

Memorandum 99-66

Attorney Fees in Eminent Domain Cases

At its August meeting the Commission decided that a more “mechanical” approach to an award of litigation expenses in eminent domain proceedings would be preferable to the current “reasonableness of the condemnor’s actions” approach in California. The Commission directed the staff to prepare a draft that would impose litigation expenses on the condemnor if the award in the proceeding exceeds the condemnor’s final offer by 25% or more. The Commission also asked the staff to attempt to develop data that would enable a reasonable projection of the consequences of such a scheme on the acquisition budgets of public entities, and also to attempt to determine what savings the public might realize in terms of the impact of settlements on the court system.

This memorandum presents policy issues involved with the concept of an award of litigation expenses if the condemnation award exceeds the condemnor’s offer by 25%. This memorandum also deals with a technical problem pointed out by Norm Matteoni of San Jose, a former Commission consultant on eminent domain law. See Exhibit p. 1.

Law of Other Jurisdictions and Statistics on Eminent Domain Costs

The Commission found it instructive at the August meeting to compare how other jurisdictions deal with this issue. There was some question whether the brief synopsis in the memorandum before the Commission at that meeting, drawn from *Nichols on Eminent Domain*, actually reflected the current state of the law in a number of jurisdictions. In addition, there was some dispute over whether as a practical matter eminent domain juries simply split the difference between the condemnor’s offer and the property owner’s demand.

In response to these questions, the Institute for Legislative Practice has reviewed the law of every state; the staff has a copy of their detailed analysis, which will be available at the meeting. We also have received a copy of a report by the Virginia Division of Legislative Services, *State Provisions on the Recovery of Litigation Expenses in Eminent Domain Proceedings* (August 24, 1999), which

includes useful analysis. We will refer to relevant law in other jurisdictions in connection with a number of issues discussed in this memorandum.

The Institute for Legislative Practice has also gathered data on eminent domain awards in comparison to the parties' offers and demands, and on the costs to the court system of trying an eminent domain case. The Institute's report on this matter will be available at the Commission meeting, but a few key findings are referred to at appropriate places in this memorandum.

Draft of 25% Rule

A provision that would impose litigation expenses on the condemnor if the award exceeds the condemnor's final offer by 25% or more would look something like this:

Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers

1250.410. (a) At least 30 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file and serve on the plaintiff its final demand for compensation in the proceeding. Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

~~(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding exceeds the offer of the plaintiff by 25% or more, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.~~

In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed and served prior to or during the trial.

(c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

Comment. Section 1250.410 is amended to replace the "reasonableness" standard with a more objective standard for determining entitlement to litigation expenses. It should be noted, however, that the reasonableness of the written offers and demands of the parties may enter into a determination of the amount of

litigation expenses, pursuant to the second paragraph of subdivision (b).

Policy Concerns with 25% Rule

The formula being developed by the Commission would provide for the defendant's litigation expenses if the amount awarded in the proceeding exceeds the plaintiff's final offer by 25% or more. This is comparable to the law in a number of states allowing litigation expenses if the award exceeds the plaintiff's offer by a specified percentage or, in some cases, if the award exceeds the plaintiff's offer by any amount. See, e.g., Montana and Oregon (any amount); Alaska, Oklahoma, and Washington (10%); Wisconsin (15%); Iowa (110%).

The staff is not satisfied this proposal has received sufficient scrutiny. Suppose, for example, the plaintiff's final offer is \$100,000 and the defendant's final demand is \$200,000. If the award comes in at \$125,000 the plaintiff would be required to pay the defendant's litigation expenses, even though the plaintiff's offer was more reasonable (i.e. closer to the amount actually awarded) than the defendant's demand. Under the 25% formula, there is little incentive for the defendant to behave reasonably. One of the key purposes of the litigation expense statute is to encourage settlement, but the "encouragement" in the 25% formula is primarily directed towards the plaintiff to meet the defendant's demand.

There are other formulas that would be more even-handed in their operation. For example, it is an element of the law of some jurisdictions that as a precondition to recovery of litigation expenses, the award must be closer to the demand of the property owner than to the offer of the condemnor. See, e.g., South Carolina and federal Equal Access to Justice Act.

The Uniform Eminent Domain Code offers an interesting approach — the defendant is entitled to litigation expenses if the award equals or exceeds the defendant's demand. This emphasizes the defendant's behavior in determining the defendant's entitlement to litigation expenses.

