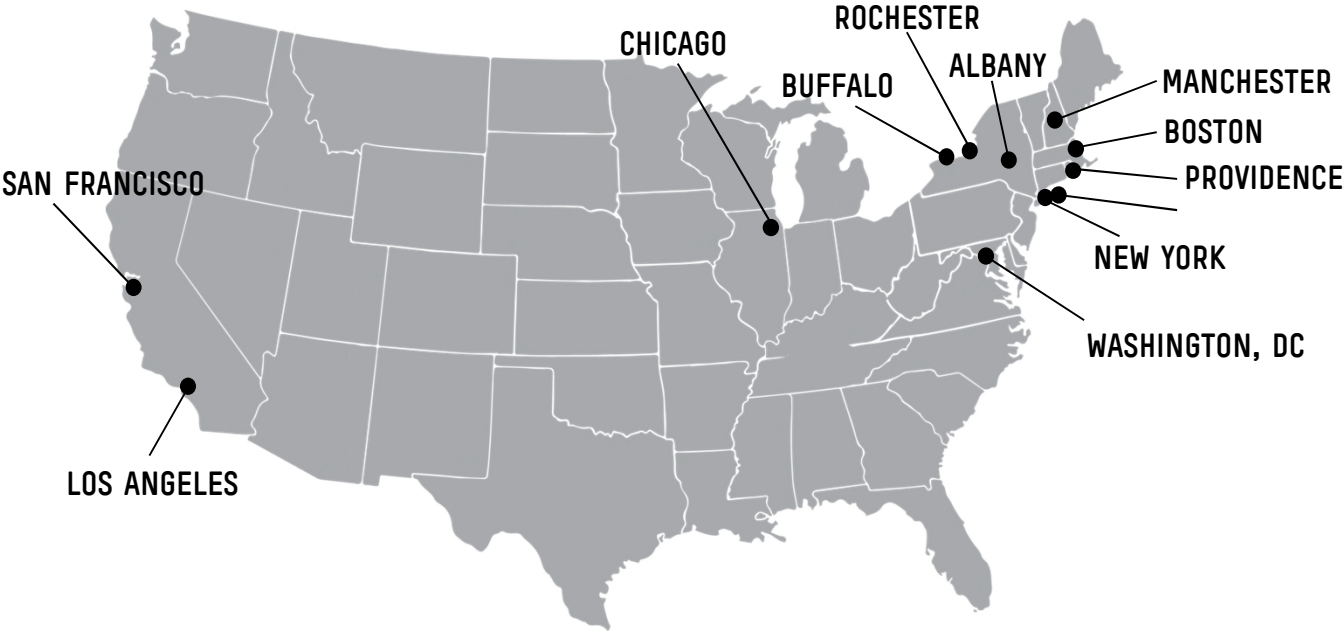


LEGAL LIABILITY FOR TREE RISKS



ROBERT M. BLUM
SEPTEMBER 21, 2016

ABOUT NIXON PEABODY



Plus:
London
Hong Kong
Singapore
Beijing
Shanghai



ABOUT ME

— Education

- Northwestern University (BS) - journalism
- Duke University (JD)

— Law Practice

- In San Francisco 30+ years
- Representing clients in vegetation management

— Board Member - CaUFC



4 TOPICS

1. Environmental loss from wildfires
2. Double and treble damages for harm to trees
3. Expansion of inverse condemnation to public utilities
4. Tree risk management



TOPIC 1 – ENVIRONMENTAL LOSS FROM WILDFIRES

Earlier methods to compute damages:

- Habitat equivalency analyses
- Amount per acre
- Multiplier of actual damages



TOPIC 1 – ENVIRONMENTAL LOSS FROM WILDFIRES

AB 1492 (Aug 2012) – Health and Safety Code § 13009.2

- (a) In a civil action by a public agency seeking damages caused by a fire, pecuniary damages must be **quantifiable and not unreasonable in relation to the prefire fair market value of the property, taking into consideration the ecological and environmental value of the property to the public**. The only recoverable pecuniary damages shall be:
 - Either the restoration and rehabilitation costs associated with bringing the damaged property back to its preinjured state or replacement or acquisition costs of equivalent value, or diminution in value of property as a result of the fire, including lost timber value, or some combination thereof..



TOPIC 1 – ENVIRONMENTAL LOSS FROM WILDFIRES

- **Short-term costs related to immediate damages** suffered as a result of the fire, such as burned area emergency response costs, costs associated with discrete restoration activities related to repair and replacement of real property improvements, and remediation and eradication costs relative to invasive species and any other nonnative infestation caused by or exacerbated by sudden burn area conditions.



TOPIC 1 – ENVIRONMENTAL LOSS FROM WILDFIRES

- (b) In addition to the damages authorized by subdivision (a), a public agency may also recover **ecological and environmental damages** caused by the fire, **if those damages are quantifiable**, and are not redressed by the damages set forth in subdivision (a), taking into consideration the ecological and environmental value of the property to the public. Ecological and environmental damages may include:
- Lost recreational value.
 - Lost interim use.
 - Lost historical and archeological value.
 - Damage to wildlife, wildlife habitat, water or soil quality, or plants.
 - Damage to any rare natural features of the property.
 - Lost aesthetic value.



