



R.E.A.C.H.

Real Estate And Construction Highlights

***A Newsletter For Real Estate
and Construction Professionals***

THOITS, LOVE, HERSHBERGER & MCLEAN
By Kenneth R. Van Vleck

Landslide Liability

THIS ISSUE

With all of the rain this spring, hillsides have been moving, houses slipping, and retaining walls failing. Who is liable for the damage?

BACKGROUND

Landslides, debris flows, mudslides, land subsidence and cliff-side failures: each of these has the potential for catastrophic failure to land and structures. In the past several months, hundreds of homes have been damaged by these kinds of geotechnical failures. They are not always caused by excessive rainfall, but the rain has definitely increased their numbers. When a hillside moves, everyone suffers: the uphill neighbor whose back yard is missing and house is suddenly on unstable ground, the downhill neighbor whose yard and home have been covered by debris, and the city or county whose roads may have been damaged or buried in the slide. The costs of repairing this kind of spectacular geotechnical failure can be enormous. But the cost of failing to repair the damage may be even greater if the hillside fails

to stabilize itself and causes further damage. Who is liable for this kind of damage, and what can a homeowner do to seek recovery?

IN BRIEF

Landslides Defined

A general overview of the categories of geotechnical failures may be helpful. They may consist of debris flows – where wet or dry material flows over the surface of the land; mudslides – where internal soil components swell, change consistencies, or slip because of trapped moisture and inadequate drainage; erosion – where surface drainage causes earth to wash away; cave-ins – where adjoining land is improperly excavated; or rock falls – where boulders released from cliff sides fall onto land below. Earth movement may even be associated with the change of direction, flow, or drainage of underground creeks, above ground landscaping, or even surface grading, causing land to become saturated and expand or dry out and compact, which may differentially raise or lower a home's foundation.

There may be slumps, slips, creeps or cracks – each with its own cause and symptoms. Failures may happen instantly or over the course of years or even longer. One law of nature is inescapable, however: it is the nature of mountains to become flat.

Landslides and the Insurance Exclusion

When faced with a catastrophic landslide cleanup, a homeowner's first inclination may be to call an insurance carrier and submit a claim. While it is certainly prudent to put a carrier on notice of potential claims, it may not always be in a homeowner's best interest to submit a claim for land movement. Frequently, land movement is excluded from first-party coverage under homeowner's insurance policies. And claims submitted, even if denied, may have an effect on insurability of the home.

There is a difference between first party claims (those submitted to your own insurance carrier for your own damage) and third party claims (those

submitted to your carrier for the defense of claims made against you by others). The same landslide may cause damage to both the uphill and downhill neighbor. If Mr. Uphill submits a claim to his own insurance carrier seeking coverage for the loss of his entire backyard and half of his swimming pool, he may find that the loss is specifically excluded from coverage. But if Mr. Downhill sues Mr. Uphill seeking the immediate removal one half of a swimming pool from Mr. Downhill's living room, that same cause (the landslide) may be a covered event under a third-party negligence claim.

First Party Claim Exclusion

In once recent case, a court examined the "earth movement exclusion" language from two different large insurance company policies:

The Allstate policy excludes coverage for any loss resulting from:

"Earth movement, including, but not limited to, earthquake, volcanic eruption, landslide, subsidence, mud flow, sinkhole, erosion, or the sinking, rising, shifting, expanding, bulging, cracking, settling or contracting of the earth. This exclusion applies whether or not the earth movement is combined with water."

Similarly, the State Farm policy excludes coverage for losses from:

"Earth Movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. Earth movement includes but is not limited to earthquake, landslide, mudflow, sinkhole, subsidence and erosion."

Some courts have upheld these exclusions, so long as the language is sufficiently clear to put a reasonable person on notice that the exclusion exists, and what it excludes. Other courts have found this language to be ambiguous enough that there may be coverage for some kinds of earth movement in spite of the exclusion. The language is not the same in all policies, and a review by a qualified attorney may be necessary to determine whether a first party claim should be submitted.

