

Furnishings, Fixtures, and the Functional Unit¹

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Introduction

This article discusses how property commonly referred to as **A**furnishings, fixtures, and equipment@ (or **AFF&E@**) is treated in the eminent domain case.

It discusses the different approaches which various courts have taken with regard to compensation for economic losses to furnishings, fixtures and equipment caused by the taking of associated land and buildings. It identifies the most common issues dealing with this type of property, and discusses the varying ways in which those issues have been resolved. At the conclusion of the article, this attorney provides his personal opinion as to how FF&E should be treated in the determination of just compensation.

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This article is not intended to serve as an encyclopedia of federal and state law on the various issues discussed.² It is also not intended to serve as a complete discussion of the Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (The Federal Relocation Act).³ Rather, it is intended to acquaint the practitioner with the most common issues dealing with furnishings, fixtures, and equipment and suggest the various ways in which some courts have treated those issues.

It is important for the practitioner dealing with these issues to not only familiarize herself with the decisional and statutory law of the particular jurisdiction, but if the condemnation is being sought by an agency of the federal government or an agency utilizing federal funds, then the practitioner must also become familiar with the Federal Relocation Act, *supra*.

What is FF&E, and what is a functional unit? FF&E is a technical term used by machinery and equipment appraisers to describe the collection of articles which is typically owned and used by a business in connection with land, building, and site improvements. Appraisers, lawyers, and courts often disagree as to whether a particular article is or should be categorized as a furnishing, fixture, or article of equipment. This disagreement is often significant because how an article is categorized often determines (1) whether it is considered real estate or Amere@ personal property, which in turn, may determine (2) whether it is condemned to the public use or remains in the private ownership of the condemnee, which, in turn, may determine (3) the owner=s right to compensation and/or the appropriate measure of compensation, and (4) whether the compensation awarded for the article is apportioned to the landowner or tenant at the conclusion of the case. Thus, the mere

²For an additional overview, see, 8A *Nichols on Eminent Domain*, Chapter 28 (Fixtures), p. 28-1 - 28-52 and Long, *Case Note, Wayne County v. William G.*, *University of Detroit Mercy Law Review* (Summer 1998).

³ 42 U.S.C.A., Sec. 4601, et. seq. The Federal Relocation Act is discussed in detail in Schnitker, *Relocation Claims and Federal Relocation Rules* elsewhere in this volume.

classification of an article may be outcome determinative in at least four regards.

It is impossible **B** and certainly not the purpose of this article **B** to categorize every type of article and describe how those articles have been categorized by every court under every factual circumstance. Nevertheless, some definition of the terms **Afurnishings**,[@] **Afixtures**,[@] **Aequipment**,[@] and **Athe functional unit**[@] is necessary, if only to provide the reader with a clear understanding of this article. Thus, for the purpose of this article, **Afurnishings**[@] are considered to be furniture and accessory items which, while not used in the technical sense of producing the product of the business, nevertheless allow the building to be used for its business purpose. In the typical law office, for example, **Afurnishings**[@] might include desks, chairs, window treatments, and pictures on the walls. **Afixtures**[@] are considered those items which are physically attached, and intended to remain with, the land or building. **Afixtures**[@] in the typical law office might include built-in-place book shelves and filing cabinets, chair rails and crown molding. **Aequipment**[@] is considered to be the machinery used to produce the business= product. In the generic law office, **Aequipment**[@] would include computers, printers, and telephone units.

The term **Afunctional unit**[@] is a legal term established by the New Jersey Supreme Court to describe the combination of a building and the industrial equipment located within it.⁴ The **Afunctional unit**,[@] like the **Aassembled economic unit**[@]⁵ has, in certain jurisdictions, become a legal classification, which is referred to in order to determine the method by which the measure of just compensation is to be determined for economic losses to FF&E suffered by a taking.

There are special items of property which, while related to FF&E, are beyond the scope of this article. They include crops

⁴*State v. Gallant*, 202 A.2d 401 (N.J. 1964).

⁵*Singer v. Oil City Redevelopment Authority*, 261 A.2d 594 (Pa. 1970).

growing in the ground, outdoor advertising signs,⁶ and plumbing and electrical wiring installed within the walls, floors, or ceiling of a building. Similarly, the intangible value of the business, as opposed to tangible business property, is beyond the scope of this article.

⁶See, 73 A.L.R. 3d 1122, *Determination of Just Compensation for Condemnation of Billboards and Other Advertising Signs*.

