PG&E must answer inverse condemnation charges, judge rules

A San Francisco County judge refused to dismiss inverse condemnation claims filed against Pacific Gas & Electric Co. by property owners affected by two major wildfires that scorched Northern California in 2019 and 2020.

Judge [Andrew Y.S. Cheng](), who sits in San Francisco County Superior Court's complex civil division, is overseeing both the Kincade and Zogg Fire consolidated actions. On Friday, he issued a pair of nearly identical decisions overruling PG&E's demurrers that challenged the strict liability doctrine. Like other mass tort judges who presided over wildfire litigation in the last several years, Cheng concluded PG&E, despite its investor-owned status, is deemed a public entity under the California Public Utilities code for purposes of inverse condemnation liability.

"The cases cited by defendant do not focus on the entity itself or its ability to spread the costs of an inverse condemnation damages judgment among the public, but rather on whether the damaged property's owner would contribute more than his or her proper share and how that loss should be spread throughout the community," Cheng wrote. "However, a lack of loss spreading ability is not material to whether plaintiffs have failed to state sufficient facts for an inverse condemnation claim." Zogg Fire cases, JCCP 5165.

Kevin J. Orsini of Cravath, Swaine & Moore represents PG&E. PG&E spokesman James Noonan issued a statement Monday contending that the utility continues to work toward a fair and timely resolution of claims associated with Zogg and Kincade fires, despite Cheng's ruling.

"The safety of our customers and the communities we serve, particularly in the face of historic drought and climate change impacts, is PG&E's most important responsibility. We remain focused on preventing major wildfires and are committed to safely delivering power to all of our customers and communities," Noonan said. "We continue to believe that California's application of inverse condemnation to private utilities is flawed, and not in the best interest of our customers."

The Zogg Fire ripped through Shasta County on Sept. 27, 2020 scorching 56,000 acres and killing four people. According to the plaintiffs, the Zogg Fire ignited when a tree fell onto one of PG&E's distribution lines.

The Kincade Fire ignited on Oct. 23, 2019 in Sonoma County and scorched 78,000 acres.

As soon as lawsuits began piling up, PG&E tried to knock out inverse condemnation claims, which is a strict liability doctrine that allows only compensation for the injured party if the damage is caused by use of a property for public improvement, absent any fault by the entity. In exchange for its monopoly status, PG&E is subject to the regulatory authority of the California Public Utilities Commission, which controls rate-settings.

PG&E argued it cannot be subject to inverse liability because the utility cannot socialize losses throughout the community. The utility giant cited six cases in support of its demurrer, including a writ filed by San Diego Gas & Electric against the California Public Utilities Commission, which was denied review by the U.S. Supreme Court in October 2019. *SDG&E v. California Public Utilities Commission*, D074417 (Cal. App. 4th Dist. Nov. 13, 2018) The high court's decision not to review the case blocked utilities' attempt to spread risks automatically and therefore, should not be subject to inverse condemnation, PG&E argued.

In his ruling, Cheng cited several mass tort wildfire cases where judges held that the utility can be held liable for inverse condemnation. Each of those judges: Allen H. Sumner of Sacramento County, Curtis E.A. Karnow of San Francisco County, and U.S. Bankruptcy Judge Dennis J. Montali of the Northern District of California, reached the same conclusion. Los Angeles County Judge Daniel J. Buckley, though not cited in Cheng's ruling, also rejected Southern California Edison's demurrer in the 2017 Thomas Fire litigation.

The only judge who never squarely addressed Southern California Edison's inverse argument on the merits is Los Angeles County Judge William F. Highberger, who is overseeing the 2018 Woolsey Fire litigation. Highberger instead asked plaintiffs to replead their cause of action to include allegations of public use in accordance with the California Supreme Court decision in *City of Oroville v. Superior Court*, 2019 DJDAR 7729 (2019) The individual Woolsey Fire cases began settling, so the motion was never renewed by Edison.

Craig S. Simon, managing partner at Berger Kahn who serves as co-lead subrogation counsel argued for all of the plaintiffs in both demurrers.

"We appreciate Judge Andrew Cheng's careful review of the cases, and appreciated his in-depth analysis of the issues. We believe PG&E's main argument that as a privately-owned public utility they are not subject to inverse condemnation under any set of facts is just plain wrong," Simon said Monday. "We are pleased that the judge saw it that way too. This is consistent with other rulings on the same issue that were handed down by judges Sumner, Karnow, Montali and Buckley."

In its criminal probation case pending in federal court in San Francisco, PG&E has been questioned closely by Senior U.S. Judge William H. Alsup of

the Northern District of California about its suspected roles in both wildfires.

In October, Shasta County District Attorney Stephanie Bridgett charged PG&E with four felony manslaughter counts and other charges for the Zogg Fire. In April Sonoma County District Attorney Jill Ravitch charged PG&E with five felonies and 28 misdemeanors for the Kincade Fire.

Following PG&E's Chapter 11 filing in January 2019, state lawmakers created a $21.5 billion wildfire fund to help utilities like PG&E offset wildfire liabilities under Assembly Bill 1054. But no private utility has ever been required to contribute to the wildfire fund just because its conduct was not just and reasonable, nor has PG&E sought reimbursement for the Kincade Fire even though it is eligible to do so, the plaintiffs pointed out in court papers.

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