



Eminent Domain - Part 4 of 4 Settlement or Trial?

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In the vast majority of condemnation cases, the condemning authority has the undisputed right to take the target property and the issue for determination is the “just compensation” due as a result of the taking. Ultimately, the decision to settle or take the case to trial will have to be made by the landowner. This decision should not be taken lightly. Rather, numerous factors must be weighed in order to make the right choice.

Over 90% of all civil lawsuits settle prior to trial. Because condemnation cases are limited to the issue of damages, the percentage of settlements in these cases probably exceeds 95%.

Condemnation cases settle for a number of reasons. Sometimes the condemning authority’s valuation is at least “fair” and there is little argument that the taking will adversely affect the remaining property. For example, valuing a residential house and lot is less controversial than valuing undeveloped property because the property’s use is defined and there are generally multiple comparable sales of similar properties to help set a value. In other situations, the amount in controversy is so small that spending thousands of dollars on experts and attorneys is not justified. In some cases, the Commissioners’ Award is returned high enough that the chance of exceeding the award by 10% at trial (and thus entitling the landowner to attorney fees) is too risky to justify the costs of trial. Generally, complete takings (when the condemning authority takes the entire property) are easier to resolve than partial takings because the issue is limited to value rather than value plus the depreciation of the remaining property.

Even large complicated cases are often settled. Utilization of credible experts and experienced and reputable attorneys allows landowners to equalize the negotiation leverage. Condemning authorities are not unmindful of their risks. The Oklahoma Department of Transportation (ODOT) maintains statistics that analyze its condemnation costs and exposure. These statistics reveal that ODOT will almost always settle for an amount much higher than its initial offer. Condemning authorities generally desire non-adversarial resolutions rather than having to pay attorney and expert fees of their own and being exposed to trial risks and the cost of paying the landowners fees. Landowners who can present a solid argument supporting their view of value and damages can often successfully negotiate settlements that double and triple the initial offer.

There are those cases that need to be tried to a jury. Some cases present unusual or novel valuation issues that the condemning authorities refuse to recognize. For example, valuing the effect that an

intangible right to conduct a licensed business with grandfathered status can be difficult to resolve. In some controversial cases, landowners get to a point where they have to try the case in order to recoup the attorneys and expert witness fees that have been expended.

Taking a condemnation case to trial is not the worst remedy. ODOT's statistics reveal that jury verdicts often exceed the initial "fair market offer" by 500%. Juries are comprised of citizens who relate to the plight of a landowner whose property is being taken against his will by the government. Recently, the government's use of eminent domain has been under attack by the public. While everyone agrees that roads and bridges are needed, the use of public funds to condemn property for commercial shopping centers and development are viewed less friendly. In all cases, jurors will initially be sympathetic toward landowners, want to believe them and give them the benefit of the doubt. However, sympathy only goes so far. Condemning authorities will often present a trial theme that the taking is necessary for the common good, that the taking will actually enhance the value of the landowner's remaining property and that the landowner is simply being greedy and asking for a windfall from the jurors who are taxpayers.

At trial, a landowner must be prepared to back up his value and damage theory with facts, documentation and expert testimony. Studies show that juries like and expect visual aides and computer generated graphics similar to what they see on the news, at work or even at church. Good quality pictures and graphics speak "ten thousand words" at trial. Jurors also expect landowners' theories to make common sense. If the landowner testifies that the property has future commercial development potential, the property needs to have access, visibility and a realistic potential for development.

In the end, the jury will ultimately determine a landowners' Constitutional right to "just compensation" which is the value of the property taken plus any damage caused to the remaining property. As in life, credibility means everything at trial. A well reasoned and supported conservative approach will generally reap great rewards. On the other hand, if a landowner is viewed as overreaching or being greedy, the jury's award can be punishing. In condemnation cases the golden rule is, "Pigs get fat, but hogs get slaughtered."

Links

[Eminent Domain - Part 1 of 4: Limits on the Power of Eminent Domain](#)

[Eminent Domain - Part 2 of 4: Step-By-Step Guide to the Condemnation Process](#)

[Eminent Domain - Part 3 of 4: Practical Strategies a Landowner Should Follow to Maximize Compensation](#)

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