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Fighting Section 409 in dangerous condition of public property cases

Public entities can't have their cake and eat it, too

By Nina Shapirshteyn and Richard Alexander

Dangerous condition cases against public entities are difficult in light of the burden of proof and harsh affirmative defenses designed to prevent second-guessing of public official decision-making. To make matters worse, over the past few years, public entities have begun asserting 23 U.S.C. § 409, a federal privilege for certain data collected for federal highway safety programs, to block plaintiffs from obtaining necessary discovery. The scarce case law on the scope of Section 409 varies from state to state and the trial courts in California are all over the map on the issue. While public entities are experienced in stonewalling discovery under this complex statute, plaintiffs' attorneys often find themselves in unfamiliar territory. It is important to appreciate the potentially lethal consequences of Section 409 that may leave you facing a trial without critical evidence.

A public entity is liable for injuries caused by a dangerous condition of its property if (1) the dangerous condition created a reasonably foreseeable risk of the kind of injury incurred and (2) either a negligent or wrongful conduct of a public entity employee created the dangerous condition *or* the public entity had notice of the dangerous condition for a sufficient time to take measures. (Gov. Code, § 835.)

A public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing it acted reasonably in that it would have been too costly and impractical to have done anything. (Gov. Code, § 835.4.)

If design immunity is asserted, to demonstrate the loss of design immunity, the plaintiff must prove (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had notice of the danger; and (3) either the public entity had a reasonable time to obtain funds and take corrective measures, or the entity, because it was unable to remedy the condition due to practical impossibility or lack of funds, did not reasonably attempt to provide adequate warnings. (Gov. Code, § 830.)

Necessary evidence

To prove that injuries were caused by a dangerous roadway and that a public entity had notice, you need to obtain the following discovery of highway information for the subject location:

• As Built plans;
• SWITRS, Statewide Integrated Traffic Records System, a database compiled by CHP which provides collision records;
• Traffic Collision Reports;
• TASAS, Traffic Accident Surveillance and Analysis System, an accident history database compiled by Caltrans. TASAS Table C is a quarterly report which identifies high collision areas;
• 911 call logs;
• Computer Aided Dispatch reports;
• Complaints about the dangerous condition;
• Prior lawsuits;
• Photologs and photographs of the collision scene;
• Maintenance logs;
• HT-65 report used by Caltrans to determine whether an improvement to the roadway is warranted. This report may include an accident history, accident rate calculations, and projected accident rate for the subject location;
• Project and safety reports;
• Traffic manuals, design manuals, HSIP guidelines.

The problem is when the above data shows a high concentration of collisions in the subject location and is damaging to public entities, they claim the data is privileged under Section 409. If a court accepts the privilege claim and excludes the data, you will have trouble meeting your burden of proof.

Public entities' shield: 23 U.S.C. § 409

Congress enacted several highway safety programs to encourage and assist states in identifying safety issues on highways and in funding improvements. The programs required the states to gather data and identify hazardous locations eligible for aid. The states objected that the absence of confidentiality of the data created the evidence available to plaintiffs in dangerous condition cases, increasing the risk of liability for accidents that took place at hazardous locations before improvements could be made. (*Pierce County, Wash. v. Guillen* (2003) 537 U.S. 129, 133 [citing H.R. Doc. No. 94–366, p. 36 (1976)].) In response, Congress adopted Title 23 U.S.C. § 409.

Section 409 prohibits the discovery or admission into evidence of "reports, surveys, schedules, lists, or data," compiled or collected by governments either to: (a) identify or evaluate highway safety hazards pursuant to 23 U.S.C. §§ 130, 144, and 148; or (b) develop plans for safety improvements which may be federally funded, in any action for damages resulting from an occurrence at any location mentioned in such documents.

Precisely what information is protected by Section 409 has become the subject of considerable dispute and confusion. Whether particular documents are in fact privileged must first be evaluated under the sparse case law. Unfortunately, the only Supreme Court decision does not provide sufficient guidance. (See *Pierce County, Wash. v. Guillen* (2003) 537 U.S. 129.) There are several helpful cases from other jurisdictions applying *Pierce County*. This article, however, focuses on additional ways to fight the Section 409 privilege if the trial court agrees the data is within the scope of Section 409.

Public entities and departments of transportation in particular, have been using the Section 409 privilege as both a shield and a sword in dangerous condition cases. For instance, where there are few/no prior collisions, Caltrans produces and relies on the documents to show the absence of prior collisions, arguing that "millions of cars traveled through this intersection without a problem." In cases where the data shows numerous prior collisions and disclosure is damaging, Caltrans invokes the privilege and refuses to produce the same type of documents to preclude plaintiffs from showing the presence of prior collisions and notice.

Under the banner of Section 409, Caltrans has on several occasions refused to produce documents it had previously produced, including TASAS, Traffic Collision Reports, and even photologs and private citizen complaints about the particular location – documents critical in establishing notice of the dangerous condition. To establish the privilege, Caltrans usually submits its expert traffic engineer's declaration stating all requested documents had been compiled pursuant to the purposes listed under Section 409.

This approach is patently unjust in light of Caltrans' use of the same documents to negate plaintiffs' dangerous condition claims. In dozens of dangerous condition cases, Caltrans has armed its experts with TASAS, traffic collision reports, and HT-65 reports to use as a weapon to opine that the roadway was not a dangerous condition. (See e.g., *Mirzada v. Department of Transp.* (2003) 111 Cal.App.4th 802 [granting Caltrans' motion for summary judgment where Caltrans relied on TASAS and CHP reports to show absence of prior cross-median collisions.]) One Caltrans expert and former employee told us in deposition that whether to claim the Section 409 privilege and withhold documents or to produce the same documents was Caltrans' "business decision."

