

Landslides – Who Should Be Held Accountable? **by Dale S. Alberstone, Esq.**

One of my core beliefs is that there is entirely too much litigation in this country, particularly in metropolitan areas and especially in Los Angeles and other Southern California counties. I suspect that most readers of this column would agree with me.

When an onlooker evaluates a landowner's problems, "take responsibility; don't blame others" may seem in order.

However, when the injury occurs to the onlooker's property, the belief in "personal responsibility" tends to wane. Indeed, there is a pervasive pattern among even self-reliant injured property owners, that where the damage is substantial, such as by earth movement affecting an apartment building or home, the owner (who generally will not have insurance coverage for the slide) looks around to see if someone else might be held accountable for the damage. To be blunt, the owner is searching for sources of money outside his own bank account for reimbursement of the cost to restore his land and residential structures.

While I believe that our society is far too litigious, I also believe that there are many instances where litigation is appropriate such as where someone else is (or was) a significant contributing factor to the damage.

The main categories of persons other than the property owner who might legitimately bear responsibility for the property damage (particularly damage caused by hillsides and other earth movement) are: sellers, brokers, geologists, architects and engineers. In addition, where a landslide results from heavy rain run-off from another's adjoining land, California law may render the neighbor liable.

Seller responsibility: California, as well as most other states, no longer follows the doctrine of "caveat emptor," which translates from Latin to mean "let the buyer beware." We now follow the principle of "compel the seller to disclose." Thus, a seller is required to disclose to a buyer all material defects in the land or property the vendor is marketing which are not likely to be known by or observable to the buyer absent such a disclosure.

For example, if the seller knows that his property has been subject to previous slides or earth movement, that information should be disclosed in writing to the buyer, particularly if the purchaser would be unlikely to know of the prior geologic problems. If the buyer acquires the property without such knowledge, and thereafter the improvements or land are destroyed by a slide, the seller may be monetarily liable to the buyer based on a theory of fraudulent concealment.

California law requires the seller of all types of property, including multi-family dwellings, to disclose to the purchaser all known facts materially affecting the value or the desirability of property offered for sale where such facts are known or accessible only to the seller (or his broker) and the seller also knows that those facts are not known to or within the reach of the diligent attention and observation of the buyer. In the early -- and famous-- case of Lingsch v. Savage (213 Cal.App.2d 729), the court gave examples which illustrate the point, such as: if the seller knows that there is a subterranean creek in his back yard or an unexploded bomb buried in the basement, the seller must disclose it, even though the contract might contain an "as is" provision.

Accordingly, in instances where landslides or other earth movement occur after the close of escrow of a property, the seller may be held responsible for failing to make a disclosure of the instability of the land if the seller experienced previous slides but failed to alert the buyer to them. On the other hand, a seller is ordinarily not required to conduct an investigation of his property to discover defects about which he does not already know. As between the buyer and the seller,

the buyer is responsible for conducting his own investigation about potential defects which are not known to the seller.

Broker Responsibility

Unlike a seller who generally has no obligation to investigate the property for defects prior to selling it, both the seller's and buyer's brokers often do have a duty to inspect and disclose. For example, Civil Code Section 2079 imposes a duty on the listing agent of residential real property consisting of one to four residential units to "conduct a reasonably competent and diligent visual inspection of the property" and disclose observable, material defects to the buyer. The theory is that the broker has a more trained eye to discover potential problems with the property (such as cracks in the walkway or patio concrete which may indicate earth movement) than does the buyer.

In addition, a broker (particularly the buyer's broker) might have a duty to recommend to a buyer of hillside property that the buyer should obtain a geologic report. Failure to make such a recommendation may be construed by a jury to be negligent and, hence, render the broker liable for the damages the buyer sustains following a landslide.

Geologist Responsibility

Obviously, a geologist who is employed by an individual to evaluate the stability of land will be liable to the property owner for failing to report adverse ground conditions which other geologists would have generally recognized and included in their report. In other words, if a geologist undertakes to prepare a hillside stability report for a property owner, he needs to be careful that the report is as accurate as modern science allows it to be. In the event of a subsequent movement of the earth, his report will be tested against the standard in the industry of other competent geologists had they been hired to perform the same services. If the report fails to disclose adverse conditions which other geologists would disclose, the geologist may be held monetarily accountable if the damage would have been avoided had the disclosure been made.

Engineer and Architect Responsibility

The focus of engineers and architects are different than that of a geologist. A geologist is retained specifically for analysis of ground conditions, whereas architects and engineers usually have broader concerns, or at least concerns which focus on matters other than geology. Their liability to a property owner is likely to be more attenuated and less assured than the geologist who fails to disclose any material adverse condition of the land.

Adjacent Owner Responsibility for Water Damage

In the early days of common law, an uphill neighbor was not liable for damage resulting to the property beneath him caused by the downward flow of rain water if that discharge resulted by natural conditions of the land. In other words, if the uphill property had never been modified (i.e. it remained in its natural state), the owner of that land would not be liable for rain water flow which damaged the lower property.

Today, the rule has changed such that liability is based on the reasonableness of the conduct of the parties (and particularly the reasonableness of the uphill party), rather than whether the uphill owner changed the natural flow. Thus, both the upper and lower landowners must act reasonably in discharging and accepting the runoff of surface water. As explained in Burrows v. State of California, 260 Cal.App. 2d 29: "1. If the upper owner is reasonable and the lower owner unreasonable, the upper owner wins; 2. If the upper owner is unreasonable and the lower owner reasonable, the lower owner wins; and 3. If both the upper and lower owner are reasonable, the lower owner wins also."

Thus, the issue often becomes a battle of experts in court as to who did and did not act reasonably. However, suffice it to say that if the upper owner collects and then concentrates the discharge of water onto the lower owner's land (rather than allowing it to run off in a broadly

disbursed fashion), the upper owner will likely be found to be unreasonable and liable to the landowner beneath.

CONCLUSION

As I commented at the outset of this article, I believe that there is entirely too much litigation in this country. Nevertheless, not all litigation lacks merit and is often necessary because someone else truly is responsible for a property owner's damage. Had proper disclosures been made or reports prepared, preventative or mitigating measures might have been implemented so as to lessen or avoid the damages.

I do believe that our laws are well justified in requiring a seller to disclose known, adverse conditions of his property which are not readily known by or observable to a buyer. I also believe that professional consultants should be responsible for producing quality work, at least equal to the standard of other similarly licensed professionals.

As for adjoining properties, uphill owners should be vigilant in ensuring that the flow of water from their land does not endanger or damage the land below. Uphill owners must implement reasonable measures to avert such damage.

Dale Alberstone is a prominent real estate attorney who has practiced real property and business law in Century City for the past 31 years. He has been appointed to periodically serve as a judge pro tem of the Los Angeles Superior Court and is a former arbitrator for the American Arbitration Association. He also testifies as an expert witness for and against other attorneys who have been accused of legal malpractice.

*Mr. Alberstone has been awarded an **AV** rating from Mardindale-Hubbell. An **AV** rating, registered through Reed Elsevier, reflects an attorney who has reached the heights of professional excellence and is recognized for the highest levels of skill and integrity. The foregoing discussion is intended as a general overview of the law and may not apply to the reader's particular case. Readers are cautioned to consult an advisor of their own selection with respect to any particular situation.*

Address correspondence to Dale S. Alberstone, Esq., ALBERSTONE & ALBERSTONE, 1801 Avenue of the Stars, Suite 600, Los Angeles, California 90067. Phone: (310) 277-7300.