burns v. Los Altos*, 2006 WL 2442909 [no showing of inadequate inspection plan, nuisance claim barred by failure to install BPD]; *Starks v. Los Angeles*, 2008 WL 570775 ["The Starks' failure to install the backwater valve resulted in the system *not functioning as designed*, due solely to the Starks' error." Distinguishing *CSAA v. Palo Alto.]*

Since these cases are not published, they cannot be cited in court. However the reasoning in the opinions can be copied and argued in pending cases, including the underlying citations of general inverse condemnation principles, and case law cited in the opinions.

CJPRMA has currently pending a case on a petition for writ of review, *WGS v. City of Oroville*, which squarely raises the issue of whether failure to install a BPD required by Code defeats an inverse condemnation claim.

Unlike the other cited theories, *inverse condemnation liability includes exposure to plaintiff's attorney fees and expert witness costs*. These type of damages may be excluded from coverage by insurance policies or self-insurance pooling agreements. *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1629, 1646 [where nuisance and inverse both found, overlapping damages covered but attorney fees and expert costs not covered].

COMPARATIVE FAULT

California is a "comparative fault" state in which a defendant can raise the fault of a tort plaintiff to seek a proportionate reduction in the recovery. (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804.) Defendants can also seek to apportion fault to others by way of claims for equitable indemnity. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578.) This is subject to the provisions of Proposition 51, California Civil Code sections 1431 and following, making liability for economic damages joint and several, but liability for non-economic damages several, only.

In California, public entities are subject to liability according to the provisions of the Government Claims Act, Government Code sections 815 and following. Claims for damage to real or personal property (or even bodily injury) are governed by sections 830 and following, the "dangerous condition" statutes.

Public entities may raise a defense of the plaintiff's comparative fault in dangerous condition cases. (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 799, and fn. 4; *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 and fn. 6; *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 768.) They may also seek equitable indemnity on a comparative fault basis from others. (See *County of Ventura v. City of Camarillo* (1978) 80 Cal.App.3d 1019, 1025.)

The comparative fault defense can be raised against nuisance claims. (*Tint v. Sanborn* (1989) 211 Cal.App.3d 1225, 1234.)

Comparative fault principles are applied by courts in other, comparable areas of tort law such as strict products liability. A strictly liable products manufacturer defendant can raise a defense of the plaintiff's comparative fault. (*Daly v. General Motors Co.* (1978) 20 Cal.3d 725, 736.) Courts also apportion fault between negligent and strictly liable defendants, so strictly liable defendants can seek indemnity based on comparative fault. (*Safeway Stores, Inc. v. Nest-Kart, Inc.* (1997) 21 Cal.3d 322; see *GEM Developers, Inc. v. Hallmark Homes of San Diego, Inc.* (1989) 213 Cal.App.3d 419, 430.)

Liability under inverse condemnation is imposed regardless of concepts of negligence or fault, and has been extended in a variety of cases, including flooding, land subsidence, a broken water main and even a sewer backup. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263-264 [liability without fault]; *Arreola v. County of Monterey* (2002) 99 Cal.App.4th 722 [flooding]; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1629 [subsidence]; *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596 [water main break]; *California State Auto Assn. Inter-Insurance Bureau v. City of Palo Alto* (2006) 138 Cal.App.4th 474 [sewer backup].) It has also been extended to "regulatory takings." (See *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263.) The law in this area is expanding, as claimants seek to fit their claims into the "takings" theory in order to recover attorney fees and avoid elements of proof necessary under nuisance and dangerous condition law, and statutory affirmative defenses.

An inverse condemnation defendant may seek equitable indemnity based on comparative fault. (*County of San Mateo v. Burney* (1988) 199 Cal.App.3d 1489, 1494.)

Currently, however, there is no case law establishing that a plaintiff's comparative fault can be raised as an affirmative defense to an inverse condemnation claim. (See *Ingram v. City of Redondo Beach* (1975) 45 Cal.App.3d 628, 633 fn. 4, decided before *Li v. Yellow Cab*, which held that plaintiff's contributory negligence could not be raised in an inverse condemnation claim; see also *Blau v. City of Los Angeles* (1973) 32 Cal.App.3d 77, 86, same.) Instead, the pre-*Li* case law has stood without examination as to the applicability of comparative fault principles.