Plan ahead and avoid Section 409 pitfalls

In every dangerous condition case, the plaintiff must propound document requests for the documents referenced above, even when the plaintiff has already obtained such documents from other sources. This way, you will elicit the public entity's intention to rely on Section 409 in time to fight the objection. Waiting until trial to confront the issue may lead to the exclusion of valuable evidence and the exclusion of experts' opinions relying on it. When the documents are withheld in discovery on the ground of privilege, you should immediately meet and confer on the issue. The public entity will most likely provide a declaration from an engineer explaining why the documents are protected by Section 409. Depose the engineer immediately and move to compel production.

Use judicial estoppel to overcome Section 409 objection

It is fundamentally unfair to allow public entities to manipulatively assert one position – that the documents are not privileged – and later, when it becomes advantageous, to assert the opposite. The doctrine of judicial estoppel should operate to preclude the claim of privilege.

Judicial estoppel prevents a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. It is intended to protect against a litigant "playing fast and loose with the courts." (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) "It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (*Ibid.*) (internal citations omitted.) Judicial estoppel "focuses on 'the relationship between the litigant and the judicial system'. . . The gravamen of judicial estoppel is not privity, reliance, or prejudice. Rather, it is the intentional assertion of an inconsistent position that perverts the judicial machinery." (*Id.* at 183.)

Judicial estoppel applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Jackson, supra,* 60 Cal.App.4th 171, 183.)

The way California courts have applied judicial estoppel supports applying the doctrine to preclude public entities from taking inconsistent positions with respect to Section 409.

In *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, a recording company signed a settlement agreement in the middle of trial, but then claimed the agreement was unenforceable. Although the agreement truly was not enforceable because it lacked necessary signatures, the court held the recording company was judicially estopped from denying the enforceability because the company's counsel had represented to the judge the parties had settled.

In *People ex rel. Sneddon v. Torch Energy Svcs., Inc.* (2002) 102 Cal.App.4th 181, an oil company was judicially estopped from claiming that federal law preempted permit conditions because the company accepted the benefits of the permits. The County of Santa Barbara approved the oil company's conditional use permit to construct an offshore pipeline. The approval was based in part on the company's compliance with the numerous conditions attached to its permits. After a rupture occurred in the offshore pipeline, the County sued the oil company for failure to comply with the permit conditions. The oil company argued the County had no authority to impose the conditions because the field of oil pipeline safety regulation was preempted. The Court of Appeal concluded the field of pipeline safety regulation was in fact preempted, but affirmed summary judgment for the County, holding the oil company was judicially estopped from claiming preemption. The Court explained:

> The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. . . . Courts apply the doctrine to. . . prohibit "parties from deliberately changing positions according to exigencies of the moment." . . . "At its heart, [it] prevents chameleonic litigants from 'shifting positions to suit the exigencies of the moment' . . . engaging in 'cynical gamesmanship' . . . or 'hoodwinking' a court"].)

(*Torch Energy, supra,* 102 Cal.App.4th 181, 189.)

Playing "fast and loose" with the courts is what public entities are doing by shifting their position as to the applicability of Section 409 to the same data depending on the case and whether the data is beneficial or harmful. These conveniently inconsistent positions are fundamentally unfair and require the application of judicial estoppel or a miscarriage of justice will result.

Use waiver to overcome Section 409 objection

Sometimes, public entities withhold documents in one case despite having produced the same documents related to the same location in other cases. A primary attribute of a privilege is that it may be waived by the party for whose benefit it exists. By disclosing the documents in other litigation, the public entities waive the privilege afforded by Section 409.

While there is no California authority on point, at least one court has ruled the Department of Transportation waived Section 409 privilege for information compiled to obtain federal funds by introducing into evidence exhibits containing such information in support of its motion for summary judgment. (*Renfro v. Burlington Northern and Santa Fe RR* (La. Ct. App. 2006) 945 So. 2d 857, 860 ["We see no compelling reason that the State cannot waive the privilege afforded to it by Section 409. . . [T]he Supreme Court recognized that statutory provisions are subject to waiver absent an affirmative indication in the statute of Congress' intent to preclude waiver. There is nothing in Section 409 that prevents the State from waiving the statutory privilege it has been granted."])

Public entities will argue they may select to waive the privilege in some cases and assert it in other cases. California has rejected a similar "selective waiver theory." (*McKesson HBOC, Inc. v. Superior Court* (2004) 115 Cal.App.4th 1229, 1240 [refusing to adopt "selective waiver" theory, under which a client could disclose a privileged communication to the government while continuing to assert it against other parties.]) In *McKesson*, the court found the plaintiff company waived the attorney-client privilege by disclosing the audit report prepared by its attorneys to the government during a government

investigation and such report was discoverable in a lawsuit by the shareholders.

To prove that a public entity has used the sought documents in other cases and therefore waived the privilege, obtain declarations from other plaintiffs' attorneys. A search on Westlaw or Lexis often reveals cases where public entities used the data in a motion for summary judgment or a motion in limine.

Offensive use of Section 409 by plaintiffs

Public entities need the same documents as plaintiffs to show the absence of other similar incidents and reasonableness. Bring a motion in limine to exclude the documents the state seeks to admit on the ground that they are not admissible pursuant to Section 409. If the public entity formally claims the documents are admissible and are not privileged, this will provide ammunition to plaintiffs in future dangerous condition cases where the public entity claims the documents are privileged.

Conclusion

The scope of Section 409 remains a gray area, of which public entities are taking an unfair advantage. Do not underestimate a public entity's invocation of the privilege that, if accepted by the court, will leave you without critical evidence in trial. Responding quickly and using the right tools will help you fight the privilege objection and deter public entities from abusing the privilege.


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