Law Offices of Harry V. Lehmann PC

Harry Vere Lehmann
Principal Attorney

4 Vineyard Court
Novato, California 94947

Area Code 415
Telephone: 897-2121
Facsimile: 898-6959

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Ms. Jennifer Galehouse, Deputy Chief Consultant
Assembly Appropriations Committee
State Capitol, Room 2114
Sacramento, CA 95814
Via fax: 916-319-2181 &
Original via Federal Express

Dear Ms. Galehouse-

I was recently asked to comment on the following issue: "Assuming the liability of the subordinate agencies such as the counties and cities has been established, does this mean that the State of California will have liability for damages resulting from the installation of the same antennas which led to the county and municipal liability?" I would gladly meet with you and answer, to the best of my ability, any question that you might have, without any limitation. In the meantime this will letter will provide a skeletal overview of the many reasons why California will remain liable for injuries and damages, including to the cities themselves, if SB-649 were to be signed into law.

I decided in 2009 to devote a substantial portion of my days time to wherever my skills could do the most good for the largest number of people. Having been invited to attend by the epidemiologist Dr. Devra Davis, I attended the International EMF Conference in Stavanger, Norway, in late November of 2009. As a result of my background and request, at Stavanger I was allowed credentialed access at will to the presenting scientists, and later allowed to travel by sea ferry with them and lodge in mountains over Bergen. From scientific insights received from this experience, I concluded that my remaining time would be most efficiently spent fighting against the irradiation of the human population with cellular non-ionizing radiation. As a result I have worked primarily in that regard with most of my time for the past seven years, having closed my law office in very late 2015. This led to the formation Green Swan Inc. in 2010, for which I serve as CEO, and which is not focused on radiation from the wireless telecommunications base stations that SB 649 seeks to install statewide, but rather focused education and tools relating to radiation coming from the smartphones themselves. However, when the severity of risk presented by S-19 in the federal Senate was explained to me and later SB-649 I was morally compelled to oppose those Bills. I have utter confidence that the best lawyers the State has or can retain will agree with the seriousness of each issue treated here and in my letter of July 19th, but this is a skeletal overview based on the materials I have on hand, without the tools of active practice at hand: Several times in this presentation the position is urged that SB-649 should not go further forward in the Legislature without the prior obtainment of a comprehensive analysis by serious and trial-hardened State lawyers, or sufficiently experienced retained counsel.

Joint Venture Liability

Although the cities object to the installation of these cancer-generators onto the their utility poles, often on property rights grounds, it nonetheless remains certain that the State and the municipal entities under SB-649 will be engaged in a cooperative endeavor. There are many indicators of the cooperative nature of this endeavor, including the provisions of the Bill which provide mechanisms through which the pricing shall be established. As to Dangerous Condition of Public Property, there is no question at all but that the State of California has been given far more than ample Notice of the dangers which SB-649 will rain down upon us all.

In essence, although the cities and counties are in the position of being married in this endeavor as a result of a shotgun wedding, nonetheless they are wed. The State has given the order, and the municipalities in the instance of passage will be cooperatively engaged with the State and the execution of this ***Industry–contrived process***. It is well established that when individuals, or public entities, set out to do an act intentionally together, and injury results from that endeavor, Joint and Several liability will attach to both entities. Therefore as a result of Joint Venture, from a liability standpoint like any other Joint Venture, the State will be held liable for the actions of its co-venturer, the individual cities and counties involved. A lawyers' holiday !

Therefore the State will be found liable on the basis of it's engagement in a Joint Venture with the cities. It is pertinent to keep in mind that under the rules of Joint and Several Liability, if the State is found to have contributed by even 1% to the liability pie chart, the State is responsible financially for the entire damages resulting therefrom from this Joint Venture.

It is an inevitable procedural development that each of these local entities, once sued by a party claiming damage (including via Inverse Condemnation from a private party, such as an apartment building owner for diminution of value), will file and serve a Cross-Complaint For Indemnification against the State of California.

Joint Liability for the Concurring Acts of Independent Tortfeasors.

An agreed Joint Venture is not the sole method upon which two parties may be found responsible, even when they did not set out together in a common plan. The classic example of this, Summers v. Tice 33 Cal.2d 80, 199 P.2d 1 (1948), is still taught in Torts classes and modernly still cited in Law & Motion pleadings. Summers v. Tice is well known, even to first year law students, as 'the shotgun case.' In that case, the plaintiff was out in the middle of a field when two independent hunters shot at game birds from different sides of that field. The hunters discharged their respective shotguns at the same time, neither one of them, independently, being careful enough to take into account that the plaintiff Tice was out in the middle of that very same field, hunting himself. Tice caught a shotgun pellet in the eye and another in the face, causing serious injury. ***The Court held that the concurring negligent acts of independent tortfeasors will result in the joint liability of each such defendant for the entire damages involved***. Thus for example, if one of these shotgun–wielding hunters was without funds, then the other tortfeasor is left to pay for the entire damages resultant from the concurring negligent actions of each and both.