There is another aspect of the 25% formula that should be addressed. In the example above, the plaintiff's final offer is \$100,000 and the award comes in at \$125,000. Suppose the defendant's litigation expenses to achieve that result were \$50,000. **Shouldn't the award of litigation expenses be limited to the amount by which the award exceeds the plaintiff's offer?** Otherwise a defendant could

act unreasonably without penalty, spending huge amounts of money to achieve a comparatively modest increase in the award, all at the plaintiff's expense.

It could be argued that some such limitation is inherent in existing law. Litigation expenses are defined to include reasonable attorney's fees "where such fees were reasonably and necessarily incurred to protect the defendant's interests". Code Civ. Proc. § 1235.140(b). However, it would require a subjective determination to conclude that an expenditure for attorney's fees that exceeds the increase obtained is not reasonable. Since our object here is to make the statute more objective and mechanical in operation, the subjective element should be eliminated.

The statutes of a number of states offer models. The most interesting is Florida, which awards attorney's fees based on the "benefits achieved", as measured by the excess of the award over the condemnor's offer. Under Florida law there is a schedule of attorney's fees — 33% of any overage up to \$250,000, 25% of the portion of any overage between \$250,000 and \$1,000,000, and 20% of any portion of the overage exceeding \$1,000,000. Michigan's formula is complex, but imposes a maximum attorney's fee award of 1/3 of the overage obtained above the condemnor's offer.

The Uniform Eminent Domain Code provides that the property owner is not entitled to litigation expenses unless the award equals or exceeds the property owner's demand, but if it does, then litigation expenses are allowed not exceeding 25 percent of the amount by which the award exceeds the condemnor's offer.

Effect of Award of Litigation Expenses on Condemnor Acquisition Costs

There is some indication in the literature that a statute providing an award of litigation expenses to the property owner, where none existed before, will create a disincentive for the property owner to settle. This presumably would result in higher condemnor costs, both in terms of increased litigation and higher awards, as well as in payment of the property owner's litigation expenses. Background research prepared by Virginia's Division of Legislative Services indicates a decrease in negotiated purchases where a litigation expense statute is enacted. Munyan, *State Provisions on the Recovery of Litigation Expenses in Eminent Domain Proceedings* 9 (Aug. 24, 1999): "A review of states that had recently adopted attorneys' fees provisions (California, Pennsylvania and Louisiana) indicates, though not conclusively, that the percentage of parcels acquired by negotiations

will decline but not significantly upon the adoption of such a provision.” (citing Dobson, *Payment of Attorney Fees in Eminent Domain and Environmental Litigation* 728-729, Transportation Research Board, (ALI/ABA 1979)).

There are no data readily available on the effect of a change in the standard for awarding litigation expenses. A natural assumption would be that a move from the existing subjective standard in California (which enables the condemnor to avoid litigation expenses in many cases) to a more objective standard will inevitably result in condemnors paying more litigation expenses. But this is not a necessary result. A bright line rule such as the 25% rule could promote settlements, actually resulting in greater savings to the condemnor. A settlement at very least saves the condemnor its own litigation expenses, not to mention the possibility that if the case goes to trial the property owner may be awarded compensation greater than the proposed settlement. A bright line standard would also minimize litigation over the issue of litigation expenses itself — a not insignificant factor under existing California law.

The statistics for California eminent domain proceedings collected by the Institute for Legislative Practice indicate that eminent domain awards tend to fall somewhere in the middle range between the final offer of the plaintiff and final demand of the defendant. Jury verdicts average 16% higher than the midway point, and bench verdicts come in almost exactly at the midway point. In terms of percentages, the average jury verdict is about 56% higher than the plaintiff’s offer and the average bench verdict is about 35% above the plaintiff’s offer. These statistics suggest that application of a 25% formula would either routinely result in an award of litigation expenses, or would tend to push the condemnor’s offer higher. Whether higher offers by condemnors would result in more settlements, or would move offers closer to awards, or would simply set a higher base from which the trier of fact would split the difference, is a subject for speculation.

