

Effect in Florida of Requiring Condemnor to Pay Condemnee's Entire Litigation Expenses

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• When condemnor and condemnee cannot agree, the unavoidable trial costs the owner substantial sums in attorneys' fees, appraisers' fees, and the other expenses of any litigation. Does the owner receive "just compensation" when he recovers the full value of his property but must spend part of it to pay the litigation expenses he was powerless to avoid?

The answer has been that, because costs and fees were never allowed under the common law and the sovereign is not liable for costs unless it consents, the constitutional requirement that just compensation be paid does not require payment of any costs or fees and none are recoverable unless clearly provided by statute.¹

This historical answer is too pallid to last indefinitely and, like the doctrine of sovereign immunity, its future is doubtful unless there be some more convincing reason for a rule of law which on its face appears unjust. Making condemnor pay all of condemnee's litigation expenses is like cutting off a head to cure a cold. This conviction is based on actual experience with the new concept in the only State that has tried it.

In 1892, a Florida statute required that condemnor pay "all costs of the proceedings"² and in 1907 the legislature added "including a reasonable attorney's fee for the defendant to be assessed by the jury."³ In 1950, it was held that "all costs" included appraisers', engineers', and photographers' fees and charges.⁴ In 1959, it was held, on authority of the earlier case, that an attorney's fee assessed by the appellate court as well as all appellate costs were payable to condemnee, unless he appealed and lost. This conclusion, it was said, was implicit in the constitutional requirement for just compensation even if there had been no statutory authority.⁵ In 1962, it was held that costs, including appraisers' fees, incurred by defendants unable to agree on the apportionment of an award after trial must also be paid by the condemnor.⁶

In Florida, therefore, condemnor pays all the litigation expenses incurred by condemnee irrespective of the outcome. No other jurisdiction has gone so far.⁷ The consequences have been revealing.

Assuming he is offered no more than condemnor's appraisal, the property owner in Florida cannot lose by going to trial and he might gain. Attorneys and appraisers interested in employment are tempted to encourage property owners to reject an offer and go to trial. The owner, assured that his litigation expenses will be paid by condemnor, has no reason to reject the advice. The first consequence, therefore, was a sharp reduction in the ratio of properties acquired by purchase, from over 90 percent

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¹Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed.904, 68 A.L.R.434; Nichols, "Eminent Domain." 3rd ed., vol. 1, §4.109.

²§1558 R.S. 1892.

³Ch. 5707, Laws 1907; presently §73.16 Florida Statutes.

⁴Dade County v. Brigham, Fla. 1950, 47 So.2d 602; 18 A.L.R.2d 1221.

⁵Jacksonville Expressway Authority v. Henry G. DuPree Co., Fla. 1959, 108 So.2d 289, 293; 69 A.L.R.2d 1445.

⁶Orange State Oil Co. v. Jacksonville Expressway Authority, Fla.App.1962, 143 So.2d 892, 895.

⁷HRB Special Report 59, 44-48 (1960). Although 13 other States allow attorneys' fees, all but Oregon are either nominal or limited to instances of abandonment. The allowance of costs in Oregon is dependent on whether the award of the Court exceeds the award of viewers.

before 1950, to less than 20 percent by 1957.⁸ This, in turn, led in one instance to a jury trial involving 90 parcels of land owned by different defendants represented by 29 attorneys before one judge and jury for the right-of-way for one road.⁹ Two other similar trials were required for the right-of-way for this particular road.

In the trial just described, the owners received nothing more than condemnor offered, the verdicts falling between the opinions expressed by condemnor's two experts. Though the verdict was affirmed, it is safe to say that no one felt this was a model for just or equitable land acquisition, and the occasional owner with a genuine issue as to value was submerged in a flood of opportunists and all came away empty-handed. The taxpayer's bill for staging this circus was substantial.

In a small north Florida county, where the court in the interest of justice elected to order separate trials, the volume of eminent domain litigation soon occupied one-third of the entire trial docket with resultant delay to all litigation. This solution proved intolerable.