Here, the State, despite overwhelming evidence showing that the microwaves involved are carcinogenic, nonetheless forces a multi-axial saturation by radiation upon the citizenry, and the county and municipal entities. Here, as in Summers V. Tice, both the state and the municipal entities will be found jointly and severally liable. However, the practical reality is that the State has a lot more money than any of these municipalities, which are likely enough to be bankrupted in some, many, or all instances as a result of the magnitude of harm which is to be inflicted as result of the passage of SB – 649.

The State's Exposure via Inverse Condemnation

CA SB-649 is opposed by more than 210 cities. Each public entity, in some instances independently, and in other instances through retained advocates, has by repeated objection to SB-649, preserved the position that the local entities involved have 'exhausted administrative remedies.' So, for example, when the League of Cities comes before Committee(s), and even in short words expresses its objection on behalf of its members, this is enough to show that the entities involved tried in good faith to stop the Bill - those brief objections in Committee provide pitons for the cities as they climb into action against S-19. Through such exhaustion of remedies, rights are preserved, including for Dangerous Condition of Public Property. These local entities have properly protected ***all*** of their rights.

Inverse Condemnation is typically where *private property* is wrongfully damaged in the course of a governmental undertaking and the constitutional eminent domain provisions allows a recovery from the responsible governmental entity. Here, as they relate to the State regarding their ownership of the poles, the municipalities are in the exact role of a separate owner of private property, the city testimony illustrates this in the repeated focus on property rights. Additionally, many poles are in private ownership, such as poles owned by PG&E. So as not to ignore this 'private property,' issue: *The State cannot argue that the cities do not have this separate and independent stature to privately own property vis a vis the State, because to so would acknowledge the cities as mere subordinate creatures of the State itself, which would by itself prove State liability on every theory*. It is noted in passing that Inverse Condemnation can even be brought where the person or entity involved has not even previously filed a Claim, an exception to the generally prevailing law. Even a late claim will not stop an Inverse Condemnation suit, unless the governmental entity can prove prejudice.

We all have a general understanding of Condemnation: The government, or more recently a corporation having governmental friends and a project of supposed public good, can seize property, like Mr. Bush's group seized the stadium grounds in Texas for the Rangers baseball team. Here in California we have a substantial compensation system for Condemnation ***which provides for the award of attorneys fees and engineering fees and professional appraisal fees, to the person or entity whose property was seized by the Condemnation involved***. The law provides reimbursement, as a practical matter often near the higher end of market values, for entities whose property is taken by the State.

There is no serious legal or Constitutional question but that the operation of SB-649, when implemented, is a 'Taking,' within the meaning of the Constitutions of both California and the federal government. Just consider the "Before and After,' situation: **Before**: The

cities and counties and/or service districts ***own*** their poles, albeit very heavily regulated by the CPUC, a point of importance mentioned later. Each such entity, as compensation for the use of the pole(s) involved can 'charge what the market will bear." **After**: The cities and counties affected by SB-649 no longer 'own,' their poles, because ***they can no longer insist upon their own valuation standards for what used to be their property***. This is so clearly a Taking that no serious experienced governmental claim lawyer will dispute that conclusion, and anybody who does is toying with you. It is noted as a matter of fairness that the limited protections from the installation of these devices in historical zones will tend to protect the-well-to-do, as there is little chance that public housing facilities will be viewed as historical.

Inverse Condemnation is the alternative provided in our legal system for situations where the Taking by government occurs prior to any formal Condemnation procedures. There are situations where this come up where the operation of a governmental program or project damages the property of another. One handy way for you to test the accuracy of an ultimate position taken here is simply to ask a deeply experienced trial lawyer with a lot of governmental litigation experience whether I am right or not.

Here, as illustrated best by the universal opposition of cities and counties, there is no serious question but that the deployment of the antennas contemplated in SB-649 is a *mandatory* California State program. That this is a mandatory compliance mandate of the State of California is self-evident in SB-649, underlined by the cities' opposition. This utility pole Taking is a State of California program on its face and California acts from a position of considerable regulatory control over utility poles, see for example A Brief Introduction to Utility Poles, a 27-page outine produced under the auspices the California Public Utilities Commission.

http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/About_Us/Organization/Divisions/Policy_and_Planning/PPD_Work/PPDUtilityPole.pdf

Further, the fact that the under SB-649 State has gone so far into control of the financial details by itself demonstrates further that this is a situation of direct State liability in Inverse, see for example the testimony below from the SF-PUC, emphasis in red is mine:

> **1:24:16 in the 7/12/17 Assembly Communications and Conveyance Video:**
> "Don Gilbert for San Francisco PUC: We have no quarrell with the industry or the technology. We hold both in high regard. This is not about that. One thing that hasn't come up is the fact that under this Bill, SF-PUC negotiated in 2014 a master license agreement with the Carriers that covers all the issues in the bill: design, fee, etcetera. Like almost every agreement like this in the state, it has a termination provision so that the elegant way this bill is going to work is: the Carriers on January 1 2018 will terminate the agreement and they will superimpose the terms of this legislation, which they are allowed to do, in place of this agreement. That doesn't seem right to us. We negotiated an agreement with

the carriers. They rely on contracts to conduct their business. We have a contract here that will be blown up and the terms, if passed by this body, this body will decide what those terms are. We just don't think that's right. Also, I have read all of the analyses of every committee of this Bill, including this one and I may be mistaken and I don't recall any third party validation for the proposition that 5G cannot be successfully rolled out without this Bill because that's the implicit argument for the bill: we have to have this Bill to roll out 5G, to get all of those economic benefits. We agree there are economic benefits. We don't agree that you need this bill to get there. Lastly, Mr. Chair, I just want to thank you and the Committee for a very fair process. Much appreciated."

