MILLER, MILLER & CANBY
MM&C
CLIENT FOCUSED. RESULTS DRIVEN.
301.762.5212 • millermillercanby.com

Post-Judgment Matters and Apportionment Proceedings

Joseph P. Suntum
James L. Thompson
Miller, Miller & Canby
Rockville, Maryland

I. Introduction

The goal of the condemnor in a condemnation proceeding is to obtain clear title to the property needed for the intended "public use." Thus, the judgment rendered by the court will provide for transfer of title to the condemnor, subject to payment by the condemnor of the amount of just compensation determined to be due. Counsel should insure that the amount of the judgment is accurate. But the work of counsel for both parties is not done with the rendering of the verdict. There remains the issue of distributing the proceeds among all parties having an interest in the property.

II. Judgment

Counsel for the owner should insure that the judgment provides for appropriate interest and costs in addition to the principal amount of just compensation. In every case, the judgment should carry post-judgment interest from the date of the judgment until the date the judgment is paid. Most jurisdictions set the amount of post-judgment interest by statute. In a traditional condemnation where the owner has retained possession and title to the property through the trial, prejudgment interest is not payable. But the judgment should include should include all damages through the date of trial, including, in addition to the value of the property taken, severance damages and other damages suffered between the time the project was announced and the trial. See, e.g. *Reichs Ford Joint Venture v SRC*, 388 Md. 500 (2005). In a quick-take case, where possession of the property was taken by the condemnor before trial, the judgment should include prejudgment interest, or some other measurement of the value for loss of use of the money, on the difference between the amount previously paid, if any, and the total amount of just compensation determined at trial. See, e.g. *370 Limited Partnership v. SRC*, 337 Md. 490, 880 A.2d 307 (1995) (discussing the appropriate methodology for calculating the amount of prejudgment interest due) and *King v. SRC*, 298 Md. 80 (1983).
.

Example: In a quick-take case, the condemnor paid $250,000 to the owner, or into the registry of the court for the owner's benefit, and took possession of the property on May 1, 2004. The action was tried and a judgment of $450,000 was rendered on March 1, 2005. The judgment should provide that the amount of just compensation to be paid is $450,000, plus prejudgment interest on $200,000 (the difference between the

amount previously paid and the amount awarded) for 9 months. The condemnor will be credited with $250,000 previously paid. And post-judgment interest will accrue on the unpaid balance until paid.

Land values in condemnation actions are often quite large and counsel should not overlook the substantial amount of prejudgment interest to which the condemnee may be entitled to receive. Indeed, counsel should consider whether the owner may be entitled to recover more than statutory pre-judgment interest based upon the argument that a reasonable rate of return on money invested over the subject period of time would have exceeded the statutory rate. In this regard, however, evidence of such higher rates of return should be presented at trial, or recovery will likely be deemed waived. See, generally, *Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding,* 56 A.L.R.Fed. 477 and *King v. SRC*, 298 Md. 80, 467 A.2d 1032 (1983) ("In other words, interest in quick-- take cases, unlike interest in conventional condemnation cases, is a constitutionally required element of just compensation and no specific statutory authority is required for its payment" and an owner is entitled to prove that the "time value" of money exceeded the statutory rate for prejudgment interest.).

II. Abandonment

A condemnor may elect to abandon a traditional, non-quick-take, condemnation after trial if it determines the cost is too high. Many jurisdictions, by statute, require the condemning authority to reimburse the condemnee for costs and expenses incurred when the condemnation is abandoned. See, e.g. the federal statute at 42 USCS Section, 4654:

> § 4654. Litigation expenses
>
> (a) Judgment for owner or abandonment of proceedings. The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if—
>
> (1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or
>
> (2) the proceeding is abandoned by the United States.

Practice tip: Check applicable statutes on this issue. As stated above, many jurisdictions have addressed this issue by statute. In the absence of a statute, however, the majority rule is that attorney fees and costs are *not* recoverable, unless the condemnor acted in bad faith or unreasonably delayed. The rational behind the majority rule is that the condemnor is doing no more than exercising its rights as any other litigant and, thus,

should not be required to pay the costs of the opposing party. See, generally, *Liability Upon Abandonment of Eminent Domain Proceedings, For Loss or Expenses Incurred by Property Owner, or for Interest on Award or Judgment*, 92 ALR 2d 355.

