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Craig S. Simon, managing partner of Berger Kahn in Orange County.

## Wildfire Suits Targeting Utilities

By Pat Broderick  
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Long after California wildfires have been contained, litigation can smolder for years.

Lawyers around the state are either preparing for trial or trying to mediate cases related to wildfires dating back to 2006, that destroyed thousands of acres of land and property, while homeowners, insurance companies and government agencies seek to recoup millions of dollars in losses.

Often it is the utilities defending these cases – laying the blame with Mother Nature or other causes outside of their control. Southern California Edison, for instance, is embroiled in litigation involving the Grass Valley fire in San Bernardino and the Malibu fires, both in 2007, and the Happy Camp blaze in Ventura County a year earlier.

Mediation is scheduled in August for the Grass Valley fire, with a trial date set in December 2011. Trial dates are set in November for the Happy Camp case. No trial date has been set for the Malibu fires.

The issues to be litigated include negligence, trespass, dangerous condition of public property and inverse condemnation due to the loss of access or value of fire-ravaged land – considered by the utility's lead defense counsel to be the toughest claim to fight.

"There are very limited defenses," said Friedrich W. Seitz, senior partner in the Los Angeles office of Murchison & Cumming, and chair of its product liability, business litigation and international practice groups, who is representing Southern California Edison but was not speaking on behalf of the utility. "The only defense is to show that the fire, which damaged your property, wasn't caused by the lines of the utility, but something else."

That's not easy, even if the utility is not negligent, he said.

"It puts the utility in the position where they have no defense, and they have to settle the cases," Seitz said. "Sooner or later, these costs are going to be spread."

John A. Girardi, in the Los Angeles office of Girardi Keese, which is representing some of the homeowners in the Grass Valley and Malibu fires, said condemnation of property is "a very powerful component of the claim."

"We'll be examining the nature of the maintenance Edison is doing," he said. "It's what initiated [the claim by] the individual homeowners in the first place, because of their own beliefs that Edison hadn't done what it should have done."

The perennial issue in wildfire litigation is the question of blame.

"The defendants like to concentrate on the awesome power of nature – that God caused this," said Craig S. Simon, managing principal at Berger Kahn in Orange County, and a co-counsel for homeowner insurance carriers in the Grass Valley and Malibu litigation. "The fact is, too often it's their conduct and failure to take reasonable precautions that is really the crux of the case."

A central player in that defense is the notorious Santa Ana winds and the role they play in spreading wildfire devastation.

"Those winds have been happening since dinosaurs roamed the Earth, and they are as predictable as snow in the Midwest in the wintertime," said Mark Grotefeld, founding partner at Grotefeld Hoffmann Schleiter Gordon & Ochoa, who works at its San Francisco and Chicago offices and is representing homeowner insurance carriers in the Grass Valley, Malibu and Happy Camp fire cases. "Utility companies, when they put their lines into service, know to what extent the winds will come."

Not so, said Stephanie Donovan, senior public relations manager at San Diego Gas & Electric, which has had its own share of litigation, most recently related to three wildfires in 2007.

"We certainly strive to maintain our lines to stay in compliance with state and federal regulations," she said. "When we get extreme weather conditions, such as in October 2007, Mother Nature is at the controls."

Donovan added, however, that the utility has bolstered its operations and maintenance procedures and is improving its systems, including replacing wood with steel transmission poles that are more capable of sustaining strong winds.

"But even if the system is maintained and in compliance with all the requirements, when the wind blows at extremely high speeds and strength, it can turn simple things into projectiles – tree branches or

back yard chairs," she said.

Shawn Caine, a Del Mar attorney who's been involved in wildfire litigation for almost 20 years, said the utilities have not maintained their systems to the levels that they should have, "but we have to credit the utilities for stepping up and recognizing their responsibility to address these problems."

Caine, along with Tom Regan at Cozen & O'Connor, served as co-liaison to the court for the insurance group, also involving other law firms, in a settlement last year between SDG&E and homeowner insurance plaintiffs resulting from the Witch, Rice and Guejito wildfires. With an estimated total of \$1.6 billion paid out by insurers, SDG&E's settlement, resolving about 20,000 claims, was valued at between \$920 million to \$960 million.

In April, the California Public Utilities Commission approved two settlements resolving its investigations into those fires. Among the terms, SDG&E agreed to pay \$14.4 million to the state's general fund and agreed to conduct additional training regarding vegetation management and the identification and repair of safety hazards.

Under a second settlement, Cox-Com Inc., and Cox California Telecom LLC, would pay \$2 million to the general fund as well as develop and implement improved inspection policies and practices.

The smoke hasn't cleared yet, however. Of the 2,000 remaining plaintiffs, about 600 have submitted settlement demands and damage estimates.

"We've made some pretty good progress, sitting down with plaintiffs," Donovan said, "and we've resolved a significant amount of them."

Meanwhile, the state has pending litigation against the utilities to recover the costs of battling fires in Malibu, Happy Camp and San Diego.

All this litigation has generated a lot of work for lawyers. But Grotefeld said that he never approaches these cases as a slam dunk.

"People shouldn't be mistaken – every time a utility company has some involvement, doesn't mean the utilities get sued," he said.

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