California Ruling Could Shift Fire Suppression Costs

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Temperatures are rising, and wildfire season has already begun across much of California. The 2020 fire season outlook from the California Department of Forestry and Fire Protection, or Cal Fire, anticipates an above normal potential for large fires, and the possibility of an earlier than usual grassfire season.

Meanwhile, coronavirus social distancing demands are creating a new challenge for firefighting agencies across the state. 2020 is shaping up to be another challenging year.

Against this backdrop, the California Supreme Court is now considering whether corporations can be held liable to pay the costs of investigating and fighting certain human-caused fires. Earlier this year, the court unanimously granted a petition for review of the Second District Court of Appeal's 2019 decision in Presbyterian Camp and Conference Centers Inc. v. Superior Court.[1]

The question before the court is: Can a corporation be held liable under Health and Safety Code Sections 13009 and 13009.1 for the costs of suppressing and investigating fires that its agents or employees negligently or illegally set, allowed to be set, or allowed to escape?

Health and Safety Code Sections 13009 and 13009.1 establish liability for "any person [who] negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property."[2] That liability includes the cost of fire suppression, providing emergency medical services, investigating and filing reports on the fire, and accounting for and collecting funds.

The appellate court in Presbyterian Camp and Conference Centers considered who could be held liable for the costs of responding to the 2016 Sherpa Fire, which ultimately burned nearly 7,500 acres in Santa Barbara County.

Could it only be the camp employee who allegedly ignited the fire by removing a burning log from a fireplace with a malfunctioning chimney, and carrying it over dry vegetation? Or could the camp and conference center operator also be liable, for allegedly failing to (1) clear dry vegetation near at least one of its cabins; (2) maintain the chimney; and (3) inspect and maintain fire safety devices?[3]

The court decided that the camp and conference center operator could be held vicariously liable, holding that corporations are persons within the meaning of Sections 13009 and 13009.1 — and, therefore, recovery of covered costs is available from a corporation where one of its agents or employees "negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by [them] to escape onto any public or private property."[4]

In so holding, however, the Presbyterian Camp court disagreed with the Third District Court of Appeal's 2017 opinion in Department of Forestry and Fire Protection v. Howell,[5] triggering an appellate split and the Supreme Court's interest in the case. Howell involved the 2007 Moonlight Fire that burned approximately 65,000 acres in Plumas County.

The state's post-fire investigation determined that the fire began when a timber harvester's bulldozer struck a rock and caused an ignition that spread to nearby vegetation. Although the fire started on private property, it spread to public land and required public firefighting resources to extinguish.

In the wake of the fire, Cal Fire, along with an insurance association and multiple landowners, sued the timber harvesting contractor, its employees, the timber purchaser that contracted with the timber harvester, the landowners where the fire arose, and their land manager, to recover costs under Sections 13009 and 13009.1.

Affirming the trial court, the appeals court, in a 2-1 decision, insulated the defendants that did not actually start the fire in question, including the landowners, their land manager and the timber purchaser, from liability resulting from the actions of the contractor hired to cut timber.

In its decision, the court focused on the use of "any person" in Sections 13009 and 13009.1, as opposed to "[a]ny person who personally or through another" in Section 13007, and on the statutes' legislative history, to conclude that:

> [N]either ... inclusion of the term "negligently" in sections 13009 and 13009.1 nor ... the statutory definition of "person" to include a corporation, incorporates common law theories of negligence into the statutes. And further ... sections 13009 or 13009.1 do not provide for vicarious liability.[6]

Justice Ronald Robie dissented from the decision in Howell. Asserting that the majority's decision "would result in corporations or companies never being held liable for fire suppression costs," he disagreed with the majority's interpretation of the statutes and analysis of their legislative history.[7]

Following in the footsteps of Justice Robie's dissent, the Presbyterian Camp court flatly contradicted the Howell court's holding that "any person" did not include corporations, and disagreed that the term "negligently" in Sections 13009 and 13009.1 made them unclear.

To the contrary, the Presbyterian Camp court held that:

> Whether the statutes permit corporations to be vicariously liable for the acts of their agents and employees hinges on the definition of "person," not "negligently."[8]

Further, the court agreed with Justice Robie's analysis of the statutes' legislative history, not with the conclusions reached by the Howell court.

Looking Forward

How the Supreme Court interprets Sections 13009 and 13009.1 to resolve this split in authority has the potential to trigger wide-reaching consequences for a variety of industries and landowners engaged in activities that could start wildfires — from forest managers to camp and conference center operators, and many businesses in between.

One need not look any further than the Camp Fire in 2018 that destroyed the community of Paradise; the Mendocino Complex Fire in 2018 that burned more of California than any fire in recorded history; the 2017 Thomas Fire that was, at the time, the state's largest wildfire, and which led to devastating mudslides; or the Tubbs Fire in 2017 that devastated Santa Rosa, to understand the terrifying potential of wildfire and its dire consequences. Below we anticipate some of potential consequences of the court's decision.

