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Torts

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Torts

Torts; hazardous recreational activities

Government Code § 831.7 (amended).
AB 700 (Cunneen); 1995 STAT. Ch. 597

Existing law provides that a public entity is generally liable for injuries caused by dangerous conditions¹ of public property.²

Existing law also provides, however, that public employees and entities are not liable to persons engaging or assisting in hazardous recreational activities on public property for either personal injuries or property damages.³ Additionally,

1. See CAL. GOV'T CODE § 830(a) (West 1980) (defining "dangerous condition" as a condition of property that creates a substantial—as distinguished from a minor, trivial or insignificant—risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used); *see also* *Peck Ranch, Inc. v. Bureau of Reclamation*, 823 F. Supp. 715, 727 (E.D. Cal. 1993) (holding that a dangerous condition can exist even if the public property is itself not defective, but where other independent acts cause injury to occur); *Gray v. America West Airlines*, 209 Cal. App. 3d 76, 85, 256 Cal. Rptr. 877, 882 (1989) (requiring a plaintiff, in order to establish the existence of a dangerous condition, to demonstrate a condition of the property such that it creates a substantial risk to any foreseeable user who uses it with due care).

2. CAL. GOV'T CODE § 835 (West 1980); *see id.* (providing that to hold a public entity liable for a dangerous condition on its property the plaintiff must establish the following: (1) the property was in a dangerous condition at the time of the injury; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred; and (4) either a negligent or wrongful act or omission of an employee of the public entity within the scope of employment created the dangerous condition, or the public entity had actual or constructive notice of the dangerous condition (pursuant to Government Code § 835.2) for a sufficient time prior to the injury to have taken measures to protect against the dangerous condition); *id.* § 835.2(a) (West 1980) (instructing that a public entity had actual notice if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character); *id.* § 835.2(b) (West 1980) (clarifying that a public entity had constructive notice of a dangerous condition only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character); *see also id.* § 835.2(b)(1), (2) (West 1980) (providing that on the issue of due care, admissible evidence includes, but is not limited to, the following: (1) whether the existence of a condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (determined by weighing the cost against the magnitude and likelihood of harm) to inform the public entity whether the property was safe for the use for which it was used or intended to be used by others, and for uses that the public entity actually knew others were making of the public or adjacent property; and (2) whether the public entity maintained and operated such an inspection system with due care and did not discover the condition); *Constantinescu v. Conejo Valley Unified Sch. Dist.*, 16 Cal. App. 4th 1466, 1471, 20 Cal. Rptr. 2d 734, 737 (1993) (concluding that liability against a public entity may only be established as provided by statute).

3. CAL. GOV'T CODE § 831.7(a) (amended by Chapter 597); *see id.* § 831.2 (West 1980) (granting immunity to public entities and employees for injuries caused by a natural condition of any unimproved public property, including any natural condition of any lake, stream, bay, river or beach); *id.* § 831.7(b) (amended by Chapter 597) (defining "hazardous recreational activity" as a recreational activity conducted on public property that creates a substantial risk of injury to a participant or spectator); *id.* § 831.7(b)(1) (amended by Chapter 597) (providing that hazardous recreational activity also means water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given, or the injured party should reasonably have known there was no lifeguard provided at that time); *id.* § 831.7(b)(2) (amended by Chapter 597) (defining "hazardous recreational activity" to also include any form of diving into water from something other than a diving board or diving platform, or at any place or from any structure where

under existing law, public entities and employees are not liable to any spectator of such activity if the person knew or reasonably should have known that the activity created a substantial risk of injury to himself or herself and was either voluntarily present or failed to leave despite the ability to do so.⁴

Public immunity is not extended under existing law, however, to cases where injuries are suffered due to the failure of the public entity to guard against or warn