As the use of inverse condemnation has expanded in the arsenal of claimants' theories, failure to consider comparative fault has led to unjust results. Thus in our experience:

- The California Sanitation Risk Management Authority, a self-insurance pool of sanitary districts, had a recent claim by a homeowner who built a home addition without proper permits and with new bathroom drains below the height of the nearest manhole, who then sued under inverse when a back occurred;
- CSRMA has another claim where the homeowner's contractor built a home addition over the lateral cleanout, a backup went into the crawlspace rather than in the yard, and the homeowner sued the member District under inverse;
- The California Joint Powers Authority, a self-insurance pool of cities, has a case pending against a member City where the office building was constructed without a backflow prevention device as required by the City Ordinance and Uniform Plumbing Code, and the business owner sued under inverse for a sewer backup.

The California Association of Joint Powers Authorities is currently supporting proposed legislation that would add a comparative fault defense expressly by statute.

MITIGATION DEFENSE

One untested alternative to comparative fault is an argument of a "mitigation of damages" defense. For SBU claims, the potential for a damaging backup is always present. That fact is essentially recognized in the Plumbing Code requirement of backflow preventers. Even for inverse condemnation claims, claimants have an affirmative duty to mitigate damages by employing preventative measures.

In a claim involving stormwater surface flow, the Court observed: "Because downstream riparian property is burdened by the servitude created by the natural watercourse rule, however, consistent with that rule the downstream owner must take reasonable measures to protect his property. Liability on an inverse condemnation theory will not be imposed if the owner has not done so." *Locklin v. City of Lafayette*, (1994) 7 Cal. 4th 327, 338.

> It is ... incumbent upon every person to take reasonable care in using his property to avoid injury to adjacent property through the flow of surface waters. Failure to exercise reasonable care may result in liability by an upper to a lower landowner. It is equally the duty of any person threatened with injury to his property by the flow of surface waters to take reasonable precautions to avoid or reduce any actual or potential injury. *Id* at 352.

Whether this rule is applicable to the generic risk of a SBU, as opposed to a specific known risk, and to non-stormwater cases, has yet to be determined.

Indeed, a claimant was held to be entitled to recover the cost of preventative measures even where the measures ultimately proved to be unnecessary. *CUNA Mutual Life Ins. Co. v. Los Angeles County* (2003) 108 Cal.App.4th 382. The Court reasoned that this result was meant to encourage preemptive mitigation, and allay an owner's fear that, if he guesses wrong and fails to take advanced measures, "if damage does in fact occur, we are confident a public agency would argue for a reduction in the amount of compensation because of an unreasonable failure to undertake feasible mitigation measures." *Id* at 396.

DAMAGES

TORT DAMAGES

Emotional Distress

Not Available for Property Damage Alone Under Dangerous Condition Law

"No California case has allowed recovery for emotional distress arising solely out of property damage, absent a threshold showing of some pre-existing relationship or intentional tort." *Cooper v. Superior Court* (1984) 153 Cal.App.3d 1008, 1012. In *Cooper*, defendants allowed a tractor to roll into plaintiff's house while no one was home. *Id*. at 1010. Plaintiff's home, grounds and swimming pool were damaged and plaintiff suffered emotional distress because she felt insecure about the temporary board covering the hole in the rear bedroom, and thus moved to a hotel. During the four months before she returned to her home, she suffered headaches and intestinal disorders and the stress continued to affect her emotionally and physically. *Ibid*. Plaintiff sought psychological therapy after the incident. *Ibid*. The Court of Appeal agreed that the claim for emotional distress had properly been dismissed on summary judgment.

In *Lubner v. City of Los Angeles* (1996) 45 Cal.App.4th 525, a City trash truck was negligently allowed to roll into the home of two artists, who lost much of their life's work from the last 40 years. *Id*. at 527. The Court of Appeal denied recovery of emotional distress damages, concluding that "*Cooper* is the controlling authority in this matter. . . ." *Id*. at 532.

In *Erlich v. Menezes* (1999) 21 Cal.4th 543, the Supreme Court reviewed *Cooper* and *Lubner*, agreeing with their conclusions and holding that a homeowner could not recover emotional distress damages for negligent construction of the home. The homeowners lived in the home and "feared the house was structurally unsafe and might collapse in an earthquake." *Id*. at 557. The Court explained that although the house was constructed negligently, "no one was hit by a falling beam," and the plaintiffs could not recover for emotional distress damages. *Ibid*. The homeowners' fear of "physical injury" is not enough. *Id*. at 555-556.