Will the Supreme Court's decision affect wildfire liability for public utilities? While the Howell court did not directly consider whether its interpretation of Sections 13009 and 13009.1 would impact liability of public utilities for wildfire suppression and investigation costs, it did discuss County of Ventura v. Southern California Edison Co.,[9] where SCE was found liable under a predecessor statute that vested liability with:

> [a]ny person who: (1) [p]ersonally or through another ... commits any of the following acts: (1) [s]ets fire to, (2) [a]llows fire to be set to, (3) [a]llows a fire kindled or attended by him to escape to the property, whether privately or publicly owned, of another.

Referring to that case, the Howell majority saw the language of the statute — and the fact that SCE itself "failed to properly maintain its own equipment that directly caused the fire" — as determinative in why SCE was held liable.[10]

The Presbyterian Camp court disagreed with the Howell court's analysis, and criticized Howell's conclusion that a corporation could be a direct actor. Referring to the Ventura County decision, the court wrote:

> Corporations are never direct actors. The electric utility did not negligently construct and maintain its power lines; its employees did. The Howell majority's assertion that sections 13009 and 13009.1 permit corporate liability when corporations are "direct actors" is a legal impossibility.[11]

Cal Fire has and does seek reimbursement from public utilities for wildfire suppression and investigation costs. Since Sections 13009 and 13009.1 no longer include the "personally or through another" language that the Howell court found determinative in Ventura County, it raises the question whether the Supreme Court's adoption of the Howell rule would disrupt the state's ability to seek reimbursement from public utilities themselves, limiting recovery to their negligent employees or contractors alone. If the Supreme Court accepts the Presbyterian Camp rule, however, we would expect no change to the current regime.

Will forest restoration and management efforts be disincentivized under the Howell rule or the Presbyterian Camp rule? There is growing consensus in California that forest restoration activities — including but not limited to thinning overstocked forests and application of prescribed fire — are necessary to improve forest health and prevent the risk

of high-severity, catastrophic wildfire.

The Howell rule, if adopted by the Supreme Court, raises several issues and questions that companies and policymakers must grapple with. First, it carries the potential for increasing the costs of forest restoration work if, for example, contractors price increased liability into their bids or pass along the costs of additional liability insurance to their clients.

Second, the government can expect lower recoveries in the case of a negligently caused wildfire, because those held liable are unlikely to have the deep pockets of their employers. This, in turn, could require the public to bear costs that some will argue should be attributed to the corporation.

Third, the Howell rule may also have a chilling effect on the desire of employees and contractors to participate in forest management activities. It also raises questions for employers and employees — for example: Is it wise for employees engaged in activities like prescribed burning to carry errors and omissions insurance? Should employers bear the cost of insurance or otherwise indemnify their employees and contractors?

Likewise, the knock-on effects of the Presbyterian Camp rule on forest management activities are uncertain. On the one hand, the Presbyterian Camp rule might carry the risk of disincentivizing forest landowners from engaging in forest management and restoration activities if they make the calculation that active forest management is just too risky.

This, in turn, could have the unintended consequence of actually increasing the risk of wildfire. On the other hand, it is also possible that the threat of liability could actually incentivize landowners and corporate forest managers to increase forest restoration and resiliency efforts to reduce the risk of wildfire start and spread.

In response to many of these concerns, the California Legislature has been active in attempting to address potential liability associated with forest restoration activities, such as the use of prescribed fire. For example, S.B. 1260, signed into law in 2018, amended Public Resources Code Section 4494 to provide that compliance with a Cal Fire-issued burn permit constitutes prima facie evidence of due diligence.

No matter the Supreme Court's ultimate ruling, we expect to see additional focus by the Legislature on liability considerations that may hamper forest restoration efforts.

Conclusion

While the implications of the Supreme Court's forthcoming decision may take years to sort out, one thing is certain: The decision will cause a cascade of impacts, both on bottom lines and the landscape.

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[1] Presbyterian Camp and Conference Centers Inc. v. Superior Court (2019), 42 Cal.App.5th 148.

[2] H&SC §§ 13009(a); 13009.1(a).

[3] Presbyterian Camp, 42 Cal.App.5th at p. 152.

[4] Presbyterian Camp, 42 Cal.App.5th at p. 163 (citing Health & Safety Code §§ 13009(a)(1); 13009.1(a)(1)).

[5] Department of Forestry and Fire Protection v. Howell (2017), 18 Cal.App.5th 154, 180.

[6] Howell, 18 Cal.App.5th at p. 182.

[7] Howell, 18 Cal.App.5th at p. 206 (dis. opn. of Robie, J.). In 2018, the Supreme Court denied Cal Fire's petition for certiorari and request to depublish the Howell decision.

[8] Presbyterian Camp, 42 Cal.App.5th at p. 157.

[9] County of Ventura v. Southern California Edison Co. (1948) 85 Cal.App.2d 529.

[10] Howell, 18 Cal.App.5th at p. 180.

[11] Presbyterian Camp, 42 Cal.App.5th at pp. 162-163 (internal citations omitted).