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Assessing property damages for California wildfire victims

Plaintiffs often assume the measure of property damage is replacement value – too often it is not

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In the last decade, California has seen an unprecedented number of calamitous wildfires that have caused not only loss of life and environmental concerns, but billions of dollars in real and personal-property damage. Many of these catastrophic fire events that have ravaged our state have been ignited by long neglected and ill-maintained utility infrastructure. The resulting devastation has prompted mass-tort claims by thousands of victims, many of whom have been left with insufficient funds – by virtue of being uninsured or underinsured – to restore or rebuild their properties without a settlement or judgment from the responsible utility company.

Victims of wildfires caused by failed public-utility infrastructure may be entitled to a multitude of damages against the defendant entity. This article explores some of the most common damages available to fire victims who have lost their homes.

Repair or restoration of real property

Real property consists of land or anything attached to land, such as a dwelling, trees and vegetation, and other non-natural hardscape or landscape. 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 ("DIV"); or (2) the cost to repair the damage and restore the property to its pre-trespass condition, plus the value of any lost use. (CACI No. 3903E.)

While seemingly clear-cut in its language, the "Lesser-Of Rule" can come into conflict with the ordinary measure of tort damages, which requires that the plaintiff be "made whole" and compensated for *all detriment sustained* as the proximate result of the defendant's wrong, regardless of whether it could have been anticipated by the defendant. (Civ. Code, § 333.)

If, for example, a residence is destroyed by a fire and the pre-fire market value was \$250,000, but the cost to rebuild is \$400,000, the "Lesser-Of Rule" dictates that the plaintiff receive only \$250,000 (assuming a post-fire FMV of \$0), and the plaintiff will not recover enough to rebuild his or her home. Where the cost of repair exceeds the value of the property, the plaintiff homeowner cannot be made whole if the only damages available are the "lesser of" DIV model. Because the



overriding purpose of tort damages is to restore an injured party to his or her pre-injury condition, trial courts have historically been given great flexibility to award real property damages that fit the particular facts of a given case. (*Starrh & Starrh Cotton Growers v. Aera Energy LLC* (2007) 153 Cal.App.4th 583, 604.)

The Personal Reason Exception

Such flexibility led to the development of the “Personal Reason Exception,” which allows a plaintiff the option of having the home/property repaired even though it will cost more than the diminution in market value. “Restoration costs may be awarded even though they exceed the decrease in market value if there is a reason personal to the owner for restoring the original condition or where there is reason to believe that the plaintiff will, in fact, make the repairs. (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 863; see also *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d.)

The “Personal Reason Exception” does not require that the plaintiff’s home was “unique”; all that is required is some personal use by them and a *bona fide* desire to repair or restore. (*Orndorff, supra*, 217 Cal.App.3d at 688.) The exception applies equally to destruction of vegetation or ornamental trees that were of personal value to their owners. (*Heninger, supra*, 101 Cal.App.3d at pp. 864-865.)

Restoration costs based on this theory are still, however, limited to those that are *reasonable* in light of the value of the real property before the injury and the actual damage sustained. (*Id.* at 690; Civ. Code, § 3359.) Whether such costs are reasonable requires an evaluation of factors including the time required to perform abatement, monetary expense, burden on the public, and costs of remediation versus value of land. (*Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1100.) For example, the owner of a unique home will likely face significant resistance from the defense in obtaining the home’s reconstruction costs

where they far exceed the value of the property.

“Betterment” refers to the enhanced value of real property arising from repairs or improvements. It is commonly used as a defense by utility companies who claim that the cost of the rebuild or repairs should be reduced by the increase in market value and quality of the home post-fire rebuild or repairs.

It is important for the plaintiff to distinguish between improvements in quality that are *necessary* for the rebuild versus those that are simply *desired* by the plaintiff fire victim. A plaintiff may elect to build a larger home than they had before the fire but cannot necessarily expect to recover the costs of that expansion. (Although, in many instances, the cost of construction and materials for small increases in size is negligible and the plaintiff should not acquiesce to a pro rata deduction of the cost per square foot without consulting their builder.)