Emotional distress damages have been allowed in dangerous condition and trespass claims where a personal injury is also involved. *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal. 3d 699, 711 (dangerous condition, witnessing a child drown); *Potter v. Firestone Tire & Rubber Co*. (1993) 6 Cal. 4th 965, 986, fn. 10 ("precedent in the law of nuisance and trespass

establishes quite clearly that emotional distress without physical injury is compensable"; [fear of toxic exposure].)

Damages for Fear, Discomfort and Annoyance Under Nuisance, Trespass

Where a nuisance or trespass claim is properly stated, a plaintiff "may recover damages for the discomfort and annoyance of himself and the members of his family and for mental suffering occasioned by fear for the safety of himself and his family…." *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 288. This is a separate damage from general damages of mental and emotional stress, and is only available if the plaintiff physically occupies the property; being a landlord merely storing personal property at the location is insufficient. *Kelley v. CB & I Constructors* (2009) 179 Cal.App.4th 442, 450, 456.

Property damage

General Measure of Damages for Injury to Real Property

> For tortious injury to real property, the general rule is that the plaintiff may recover the lesser of (1) the diminution in the property's fair market value, as measured immediately before and immediately after the damage; or (2) the cost to repair the damage and restore the property to its pre-trespass condition, plus the value of any lost use. The practical effect of this rule is to limit damages to property to the fair market value of the property prior to the damages. *Kelley v. CB & I Constructors* (2009) 179 Cal.App.4th 442, 450.

However, this rule is subject to the "personal reason exception," under which a plaintiff will be entitled to the cost to restore the property to its former condition, even if the restoration cost exceeds the diminution in value, but only if the restoration costs "are reasonable in light of the value of the real property before the injury and the actual damage sustained." *Id* at 451. Whether such access damages are reasonable is initially a question for the jury, but is reviewable by the court to determine whether it is "grossly disproportionate." *Ibid* [rejecting a bright line percentage test, and approving restoration costs 67% above value].

The following quote is from a property damage/fire loss case, but states the black letter rule re recovery of damages, as limited to the lesser of fair market value of the loss or cost of repair/replacement:

> Notwithstanding this general limitation, if a plaintiff has a personal reason to restore the property to its former condition, he or she may recover the restoration costs even if such costs exceed the diminution in value. This rule is sometimes referred to as the "personal reason exception." (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687, 266 Cal.Rptr. 193 (*Orndorff*); *Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 863–864, 162 Cal.Rptr. 104 (*Heninger*); see also *Weld County Bd. of County Com'rs v. Slovek* (Colo.1986) 723 P.2d 1309, 1314–1316; *Roman Catholic Church v. Louisiana Gas* (La.1993) 618 So.2d 874, 876–880; see generally 6 Witkin, *supra*, Torts, § 1728, pp. 1264–1265; Rest.2d Torts, § 929, com. b; 2 Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.2002) § 12.31, pp.

> 784–787; 1 Dobbs, Law of Remedies (2d ed.1993) § 5.2, pp. 713–721.) Even when this exception applies, however, restoration costs "are allowed only if they are reasonable in light of the value of the real property before the injury and the actual damage sustained." (*Orndorff, supra,* 217 Cal.App.3d at p. 690, 266 Cal.Rptr. 193; *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 810, 24 Cal.Rptr.2d 554; see also Civ.Code, § 3359 ["Damages must, in all cases, be reasonable"] ; *Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 167–168, 100 Cal.Rptr.2d 662.) For example, "the owner of a unique home ... cannot insist on its reconstruction where the cost to do so far exceeds the value of the home.... Nor are repair costs appropriate where only slight damage has occurred and the cost of repair is far in excess of the loss in value." (*Orndorff, supra,* 217 Cal.App.3d at p. 690, 266 Cal.Rptr. 193.) Whether the restoration costs are reasonable is a question for the trier of fact in the first instance, but an award of such costs may be unreasonable as a matter of law if it is grossly disproportionate to the value of the property or the harm caused by the defendant. (*Ibid.;* see also *Heninger, supra,* 101 Cal.App.3d at pp. 865–866, 162 Cal.Rptr. 104.) *Kelly, supra,* 179 Cal.App.4th 442, 450-451.

Personal Property Damage/Lost Profits

The measure of damages is generally the lesser of the lost FMV or cost of repair. See CACI 3903J. If the property cannot be fully repaired, the damages may be cost of repair plus depreciation of partially repaired item. *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600.