FF&E is an interesting area of eminent domain law and practice for several reasons. First of all, it is an area in which the law of most states is not yet fully developed. There are several reasons for this. There have been far fewer condemnation cases involving furnishings, fixtures, and equipment than there have been cases involving lands or buildings. Obviously, since there have been fewer cases, there have been fewer appeals, limiting the courts' opportunities to establish and develop decisional law in this area. In addition, since equipment is generally less valuable than land and buildings, disputes regarding furnishings and fixtures are generally easier to settle and less likely to be appealed than issues regarding other forms of property. Finally, since 1970, many condemnees facing economic losses relating to furnishings, fixtures and equipment have had an alternate remedy **B** the Federal Relocation Act. Passage of this act has provided many condemnees with rights to compensation not previously provided under their states' laws. Because condemnation law in the field of FF&E is not as developed as condemnation law regarding other property, there is more of an opportunity for the practitioner **B** be she representing the authority or the owner **B** to shape the law and provide certainty in those areas in which the law may yet be definitive.

Dealing with fixtures and equipment is also interesting because the relationship between personal property, real estate, and condemnation has been a challenging one, not only for the parties and their attorneys, but for the courts, themselves. As one court has noted:

The concept of personal property shedding its identity as personalty and assuming, from its relationship to land or structures situated thereon, the status of real property or fixtures, has bedeviled the courts for years, and has continually stymied them in their efforts to formulate a comprehensive and generally applicable rule of law. Complicating the task is the need for definition in situations where the relationships between the parties differ, or where consideration of public policy point in different

directions, e.g., eminent domain, taxation, vendor-vendee, and mortgagor-mortgagee.⁷

⁷*Masheter, Dir. of Highways v. Boehm*, 307 N.E.2d 533, 537 (Ohio 1974).

Dealing with FF&E often proves interesting to the practitioner for other reasons as well. It is one of the few areas of condemnation law in which alternate remedies may be available to a condemnee. State law may provide an owner with alternate forms of compensation for economic losses fo FF&E. In addition, the Federal Relocation Act may provide an owner with a right to compensation for the same or similar losses as state substantive law. The owner=s attorney may thus be required to evaluate the advantages and disadvantages of (a) claiming damages to equipment under various forms of compensation available to her under state law, and/or (b) determining whether to proceed under state law, the Federal Relocation Act,⁸ or a combination of both. The attorney for the authority has a corresponding responsibility to assure that the owner=s access to both the Federal Relocation Act and the eminent domain compensation trial does not result in **A**double compensation,@ which, in turn would result in a forfeiture to his governmental client.

The fact that losses to FF&E may be recoverable either as various elements of compensation or under different processes raises the possibility that the practitioner will need to concern himself with issues relating to election of remedies and, if partial settlements are reached, collateral estoppel and res adjudicata.

Dealing with furnishings, fixtures, and equipment is also interesting from a factual standpoint. Owing to their technical nature, many articles of equipment are interesting in their own right. The articles then may become even more interesting because of the manner in which they have been assembled, connected, and used in conjunction with other articles, buildings, and the land. The old adage that **A**No two pieces of property are exactly alike@ is no more applicable to assemblages of furnishings, fixtures, and equipment. The condemnation lawyer who enjoys the challenge of dealing with **A**comparable

⁸One benefit of receiving compensation as relocation benefits under the Federal Relocation Act is because payments under that act are not considered as income for federal income tax purposes. See, 42 U.S.C., Sec. 4636.

sales, @ income, replacement costs and depreciation of land and building will find application of the same principles to furnishings, fixtures, and equipment even more challenging.

There are numerous issues relating to FF&E which can arise in the condemnation action. Most of those issues relate to possession, abandonment, valuation, and apportionment of the award. The three issues which most frequently arise are:

1. After the taking, who owns these articles? (Have they been condemned, or does the owner still own them?)

2. Is the owner entitled to any form of compensation for economic losses relating to these items caused by the taking?
3. If the owner is, in fact, entitled to compensation, what sort of compensation is he or she entitled to? (Is the owner limited to moving costs, or is the condemning authority obligated to pay for the loss in value of the articles, attributable to their no longer being used in connection with the real estate?)

The Classical FF&E Case

The condemnation of commercial and industrial buildings frequently involve the issue of what becomes of the furnishings, fixtures, and equipment used in conjunction with those buildings.

In most cases, the parties are in agreement as to which items constitute fixtures; and the condemning authority willingly pays just compensation for those items considered to be part of the value of the property taken.⁹ In addition, the

⁹Sometimes, even though these articles are deemed condemned, the agency gives the owner an option to repurchase the items from the authority for an agreed-upon price. This price is generally the **A**salvage value,@ estimated by the agency=s appraiser. In situations such as this, it is in the authority=s interest to secure from the owner a written waiver of any rights to claim moving costs or relocation benefits for these items. Such a waiver protects the authority from the risk of paying the value and the moving costs for the same item. Unless the compensation for the items is resolved concurrently with the granting of the option, it is in the owner=s interest to secure from the agency a written agreement that the jury will not be advised that the owner has repurchased the item or the repurchase price paid (reserving the right of the parties to introduce the amount, not as a **A**repurchase price@ but as one or both parties= estimate of **A**salvage value,@ which may be required in order to estimate value or damage). Such an agreement avoids the possibility of jury confusion over the fact that the owner still owns **B** and is being paid compensation for **B** an article condemned and avoids the risk that the jury will misconstrue the **A**salvage value@ repurchase price as market value.

condemnor generally reimburses the owner for its actual expenses of relocating the equipment not considered to be real estate.