To the extent that higher/better quality materials were used, consider whether these were required by code (e.g., a local regulation requiring all new builds to install solar panels) or whether pre-fire materials are now outdated and unavailable. It is unlikely that fire victims will be able to rebuild the exact structure with the same materials used 40 years earlier, and thus, the newly built home may appear “nicer” and “updated.” But the defendant utility company is not entitled to a discount under the guise of “betterment” when it involves necessary repairs, and plaintiffs were forced to make such premature improvements that they otherwise would not have done but for the fire. (See, e.g., *Cheeks v. California Fair Plan Assn.* (1998) 61 Cal.App.4th 423, 425 [after determining actual cash value of a loss based on costs of repair, insurer cannot reduce amount by depreciation or betterment].)

Loss of use

To recover damages for loss of use, plaintiff must prove the reasonable cost

to rent similar property for the time when he or she could not use the property. (CACI 3903G.) A plaintiff should consider the length of time it will take to fully rebuild/restore the property and obtain evidence from his or her builder regarding the anticipated time to completion. If the main dwelling, for example, is rebuilt but the detached garage, landscaping and pool are not completed, plaintiff should seek loss-of-use damages that are ongoing until such time as restoration is final.

Personal-property contents

Where an injured party loses personal property in the fire, it is a common misconception that the plaintiff is entitled to the cost of replacement of such items; but this is not the legal measure of damages. The plaintiff is entitled to the fair-market-value of the property at the time of the loss or destruction (i.e., difference in the market value of the property immediately before and immediately after the harm/injury). (*Lane v. Spurgeon* (1950) 100 Cal.App.2d 460, 463.) In light of the goal of tort damages (i.e., to put plaintiff back in the same position as if the injury had never occurred) this approach may make sense. In reality, fair-market-value is typically *less* than replacement cost and, in many cases, will not provide the victim sufficient funds to refurbish their home with new items or items of the same quality that they previously owned.

One exception to the general rule is applied in cases involving damage to personal property that has little or no market value, but that has special value to the owner/plaintiff (i.e., “peculiar value”). “Where the market value is relatively small as compared with its special value to the owner, the value to the owner may sometimes be recovered, and resort may be had to such evidence as the value of time spent in producing it. This exception is applied, e.g., to books, manuscripts, etc.” (Witkin on Torts section 1453, p. 928.)



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The California Supreme Court analyzed “peculiar value” of scrapbooks, data, and a rare book destroyed in a fire in *Willard v. Valley Gas & Fuel Co.* (1915) 171 Cal.9. Noting that such items could not have any market value but could be “of great value” to the plaintiff, the court determined it was proper for the plaintiff to testify as to the items’ value to him. (*Id.* at 12.)

Annoyance and discomfort

In actions for nuisance or trespass, the plaintiff is entitled to damages that would compensate for the annoyance and discomfort – including emotional distress or mental anguish – caused by the injury to a plaintiff’s peaceful enjoyment of the property. (CACI 2031; see, *Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1356.)

The occupant of the property need not be physically present at the time of the fire to recover annoyance and discomfort damages. (*Id.* at 1352), but it is necessary that the “annoyance and discomfort arise from and relate to some personal effect of the interference with use and enjoyment which lies at the heart of the tort of trespass.” (*Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1094.) “Occupying” the property does not require that a plaintiff reside there. (*Id.* at 1094 [owner was frequently present on

the property and considered to have occupied it.]

In determining the amount of recovery for annoyance and discomfort, the court considers the sentimental and aesthetic value of the things destroyed, the owner’s affection for his or her possessions, as well as the owner’s peace, comfort, and quiet possession of the property. (Damages; loss of use and enjoyment, 6 Cal. Real Est. § 19:25 (4th ed.))

Attorneys’ fees

Code of Civil Procedure section 1036 allows a plaintiff prevailing on an inverse-condemnation cause of action to recover attorneys’ fees. The amount of fees awarded is within the sound discretion of the court and cannot be increased beyond what was actually incurred. (29 Cal. Jur. 3d Eminent Domain § 374.) It is further within the court’s discretion to award fees incurred with respect to a non-inverse condemnation cause of action that is relevant to the inverse condemnation claim. (*Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 365.)

Conclusion

As unprecedented wildfires continue to rage and burn millions of acres across the West, it is important that attorneys representing wildfire victims are well

versed in the economic and non-economic damages applicable in order to maximize compensation for their clients.

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