diving is prohibited and reasonable warning has been given); *id.* § 831.7(b)(3) (amended by Chapter 597) (providing that “hazardous recreational activity” also means animal riding, including equestrian competition, archery, bicycle racing or jumping, mountain bicycling, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, paragliding, body contact sports (sports in which it is reasonably foreseeable that there will be rough bodily contact between one or more participants), surfing, trampolining, tree climbing, tree rope swinging, water skiing, white water rafting, and wind surfing); *see also* *Yarber v. Oakland Unified Sch. Dist.*, 4 Cal. App. 4th 1516, 1519, 6 Cal. Rptr. 2d 437, 438 (1992) (holding that Government Code § 831.7 rendered a school district immune from liability when the plaintiff injured himself in a district gymnasium during an after-hours adult basketball game); *id.* at 1519-20, 6 Cal. Rptr. 2d at 438-39 (discussing the inherent risks of bodily contact and injury from playing basketball, and stating that the sport carries with it the risk of injury defined by the statute); *Valenzuela v. City of San Diego*, 234 Cal. App. 3d 258, 262, 286 Cal. Rptr. 1, 3 (1991) (holding that the immunity provided by California Government Code § 831.7 applied to a case where the plaintiff struck his head on submerged rocks when diving into the ocean, and the immunity applied despite the fact the city had undertaken to provide passive risk management by posting some warning signs in other areas); *cf.* CAL. CIV. CODE § 846 (West Supp. 1995) (providing that an owner of any estate or any other interest in real property owes no duty of care to keep premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purposes); *id.* (providing that this exemption for liability does not apply to willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity, nor does the exemption apply for injuries suffered where permission to enter for recreational uses was granted for consideration or to persons who are expressly invited, rather than merely permitted, to come on the premises by the landowner); ILL. ANN. STAT. ch. 745, para. 10/3-106 (West 1993) (immunizing from liability any local public entity or public employee for an injury where the liability is based on the existence of a condition of public property intended or permitted to be used for recreational purposes and the entity or employee is not guilty of willful and wanton conduct proximately causing such injury); KAN. STAT. ANN. § 75-6104(o) (Supp. 1995) (providing that governmental entities and employees are not liable for claims for injuries resulting from the recreational use of certain public property, unless the entity or employee is guilty of gross or wanton negligence, proximately causing the injury); MICH. COMP. LAWS § 300.201(1) (West Supp. 1995) (providing that no cause of action shall arise for injuries to a person who is on the land of another without paying consideration, for a variety of recreational purposes, unless the owner, tenant or lessee is guilty of gross or willful and wanton misconduct); *Jenkinson v. Department of Nat. Res.*, 406 N.W.2d 302, 304 (Mich. Ct. App. 1987) (noting that Michigan’s recreational use statute, providing immunity for landowners from suits by certain recreational users, has been held applicable to public lands). *But see* *Iverson v. Muroc Unified Sch. Dist.*, 32 Cal. App. 4th 218, 227, 38 Cal. Rptr. 2d 35, 41 (1995) (holding that Government Code § 831.7 is inapplicable to a body contact sport that is part of a mandatory physical education class conducted during school hours on school grounds); *Acosta v. Los Angeles Unified Sch. Dist.* 31 Cal. App. 4th 471, 475-76, 37 Cal. Rptr. 2d 171, 173-74 (1995) (holding that a school district is not immune from liability to a gymnast, injured during practice in a school gymnasium after school, during the off-season), *review denied* 1995 Cal. LEXIS 2621. *See generally* Michael D. Lee, Note, *The Protection of Children After Ornelas v. Randolph: A Proposed Amendment to California’s Recreational Use Statute*, 25 PAC. L.J. 1131, 1149-61 (1994) (discussing the legal and legislative history of California’s recreational use statute); Robin C. Miller, Annotation, *Effect of Statute Limiting Landowner’s Liability for Personal Injury to Recreational User*, 47 A.L.R. 4TH 262, 275 (1994 & Supp. 1995) (discussing cases where recreational use statutes granting landowner immunity have been held applicable to public entities and employees).

4. CAL. GOV’T CODE § 831.7(a) (amended by Chapter 597).

of known dangerous activities or conditions that are not reasonably assumed by the participant as inherently part of the activity causing the injury.⁵

Existing law expressly includes hang gliding, sport parachuting, and bicycle racing and jumping within the list of hazardous recreational activities for which public entities and employees are not liable for injuries suffered by participants therein.⁶ However, prior law did not include paragliding or mountain bicycling within the express definition of hazardous recreational activity.⁷

Chapter 597 provides that public entities and employees are not liable for injuries suffered by persons paragliding and mountain biking on public lands because these are hazardous recreational activities.⁸

COMMENT

Chapter 597 was introduced at the request of the Midpeninsula Regional Open Space District and supported by many other public entities maintaining public lands, all of which were concerned with the increased number of accidents, and potential liability, involving mountain bikers and paragliders.⁹ The supporters

5. *Id.* § 831.7(c)(1) (amended by Chapter 597); *see id.* § 831.7(c)(2)-(5) (amended by Chapter 597) (providing that immunity is also not extended where the following conditions exist: (1) damage or injury was suffered in any case where permission to participate in the hazardous recreational activity was granted for a specific fee, other than a fee or consideration charged for a general purpose such as a general park admission, parking or vehicle entry fee, or an administrative or group use application or permit; (2) injuries were proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work of improvement utilized in the hazardous recreational activity out of which the damage or injury arose; (3) the public entity or employee recklessly or with gross negligence promoted the participation or observance of a hazardous recreational activity by means other than announcing or advertising the availability of facilities and services on the property; or (4) injuries are proximately caused by any act of gross negligence by a public entity or employee); *id.* § 831.7(d) (amended by Chapter 597) (providing that the immunity granted by California Government Code § 831.7 is not extended to an independent concessionaire or any person or organization, other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization). *But see id.* § 831.7(c)(5) (amended by Chapter 597) (providing that nothing within California Government Code § 831.7(c) creates a duty of care or basis of liability for personal injury or for damage to personal property).