In many cases, however, the taking of commercial and industrial buildings has a profound effect on the utility and value of the associated furnishings, fixtures, and equipment. The parties to the condemnation case often disagree as to how, if at all, this effect should be addressed in the condemnation case, and, in such cases, these issues become a critical part of the case and trial.

One fact pattern which seems to recur is the situation in which:

1. The condemnee, for one reason or another, is unable B without substantial economic loss B to relocate the furnishings and equipment it uses in conjunction with the property taken, and

2. The condemning authority does not consider those articles as part of the real estate taken, and

Either

3. The condemning authority is unwilling to condemn those articles and therefore assume the legal responsibility for payment of their value, or

4. The condemning authority is unwilling to pay the owner the difference between (a) the Avalue-in-place@¹⁰ of the articles and (b) their Asalvage value,@¹¹ even if the owner sells the articles at a liquidation sale, and

5. The amount which the owner is entitled to receive as estimated moving costs for the articles either (a) under state law or (b) the Federal Relocation Act is less than the difference between (a) their Avalue-in-place@ and (b) their salvage value.

This recurring fact pattern is illustrated by the following hypothetical case.

Mr. and Mrs. Picata have owned and operated a waterfront Italian seafood restaurant for thirty years. They lease the building and land but own all of the furnishings, fixtures, and equipment associated with the restaurant.

The state seeks to condemn the property. The condemnation petition sets forth a legal description, but it merely describes the land. It does not mention what buildings, furnishings, or fixtures the agency seeks to condemn.

¹⁰Avalue-in-place@ is a term used to describe the value of an item, taking into account its present location and its relationship with other items of property at that location.

¹¹Asalvage value@ is a term used to describe the most probable price that would be paid for an article that is removed from its existing location, possibly for use somewhere else.

The condemning authority files a declaration of taking, with an estimate of value based upon an appraisal. The appraisal includes the value of the land, the building, electrical wiring, and kitchen cabinets. The appraisal does not, however, include estimates of value for the following items owned by the Picatas:

- A large illuminated road-side sign
- Six ovens
- Three dish washer-drier units
- A wall safe
- A bar
- A stage
- Tables and chairs, including seating booths
- Venetian blinds and drapes
- Ceiling fans
- An aquarium used to house live lobsters

The court enters an order of taking, requiring the condemning authority to deposit its estimate of value into the registry of the court, allowing the owner to withdraw it, and granting the owner six months of extended possession. The order makes no mention of what articles have been formally condemned to the use of the authority.

Mr. and Mrs. Picata are unable to relocate their restaurant. Their lease contains a condemnation clause, which precludes them from sharing in the award for the real estate. More importantly, they cannot locate a suitable replacement building where the rent is low enough for them to continue to operate profitably. The Picatas thus go out of business.

When it comes time to surrender possession of the property, the owner leaves behind the sign, ovens, dish washers, pots and pans, the wall safe, the bar, and the tables and chairs. The condemning authority notifies the owner that, unless he removes these articles from the premises, the condemning authority will consider them abandoned, will remove them from the premises, and will charge the owner for the cost of removal. The condemning authority also reminds the owner of his rights under the Federal Relocation Act and reiterates its willingness to pay relocation benefits relating to those items as provided for by the Act.

The owner sends this letter to his lawyer, who advises the condemning authority that the owner considers all of the articles to have been condemned and now owned by the condemning authority. He informs the condemning authority that the owner's appraisal at trial will include the value of all of the items left behind.

The parties now have disputes over, not only the value of articles of property which both sides agree have been condemned, but over the exact nature of the property which has been condemned and how, if at all, the owner should be compensated for those articles.

Clearly, under the above hypothetical case, Mr. and Mrs. Picata have suffered a real and substantial economic loss, which they would not have suffered had it not been for the taking of the land and building they rent. Just as clearly, Mr. and Mrs. Picata are acting reasonably in not reestablishing their business since the change in location and higher rent will not allow them to operate profitably.