Example: School relocates its campus to a new location and the former school building is bought by a charitable religious organization to be used as its headquarters. The property is underutilized and the owner, as a result of under funding, fails to maintain the property. Over time the old school building deteriorates and the community pressures the government to acquire the property for a local park. The condemnor appraises the value of the property in its physically depreciated and functionally obsolete condition at $500,000. The owner contends that the property constitutes a "church" and, therefore, by statute, depreciation and obsolescence may not be considered. Rather, the condemnor must pay just compensation equal to the cost of constructing a comparable facility at another location. The owner demands $2,000,000 in compensation. The condemnor refuses, as that price is too great to pay for a local park, even to satisfy the community demand.

At trial, the jury finds that the property is, in fact, used as a "church" by the religious organization and returns a judgment in the amount of $2,000,000. The condemnor wishes to abandon the condemnation. The owner demands reimbursement of its attorneys fees and costs, which exceed $500,000 on a contingent basis. The condemnor, faced with paying over $500,000 for attys fees and costs without obtaining title to the property, reconsiders its decision to abandon the condemnation and pays the $2,000,000 award.

Of course, if the condemnor is obligated to pay the attorneys fees and costs of the owner, the *amount* of reasonable fees and costs due to be paid is often litigated in a separate post-trial proceeding.

Example: Condemnor sought to condemn property owned by a water and sewer utility company. The condemnor valued the property at $2,083,693, the owner contended just compensation was $11,295,000. After trial the jury awarded $9,700,000, which the condemnor was unwilling to pay. The owner then demanded that the condemnor pay $2,055,000 to reimburse it for its attorneys fees. The condemnor asserted the claimed fees were excessive. In settlement of a contested post-trial proceeding, the condemnor agreed to pay the owner approximately one-half that sum. The condemnation was abandoned and the owner retained title to the property. (See, *WSSC v Utilities, Inc. of Maryland*, 365 Md. 1 (2001).)

III. Apportionment

A. Overview of Issue

Fee simple title includes rights of ownership in real property extend from below the ground up through the surface into the sky above. The rights of ownership may be divided into more than one estate. Thus, real estate ownership is often described as

including a “bundle” of rights such as fee simple ownership, easement rights, leasehold interests, air rights, mineral rights and security interests. One party may hold these property interests alone, or the “different sticks comprising the bundle” may be divided among different parties. See, *WSSC v Frankel*, 57 Md. App. 419, 420 A2d 813 (1984) where after an extensive discussion, the court held that restrictive covenants were compensable property rights in an eminent domain action. “[I]n the latter part of the nineteenth century the Hohfeldian notion of property as a bundle of rights, some tangible and some intangible, began to gain currency. Kanner, 1976 *Institute of Planning, Zoning and Eminent Domain* at 239-41. The constitutional concept of property for eminent domain purposes now addresses itself to every sort of interest the citizen may possess. (citations omitted) This concept has long been recognized in Maryland. The term property "extends to easements and other incorporeal hereditaments, which, though without tangible or physical existence, may become the subject of private ownership." (citation omitted).”

In a condemnation action, the condemnor seeks to obtain clean title to all the property and condemn all other interests in the property. Thus, condemnors are required to name all persons and entities with an interest in the property as defendants in the condemnation action, otherwise the condemnation will be defective and the condemnor will take title subject to the unnamed party’s interest.

These various interests in the property may lead to competing interests in the condemnation award. But it is not necessarily any concern to the condemnor who receives the money. Rather, the condemnor is only interested in obtaining title clear of any competing interests and determining how much, in total, it must pay.

Thus, most jurisdictions follow the Undivided Fee Rule and Unit Rule in valuing the property for purposes of condemnation.[1] The Undivided Fee Rule provides that the fair market value of a whole taking is to be determined without consideration of the various claims and interests. In other words, the property is to be valued as if all the interests are own by one person. The Unit Rule requires that the entire property including land, buildings, fixtures and other improvements be valued as a single property. The rationale behind these rules is that taking by the power of eminent domain is by superior title, rather than by separate interests. Therefore, compensation is awarded for the property and not the separate interests. And the separation of the fee into separate interests should not increase the amount of compensation that the condemnor has to pay for the taking of the fee.

[1] There are jurisdictions, such as Iowa, that do not follow this rule, but value each property interest separately. And in some cases the sum of the parts exceeds the value of the undivided fee. See, *Wilson v. Fleming,* 239 Iowa 718, 31 NW2d 393 (1948) and *Des Moines v McCune,* 487 NW2d 83 (Iowa Sup. 1992). Of course, that the “sum of the parts” exceeds the whole is reason for those courts that do, generally, follow the unit rule to make an exception. See, e.g. *Heritage Realty v. City of Baltimore*, 252 Md. 1, 248 A.2d 898 (1969) and the discussion *infra.*

The general procedure, then, is to value the property as if one person owned all interests and then apportion that award among the various interested parties. Of course, like most rules, this rule works well generally, but not in every case.