6. *Id.* § 831.7(b) (amended by Chapter 597).

7. 1983 Cal. Stat. ch. 863, sec. 1, at 3155-57 (enacting CAL. GOV'T CODE § 831.7).

8. CAL. GOV'T CODE § 831.7(b)(3) (amended by Chapter 597); *see id.* (noting that mountain bicycling does not include riding a bicycle on paved pathways, roadways, or sidewalks).

9. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 700, at 3-4 (Apr. 19, 1995); *see id.* (stating that in the Midpeninsula Regional Open Space District's 23 open space preserves, there has been a marked increase in the number of accidents involving mountain bikers and that paragliding is sufficiently distinct from hang gliding and sport parachuting, which were included in California Government Code § 831.7 prior to the enactment of Chapter 597, and sufficiently hazardous, to warrant inclusion); *see also id.* at 3 (noting that the Midpeninsula Regional Open Space District reported 44 mountain biking accidents in 1993 and 47 in 1994, and of those, 71 were classified as moderate or serious, including life threatening; 90% required emergency response; and 10% required helicopter evacuation); *id.* (stating that the County of Santa Clara, which also supports Chapter 597, reported that a majority of the mountain biking accidents it experiences requires emergency response and medical evacuation); *id.* (reciting the description of mountain biking provided by Santa Clara County, which may distinguish it from other forms of biking covered by the

of Chapter 597 state that although current law intentionally does not provide an exhaustive list of the specific activities for which they are immune as public entities, the listing of a specific activity bolsters their defense to such actions.¹⁰

Anthony J. Stanley

Torts; pipeline corporations—strict liability

Civil Code § 3333.4 (new).
AB 1868 (Katz); 1995 STAT. Ch. 979

Under existing law, the Public Utilities Commission¹ regulates public utilities,² including pipeline³ corporations.⁴ Existing law also sets forth the

statute, as characterized by high speed on rough and steep terrains); Letter from L. Craig Britton, General Manager, Midpeninsula Regional Open Space District, to Assemblymember Phil Isenberg, Chair, Assembly Judiciary Committee (Apr. 14, 1995) (copy on file with the *Pacific Law Journal*) (explaining that of the 91 mountain biking accidents on district land between 1993 and 1994, 21 were minor, 51 were moderate, and 20 were serious or life threatening). *But see* ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 700, at 4 (Apr. 19, 1995) (reporting that the Consumer Attorneys of California (CAOC) oppose including mountain biking as a hazardous recreational activity because it is a family activity that is often engaged in by children); Letter from Jim Hasenauer, President of the International Mountain Biking Association, to Assemblymember Phil Isenberg, Chair, Assembly Judiciary Committee (Apr. 18, 1995) (copy on file with the *Pacific Law Journal*) (objecting to the classification of mountain biking as a hazardous recreational activity due to the fear it would unjustifiably taint the sport's reputation, and claiming that the sport does not create a substantial risk of injury); Letter from Wayne McClean, President, Consumer Attorneys of California (CAOC) to Assemblymember Phil Isenberg (Apr. 12, 1995) (copy on file with the *Pacific Law Journal*) (distinguishing mountain biking from the other activities listed in § 831.7, as allegedly not involving serious risks and, unlike the others, a predominately family activity often engaged in by children).

10. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 700, at 3 (Apr. 19, 1995).

1. *See generally* CAL. PUB. UTIL. CODE §§ 301-325 (West 1975 & Supp. 1995) (setting forth the organization of the Public Utilities Commission).

2. *See id.* § 216(a) (West Supp. 1995) (defining "public utility" to include common carriers, toll bridge corporations, pipeline corporations, gas corporations, electrical corporations, telephone corporations, telegraph corporations, water corporations, sewer system corporations, and heat corporations, where the service or commodity performed for, or delivered to, the public); *see also* CAL. CONST. art. XII, §§ 1-9 (discussing public utilities); *Unocal Cal. Pipeline Co. v. Conway*, 23 Cal. App. 4th 331, 334-35, 28 Cal. Rptr. 2d 429, 431 (1994) (holding that a pipeline corporation which has as its only customer its parent company, is a public utility as defined in California Public Utilities Code § 216, and thus, the pipeline corporation has the power of eminent domain).

3. *See* CAL. PUB. UTIL. CODE § 227 (West 1975) (defining "pipeline" to include real estate, and personal property, controlled, operated, or managed in connection with the transmission, distribution, or delivery of crude oil and other non-water fluid substances through pipelines).

