

## **Landslides ---Who Should Be Accountable?**

by Dale 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, Orange and other Southern California counties. I suspect that most readers of this column would agree with me. As an observer of other people's problems, "blame yourself, not someone else" may seem in order.

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However, when the injury occurs to the observer himself, 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 which destroys an apartment building or home, the owner (who generally will not have insurance coverage for the slide) begins to look around to see if someone else might be responsible for the damage. To be blunt, the owner is looking 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, in general, is far too litigious, I also believe that there are many instances where litigation is appropriate because someone else is (or was) a significant contributing factor to the damage.

The main categories of persons who might legitimately bear responsibility for the property damage (particularly damage caused by hill slides and other earth movement) are: sellers, brokers, geologists, architects and engineers.

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

Thus, 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. 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.

Our law requires the seller of all types of property, including apartment buildings, to disclose to the buyer 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 some examples which illustrate the point. 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.

In instances where landslides or other earth movement occur after the sale 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 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 following delivery of an accurate report.

**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.

Each professional consultant is held to a standard of skill and care as would be customarily possessed by other consultants licensed in the same field.

## 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 norm of other similarly licensed professionals.

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*The foregoing discussion is intended solely 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 any particular situation.*

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