Practice tip: Courts often seek to adopt "black-letter rules" and make them applicable to all situations. But no single apportionment rule can fairly fit all situations. And courts are constrained from imposing a black-letter rule in condemnation actions because of the *constitutional* right of owners to receive just compensation. Counsel should consider whether the application of the general rule in your jurisdiction would, in your specific case, result in such a constitutional deprivation and, if so, challenge the applicability of the general rule. See, e.g. *Heritage Realty v. City of Baltimore*, 252 Md. 1, 248 A.2d 898 (1969) (Where, even though Maryland generally follows the unit rule, the court recognized that, under certain circumstances, the total cost of the acquisition of separate interests in property by the City could, in the aggregate, be greater than the value of the property.)

Because all parties with an interest in the subject property are made a party to the condemnation proceeding, and the jury award must be apportioned between all parties, these competing interests may create tension and potential conflict between defendants at trial, which counsel must work to control.

Example: Both a landlord and a tenant with a long-term lease have an interest in a property being condemned. It is in both parties' interest to insure that the award of just compensation is as great as possible. However, after trial the landlord's interest will be to minimize the value of the tenant's leasehold interest to have more of the award apportioned to the landlord's reversionary interest. But the tenant may seek to use evidence the owner presented at trial to justify a higher valuation of the property as a whole to support the tenant's claim that the high market rents introduced by the owner confirm the "bonus value" of his lease and entitle the tenant to a greater portion of the award. Thus, both the landlord and the tenant must consider trial and post-trial issues when presenting their case. Although Landlord and Tenant usually want the total award to be as large as possible, there may be situations where their valuation theories, or evidence, conflict. These strategic issues become even more pressing if the respective rights of the landlord and tenant must be resolved *at trial* and not postponed to a post-trial hearing, i.e. that the jury will be instructed to render separate awards to each.

In other words, apportionment of a condemnation award may not, in fact, be a "post-judgment" matter. Most jurisdictions require that all interests in the property be valued and allocated at trial in a single proceeding and do not allow for separate proceedings after trial to value the respective interests of competing parties. See, generally, *Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award*, 94 A.L.R. 3d 696. Counsel should consider "apportionment issues" well in advance of trial and insure that the evidence and trial strategies incorporate these issues.

Example: An applicable statute provides that a condemnor must pay any unpaid lien owing to the water and sewer authority when property subject to the utility's

lien is taken by condemnation. The utility is made a party to the condemnation proceedings and the jury renders an award of just compensation. After trial the owner seeks to have the condemnor pay the utility pursuant to the statute. The condemnor argues that the owner must satisfy the lien out of the jury award. The trial court rules against owner. On appeal, the court found that the condemnation award was intended to cover the damages sustained by all affected parties, including the encumbrance on behalf of the water and sewer utility, which was a party to the condemnation proceeding. The court reasoned that the owner should have raised objections before the question of damages was submitted to the jury. The owner could have requested that the jury return separate verdicts for the owner and the utility. Having failed to do so, the award was to be distributed as determined at trial. See, *Smith v SRC*, 262 Md. 418, 278 A.2d 52 (1971).

Counsel should also insure that the method used to value the property as a whole at trial is consistent with the valuation method used to apportion the award.

Example: As of the date of take, the value of the subject property could be determined using either an existing, long-term, below market lease, or market rents. Application of the Unit Rule would require that the below-market lease be ignored. In reality, a knowledgeable buyer would pay less for a rental property that is encumbered with a long-term lease paying below market rent, than the buyer would pay for the same property unencumbered by a lease, which could be rented at higher market rates. See, e.g. *Ort Children Trust Four vs. Supervisor of Assessments*, 294 Md. 195, 448 A.2d 947 (1982). If a below-market lease is considered at trial in valuing the property using the income approach, the tenant should not be entitled to any portion of the award, because the below-market lease depreciated the total value of the property. In such a case, the award would, necessarily, only include the value of the landlord's interest. Of course, in that happened, the tenant would have his property (leasehold interest) taken without just compensation, which is why application of the Unit Rule requires that such a lease not be considered. For this reason, where both a Landlord and tenant have an interest in property and the lease provides for below-market rent, counsel for the owner should insure that the property is valued at trial using market rents, not actual rents. Of course, the condemnor will argue that it is being required to pay more than the FMV of the property, because no knowledgeable buyer would ignore the existing lease. But that is a constitutional necessity. See, *Baltimore v Latrobe*, 101 Md. 621, 61 A. 203 (1905) ("Each [party with an interest in the property] is entitled under the constitution to be compensated in damages for the amount of his interest taken, and if it be true that the values of the two interests are more than what the lots would be worth, if owned by one person, the necessities of the case require an apparent exception to the general rule announced above as to what the condemning party must pay.)

Of course, in the contrasting situation, where the owner is the beneficiary of a long-term lease of the property at above-market rates, with a strong, credit-worthy tenant, the owner should argue that the contract rent, not market rates, must be used to value the property and that the tenant is not entitled to any portion of the award. Otherwise, the derived value will be less than the property's actual FMV (fair market value) and the

owner would be unconstitutionally denied just compensation. Note, see section C below for further discussion of leasehold interests.

B. Mortgagors

Holders of security interests generally have priority in a condemnation award and interests secured by the property should be satisfied out of the condemnation award. Thus, mortgages and home equity loans, and other encumbrances must be satisfied in order that the condemnor may receive clear title. This process is straightforward in a complete taking. But competing interests and allocation issues arise with partial takings.

Example: A 2-acre property improved with a single-family house and encumbered with a $400,000 mortgage has 10,000 square feet of frontage taken in a condemnation action to widen a road. The determined just compensation is $42,500. How much, if any, of the award must be paid to the mortgagor? The answer to this question is most likely to be found in the loan documents and Deed of Trust that secures the loan. But the owner may be able to prevail upon the lender to waive payment, accept a reduced amount, or permit some or all of the award to be reinvested in the property if the owner can demonstrate that the remaining property provides adequate continued security for the loan and the loan is in good standing.

C. Tenants

In the absence of a lease clause governing the issue, upon a taking of leased premises by eminent domain the landlord and tenant split the condemnation award based upon their respective interests. The measure of damages for a leasehold interest taken by eminent domain is the fair market value of the lease. The FMV is commonly valued as the difference between the fair rental value of the premises at the time of the taking based upon existing rents in the market and the contract rent due to be paid pursuant to the lease. If the market rent exceeds the lease rent, i.e. the tenant is paying below-market rent, the economic advantage enjoyed by the lessee under the lease is referred to as the bonus value. The "bonus value" method requires a determination of the difference between the fair rental and the contract rental for the affected leasehold, which difference is discounted to present value for purposes of apportioning the award.

Example: Consider a tenant has 10 years remaining on a 20-year lease, pursuant to which tenant is paying $20.00 per square foot rent for 10,000 square feet. The evidence reflects that comparable properties are leasing for $26.00 per square foot at the time the property, including leasehold, is condemned. Ignoring escalations in the market, or the lease, the tenant then has lost $6.00 per square foot in leasehold value, or leasehold advantage. In other words, the tenant will have to pay $6.00 per square foot more to rent comparable space elsewhere, which will cost the tenant an additional $600,000 over 10 years. The present value of that increased cost represents the lost leasehold value to the tenant. [Of course, the real value of the lease to the tenant is likely much greater than even the substantial economic benefit of the lease, as the costs to relocate and lost value of the chosen location is not included.]

Thus, if the tenant has a lease at below-market rent, the leasehold could have a considerable value. Of course, if a tenant is paying above-market rent there may be no value in the leasehold interest, because, theoretically, the tenant should be able to lease comparable space at a different location for less.

Landlords and tenants are well advised to contemplate and address the impact that a condemnation of all, or part, of leased property will have on the rights of the parties when they negotiate the lease. Most commercial lease today contain some form of "condemnation clause" addressing these issues. And most such clauses, usually drafted by landlords and often not seriously considered by tenants, provide that the lease will terminate upon condemnation and that the tenant is not entitled to any portion of the award. Of course, as shown above, a leasehold interest may represent a valuable interest for the tenant and tenants should carefully consider such issues when leasing property.

A condemnation clause should address the many issues that may be impacted by a condemnation, including:

(1) How will compensation for the realty be divided between the landlord and the tenant in the event of a taking?
(2) Who is entitled to compensation for trade fixtures and tenant improvements?
(3) How will an award for building improvements be allocated between the landlord and the tenant?
(4) Under what circumstances may either party terminate the lease?
(5) Who is obliged to rebuild in the event of a partial taking, and under what circumstances?
(6) How is a rent abatement, if any, to be calculated in the event of a partial taking?
(7) How will temporary takings be handled?

