

## Landslide Litigation: The True Cost Of That View

When Jack Martin began rebuilding the small cottage he bought in Malibu's Las Flores Canyon, he did the work himself. Over evenings and weekends, he spent years painstakingly creating a dream home for his wife and her elderly mother. But in the winter of 1998, even his best attempts at covering the steep slopes surrounding his property with plastic and sandbags couldn't save his home from destruction by a landslide.

Like many hillside areas in Los Angeles and Orange County, the Martin's home sat atop an ancient landslide, created thousands of years ago. It was stable in this desert climate, until a combination of home construction, roads, water from sprinklers, and an extraordinarily heavy rainfall triggered another slide.



**TOM SALINGER** is a partner with Rutan & Tucker and former head of its Litigation Department. He has handled numerous landslide cases and has tried cases involving the Las Flores Canyon landslide in Malibu and the Bluebird Canyon landslide in Laguna Beach.

While certain areas are known for their history of landslides, many hillside developments are susceptible to the same forces. With the recent historic wildfires and torrential rains, more slopes than ever are at risk.

Whether an attorney represents a homeowner, a builder, a subcontractor, a government entity or a lender, the very first step in landslide litigation should be to find the right expert or team of experts. Because the issues can be very complex, this could mean a geologist, a

geotechnical engineer, a hydrologist, a civil engineer, an architect, a surveyor, a photogramatist, or other specialists and the right initial consultant can help determine which other experts will be needed.

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A good expert will help evaluate the cause of the slide, the area involved, how much additional movement can be expected, what precautions need to be taken right away, and what should be the ultimate repair. In addition, a good expert will be able to help you locate other appropriate experts, coordinate the information coming from the expert team, and have the forensic skills to testify on behalf of your client. Keep in mind that your experts must not just be good in the field; they must also be good in the courtroom. No matter how technically competent or how many licenses your expert has, if he cannot explain himself clearly and respond to questions precisely, you may not convince the other side to settle or the trier of fact to accept your expert's view of the cause of the landslide.

If you personally do not have experience with a particular expert before selecting and designating that expert, at a bare minimum, you should talk to other attorneys who have seen that expert testify at depositions and/or at trial. Do not

neglect to personally interview an expert before making the final decision to hire him. It is a serious mistake to designate an expert without having substantial information about that expert's technical and forensic skills.

In Jack Martin's case, for example, the geologist who was retained defined the area affected by the slide early in the case through the use of site mapping and a review of available reports and aerial photographs. In addition, he traveled to the site in the middle of the night during a heavy rainstorm to take extraordinary photographs demonstrating the corrosive effect of re-directed storm water on the toe of an ancient landslide. Unless you learn a lot about your expert before selecting him, you won't know whether he will bring that level of technical competence and dedication to your client's case.

Often due to budget constraints, many parties hesitate to undertake subsurface investigation. Defendants may also fear that information uncovered in the investigation will help plaintiffs and ultimately hurt their cases. Well thought out investigations, however, more often can help the defense overcome over-inflated claims by owners.

If you represent the homeowner or a lender (because lenders often have the most equity in a property), the costs of investigation can frequently be recovered as damages. See *Stearman v. Centex Homes* (2000), 78 Cal. App. 4th 611, 624-625.

Even with your own team of experts in place, you should seriously consider asking the court to select a neutral expert. This expert would advise the court or make recommendations on technical issues. If both parties are willing to

stipulate to the use of this expert, courts are particularly inclined to do so.

In a case a few years ago, plaintiffs claimed over 150 homes were involved in a landslide. When the neutral expert's report found no basis for that claim, the case settled almost immediately. In many cases, a good neutral expert will narrow the difference between the parties and frequently help settle the case.

No matter which party you represent, documenting movement in a slow-moving landslide is vital to estimating the progression-or lack of progression-of the slide. Sometimes these photos or videotapes can show that what an owner considers a landslide is just settlement, creep or lateral fill extension that has largely played itself out.

Because documenting this movement requires owner cooperation, if you represent another party, you will want to schedule a site inspection very early in the case. Do not be bashful about requesting another inspection later in the case if you feel circumstances warrant it.

Obviously, your expert should accompany you on these inspections in order to provide technical insight and suggest appropriate testing such as soil samples, manometers, inclinometers, borings, etc. If you represent the owner, you will want your expert to be present when the defense experts conduct their inspection and/or testing. He will be able to learn a

great deal from observing what the other experts do as well as from his discussions with them.

To evaluate the extent of recent movement, often aerial photographs are vital. Your expert should be able to advise you on collections held by schools, government entities and private services, and which of these would be most appropriate for the information you are seeking. Your expert may also be able to use images from Google Earth or other Internet sites.

If no historical aerial photographs are available, or if the landslide has moved since the last photos were taken, it may be worth the expense to hire a firm to create new aerial photos. An added benefit of taking aerial photographs is that they can be used to create a current topographical map.

Accurate topographical maps can be used to document distress, evaluate whether the distress is caused by the slide, compare movement of the landslide over time, and, at times, help formulate a stabilization or repair plan.

In landslide litigation, particularly in jury trials, all this investigation and data can result in rooms full of documents and reports, many of them so technical and conflicting that even other experts will not be able to make sense of them. With technical experts testifying on both sides, jurors may get so confused that they base their decisions on factors totally unrelated to the underlying mer-

its of the case (such as whether they like the plaintiffs or not).

Working with your consultant, you should consider which of the most important points are best to illustrate visually-using topographical maps, photos, or simple diagrams that can explain which forces acted on the ancient landslide to trigger renewed movement. In some cases, it might even be helpful to make a videotape (e.g., demonstrating drainage patterns such as was done in the Martins' case) or a video animation (e.g., showing how and/or why the landslide moved). If you want to use any of these visual aids at trial, you will frequently face many evidentiary objections when attempting to introduce them into evidence. Therefore, you will have to take care that your expert can lay a proper foundation for this demonstrative evidence and that this evidence is not argumentative or in some other fashion inappropriate.

As long as hillsides and canyons provide spectacular views, homeowners will continue to choose these sites, even though many of them will be sitting atop ancient landslides. With volatile weather patterns predicted for the years ahead, more and more of them will eventually slide. So when that call comes, remember to select your expert team early and carefully; and after you have selected them, use them wisely. This will help you obtain the best outcome for your client.