4. *Id.* § 701 (West 1975); *see* CAL. CIV. CODE § 3333.4(m)(1) (enacted by Chapter 979) (stating that notwithstanding California Public Utilities Code § 228, "pipeline corporation" includes any corporation or person who directly operates, manages or owns any pipeline system qualifying as a public utility within California Public Utilities Code § 216 and for compensation within this state); CAL. PUB. UTIL. CODE § 228 (West Supp. 1995) (defining "pipeline corporation" as every corporation or person, who for compensation, owns, controls, operates, or manages any pipeline within California; however, "pipeline corporation" does not encompass corporations or persons using landfill gas technology and owning, operating, or managing any pipeline solely for the distribution of landfill gas or other type of generated or produced energy); *see also*

measure of damages in various situations.⁵

Chapter 979, known as the Oil Pipeline Environmental Responsibility Act,⁶ requires each pipeline corporation qualifying as a public utility that transports crude oil⁷ in a public utility oil pipeline system,⁸ to be strictly liable for any damages incurred by any injured party that results from the discharge or leaking of crude oil from the public utility pipeline.⁹ Chapter 979 specifically sets out the only instances in which it applies.¹⁰ Moreover, Chapter 979 provides that pipeline

Television Transmission, Inc. v. Public Util. Comm'n, 47 Cal. 2d 82, 84, 301 P.2d 862, 863 (1956) (determining that the Public Utilities Commission "is a regulatory body of constitutional origin and derives its powers from the Constitution and the Legislature"); Motor Transit Co. v. Railroad Comm'n of Cal., 189 Cal. 573, 581, 209 P. 586, 589 (1922) (holding that regulation of public utilities are a proper exercise by the State of its police power and when the power is exercised, all phases of operation of such utilities become at once subject to the state's police power).

5. CAL. CIV. CODE § 3333 (West 1970); *see id.* (explaining that for the breach of a non-contractual obligation the measure of damages is the amount which accounts for all the detriment proximately caused, unless otherwise expressly provided); *see also id.* §§ 3333-3343.7 (West 1970 & Supp. 1995) (setting forth the damages for wrongs in various situations; for example, the negligence of health care providers, wrongful occupation of real property, willful holding over of real property, conversion of personal property, injuries to animals, and fraud in the purchase, sale, or exchange of property).

6. *See* 1995 Cal. Legis. Serv. ch. 979, sec. 1(a), at 5782 (declaring the title of the act).

7. *See* CAL. GOV'T CODE § 8670.3(f) (West Supp. 1995) (defining "oil" as any petroleum, liquid hydrocarbons, or petroleum products and providing a non-exclusive list of those products); *see also* CAL. CIV. CODE § 3333.4(l) (enacted by Chapter 979) (describing "fraction of crude oil" as "a group of compounds collected by fractional distillation that condenses within the same temperature band, or a material that consists primarily of such a group of compounds, or of a mixture of such groups of compounds").

8. *See* CAL. CIV. CODE § 3333.4(m)(3) (enacted by Chapter 979) (defining and describing a "pipeline system" as a construction through which crude oil moves in transportation).

9. *Id.* § 3333.4(a) (enacted by Chapter 979); *see id.* § 3333.4(c) (enacted by Chapter 979) (listing the damages for which a pipeline corporation is liable under this section, including: "(1) all costs of response, containment, cleanup, removal, and treatment, including, but not limited to, monitoring and administration costs; (2) injury to, or economic losses resulting from destruction of or injury to, real or personal property; (3) injury to, destruction of, or loss of, natural resources, including, but not limited to, the reasonable cost of rehabilitating wildlife, habitat, and other resources and the reasonable cost of assessing that injury, destruction, or loss, in any action brought by the state, a county, city, or district; (4) loss of taxes, royalties, rents, use, or profit shares caused by the injury, destruction, loss or impairment of use of real property, personal property, or natural resources; and (5) loss of use and enjoyment of natural resources and other public resources or facilities in any action brought by the state, county, city, or district"); *see also id.* § 3333.4(m)(2) (enacted by Chapter 979) (defining "owning" as the legal entity owning the pipeline system itself but not including those entities holding an ownership interest in the entity owning the pipeline system or multiple pipeline systems); 1995 Cal. Legis. Serv. ch. 979, sec. 1(b), at 5782-83 (declaring the legislative intent for Chapter 979 and recognizing both the economic importance of crude oil and the hazards of oil pipelines); *id.* sec. 1(c), at 5783 (noting that in order to mitigate the risks and hazards of public utility oil pipeline operation, the responsibility for preventing, abating, and remediating oil spills from pipelines and the pipeline corporation's absolute liability for damage caused by such spills should be clarified; thus, to ensure that pipeline corporations have the ability to fulfill these obligations financially, it is necessary to require that specified evidence of financial responsibility be provided); *id.* sec. 1(d), at 5783 (noting further that financial responsibility evidence should continue to be maintained to cover risks posed by the pipeline and related facilities following the cessation of operation until the pipeline's closure and the cleanup of releases from the pipeline have been determined to be satisfactory by the State Fire Marshal). *See generally* 42 U.S.C.A. § 9607 (West Pamphlet 1995) (discussing liability and compensation when hazardous substances are released).

