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DISTINCTIONS BETWEEN FLORIDA AND FEDERAL PRACTICE

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I. [§16.1] I N T R O D U C T I O N

To those accustomed to Florida eminent domain practice, the federal arena may appear somewhat different. The differences stem from Florida's more restrictive constitutional and statutory limitations on the inherent sovereign power of eminent domain, and from the discovery and pretrial requirements of the Federal Rules of Civil Procedure. The purpose of this chapter is to highlight the most significant distinctions and similarities between federal and Florida eminent domain law.

II. [§16.2] SOURCES, LIMITATIONS, AND MODE OF EXERCISING POWER

Among the inherent powers of the United States and the state of Florida is the power of eminent domain. This inherent power is necessary for governmental entities to carry out their functions. The power may be defined as the sovereign power of the government to appropriate for public use both real and personal property within its geographical limits. *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 43 S.Ct. 442, 67 L.Ed. 809 (1923); *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449 (1876).

The federal limitation on the power of eminent domain is found in the Fifth Amendment to the United States Constitution, which directs “nor shall private property be taken for public use without just compensation.”

Article X, §6(a) of the Florida Constitution contains the following restrictions on the power of eminent domain: “No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.”

The constitutional limitations in Florida are far more restrictive than those in the federal constitution, which requires only that “just” compensation be paid. There is no requirement that payment be made before the taking of the property. On the other hand, the Florida Constitution requires that “full” compensation be made before the taking. Whereas 40 U.S.C. §258a makes a deposit the prerequisite for a taking, the provision is statutory and not constitutional. Full compensation in Florida includes the payment by the condemnor of attorneys’ fees and costs. *F.S.* 73.091–73.092. There is no parallel federal constitutional requirement. Attorneys’ fees in federal cases are paid only in limited circumstances. See §16.17.

III. [§16.3] STATUTORY AUTHORITY

The practice of eminent domain in Florida is governed by *F.S.* Chapters 73 and 74. *F.S.* Chapter 73 deals with the process starting with the filing of the eminent domain case through final disposition. *F.S.* Chapter 74

discusses issues such as the quick take proceedings that enable the condemnor to take title and use the property in advance of final judgment. The federal practice of eminent domain is governed by 40 *U.S.C.* §258a and Fed.R.Civ.P. 71A. Both Florida and federal eminent domain proceedings are in rem proceedings.

IV. PRACTICE AND PROCEDURE

A. [§16.4] Process Service And Publication

Service of process under Fed.R.Civ.P. 71A(d) requires only that the notice of condemnation be served on the defendants. There is no requirement that the defendant actually receive a copy of the complaint, but a copy will be given to each defendant on request. Fed.R.Civ.P. 71A(c)(3). The defendant must serve an answer within 20 days after service of the notice, or waive the right to contest the taking. This is similar to the state provision that requires the service of written defenses no later than specified in the summons which, under *F.S.* 73.031, can be no less than 28 nor more than 60 days from the date of the summons. In Florida, service is made under *Fla.R.Civ.P.* 1.070.

B. [§16.5] Petition Or Complaint

Under *F.S.* 73.021(4), the case caption usually contains the names of all of the defendants to the litigation; the federal complaint names the property as primary defendant and at least one of the owners as an additional defendant. Fed.R.Civ.P. 71A(c)(1). The body of the complaint is similar to the extent that both the federal complaint and the state petition require

1. a statement of the authority for the taking;
2. a statement of the use to which the property is to be put;
3. a description of the property;
4. a statement of the interest to be acquired; and
5. a list of the defendants who may have a claim in interest to the property.

The state petition also requires

1. a statement addressing surveys;
2. a statement of good faith intention to build the project;
3. a demand for relief not contained in the federal complaint; and
4. a statement of whether a mobile home exists on the property to be taken, and, if so, additional information regarding removal of the

home.

F.S. 73.021.

C. [§16.6] Offers Of Judgment

Florida law permits either the petitioner or the defendant to make an offer of judgment. *F.S. 73.032.* The petitioner may serve the defendant with an offer of judgment under any circumstance provided by the statute; the defendant may make an offer of judgment to the petitioner only for an amount under \$100,000.

There is no similar federal provision for offers of judgment.

D. [§16.7] Acquiring Or Perfecting Title After Appropriation

Florida law provides that a party having the power of condemnation may acquire property or perfect title to that property even after that property has been occupied by the condemning authority. *F.S. 73.041.*

Although there is no similar federal statute, there is no case law that would bar the acquisition of property even after seizure.

E. [§16.8] Return And Default

F.S. 73.051 provides that any party having an interest in or lien on the property may file “written defenses” to the petition on or before the “return date.” Even if the defendant fails to respond, he or she still may appear before the jury to claim compensation for the property.

F.S. 73.051 is similar to Fed.R.Civ.P. 71A(e), which requires no answer to preserve the right to seek full compensation. However, any defense to the taking not raised within 20 days after service of the notice on the defendant will be waived. The federal rule also authorizes the filing of only an answer; no other pleadings are specifically authorized in federal condemnation actions.