Cost Impact on Court System

Apart from the question whether a bright-line standard for awarding the property owner litigation expenses will increase condemnor acquisition costs, there may be savings to the public in the form of decreased court costs resulting from settlements. As our consultant Gideon Kanner has pointed out, eminent domain litigation increases fees payable by a condemnor to a property owner’s lawyer and valuation experts, at the expense of the public:

It imposes needless burdens on all parties, including the courts. Avoidable procedural/litigational complexities, as Justice Friedman astutely noted in *People v. Voltz*, 25 Cal. App. 3d 480, 487 (1972), only shift the cost of adjudication from the parties to the courts (“Any profit to the state highway fund would be weighed in the balance against the increased cost of court operation. One segment of government would pay for the tactical choices of another.” *id.* at 487) In other words, in such cases the condemnor’s gain is not only the owners’ but also the courts’ loss.

The Commission has requested additional information about the court costs involved in eminent domain litigation. The Institute for Legislative Practice has collected some statistical information, which indicates that the average eminent domain jury trial consumes about 10 days, at a cost to the taxpayers of about \$33,000 (taking into account courtroom costs such as salaries and overhead). The staff notes that this does not take into account the very substantial imposition on jurors and prospective jurors summoned to resolve the valuation dispute.

These numbers, combined with the Institute’s findings that verdicts tend to fall midway between the offers and demands of the parties, suggest that the litigation expense statute should be so structured as to maximize the incentive of the parties to achieve a negotiated settlement of the valuation dispute.

Filing Final Offer and Demand

Mr. Matteoni (Exhibit p. 1) observes that Code of Civil Procedure Section 1250.410 requires the final offer of the plaintiff and demand of the defendant to be “filed” with the court. Notwithstanding the statutory requirement, Mr. Matteoni has experienced some courts whose clerks refuse to file, but instead “lodge” the documents with the court. When a motion is made for litigation expenses, the statutory filing requirement has not been satisfied, since the offer and demand have been lodged rather than filed. Procedural gymnastics are necessary to get around this problem. Mr. Matteoni hopes it can be resolved directly by statute.

As long as we’re dealing with this section anyway, **the staff suggests that we expand the filing requirement to allow lodging as an alternative.**

Code Civ. Proc. § 1250.410 (amended). Pretrial settlement offers

1250.410. (a) At least 30 days prior to the date of the trial on issues relating to compensation, the plaintiff shall file or lodge with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant shall file or lodge and serve on

the plaintiff its final demand for compensation in the proceeding. Such offers and demands shall be the only offers and demands considered by the court in determining the entitlement, if any, to litigation expenses. Service shall be in the manner prescribed by Chapter 5 (commencing with Section 1010) of Title 14 of Part 2.

(b) If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the offer of the plaintiff was unreasonable and that the demand of the defendant was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to Section 1268.710 shall include the defendant's litigation expenses.

In determining the amount of such litigation expenses, the court shall consider the offer required to be made by the plaintiff pursuant to Section 7267.2 of the Government Code and any other written offers and demands filed or lodged and served prior to or during the trial.

(c) If timely made, the offers and demands as provided in subdivision (a) shall be considered by the court on the issue of determining an entitlement to litigation expenses.

Comment. Section 1250.410 is amended to provide for lodging the offer and demand with the court as an alternative to filing. This is intended to avoid jurisdictional issues where a court clerk lodges, rather than files, the offer and demand.

This will eliminate the battle with the court clerks, and perhaps save the parties a filing fee. (If this appears to be a generally acceptable solution, it could also be included with other technical eminent domain revisions proposed for next session.)

Respectfully submitted,

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Executive Secretary

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RE: Eminent Domain

Dear Nat:

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I am following with interest the Commission's agenda on the studies and proposed revisions to the Eminent Domain Code.

I recently experienced a problem that has come up from time-to-time in filing the statutory offer and demand required by CCP §1250.410. Some court clerks do not want to file these documents, rather proposing that they be lodged with the court. I have had experience with the courts on a motion for litigation expenses applying the statute literally. In fact, you will notice that the language in the statute places filing before serving. Thus, some courts view the filing as an important verification concerning the transmittal of the offer or demand.

Further, the clerk offices that refuse to file are inconsistent, taking some papers for filing and others for lodging. Thus, the attorney whose papers are not filed must contact the other side to seek a stipulation regarding the non-filing or argue with the clerk.

I am not sure that more words can be added to the statute to stress the filing, such as "file not lodge". Or, perhaps we should give in to the inevitable and change the word "filing" to "lodging".

This is not a big issue, but it is troublesome. Thus, I refer it to the Commission.

Very Truly Yours,


NORMAN E. MATTEONI

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