10. CAL. CIV. CODE § 3333.4(h) (enacted by Chapter 979); *see id.* (listing the pipeline systems for which this section is applicable, including: (1) the pipeline system proposed by Pacific Pipeline System, Inc., identified in PUC Application No. 91-10-013, for which the maximum requirement of \$100 million shall apply; (2) any other public utility pipeline system for which completion of construction will occur on or after January

corporations are not liable in certain circumstances.¹¹

Chapter 979 further requires pipeline corporations to immediately clean up all crude oil, or any fraction thereof, that leaks or is discharged from a pipeline.¹²

Furthermore, Chapter 979 authorizes a court to award reasonable, attorneys' fees and costs, including the expense of any expert witnesses necessary to the prevailing plaintiff.¹³ A court may also award reasonable costs of the suit, attorneys' fees, and the cost of any necessary expert witnesses to any prevailing defendant if the court finds that the plaintiff commenced or prosecuted the suit in bad faith or solely to harass the defendant.¹⁴

Although Chapter 979 does not apply to claims or causes of actions for damages for personal injury or wrongful death, Chapter 979 does not prohibit any party from bringing an action for damages under any other provision or principle of law, including, but not limited to, common law.¹⁵ Lastly, Chapter 979 prohibits pipeline systems from operating unless the State Fire Marshal certifies that the pipeline corporation demonstrates minimum financial responsibility to respond to potential liability in the amount of \$750 times the maximum capacity of the

1, 1996, other than a system subject to the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act; however, if only a part of a pipeline system is subject to the Act, any evidence of financial responsibility that satisfies that act, and that meets the conditions of this section, must be credited toward this section's requirements; and (3) any major relocation of three miles or more of a pipeline system accomplished through eminent domain; however, this section is inapplicable to portions of the pipeline not relocated).

11. *Id.* § 3333.4(b) (enacted by Chapter 979); *see id.* (stating that a pipeline corporation is not liable to an injured party under California Civil Code § 3333.4 for any of the following reasons: (1) damages, other than removal costs incurred by the state or a local government due to an act of war, hostilities, civil war, or insurrection or by a natural disaster or other calamity of an exceptional and inevitable character—aside from an earthquake—where damages could not have been prevented or avoided by the exercise of due care or foresight; (2) damages caused by negligence, intentional wrongdoing, or by the landowner's criminal conduct (including the agent, employee or contractor of the landowner) upon whose property the pipeline system is situated; (3) except as provided by California Civil Code § 3333.4(b)(2), damages caused by the negligence or intentional conduct of the person; (4) except as provided by California Civil Code § 3333.4(b)(2), damages caused solely by the criminal act of someone other than the pipeline corporation or one of its agents or employees; (5) natural seepage from other sources than the public utility pipeline; and (6) damages that arise out of, or are caused by, a state or federally authorized discharge); *id.* § 3333.4(i) (enacted by Chapter 979) (declaring that California Civil Code § 3333.4 does not apply to the following: (1) a pipeline system constructed before January 1, 1996, that is converted to a public utility prior or after that date; and (2) a public utility pipeline system not already subject to this section, that is undergoing repair, replacement or maintenance, unless such work is for relocation purposes).

12. *Id.* § 3333.4(e)(1) (enacted by Chapter 979); *see id.* (noting that the pipeline corporation must abate as soon as practical any effects of the leak or discharge and take any other remedial action, as necessary); *see also id.* § 3333.4(e)(2) (enacted by Chapter 979) (permitting a pipeline corporation to recover costs for the circumstances listed in California Civil Code § 3333.4 for which it is not at fault by means of other available causes of action, including indemnification or subrogation). *See generally* CAL. CORP. CODE § 25505 (West 1977) (allowing corporations, in certain circumstances, the right of indemnification for civil liability).

13. CAL. CIV. CODE § 3333.4(d) (enacted by Chapter 979).

14. *Id.*

15. *Id.* § 3333.4(f), (g) (enacted by Chapter 979); *see id.* § 3333.4(g) (enacted by Chapter 979) (noting that damages shall not be awarded pursuant to California Civil Code § 3333.4 if the injured party has been awarded damages for the same injury under another provision or principle of law).

pipeline measured by the number of barrels per day.¹⁶ The maximum financial responsibility required by the State Fire Marshal is up to \$100 million per pipeline system, or a maximum of \$200 million per multiple pipeline system.¹⁷

COMMENT

In 1990, the California Legislature enacted the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act,¹⁸ which makes the owners and transporters of oil strictly liable for damages caused by the discharge or leaking of oil into marine waters.¹⁹ However, no comparable strict liability law was imposed for