Loss of use damages are also available for damaged personal property. See *Crain v. Sumida* (1922) 59 C.A. 590, 597, [value of loss of use may be established by evidence of rental value of property]. This may include lost prospective profit for lost opportunity to sell the property. *Johnson v. Central Aviation Corp.* (1951) 103 C.A.2d 102. However, where premises have been damaged and a commercial owner/occupant claims loses business profits, entitlement to such lost profits terminates once the repairs are made, and the premises restored. Further claims would be speculative.

> By analogy, an award of damages for lost business profits should be confined to that period of time reasonably necessary to "repair" the business, i.e., to get it back into operation at its former capacity. Put another way, an award of damages for profits lost by an interrupted business should be limited to the period of the interruption. Once a business has been resurrected, profits allegedly lost thereafter are not necessarily attributable to a defendant's negligence, and become matters of speculation and conjecture. *Blake v. E. Thompson Petroleum Repair Co*. (1985) 170 Cal. App. 3d 823, 834.

Emotional distress damages are generally not allowed for personal property damage, but have been allowed for injury to pets. A plaintiff can recover emotional distress damages on a trespass to personal property cause of action because of injury to an animal. *Plotnik v. Meihaus* (2012) 208 C.A.4th 1590, 1605, [injury to dog, no distress damages for negligence, allowed for trespass involving "intentional" attack].

In certain unique cases, where the property has little market value, but great personal value, some damages may be awarded for the "unique" value. See *McMahon v. Craig* (2009) 176 C.A.4th

1502, 1518, ["peculiar value" of property, which is property's value against one who had notice of the value before incurring liability for damages to that property, refers to property's unique economic value, not its sentimental or emotional value; thus, in action against veterinarians, dog's value to owner as companion was not recoverable as element of dog's peculiar value]; *Kimes v. Grosser* (2011) 195 C.A.4th 1556, 1559, [where neighbor shot cat, owner could recover reasonable and necessary damages incurred for cat's care and treatment, even if damages exceeded negligible market value of cat].

INVERSE CONDEMNATION DAMAGES

Real Property Damage

Only diminution of real property value damages are recoverable in inverse condemnation, not damages for emotional distress, annoyance or discomfort. *Heimann v. City of Los Angeles* (1947) 30 Cal.2d 746, 756; *People v. Ricciardi* (1943) 23 Cal.2d 390, 396.

Furthermore, lost business profits are not recoverable under an Inverse Condemnation claim. "An award of damages to business is not authorized, nor is an award for loss of earnings." *Parking Authority of the City of Sacramento v. Nicovich* (1973) 32 Cal.App.3d 420, 424. Ordinarily, loss of business resulting from condemnation is not an element of damages. *City of Stockton v. Marengo* (1934) 137 Cal.App.760, 764.

However, loss of business goodwill is recoverable. Code Civ. Proc. § 1263.510; *Hladek v. Merced* (1977) 69 Cal.App.3d 585, 589, fn. 1; *Chour v. Cmty. Redevelopment Agency* (1996) 46 Cal. App. 4th 273, 277.

Mitigation costs are recoverable. *Albers v. Los Angeles* (1965) 62 C.2d 250, 270. Relocation costs are also recoverable. Gov't. Code § 7260-7277; *Beaty v. Imperial Irr. Dist.* (1986) 186 Cal.App.3d 897.

The property owner may also be entitled to recovery for loss of use based on the fair rental value of damaged property, (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 54) and relocation benefits (Gov't Code §§7260 *et seq*.).

The standard measure of compensation is "fair market value." *Tilem v. Los Angeles* (1983) 142 Cal.App.3d 694, 707. "While cost of replacement or restoration of improvements ('cost of cure') may be relevant evidence on the issue of damages [citation], it is not a measure of damages to be separately assessed without reference to the loss in fair market value of the property taken or damaged. *Olson v. Cnty. of Shasta* (1970) 5 Cal.App.3d 336, 342. Use of "cost of repair" may be available only in "extraordinary cases." *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 808.

Personal Property Damage

Damage to personal property is recoverable in inverse condemnation. *Concrete Serv. Co. v. DPW* (1969) 274 Cal.App.2d 142.

> Just compensation also includes the loss of any inventory or personal property caused by the taking. [*Name of property owner*] may be entitled to the retail value of the inventory or personal property if the property is unique and not readily replaceable. Otherwise, [*name of property owner*] is entitled to wholesale value. CACI 3507.