Because the owner's attorney's fee and expert witnesses' fees are related to the time and effort expended and cost is no deterrent, the trial tends to become a marathon limited only by the patience of the judge and the obvious impatience of the jury. It is not uncommon for the trial of five parcels, regardless of value, to take two weeks. In one instance, two weeks were spent selecting a jury.

Although these extremes cannot prove the point, they do illustrate two facts: (a) when the owner's litigation expenses are paid by his adversary and his advisers get more as they litigate longer and harder, litigation increases; and (b) when more than one-half the property required by the public must be litigated in court, either the judicial structure is choked beyond endurance by the added burden or the court in self-defense so accelerates the litigation that justice can become an accident. In practice, therefore, the intended objective of assuring the owner just compensation is not attained but actually is threatened.

The next consequence of imposing all of condemnor's litigation expenses on condemnor was to increase condemnor's acquisition costs by not less than 30 percent of the initial appraised value of the required property.¹⁰

The breakdown of this additional cost can be illustrated with an average parcel. The following figures are actual averages from experience over the past four years. The parcel was initially appraised at \$7,814. At trial, the higher of two appraisals submitted by condemnor was \$8,306. Because the owner's expenses are recoverable, he offered at least two experts and two were needed to meet him. The verdict was \$8,716. The owner's proof, it is noted in passing, sought \$19,650. The jury awarded the owner's attorney a fee of \$739. It is difficult in this climate to find attorneys experienced in this field willing to testify that more modest fees are reasonable. They may be defending the next trial. The owner spent \$461 for expert witnesses, photographs, surveys, and what not, of which the trial court assessed \$360 against condemnor. The expense to condemnor in litigation expenses excluding the time of its employees was \$213. Counsel's time and the time of condemnor's right-of-way engineer and others added \$158.

The foregoing figures do not include all of the cost to condemnor of litigating. Of the parcels tried, 14 percent were appealed at very considerable additional expense. No effort is made to estimate the public's additional expense in the time of the court, jurors, or the delay in acquisition.

The net effect, therefore, is that the public spent at least \$10,186 to acquire a parcel initially appraised at \$7,814. Of this additional \$2,372 spent by the public, the owner received \$902, less the difference in costs incurred by him (\$461) and the costs recovered (\$360), or a net benefit from litigation to the owner of \$801, 10 percent more than the initial appraisal. The other \$1,571 went down a rat hole, so far as both the owner and the public are concerned.

⁸All figures given come from the records of Dade County (Greater Miami), which has 20 percent of Florida's population.

⁹Dratch v. Dade County, Fla.App.1958, 105 So.2d 171.

¹⁰This and the following figures are based on the records of Dade County's acquisition of \$14 million worth of right-of-way for 32 projects over the past four years.

Is the additional \$801 recovered by the owner actually a more just value for his property or does it merely reflect the difficulty of keeping juries from some degree of compromise?¹¹ If the verdict is more just, does the amount involved warrant the extraordinary cost to the public? The verdicts returned indicate strongly that a lack of confidence in the integrity and accuracy of condemnor's valuations is totally unjustified. A policy that encourages rather than discourages litigation must be based at least in part on the premise that the public agency cannot be trusted to make a just offer. It is difficult to believe this premise is sound. On the contrary, it is a fair generalization that public appraisals tend to exceed the market simply because public employees have less incentive to save money than to avoid friction with disappointed citizens.

The independent appraiser employed by a public agency is rarely under pressure to limit his value. He knows that a tight estimate will provoke arguments, bitterness, litigation, and difficult cross-examination. A more generous estimate tends to avoid, or at least ease, all these pressures and is likely to please the agency negotiators who probably had a hand in selecting him for employment. The taxpayers can never know whether he was tight or generous in his estimate. Which course is he likely to follow? Invariably he will resolve all doubts in favor of the owner. It is a fact that the most valuable use to which property can be put is for it to be condemned by the public.

There is far less reason to suspect the fairness of government dealing with its citizens than there is to suspect the fairness of insurance companies or the defendants in other civil litigation. Why, then, should litigation be financed and thus encouraged when the government is involved, but not when private interests only are involved?

It is said that public policy requires that the property owner be placed on an equal footing with his government in condemnation cases. The government's resources are unlimited and the owner is like a pebble before this wave. However, the third consequence of requiring government to finance the defense is that it does not equate the parties, it quite literally puts the government at the mercy of the property owner.

The owner can employ the very best attorney and experts available, because the only limit to their compensation is the amount of time and energy they are willing to spend. They cannot fail to be paid. Government operates under budgets and can rarely afford to employ the best, reluctant as one may be to admit it. At trial, therefore, the owner holds the high cards. His superior advocate represents a litigant who usually has nothing to lose and everything to gain. He controls the extent and, therefore, the expense to the government of the litigation. The owner holds the high cards at the bargaining table as well. Is the public interest truly served by putting the government at the mercy of its individual citizens?

The final consequence, in practice, of making condemnor pay all of condemnee's litigation expenses is to nourish very directly an industry of lawyers, appraisers, surveyors, engineers, photographers, and the like who will be paid by condemnor if condemnee will let them take his matter to court. The vast majority of these people do not let their personal interest becloud their ethics or their sense of duty to their clients. The few that do create a cancer disproportionate to the numbers of individuals involved. They are as difficult and costly to eradicate as the ambulance chaser. Almost invariably they do nothing for the owner who employs them, other than undermine his confidence in his government and its courts.

The completely reputable and highly skilled attorneys employed by condemnees create a less obvious but graver problem. Because their rate of compensation is limited only by their ability to persuade or overwhelm a jury, there is every tendency to attract the very best attorneys and experts to the condemnee's side. Because they are advocates, their enthusiasm for their client's cause can warp their sense of justice. They are not intimidated by established precedent. Because they are, by the process of selection, the cream of an influential group, it is but a matter of time before their views become those of the courts and, to a lesser extent perhaps, the legislature.

The author cannot quarrel with the fact that courts tend to reflect the views of lead-

¹¹Twelve of 32 juries returned verdicts identical to the evidence for all parcels tried. The other 20 juries compromised to some degree on at least some parcels.

ers of the bar. They should. One can only marvel at what has happened to the law of eminent domain in Florida since the leaders of the bar were induced to the side of the condemnee.

In 1950, it was held, as already noted, that "all costs" in a statute then 58 years old required condemnor to pay not only all taxable court costs but all expenses of litigation, a legislative intent theretofore completely unsuspected and a holding virtually without precedent.¹²

In a series of decisions from 1958 to 1959, it was held that an owner may recover a value for property based on uses prohibited by existing restrictions,¹³ nullifying the effect of two earlier decisions.¹⁴

In 1959, it was held that interference with ingress, though other access was available, constituted a taking¹⁵; this, despite the deliberate omission of a constitutional prohibition against damage without compensation in Florida.¹⁶ This decision blunted, if it did not reverse, at least two prior decisions.¹⁷

In 1959, it was held that an owner may recover moving expenses, though the opinion concedes that this is against the clear weight of authority elsewhere and is without statutory authorization in Florida.¹⁸

In 1961, the granting of a new trial was affirmed merely because the judge was shocked by the verdict, though it was within the range of proof and the trial itself was admittedly free from error.¹⁹ This decision abandoned at least one prior decision.²⁰

In 1962, it was held that condemnee can compel production before trial of all opinions and data in the hands of condemnor's experts though condemnor cannot have access to condemnee's experts. The court acknowledged that this was directly contrary to the rule that governs all other civil litigation in Florida.²¹

In 1962, it was held that condemnor must pay all litigation expenses incurred by defendants in a private squabble over apportionment of an award after trial²² though condemnor has no interest in nor control over this litigation.