TOPIC 1 – ENVIRONMENTAL LOSS FROM WILDFIRES

- In assessing the reasonableness of damages under subdivision (b), the prefire fair market value of the property is relevant and one factor to be considered, in addition to the other factors listed in subdivision (b).



TOPIC 1 – ENVIRONMENTAL LOSS FROM WILDFIRES

- A public agency plaintiff who claims environmental damages of any kind under subdivision (a) or (b) shall not seek to enhance any pecuniary or environmental damages recovered under this section.
- ... if a public agency claims environmental damages under subdivision (a) or (b), it shall not seek to enhance any damages recovered under this section for any reason, and shall not use Section 3346 of the Civil Code or Section 733 of the Code of Civil Procedure to do so, regardless of whether those sections might otherwise apply.



TOPIC 1 – ENVIRONMENTAL LOSS FROM WILDFIRES

- For purposes of this section, the term “public agency” means the United States of America or any political subdivision thereof, the State of California, any city, county, district, public agency, or any other public subdivision of the state.



TOPIC 2 – DOUBLE AND TREBLE DAMAGES FOR HARM TO TREES

Civil Code § 3346

- For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is **three times such sum as would compensate for the actual detriment**, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be **twice the sum as would compensate for the actual detriment** ...
- *Gould v. Madonna* (1970) 5 Cal.App.3d 404
- *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442



TOPIC 3 – EXPANSION OF INVERSE CONDEMNATION TO PUBLIC UTILITIES

Albers v. County of Los Angeles (1965) 62 Cal.2d 250 - “any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed is compensable, whether foreseeable or not.”

Barham v. Southern Cal. Edison Co. (1999) 74 Cal.App.4th 744
– applied to public utility

San Diego 2007 Wildfire Cases



TOPIC 4 – TREE RISK MANAGEMENT

Who Owns the Tree?

- Civil Code § 833

Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another.

- However, roots and limbs extending over the boundary may be a nuisance that the neighbor may be able to abate if reasonable.

- Civil Code § 834

Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.



TOPIC 4 – TREE RISK MANAGEMENT

Natural Conditions Immunity

- Government Code § 831.2 - Neither a public entity nor a public employee is liable for an injury caused by a **natural condition** of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.
- *Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170
 - Dead tree in natural area bordering paved parking lot – immunity applied
- *Alana M. v. State of California* (2016) 245 Cal.App.4th 1482
 - Dead tree in forest near state camp ground – immunity applied



TOPIC 4 – TREE RISK MANAGEMENT

Dangerous Conditions Liability

- Government Code § 835. ... a public entity is liable for injury caused by a **dangerous condition** of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was **proximately caused** by the dangerous condition, that the dangerous condition created a **reasonably foreseeable risk** of the kind of injury which was incurred, and that either:
 - (a) A **negligent or wrongful act or omission** of an employee of the public entity within the scope of his employment **created** the dangerous condition; or
 - (b) The public entity had **actual or constructive notice** of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to **protect against** the dangerous condition.



TOPIC 4 – TREE RISK MANAGEMENT

Dangerous Conditions Liability

- Government Code § 830 - definitions
- (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.
- (b) "**Protect against**" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.
- (c) "**Property of a public entity**" and "**public property**" mean real or personal property owned or controlled by the public entity, but do not include **easements**, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.



TOPIC 4 – TREE RISK MANAGEMENT

Dangerous Conditions Liability

- Government Code § 835.2
- (a) A public entity ... had **actual knowledge** of the existence of the condition and knew or should have known of its dangerous character.
- (b) A public entity had **constructive notice** of a dangerous condition ... if the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of **due care**, should have discovered the condition and its dangerous character.



TOPIC 4 – TREE RISK MANAGEMENT

Dangerous Conditions Liability

- Government Code § 835.2 (cont'd) – Evidence of due care
- (1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.
- (2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.



TOPIC 4 – TREE RISK MANAGEMENT

Dangerous Conditions Liability

- Government Code § 835.4 – **Not liable** ...
- (a) Under 835(a) ... the act or omission that created the condition was reasonable ... determined by weighing the probability and gravity of potential injury to persons and property ... against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.
- (b) Under 835(b) ... the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable ... determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property ... against the practicability and cost of protecting against the risk of such injury.



TOPIC 4 – TREE RISK MANAGEMENT

Nuisance

- Civil Code § 3479
- Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, 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, or unlawfully **obstructs the free passage or use**, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.



TOPIC 4 – TREE RISK MANAGEMENT

Possible Sources of Liability

- Tree or limb failure
- Roots creating tripping hazard or physical damage
- Growth affecting traffic
- Growth affecting signals, signs



QUESTIONS?



THANK YOU

Robert M. Blum

**Nixon Peabody LLP
One Embarcadero Center
18th Floor
San Francisco, CA 94111-3600
rblum@nixonpeabody.com**



This presentation contains images used under license. Retransmission, republication, redistribution, and downloading of this presentation, including any of the images as stand-alone files, is prohibited.

This presentation may be considered advertising under certain rules of professional conduct. The content should not be construed as legal advice, and readers should not act upon information in this publication without professional counsel. ©2013. Nixon Peabody LLP. All rights reserved.