16. *Id.* § 3333.4(j)(1) (enacted by Chapter 979); *see id.* § 3333.4(j)(2) (enacted by Chapter 979) (declaring that for the purposes of this section, financial responsibility must be shown by evidence that is substantially the same as that necessary under California Government Code § 8670.37.54); *id.* (instructing that the State Fire Marshal will require the documentation evidencing financial responsibility to be placed on file with that office, and will allow financial responsibility to be available for payment of claims for damages of any party, including, but not limited to, the State of California, local governments, special districts, and private parties, that obtain a final judgment against a pipeline corporation); *id.* § 3333.4(k) (enacted by Chapter 979) (stating that the State Fire Marshal requires proof of financial responsibility to cover postclosure cleanup costs; furthermore, this evidence of financial responsibility must equate to 15% of the total amount of financial obligations, and must be maintained by the pipeline corporation for four years after the pipeline is fully idled pursuant to an approved closure plan); *cf.* CAL. GOV'T CODE § 8670.37.53(a) (West Supp. 1995) (requiring vessels carrying oil to demonstrate the financial ability to pay at least \$750 million for any damages caused, and this requirement rises to \$1 billion on January 1, 2000). *See generally id.* § 8670.37.54(a) (West 1992) (discussing how financial responsibility may be demonstrated).

17. CAL. CIV. CODE § 3333.4(j)(1) (enacted by Chapter 979).

18. *See generally* CAL. GOV'T CODE §§ 8574.1-8574.10, 8670.1-8670.72 (West 1992 & Supp. 1995); CAL. PUB. RES. CODE §§ 8750-8760 (West Supp. 1995) (setting forth the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act).

19. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 1 (Apr. 19, 1995); CAL. GOV'T CODE § 8670.56.5(a) (West 1992); *see id.* § 8670.56.5(b) (West 1992) (noting that a responsible person is not liable to an injured party under the act for any of the damages caused under specified circumstances); *see also id.* § 8670.3(h) (West Supp. 1995) (defining "marine waters" as waters subject to tidal influence, but excluding the Sacramento-San Joaquin Delta waters upstream from a line travelling north to south through the point where Contra Costa, Sacramento, and Solano Counties meet); *id.* § 8670.3(o) (West Supp. 1995) (defining "responsible party" as either of the following: (1) "the owner or transporter of oil or a person or entity accepting responsibility for the oil"; or (2) "the owner, operator, or lessee of, or person who charters by demise, any vessel or marine facility, or a person or entity accepting responsibility for the vessel or marine facility"). *See generally Chevron to Clean Pipe Leak*, L.A. TIMES, Mar. 13, 1995, at D4 (quoting Chevron which stated it would take full responsibility for cleaning up the approximately 200 barrels of crude oil blend that was released from a break in a pipeline into the Los Gatos Creek in Kettleman City, California); David Haldane, *Oil Firm, Industry to Pay Spill Settlement*, L.A. TIMES, Feb. 8, 1995, at B11 (discussing a 1990 oil spill off Huntington Beach which ruined 15 miles of beaches, caused environmental damage, and killed birds and marine animals); Jeff McDonald, *Texaco OK's Settlement Over Spills*, L.A. TIMES, July 19, 1995, at B1 (commenting that Texaco settled a civil lawsuit for \$195,000 for a crude oil spill of thousands of gallons which tainted western Ventura County streams); Jeff McDonald & Julie Fields, *Cleanup Crews Also Battling Oil Leaks*, L.A. TIMES, Mar. 16, 1995, at B1 (reporting that storms in Ventura County helped cause nearly 2,000 gallons of crude oil to leak into the mountains looming above the Ventura River); Thomas S. Mulligan & Michael Parrish, *Exxon Ordered to Pay \$5 Billion for Oil Spill*, L.A. TIMES, Sept. 17, 1994, at A1 (discussing the \$5 billion jury award against Exxon for the 11,000,000 gallons of crude oil spilled into Alaska's Prince William Sound on March 24, 1989); *id.* (noting that the spill caused fish, ducks, and sea lions to become scarce, and thus prevented natives from practicing subsistence fishing and hunting methods that have been practiced for thousands of years); Lee Romney, *Unocal Oil Spill Produces a Sticky Mess in Fullerton*, L.A.

damages caused by oil spilled while being transported on land.²⁰

Pacific Pipeline, a limited liability company, has been organized by major oil companies²¹ to build and operate an oil pipeline that will run from southern Kern County to Wilmington, Carson, and El Segundo, California.²² Since the pipeline is a public utility, it is authorized to secure its right-of-way by eminent domain²³ through any private property through which it will pass.²⁴

Chapter 979 was sponsored by Tejon Ranch, through whose property the pipeline would pass.²⁵ Tejon Ranch argued that since the federal Superfund law²⁶

TIMES, July 12, 1995, at B4 (discussing the 200 gallons of crude oil that leaked from a Unocal oil field in July 1995).

20. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 1 (Apr. 19, 1995).

21. See SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 6 (July 25, 1995) (listing the four owners of Pacific Pipeline as Chevron, Unocal, Texaco, and Anschutz Company).

22. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 1 (Apr. 19, 1995); see SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 6 (July 25, 1995) (noting that the proposed Pacific Pipeline will carry crude oil 132 miles from Kern County to refineries in the Los Angeles-South Bay area); *id.* (stating that the proposed Pacific Pipeline route will pass through mainly industrial areas along the Southern Pacific railroad's right of way; furthermore, the route will parallel Interstate 5); *id.* (commenting that the pipeline is intended to replace the method of transporting crude oil from Kern County to Los Angeles refineries, which involves 50,000 tanker truck trips per year, half-mile long oil trains, and old pipelines).

23. See BLACK'S LAW DICTIONARY 523 (6th ed. 1990) (defining "eminent domain" as the power to take private property for public use by the state, municipalities, and private persons or corporations authorized to exercise functions of public character).

24. CAL. PUB. UTIL. CODE § 615 (West 1975); see *id.* (authorizing a pipeline corporation to condemn any property necessary for the construction and maintenance of its pipeline); *cf.* MD. ANN. CODE art. 23, § 341A(b) (1994) (stating that an oil pipeline corporation which is operating pipelines in Maryland may attain by eminent domain any property necessary for the operation of those pipelines and appurtenances or necessary for the construction and operation of additional oil pipelines along, on, adjacent to, or incidentally deviating, from routes within its established rights-of-way); OKLA. STAT. ANN. tit. 52, § 9 (West 1991) (authorizing all domestic gas pipeline corporations in Oklahoma to build, operate, and to acquire, by purchase or by eminent domain, sites for pumping stations in Oklahoma wherever necessary, with consideration being given to the size, capacity, pressure, facilities and powers of all other possibly affected gas pipeline corporations, consumers, and producers); TENN. CODE ANN. § 65-28-101 (1993) (declaring that a pipeline corporation has the right to appropriate as an easement or right-of-way lands necessary for its pipelines, lands, and rights in land, for the development, construction and operation of underground storage reservoirs for natural gas, and lands for pump stations and terminal facilities over any lands of any person or corporation through which a pipeline may be located); WASH. REV. CODE ANN. § 81.88.020 (West 1962) (noting that the power of eminent domain is conferred for acquiring rights of way for common carrier pipelines and the pipeline corporations have the right to condemn and appropriate lands and property under the same procedure as is provided for condemnation and appropriation by railway companies, but clarifying that no private property shall be taken or damaged until compensation has been made); WIS. STAT. ANN. § 32.03(2) (West 1989) (allowing any railroad corporation or pipeline corporation to acquire by condemnation lands or interest which are held and owned by another railroad corporation or pipeline corporation; moreover, in the case of a pipeline corporation no such land shall be taken except for crossing or in such manner as to interfere with or endanger railroad operations).

25. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1868, at 2 (June 1, 1995).

26. See generally 42 U.S.C.A. §§ 9601-9675 (West 1983 & Pamphlet 1995) (setting forth the federal Superfund law, which is the common name for the Comprehensive Environmental Response Compensation and Liability Act (CERCLA)); *id.* (authorizing the federal government to impose liability upon parties involved with a release or a threatened release of a hazardous substance).

and the California Carpenter-Presley-Tanner Hazardous Substance Account Act²⁷ both expressly exclude crude oil and its fractions from strict,²⁸ vicarious,²⁹ and joint and several liability,³⁰ there was no law which addressed liability for cleanups or damages involving crude oil spillages.³¹

Furthermore, Tejon Ranch also maintained that landowners were unable to bargain with the pipeline corporations to assure that their property is adequately protected from spills, because as a public utility, Pacific Pipeline has the authority to demand a right-of-way across Tejon Ranch's land by eminent domain.³²

Thus, Chapter 979 was enacted to require pipeline corporations to be held legally and financially responsible for damages caused by oil pipeline spills.³³ Although Pacific Pipeline carries some insurance, the sponsor of Chapter 979

27. See generally CAL. HEALTH & SAFETY CODE §§ 25300-25395 (West 1992 & Supp. 1995) (setting forth the California Carpenter-Presley-Tanner Hazardous Substance Account Act); *id.* § 25301 (West 1992) (declaring the purposes of the California Hazardous Substance Account Act as establishing a program to provide for response authority for releases of hazardous substances, compensating certain persons for expenses resulting from injuries caused by exposure to released hazardous substances, and making funds available in order to permit California to pay its 10% of the costs mandated by federal law).

28. See BLACK'S LAW DICTIONARY 1422 (6th ed. 1990) (defining "strict liability" as liability without fault).

29. See *id.* at 1566 (defining "vicarious liability" as the imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons).

30. See *id.* at 837 (defining "joint and several liability" as the liability of joint tortfeasors, *i.e.*, liability that an individual or business either shares with other tortfeasors or bears individually without the others).

31. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1868, at 2 (June 1, 1995); see *id.* (quoting Tejon Ranch in the following statement: "Congress and the California Legislature have woven an elaborate statutory quilt to address liability for the environmental harm that often results from the release of hazardous substances. Nevertheless, a regulatory void exists with respect to personal injuries, property damage, damage to natural resources and consequential damages caused by spills or leaks from crude oil pipelines in upland environments"); see also 42 U.S.C.A. § 9601(14) (West Pamphlet 1995) (stating that the term "hazardous substance" does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance); CAL. HEALTH & SAFETY CODE § 25317(a) (West 1992) (defining "hazardous substance" to include crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance, but excluding petroleum). See generally Robert N. Aguiluz, *Refining CERCLA's Petroleum Exclusion*, 7 TUL. ENVTL. L.J. 41 (1993) (discussing the legislative, administrative, and judicial history of CERCLA's petroleum exclusion); Robert B. McKinstry, Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation, and Liability Act*, 5 VILL. ENVTL. L.J. 83, 84-85 (1994) (listing the states that have some version of a Superfund law); *id.* at 85 (stating that the states' own Superfund laws were enacted to enable states to fulfill their statutory responsibilities under CERCLA); William B. Johnson, Annotation, *Determination Whether Substance Is "Hazardous Substance" Within Meaning of § 101(14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9601(14))*, 118 A.L.R. FED. 293 (1994) (analyzing federal cases in which courts have discussed the question whether particular wastes were "hazardous substances" within the meaning of § 101(14) of CERCLA).

32. ASSEMBLY JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 2 (Apr. 19, 1995); see *id.* (stating that because public utilities have eminent domain rights, "landowners cannot demand, as a condition of granting permission to cross their land, that they be assured by the public utility that they will have adequate recovery in the event of an oil spill").

33. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1868, at 2 (May 24, 1995); see *id.* (commenting that supporters of AB 1868 believe that protection will be provided from companies who may attempt to escape liability through a series of financial and legal structures); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1868, at 2 (June 1, 1995) (stating that the sponsor of AB 1868 argues that it is not enough to make Pacific Pipeline liable because it is a limited liability company—an organization set up to protect owners from liability, including those related to environmental disasters).

believes that if a major oil spill should occur, the amount of aggregate coverage is totally inadequate.³⁴

Opponents of Chapter 979 argued that the responsibility of spills should be with the facility operators or those causing the accident.³⁵ Furthermore, opponents argued that sufficient protection exists for damages as a result of any spills.³⁶

Although there is liability under the common law for oil pipeline spills, there are several limitations on this liability.³⁷ First, owners of pipelines are probably not found to be strictly liable without an assessment of fault.³⁸ Even though there are no California cases on this subject, under general principles of law, strict liability can be used only if transporting oil through a pipeline is considered to be an "ultra-hazardous" or "abnormally dangerous" activity.³⁹ Secondly, even if pipeline owners are found liable for a spill, the damages recoverable are limited under common law.⁴⁰ Lastly, due to the fact that pipelines are usually owned by corporations organized for the specific purpose of operating the pipeline, the pipeline owner often does not have the resources to pay for a spill.⁴¹

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34. ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF AB 1868, at 2 (June 1, 1995); *see id.* (noting that many of Pacific Pipeline's policy exclusions make potential recovery difficult in many spillage scenarios; furthermore, the lending institutions financing the pipeline have first priority in the event of damage).

35. ASSEMBLY COMMITTEE ON APPROPRIATIONS, COMMITTEE ANALYSIS OF AB 1868, at 2 (May 24, 1995).

36. *Id.*

37. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 7 (July 25, 1995).

38. *Id.*

39. *Id.*; *see id.* (noting that strict liability is clearly specified for marine oil transporters because of the uncertainty of whether their activities are considered "ultra-hazardous"). Compare RESTATEMENT (SECOND) OF TORTS § 519 (1977) (proposing strict liability for "abnormally dangerous" activity) with RESTATEMENT OF TORTS § 519 (1938) (urging strict liability for an "ultra-hazardous" activity). *See generally* RESTATEMENT (SECOND) OF TORTS § 520 (1977) (listing six factors to be considered in determining whether an activity is "abnormally dangerous": (1) the existence of a high degree of risk of some harm to the person, land or chattels of others; (2) the possibility that the resulting harm will be great; (3) the inability to eliminate the risk even if reasonable care is used; (4) the extent to which the activity is not a "common usage"; (5) the inappropriateness of the activity to the location where it occurs; and (6) the extent to which its societal value is outweighed by its dangerousness); RESTATEMENT OF TORTS § 520 (1938) (defining an activity as "ultra-hazardous" if it "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage"); *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 662 F. Supp. 635, 644 (1987) (holding that shipping acrylonitrile, a flammable and toxic chemical, through a residential Chicago area was an "abnormally dangerous" activity within the meaning of the Restatement (Second) of Torts § 520, and thus the defendant was strictly liable for a chemical spill).

40. SENATE JUDICIARY COMMITTEE, COMMITTEE ANALYSIS OF AB 1868, at 7 (July 25, 1995); *see id.* (suggesting that economic and natural resources damages, and the costs of measuring such damages are most likely not recoverable under the common law).

41. *Id.*