Illustrative of the concern for the property owner (represented by the ablest counsel that condemnor's money can hire) is the following passage:

The powerful government can usually take care of itself; when the courts cease to protect the individual—within, of course, constitutional and statutory limitations—such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign.²³

¹²See note 4 supra. Compare *Inland Waterway Develop. Co. v. City of Jacksonville, Fla.* 1948, 38 So.2d 676.

¹³*Board of Com'rs. of State Inst. v. Tallahassee B. & T. Co., Fla. App.* 1958, 100 So.2d 67, cert. den. 101 So.2d 817; *Fla.App.* 1958, 101 So.2d 411; *Fla.App.* 1959, 108 So.2d 74; *Fla.* 1959, 116 So.2d 762; *Swift & Company v. Housing Authority of Plant City, Fla.* 1958, 106 So.2d 616.

¹⁴*City of Miami Beach v. Hogan, Fla.* 1953, 63 So.2d 493; *Yoder v. Sarasota County, Fla.* 1955, 81 So.2d 219.

¹⁵*Florida State Turnpike Authority v. Anhoco Corp., Fla.* 1959, 116 So.2d 8, 16.

¹⁶*Selden v. City of Jacksonville, 28 Fla.* 558, 10 So. 457, 462, 14 L.R.A.370 (1891).

¹⁷*Weir v. Palm Beach County, Fla.* 1956, 85 So.2d 865; *Lewis v. State Road Department, Fla.* 1957, 95 So.2d 248.

¹⁸See note 5 supra.

¹⁹*Bennett v. Jacksonville Expressway Authority, Fla.* 1961, 131 So.2d 740.

²⁰*Edwards v. Miami Shores Village, Fla.* 1949, 40 So.2d 360. See also comment by another court in *Bainbridge v. State Road Department, Fla.* 1962, 139 So.2d 714, 719.

²¹*Shell v. State Road Department, Fla.* 1962, 135 So.2d 857, 860.

²²*Orange State Oil Co. v. Jacksonville Expressway Authority, Fla.App.* 1962, 143 So.2d 892, 895.

²³*Jacksonville Expressway Authority v. Henry G. DuPree Co., Fla.* 1959, 108 So.2d 289, 293, 69 A.L.R.2d 1445; compare the observation of another court, *Bainbridge v. State Road Department, Fla. App.* 1962, 139 So.2d 712, 717.

This remark, it must be remembered, is made in the only State where the entire cost of litigation incurred by the owner must be paid by the public.

Also illustrative of the degree to which an able and dedicated court has been moved by a policy that attracts the strongest advocates to the defense of property owners is the fact that one most able justice, in dissenting from a decision favoring the owner, was moved to explain that this signaled no change as to his sympathy:

In almost every case where the question was at issue, I have upheld the rights of the landowner in such proceedings.²⁴

The end is not yet in sight. Implicit in many decisions is a rejection of the market value concept of compensation in favor of a special value to the owner concept.²⁵ One must anticipate that mental anguish, inconvenience, and sentimental value will in time be added to the public's bill in Florida. The author cannot demonstrate that the recent developments in Florida condemnation case law are attributable solely to the fact that condemnee's litigation expenses are paid by condemnor, but this fact was certainly the major cause.

It may be too soon to conclude that Florida is wrong and the rest of the country is right. However, the balance of public interest and private interest reflected in the established eminent domain procedures and precedents in this land has stood the test of time well. Any tampering with such tested scales should be approached most cautiously. The Florida experiment in requiring condemnor to finance all of condemnee's litigation expenses has demonstrated the danger of disturbing the tested balance. If the suspected malady required treatment, the cure was ineffective, very expensive, and it has produced and will continue to produce harmful side effects that are far more serious than the assumed malady.

²⁴Bennett v. Jacksonville Expressway Authority, Fla.1961, 131 So.2d 740, 745.

²⁵E.g., Jacksonville Expressway Authority v. Henry G. DuPree Co., Fla.1959, 108 So.2d 289,292. Compare Nichols, "Eminent Domain." 3rd ed., vol. 4, §12.22; Orgel, "Valuation Under Eminent Domain." 2nd ed., vol. 1, p. 74.