The Measure of Just Compensation for Losses Relating to Furnishings, Fixtures, and Equipment

Moving Costs

Historically, the majority of courts have recognized the general rule that owners cannot recover moving costs for personal property.¹² Many courts have held that costs of removing or relocating personal property are not recoverable as just compensation because such costs constitute noncompensable consequential damages.¹³

However, while most courts adhere to the general rule,¹⁴ several state courts have allowed evidence of an owner's moving costs to be submitted to the trier of fact in valuation proceedings.¹⁵ In some instances, state courts have held that their state constitutional provisions for just compensation or full compensation require payment of reasonable moving costs for personal property.¹⁶ For example, the Florida Supreme Court has stated:

Although the contention that moving costs have no bearing on the fair market value of the premises may be meritorious in other jurisdictions, it has no merit in Florida, where an owner is constitutionally guaranteed full or just compensation. The theory and spirit of such a guarantee require a practical attempt to make

¹² For an overview, see, 69 A.L.R. 1453, *Cost to Property Owner of Moving Personal Property as Element of Damages or Compensation in Eminent Domain Proceedings*.

¹³ See, *U.S. v. Petty Motor Co.*, 327 U.S. 372 (1946); *U.S. v. General Motors Corp.*, 323 U.S. 373; However, in *U.S. v. General Motors Corp.*, the United States Supreme Court recognized that, in instances where a leasehold has been condemned for a temporary period, then removal costs may be considered in determining just compensation.

¹⁴ See, *Williams v. State Highway Commission*, 113 S.E. 2d 263 (N.C. 1960); *Skaff v. City of Sioux City*, 120 N.W. 2d 439 (Iowa 1963)

¹⁵ See, e.g., *Jacksonville Expressway Authority v. Dupree*, 108 So.2d 289 (Fla. 1958); *Mississippi State Highway Commission v. Rogers*, 136 So.2d 216 (Miss. 1961)

¹⁶ *City of Richmond v. Old Dominion Iron and Steel Corporation*, 212 Va. 611 (Va. 1972); *Jacksonville Expressway Authority v. Dupree*, *supra*.

the owner whole (citation omitted) A person who is put to expense through no desire or fault of his own can only be made whole when his reasonable expenses are included in the compensation. Jacksonville Expressway Authority v. Dupree, supra, at 292.

In other instances, state courts have allowed the trier of fact to consider an owner=s moving costs based on specific statutory authorization providing for recovery of such costs. ¹⁷

ALoss in Value@ vs. AMoving Costs@

The courts have long recognized that an owner can suffer substantial economic losses to its furnishings, fixtures, and equipment because of the taking of its real estate.

In 1914, Judge Cardozo wrote:

It is intolerable that the State, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value.¹⁸

While the courts seem to be in agreement in acknowledging that the taking of real estate often reduces the utility and value of personal property used in connection with that real estate, there is no consensus as to whether the just compensation clause of the federal or their states= constitutions requires payment for those losses, and, if so, the measure of that compensation.

¹⁷ See, *Memphis Housing Authority v. Memphis Steam Laundry-Cleaners, Inc.*, 463 S.W.2d 677 (1971) (costs of moving fixtures and equipment in connection with condemnation of commercial laundry were recoverable under T.C.A. sec. 23-1414)

¹⁸*Jackson v. State*, 106 N.E. 758 (N.Y. Ct. of App. 1914).

When payment of compensation is required, the two measures usually applied to FF&E are either (a) loss in value,¹⁹ or (b) moving costs. One significant problem, as indicated by Mr. and Mrs. Picata=s hypothetical case outlined above, is that payment of moving costs is inadequate when the owner is unable to move its equipment.

The courts have generally applied one of two tests to determine whether the owner is entitled compensation for loss in value or is limited to moving costs. The traditional test, still applied in most jurisdictions, is the fixture test. Under this approach, if the item is determined by the court to be a fixture, then it is part of the real estate deemed condemned and the authority is obligated to pay the owner an amount equal to the value of the item. The modern tests are the **Afunctional unit@** and **Aassembled economic unit@** tests. Under these approaches, whether an article of personal property is considered a fixture does not determine the owner=s measure of compensation; its attachment to the real estate is irrelevant. Instead, the courts applying the modern tests determine whether the articles, together with the land, building, fixtures, and other equipment, form an integral and valuable part of a going business.

Whereas the traditional **Afixture test@** emphasizes physical attachment, the modern **Afunctional unit@** and **assembled economic unit@** tests emphasize function and actual economic loss.

The Fixture Test

Most courts only allow the owner to recover **Aloss of value@** for an article of personal property if that article is considered to be a fixture.

¹⁹**ALoss in value,@** in turn, is generally measured in two ways: (1) Value-in-place is sometimes used when the article is left behind, and (2) the difference between value-in-place and salvage value is sometimes used, when the article is removed and retained by its owner.

A fixture is an article of personal property which by annexation becomes assimilated into the realty.²⁰ An article of personal property is generally deemed to be a fixture if it meets a three-pronged test:

1. Annexation to the realty, either actual or constructive
2. Adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated, and

²⁰*Wayne County v. