To present the full picture to a trier of fact, the cost-to-cure must be weighed against the damages it seeks to mitigate. To permit a condemning agency to present evidence of a cost-to-cure without fully explaining the damages it has caused only tells half the story and potentially could lead the jury to view the cure as an accomplished fact. Hence, condemnors should be required to testify as to the value of the property without the cure, because the cure is only a possibility, while some degree of damage is certain.

Most jurisdictions have not addressed the issue of whether an award of damages in a partial-taking case may be limited to a cost-to-cure when the proposed cure requires discretionary approvals or permits from a governmental agency. Accordingly, there are few decisions addressing what must be demonstrated to allow evidence of such a cure and who bears the burden of proof with respect thereto. Nevertheless, the constitutional mandate of "just compensation" is jeopardized if a property owner is obligated to seek a permit or an approval when such approval is discretionary. Given the implications and the risk associated with a contingent cost-to-cure, the burden of proof should fall squarely on the party proposing the cure, which is typically the condemnor. Additionally, the party proposing the cure should be required to demonstrate more than a reasonable probability of such a cure. Rather, the proponent should be required to present evidence that the cure is reasonably certain to be achieved.

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The Case for Recovery of Business Loss in the Taking of Real Property

By Christian Torgrimson and Angela Robinson – February 16, 2011

No single issue can complicate an otherwise routine condemnation case as quickly as a business-loss issue. When the site upon which a business depends is taken or damaged, it is not uncommon to see business-loss claims that are well in excess of the value of the real estate. With claims of this magnitude, business owners and their counsel must convince courts that a taking or damaging of real property can cause a bona fide loss to intangible aspects of the business, including goodwill and going-concern value; the intangible nature of a business should not preclude recovery because the loss can be properly quantified; and therefore such loss must be a part of the Fifth Amendment's mandate that "just compensation" be paid before private property is taken. Some state courts and legislatures have agreed, recognizing business loss as an element of just compensation in different forms, and offering the same possibility to practitioners seeking to change the law in other jurisdictions. However, recovery for business loss in condemnation cases still remains the exception to the rule.

The General Rule—No Recovery for Business Loss

Despite the gradual recognition of business loss as part of just compensation, most courts remain reluctant to compensate property owners for business loss that cannot be precisely quantified. The traditional reason for denying recovery is that damage to business is *damnum absque injuria*, a harm without an injury, and thus not compensable. Other common lines of reasoning that courts articulate for denying business-loss recovery include:

- Business loss is too speculative to calculate to an acceptable degree of certainty.
- The condemnor has not taken the business from the owner, only the real property.
- The U.S. Constitution does not grant compensation for the taking of personal or intangible property.

Exceptions to the General Rule

As a result of the substantial hardship caused by the exclusion of business loss to business owners, some courts have chipped away at the general rule. The U.S. Supreme Court carved out two major, albeit narrow, exceptions in cases involving businesses taken for government operation and cases involving temporary takings. In 1893, the Supreme Court first addressed a governmental taking of a business for continued operation in *Monongahela Navigation Co. v. United States*. In *Monongahela*, a company had been granted a state charter to construct and operate locks on the Monongahela River, which the government condemned and continued to operate. The legislation authorizing the taking provided no award of compensation for the loss of the franchise to collect tolls. In holding that the Fifth Amendment required that the company be provided with the "full and perfect equivalent" of the appropriated property, the Supreme Court emphasized that the company was entitled to recover compensation for the loss of its franchise because it was an integral part of the property's value to the owner.

In 1949, the Supreme Court addressed the temporary taking of a business in the case of *Kimball Laundry Co. v. United States*, in which the government temporarily occupied and operated the Kimball Laundry plant to serve the members of the army. The market value of the laundry plant dropped considerably during this time. The district court awarded recovery for the physical takings related to the equipment, machinery, and the like, but wholly denied recovery for the diminution in the value of the business. The Supreme Court held that the intangible nature of a business, in and of itself, does not preclude compensation for its loss when a business is temporarily condemned. The temporary taking effectively eliminated Kimball's ability to profit from its customer list and customers' loyal patronage during the government's occupancy of the premises. In holding that the government had to compensate the Kimballs for the going-concern value of the lost business, the Supreme Court distinguished between a permanent taking of a fee simple to business property and a temporary taking of the same. In the former, the Supreme Court found it was highly probable that the owner would be able to relocate the going-concern value and that any losses resulting from the owner's inability to do so would be "speculative." In

the latter, however, the likelihood that the owner would be able to temporarily relocate was so remote as to give rise to a requirement for compensation.

Trend Toward Allowing Business-Loss Recovery
More recently, the general rule of no recovery has been the subject of harsh criticism. This criticism has caused several states to modify or even eliminate the rule, either legislatively, judicially, or in the case of Louisiana, by constitutional amendment.

Legislative Recognition of Business-Loss Recovery
Several courts have recognized the harshness of the reality of denying recovery to a business owner, but have concluded that the remedy must be legislative, rather than judicial in nature. To date, the following five states have enacted the most comprehensive legislation authorizing business-loss recovery.

California and Wyoming
A business owner may recover goodwill by proving (1) the taking of property or injury to the remainder caused the business loss; (2) neither relocation nor other reasonable steps will prevent the loss; and (3) no other statutory or other form of recovery will include compensation for the loss.

Florida
"Where less than the entire property is sought to be appropriated . . . an established business of more than 4 years' standing before January 1, 2005 . . . [or] an established business of more than 5 years' standing on or after January 1, 2005" may recover for business loss.

Idaho
A business owner may recover for business loss if: (1) The property sought to be condemned constitutes only a part of a larger parcel; (2) the business has more than five years' standing; (3) the taking of the property reasonably caused the business loss; (4) the business is owned by the party whose lands are condemned or located upon adjoining lands owned or held by such party; (5) neither relocation nor other reasonable steps would have prevented the loss; (6) no other statutory or other form of recovery will include compensation for the loss; and (7) the business owner submits the required statutory notice to the condemning authority.

Vermont
Property owners should be compensated for "the direct and proximate decrease in the value" of a business located on property that is to be taken.

Judicial Recognition of Business-Loss Recovery
Courts in Georgia, Michigan, Minnesota, Wisconsin, Alaska, and Nevada have all determined that, as a matter of state constitutional law, business loss is compensable to varying degrees. These judicial determinations, that recovery of business loss in condemnation cases is mandated

by state constitutions, represent a fundamental shift away from the legal reasoning underlying the general rule of no recovery.

Georgia
In 1966, *Bowers v. Fulton County* became the Georgia Supreme Court's seminal state decision requiring compensation for businesses loss as a matter of state constitutional law. In *Bowers*, the Georgia Supreme Court held that a property owner could recover for business loss and relocation expenses as separate items of damage in addition to the value of the property condemned. In so holding, the Court expressly overruled numerous earlier cases that disallowed the recovery of business loss and limited evidence of such loss to the purpose of showing the use and value of the property condemned.

In spite of the broad language of the *Bowers* decision, there are several elements of procedure and proof that are required before business loss may be recovered in Georgia:

- A condemnee must plead and prove business loss as a separate element; a condemnor is not required to include business loss in its initial estimate of compensation.
- A condemnee must prove a unique relationship between the business and the property condemned under any one of three tests for uniqueness.
- Evidence of business loss cannot be remote or speculative, and the loss must be permanent, not temporary.
- A tenant operating the business may recover for either a total loss of or partial damage to a business that continues to operate; a fee owner operating the business must prove a total loss at that location to recover business loss as a separate item of damage.

Michigan
Michigan allows recovery of business losses on a limited basis. Just compensation requires that the condemnee be "in as good a position as was occupied before the taking." Going-concern value and good will are recoverable only if the business is taken for use as a going concern. The rationale is that a successful business may generally be relocated to another location; therefore, if the government does not take the business for use as a going concern, "the owner of that interest need not be compensated since nothing is taken."

Minnesota
In Minnesota, courts uphold the general rule denying recovery of business loss in condemnation cases, but allow recovery in certain situations. A condemnee can recover loss of going-concern value by showing: "(1) that his going-concern value will in fact be destroyed as a direct result of the condemnation, and (2) that his business either cannot be relocated as a practical matter, or that relocation would result in irreparable harm to the interest."

Wisconsin
Caselaw in Wisconsin is inconsistent as to whether a business owner may recover for incidental losses. In *Luber v. Milwaukee County*, the Wisconsin Supreme Court had no difficulty in holding that rental income is a property interest for which an owner must receive compensation under the Wisconsin constitution, noting that the test for determining damages is not what the government has gained, but rather what the owner has lost. The *Luber* court found that the Wisconsin statute providing for restricted compensation operated not as "a matter of legislative charity but as an unauthorized limit upon recovery." Therefore, the *Luber* Court explicitly rejected the rule making such consequential or incidental damages *damnum absque injuria*, and invalidated the Wisconsin statute insofar as it limited compensation.

However, subsequent cases cast doubt on the *Luber* ruling, thus making the extent of recovery for a business owner in Wisconsin uncertain. For example, in *Hasselblad v. City of Green Bay*, the Wisconsin Court of Appeals concluded that *Luber* "does not constitutionally mandate unlimited recovery for all consequential damages in eminent domain actions." In *Hasselblad*, the court upheld a statutory limit on business-replacement damages, finding no constitutional right to compensation for relocation expenses. The court recognized that *Luber* was a "radical departure" from the prevailing rule that condemnation provides no recovery for consequential or incidental damages. The court also found that there was a rational basis for distinguishing the incidental damages awarded in *Luber* because "[r]ental losses bear a direct relationship to fair market value that business replacement expenses do not."

Alaska
In Alaska, the temporary loss of profits during relocation of a business due to the taking of property on which a business is conducted, constitutes property that is "damaged for public use" for which there must be compensation under the Alaska constitution. Loss of profits to business resulting from the state's exercise of eminent-domain power is an item of special damages, and thus the condemnee has the burden of proving by preponderance of evidence the amount of profits lost as a direct result of the taking.

Nevada
In *State v. Cowan*, the Nevada Supreme Court held that lessees were entitled to compensation for destruction of their business as an exception to the undivided-fee rule. The court also held that business goodwill, rather than lost profits, was the appropriate measure of damages for the complete destruction of the lessees' business. In *Cowan*, the lessees operated a franchised gasoline station on the condemned property that was completely destroyed. The lessees were unable to relocate their business because oil companies were not extending new leases for gas-station franchises in the area, which meant the lease's value was inextricably tied to the unique location of the condemned property. In this situation, the court concluded that the undivided-fee rule would not adequately compensate the lessees for what was taken, and therefore the Nevada constitution required compensation for the destruction of the business.

Louisiana—Constitutional Recognition of Business-Loss Recovery

Historically, Louisiana courts denied compensation for business loss under the theory that such losses were *damnum absque injuria*. In 1974, however, Louisiana amended its constitution, providing that

[i]n every expropriation or action to take property . . . the owner shall be compensated to the full extent of his loss . . . [which] shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred by the owner because of the expropriation.

Subsequent to its adoption, courts interpreting the Louisiana constitution of 1974 have determined the following: that business owners must receive sufficient compensation to restore their building facilities to their pre-condemnation condition, even where the compensation exceeds the value of the entire parent tract; that property owners can recover for the loss of future rental income under a lease; that lessees can recover for loss of business interest; and that loss of business profits is compensable.

Conclusion

Prohibition of recovery for business loss remains the general rule across the country, thus ensuring continued losses are incurred by business owners when the real estate is taken or damaged. However, the past few decades have seen an increased trend among states recognizing business loss as an element of just compensation, both legislatively and judicially. An argument can be made that to satisfy the "just compensation" clause of the Fifth Amendment, the taking of private property must include business loss. Despite the intangible nature of a business, such loss can and should be quantified as part of just compensation.

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NEWS & DEVELOPMENTS

Transcanada Keystone and the XL Pipeline Project

In 2007, TransCanada Keystone Pipeline Company began a public-relations campaign across the Great Plains as a prelude to constructing a crude-oil pipeline from the oil sands of Alberta, Canada, through the central United States, to refineries in Illinois and Oklahoma. TransCanada is a Canadian company, building the pipeline in partnership with Conoco Phillips. Between them, they control almost $200 billion in assets, with $6.5 billion in net income in 2009.