Third Party Claim Coverage

As noted above, however, when Mr. Downhill sues Mr. Uphill for negligence, claiming that he failed to take reasonable steps to avoid the failure of the land supporting his swimming pool, there may be third party negligence coverage available to Mr. Uphill to pay for (1) his legal defense, and, to the extent Mr. Downhill proves negligence, (2) the damage caused to Mr. Downhill's property. But Mr. Uphill's insurance carrier may not cover his own losses.

In an interesting twist, if Mr. Uphill cross-complains against Mr. Downhill, asserting that his negligent actions in failing to properly maintain the retaining walls caused the landslide, Mr. Downhill's insurance carrier may be obligated to defend and indemnify him for those losses.

Liable Parties

There may be numerous liable parties for geotechnical failures. Given the variety of those failures, it would be impossible to address all of the potential types of liability in this forum. But in general the potential liable parties may include:

Property Developers and Their Agents

The property developers, their architects, designers, engineers (of all types), contractors, geologists, and even, in some limited cases, lenders, may be liable for the damage. Liability may be based on negligence, breach of warranty, fraud, or even strict liability, depending on the circumstances of the failure and the kind of developer.

In one case, a property developer affirmatively misrepresented that the property was on a "cut" site, not a "fill" site. (A cut site is one in which the lot is cut into the hillside, while a fill site is built up using compacted fill.) At the first rains, the property slid, and it was conclusively demonstrated that the site was in fact a "fill" site not a cut site. In that case, the buyer was entitled to rescission of the real estate transaction based on the fraudulent misrepresentation.

Neighboring Property Owners

Neighbors may owe a duty to protect against these kinds of failures between their properties. For example, both Mr. Uphill and Mr. Downhill may well have valid arguments that the other was negligent in some respect. Other kinds of liability may be based on the failure of lateral support (for example in excavating¹ or retaining wall failures), or nuisance, or even the concentration and discharge of surface water.

County, City or Other Government Agencies

Hillside failures may be caused by the negligent cutting of roads, without appropriate restraining structures in place, by inappropriate placement of drainage, or even roads that, because of their slope, gather and discharge water across the land of a downhill landowner in a way that causes damage. In dealing with these kinds of claims, it is imperative to follow any number of governmental claims statutes, which may significantly shorten the claims periods, and may require that claims be presented in a specific manner before a lawsuit may be brought.

Prior Owners of Property

If a prior owner of property knew of a condition of the land that would suggest its geological instability and failed to disclose that condition upon sale of the property, the prior owner may be liable for fraud or negligent misrepresentation.² In one example, a property seller knew that there was a noticeable gap growing at the intersection of sidewalk and lawn. Before selling, the seller had the gap filled, and additional sod placed to cover the scar. But the gap was evidence of land movement that might have put a buyer on notice of the need to further investigate the stability of the hillside. The slope failed, and the buyer sued.

¹ Note that there are specific statutes requiring notice to neighbors before excavating. The failure to follow those statutory notice obligations may create strict liability for any lateral support failure.

² For an in-depth look at residential real estate sales disclosure obligations, please see the May 2006 issue of R.E.A.C.H., "Transfer Disclosure Obligations In residential Real Estate Sales."

If indeed the prior owner misrepresented a material condition of the property, and the buyer relied upon that misrepresentation, the buyer may be entitled to rescission of the sale – essentially transferring the severely damaged property (and possibly even any potential liability associated with the landslide) back to the seller, in exchange for a full recovery of all money spent in acquiring the property.

CONCLUSION

When the earth moves due to earthquake, heavy rains, poor construction, change in drainage, or loss of vegetation, the damage can be enormous. What may have seemed a simple and innocuous thing to do, such as adding landscaping to a hillside, may have catastrophic results. When that happens, it is important to quickly and effectively stabilize the moving earth to prevent further damage. It is also important to identify the potentially liable parties and put them on notice of a possible claim for damages.

NEXT ISSUE: Mechanic's liens: Constitutionally protected double jeopardy.

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