F. [§16.9] Prelitigation Notice

Florida law requires the condemning authority to notify fee owners before litigation that they have certain statutory rights to attorneys' fees and costs. *F.S. 73.0511.* No similar provision exists in the federal law. Attorneys' fees and costs are not payable as a matter of right in federal takings.

G. [§16.10] Pretrial Hearings

F.S. 73.061 authorizes the court to hold a pretrial hearing to settle disputed matters and to resolve questions of taxes or assessments. Federal law provides that all issues other than the issue of just compensation must be tried

by the court. Fed.R.Civ.P. 71A(h). In practice, many pretrial issues are determined by the federal court, as in Florida courts. The pretrial process is helpful particularly in complex cases involving environmental issues or other issues having a direct impact on the kind, quality, and nature of the land.

H. [§16.11] Taking Issue

In federal cases, the right to condemn property generally is a settled issue once the Congress has determined that a taking is necessary, if the purpose of the taking falls within the constitutional right of Congress. See *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). No order of taking need be entered by the court. Title passes to the government when the declaration of taking is filed:

Upon the filing [of] said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto.

40 U.S.C. §258a.

This is not the situation under Florida law. The burden of proving the right to take the property lies with the condemning authority. In Florida, title passes only when the court enters an order of taking and the condemnor makes a deposit into the court. *F.S.* 74.051, 74.061.

I. [§16.12] **Discovery and Pretrial Procedure**

The 2000 amendments to the Federal Rules of Federal Procedure significantly altered pretrial practice and discovery for federal civil actions, including eminent domain proceedings. The practitioner should carefully review the amended federal rules, particularly Rules 16 and 26, for distinctions from state trial practice such as: the planning conference required by Rule 26(f), the initial disclosures required by 26(a)(1), the expert disclosures required by 26(a)(2), and pretrial disclosures required by 26(a)(3).

J. [§ 16.13] Trial

Florida condemnation cases are heard on a priority basis by a jury of 12 persons. *F.S.* 73.071. Generally, the jury hears evidence only on the issue of full compensation; all other issues are heard by the court. However, in the

context of business damage claims, when the parties dispute whether an affected business was in existence for five years before the taking, the court may permit the jury to resolve this factual issue in addition to compensation issues. *Tampa-Hillsborough Expressway Authority v. Casiano-Torres*, 659 So.2d 1125 (Fla. 2d DCA 1995).

On the other hand, the federal rule provides for the “issue of just compensation” to be tried **by either:**

1. a tribunal **pecially constituted by an Act of Congress governing the case;** or, in the absence of such a **pecially constituted tribunal,**
2. a jury on demand of the parties; or
3. **by a commission of three persons appointed by the court because of the character, location or quantity of the property to be condemned or for other reasons in the interest of justice.**

Fed.R.Civ.P. 71A(h).

In the United States District Court, Southern District of Florida, commission trials have been fairly standard procedure for major projects such as the condemnation of the Big Cypress National Preserve and Everglades National Park. The commission has the powers of a master set forth in Fed.R.Civ.P. 53(c) and must file a written report of the findings of the proceedings. **It is on the basis of those findings that the court enters judgment. The parties may serve written objections within 10 days of the notice of filing of a commission report, and the court’s action on the report and/or any written objections must proceed consistent with Rule 53(e).**

The issue of just compensation is the only issue tried by the federal factfinder, be it a jury or a commission. All other issues are tried directly by the court.

J. [§16.14] Compensation

Business damages are provided for specifically in *F.S.* 73.071(3)(b). To be eligible for business damages, the defendant must qualify under the restrictions set out in the statute. The property must be taken for right of way purposes, and the damage must have occurred to a business of five or more years' standing. Specific defenses must be set forth in the complaint along with the nature and extent of the damages.

Federal law does not recognize business damages except in certain unique situations. *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed. 1765 (1949), 7 A.L.R.2d 1280.

Florida has limited the possible adverse impact of the enhancement created by the taking. Under *F.S.* 73.071(4), enhancement to remaining property may not be set off against the value of the property appropriated. There is no similar provision under federal law.

It is possible under federal law to obtain a zero verdict when the enhancement to the remaining property has exceeded not only the severance damage but the value of the part taken. *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1943).

K. [§16.14] Scope Of The Project Rule

Both state and federal law recognize the “scope of the project rule,” which governs the effect on an owner's compensation of changes in market value resulting from the government project. Both interpret the rule to prevent project-induced decreases in the value of the condemned property from reducing the owner's compensation. However, it is open to question whether the state and federal interpretations diverge with respect to project-based increases in value.

Under the federal interpretation, owners may not benefit from market increases resulting from the project. As stated in *United States v. 320.0 Acres of Land, More or Less, in County of Monroe, State of Florida*, 605 F.2d 762, 781–782 (5th Cir. 1979):

If the condemned land was probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to that project, then the owner is not entitled to any increment in value occasioned by the Government's undertaking the project.

F.S. 73.071(5) appears to mandate the same result:

Any increase or decrease in the value of any property to be acquired which occurs after the scope of the project for which the property being acquired is known in the market, and which is solely a result of the knowledge of the project location, shall not be considered in arriving at the value of the property acquired.

However, the language of *F.S.* 73.071(5) directly conflicts with Florida Supreme Court precedent announced in *Dept. of Transportation of State of Florida v. Nalven*, 455 So.2d 301 (Fla. 1984), which explicitly declined to adopt the federal scope of the project rule and held that an owner may benefit from any general increase in value spurred by knowledge of the government project. Because it is the courts and not the legislature that determine full compensation under Florida law, the portion of *F.S.* 73.071(5) relating to increases arguably is unconstitutional. This conflict is significant because the legislature may not act to diminish full compensation as defined by the courts.

As stated in *Daniels v. State Road Dept.*, 170 So.2d 846 (Fla. 1964),

It is well settled that the determination of what is just compensation for the taking of private property for public use 'is a judicial function that cannot be performed by the Legislature either directly or by any method of indirection.'

* * *

[T]he Legislature may declare its policy with respect to the compensation that should be made in taking private property for public use; and that these declarations, while not conclusive or binding, are persuasive and will be upheld unless clearly contrary to the judicial view of the matter.

170 So.2d at 851, 853. Thus, the portion of *F.S. 73.071(5)* relating to increases in value resulting from a project arguably is invalid as a clear conflict with the holding of *Nalven*. To date no appellate decision has addressed this inconsistency.

L. [§16.16] Other Florida Statutory Valuation Provisions

In addition to business damages, Florida has provided for special valuation provisions governing mobile homes (*F.S. 73.071(3)(c)*), electric utilities (*F.S. 73.0715*), mobile home parks (*F.S. 73.072*), and condominium common elements (*F.S. 73.073*).

There are no similar provisions under federal law.

M. [§16.17] Jury View

A jury view is mandatory on request in state court under *F.S. 73.071(6)* and discretionary in federal court under Fed.R.Civ.P. 71A(h).

N. [§16.16] Costs And Attorneys' Fees

Florida law allows the payment of defense costs including attorneys' fees, accountant fees, and other expert witness fees. Entitlement is **guaranteed established** by *F.S. 73.091*. *F.S. 73.092* includes the procedure for the computation of attorneys' fees. On the other hand, there is no federal entitlement to either attorneys' fees or costs similar to those provided in Florida. There is a provision for payment of attorneys' fees and costs under certain circumstances. 5 *U.S.C. §504*; 42 *U.S.C. §4654(a)*. Compare *United States v. 410.69 Acres of Land, More or Less in Escambia County, Florida*, 608 F.2d 1073 (5th Cir. 1979).

In Florida, attorneys' fees and costs are considered part of the full compensation requirement of the Florida Constitution. *Behm v. Division of Administration, Dept. of Transportation*, 288 So.2d 476 (Fla. 1974). Federal constitutional law recognizes no comparable right. To be paid attorneys' fees and costs in a federal eminent domain case, the defendant seeking this

reimbursement must qualify as a “prevailing party” under the Equal Access to Justice Act, 5 *U.S.C.* §504 and 28 *U.S.C.* §2412. The definition of “prevailing party” is set forth in 28 *U.S.C.* §2412(d)(2)(H):

[A] party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

V. [§16.19] TUCKER ACT

Under the Tucker Act, Ch. 359, 24 Stat. 505, the United States has consented to suits by parties who allege that their property has been taken without the formality of purchase or condemnation. The Tucker Act is the basic jurisdictional act for the United States **Claims Court**. See 28 *U.S.C.* §1491.

Florida has no similar specific statute authorizing so-called “inverse condemnation” claims. Inverse condemnation cases have proceeded in state court under the theory that the compensation clause of Article X, §6, of the Florida Constitution is self-executing.

A federal plaintiff is allowed a choice of forum (either a district court or the Court of Claims) in actions of \$10,000 or less. 28 *U.S.C.* §1346. For claims above that amount, the Court of Claims has exclusive jurisdiction. A choice of forum may not be obtained by splitting a cause of action, either as to time of filing or as to substantive claims.

Causes of action must be brought in the district court within six years after the right of action first accrues. 28 *U.S.C.* §2401. The statute setting a six-year limitation on claims over which the Court of Claims has jurisdiction, 28 *U.S.C.* §2501, is considered jurisdictional and cannot be waived. In “taking” cases, the Supreme Court has held that the property owner may wait and see what property actually is going to be taken before the statutory time begins to run. In *United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947), the court explained when a taking would occur:

Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time. The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure enshrining old or new niceties regarding “causes of action” — when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring

suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him — for instance, the uncertainty of the damage and the risk of *res judicata* against recovering later for damage as yet uncertain. The source of the entire claim — the overflow due to rises in the level of the river — is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really “taken.”

331 U.S. at 748–749.

Although it may be a plausible defense, ignorance of the existence of a lawsuit generally will not toll the statute of limitations. However, the Court of Claims has recognized an exception

when an accrual date has been ascertained, but plaintiff does not know of his claim . . . [p]laintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was “inherently unknowable” at the accrual date.

Japanese War Notes Claimants Association of Philippines, Inc. v. United States, 373 F.2d 356, 358–359 (Ct. Cl. 1967).

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