The State of California will lose the many Inverse Condemnation cases filed on behalf of the municipalities, etc., however severally consolidated, and not: Where cities, counties and service districts sue the State for lost revenue or diminution of value from the Inverse Condemnation of their poles by the State of California, they will win. However, long before the final decisions awarding damages, the State will experience hemorrhagic financial bleeds for the many teams of lawyers and experts that California will be forced to field. There will be ***massive defense expenses*** even before the ultimate award of damages, attorneys fees, appraisal fees, and expert witness fees for scientific & engineering testimony.

Whereas it would be normal for the State to fight Certification of Classes in this situation, the State might well not fight hard on that this time, in the hope that the resulting consolidation(s) will save fees. Also, a Coordinated Action, as was the case in the Yuba Flood Cases is possible. However even the extent to which consolidation of suits will occur, will itself involve protracted litigation at massive expense; considering, for one example, that the proper venue for a matter involving a real estate property claim is normally the county in which the subject property is located, just one of the several barriers to statewide consolidation of these suits.

<u>Ask Your Lawyers, including about preemption under the new U. S. Senate passage of S-19</u>

One way of getting a good feel for the State's liability in this instance of the passage of SB-649 is for you to ask three separate lawyers from separate institutions or firms, the following question: "Here is Mr. Lehmann's letter of July 19th, along with his letter of August 10th, please send me a report on your letterhead explaining why the State has no liability." Have trial-seasoned lawyers provide their views. Don't listen, on this, to lawyers who do not have major trial experience. The reasons that actually experienced trial lawyers should be found and/or retained to advise on this Bill is due to the tendency of the more purely academic to mistake idealistic intention for likely result.

In compliance with even a minimum standard of legislative care, that this Bill and its legal and financial consequences should be examined by your best trial-seasoned lawyers

prior to passage. An in-depth fully researched legal analysis would be a week-long project for a team made up of a trial-experienced lawyer, an solid Associate, and supported by a fine paralegal. ***SB-649 should be thoroughly examined by retained and State professionals prior to any passage, due to the previously hidden seriousness of the legal an health issues***.

As a sudden example of a new legal element urgently requiring legal analysis prior to any vote by the Assembly: We've had very bad news on August 4th, and the news is deadly serious. Federal Senate Bill, S-19, which had been on Hold since late March, was just suddenly passed, by Unanimous Consent in the Senate ***without a hearing***. The argument will be made that this will result in total federal preemption, rendering the SB-649 fight moot. I elect not to take a position on that issue here, but S-19 will be argued to contain 'occupy the field,' preemptive language. ***It would be foolhardy at great legal expense to send this Bill to the Governor without, in addition to legal-financial liability analysis, an analysis of this suddenly-pertinent preemption question.*** For this unfortunate ***and sudden*** reason alone, claimed federal preemption, this Bill should not be passed by the Assembly this term.

Respondeat Superior: Liability based on Agency relationship.

The municipal and county governments of the State of California appear to be uniform in their objection to the passage of SB – 649. The opposition of the municipal and county governments to this Bill has been evident at every hearing so far on this, growing in scope, both in the Senate and in the Assembly committee hearings that have so far taken place. Therefore, it is obvious that the counties and cities, if they are forced to comply with the provisions of SB – 649, will be doing so involuntarily. This will be correctly noted by plaintiff's counsel in these cases to show the existence of an Agency relationship, and which the State is the Principal, and the local entities are the mirror Agents of the state. While doubtless many hundreds of pages could be recited to demonstrate the core legal principle that a principal is responsible for the acts of its Agent, suffice to say that ordinary common sense ideas also apply: for example, if a plaintiff is injured as the result of negligent driving by the driver of a truck owned by a large company, in course and scope of the driver's employment, it is exceedingly well established in the law that the principal (in that instance the company) the company is responsible for the negligence of the driver. The same thing clearly applies here, the municipalities are acting, albeit involuntarily, as agents of the State, and because of that ***Agency*** the State is responsible for the damages caused by the Stat –ordered melding of cellular antennas into the public utility poles.

The State has indirect liability for Inverse Condemnation in the instance of a third party claim against a municipality: The State has direct Joint Venture liability: The State has Joint and Several Liability because the concurring acts of separate negligent tortfeasors results in Joint liability for both: The State has direct liability for Inverse Condemnation: The State has liability based on Agency. In addition, there are Non-Delegable Duty issues here which, while beyond the scope of this letter for me to treat fully, in summary mean that the State cannot delegate away its responsibility to avoid injury to its residents from its activities.

Cordially,

Harry V. Lehmann