Courts generally find such lease provisions enforceable, even when they deny the tenant all interest in an award. But the courts will strictly construe them. The courts do not look with favor on lease clauses that cause the forfeiture of the tenant's interest on condemnation, and a lease contract will be construed not to have that effect if its language and the circumstances possibly permit such a construction. Consequently, counsel who represent a tenant in a condemnation action should review the lease and any condemnation clause in the lease for grounds to argue that the clause should not be enforced. See, e.g. *Belmont Clothes, Inc. v. Pleet,* 229 Md. 462, 182 A.2d 731 (1962). Here, the court held that a clause providing that the lease would terminate if through fire, "condemnation by public authorities," storm, the elements, and the like, did not include takings under eminent domain. Rather, the subject lease provision was interpreted to apply only to the kind of condemnations resulting from failure to comply with orders of the health, fire, or police departments. Thus, upon a taking by eminent domain the tenant was not barred, by the clause, from recovery for the value of the leasehold interest. See, generally, *Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property,* 22 A.L.R. 5th 327.

In addition to rent differential, landlords and tenants must consider the effect of fixtures on their respective compensation. Fixtures are generally considered part of the real property and are, thus, included in the FMV of the property when appraised. But a lease may provide that the tenant has the right to remove fixtures, especially trade fixtures, at the end of the lease. In such a case the tenant may argue that compensation for the value that the fixtures added to the property should be paid to the tenant as the fixtures are, by the terms of the lease, the personal property of the tenant.

D. Co-owners and Remainder Interests

Interests between co-owners, whether they be joint tenants, tenants in common, life tenants, or a holder of a reversionary interest must also be considered and resolved in apportioning a condemnation award.

Life tenants present an interesting problem. In absence of statutory authority, or consent by all the parties concerned, the courts have generally held that the rights of the life tenant and remainderman in the condemnation proceeds are the same as they were in the lease. That is, the life tenant has the right to the use of the proceeds during his life, and the remainderman is entitled to the corpus upon the death of the life tenant.

Most jurisdictions treat the entire condemnation award as the corpus and appoint a Trustee to invest the award. The life tenant then is entitled to receive income generated from the corpus during his or her life and the principal is transferred to the remainderman upon his or her death. This raises an interesting and difficult issue of whether the remainderman will enjoy any measure of appreciation in value of the principal over the investment period, or will all the income be disbursed to the holder of the life interest?

Other jurisdictions seek to value each interest, calculating the life expectancy of the life tenant, the probable investment returns over that period of time, and discounting that amount to present value. Obviously, such a financial calculus may become exceedingly complicated as every variable and its impact on the apportionment is subject to debate and the testimony of opposing experts between the interested parties. See, generally, *Distribution as between life tenant and remainderman of proceeds of condemned property*, 91 ALR 2d 963.

E. Easements and Restrictive Covenants

The general method of valuing an easement is the difference between the FMV of the property burdened by the easement and the value of the property without the easement. Easements raise issues similar to leases and counsel must make sure the valuation method employed at trial is consistent with the method used to value the easement after trial, if separate hearings are held.

Often the value of an easement or restrictive covenant to its holder, the dominant estate, often exceeds the value of that easement or restrictive covenant to the owner of the

burdened property, the "servient estate." Consider, for example, an access easement through the servient estate that provides the only means for ingress and egress to the dominant estate. The presence of the easement may not diminish the full use and enjoyment of the servient estate, especially if the serviant estate uses the same area for its ingress and egress. Thus, the difference in value of the servient estate with the easement and without the easement may be minimal. But the loss in value to the owner of the dominant estate may be substantial, even total if no other access to servient estate may be obtained. Thus, counsel should carefully consider whether the valuation issues presented by easements or restrictive covenants require that an exception to "Unit Rule" be permitted in order for all parties to receive just compensation. For a fuller discussion about condemnation of easements see our article in the 20th Annual ALI-ABA course of study materials *Eminent Domain and Land Valuation Litigation,* Coral Gables, Florida, January 2003.

IV. Conclusion

Many of the issues presented by multiple interests in property may best be resolved between the competing parties apart from the involvement of the condemnor. Counsel should consider trying to resolve apportionment issues in advance of trial early in the case, in order that a single and focused strategy to maximize the award may be pursued without contradiction, or conflicting evidence at trial. Even if a complete resolution between owners of competing interests cannot be achieved, agreement may be reached on cooperation and trial strategy.