Other Recoveries – attorney fees and expert costs

Of course, recovery of attorney's fees and expert costs are available in inverse condemnation claims, as is pre-judgment interest. Code Civ. Proc. § 1036.

Injunctive Relief

Often, a request for declaratory relief is thrown in to a backup claim, as little more than an afterthought. An injunction should not be granted unless other relief, such as monetary damages, would be inadequate. *Hillside Water co. v. City of Los Angeles* (1938) 10 Cal.2d 677, 688. Where an established public use is involved, the *Hillside Water* Court found that an inverse condemnation claim damages award was the appropriate remedy. *Ibid.; Sheffet v. Los Angeles* (1970) 3 Cal.App.3d 720, 737; *Frustuck v. Fairfax* (1963) 212 Cal.App.3d 345, 371 [use of culvert directing excess storm water flow onto plaintiff's property will not be enjoined; remedy is damages in an inverse condemnation claim.]

EXPOSURE CONSIDERATIONS

The most common causes are:

- Accumulation of foreign material (such as grease from commercial kitchens) in the main
- Tree roots that find breaks in the main and grow toward a water source
- Improper construction by the homeowner, such as installation of non-permitted toilets or shower drains below the level of the nearest manhole
- Sometimes an entity is hydro-flushing a main line, unaware of a blockage that leads to a backup
- Occasionally the cause is damage to the pipe, for example caused by the contractor for another nearby underground utility
- SBUs are much more common in periods of heavy rain, when infiltration of rainwater into the system causes mains to be overcharged

Risk avoidance measures:

- An inspection program is crucial
- Should be documented and targeted to inspect higher risk areas more frequently
- Entity should have an SBU response plan in place – directions on what to do when a spill is reported (contractors to hire, accommodations where premises uninhabitable)

Liability mitigation measures after loss:

- Should try to determine source of blockage (main vs. lateral) at outset and document
- Immediate remediation to avoid health risk regardless of liability
- If liability apparent, should consider agreeing early on to bear cost of remediation and rebuild at outset, but with entity's choice of contractor (upon claimant's consent) since cost control is a major issue
- Claimants are not just members of the public, but rate-paying customers of the sanitary sewer service
- Where liability is disputed or doubtful, encourage the claimant to contact homeowner's carrier immediately to determine coverage (some carriers now exclude this or charge as a separate coverage)
- Investigation needs to keep track of items discarded or damaged
- Damages liability is cost to repair or replace, whichever is less (may be less than homeowners insurance would cover)
- Sometimes restoration work can require code upgrades, for example for accessibility, or asbestos remediation if asbestos in sheetrock

As a general rule, if an SBU is caused by a problem in the plaintiff's privately owned lateral line – rather then the City owned main line – the City does not have liability.

Sewer flow is based on gravity. If there is a backup in the system, the overflow will occur at the lowest uphill point. That point should be a manhole or other release point on the main line; theoretically the overflow should occur at the next uphill manhole. If, instead, the backup flows out of the toilets/drains of a building, it is very likely because those drains are at an elevation below the closest uphill manhole.[1]

Occasionally, because of topography of the property, a toilet or other drain is the lowest point. In such a situation, the property's lateral should have a back flow prevention device. This is essentially a one-way valve (or other system) that allows flow to the main, but not in reverse. The Uniform Plumbing Code has required this for decades and many Cities and Counties have ordinances requiring the installation and proper maintenance of back flow preventers in such situations. In the event of a claim, it is often necessary to investigate the construction and permitting history of a building, and determine which version of the UPC or local ordinance applies.

The City should immediately respond to an overflow for the sake of dealing with a public health concern, at least until it is apparent that the City is not at fault. As soon as it is determined that homeowners' insurance coverage is available, the City should make sure the claim has been tendered and determine whether to involve the insurance company in the remediation and replacement work. An insurer may end up with a subrogation claim against the City for expenditures on behalf of the property owner, but expenditures incurred by the City would be very difficult to recoup from the insurer.

Involvement of the insurer is beneficial to the property owner, not just for another pocket, but because the insurance might provide replacement value rather than depreciated fair market value of damaged property. Further, a homeowner's carrier will normally be far more skilled at dealing with remediation contractors and controlling costs.

[1] There can also be problems during heavy storms if the sewer system is combined with the storm water system or if there is a blockage in the manhole.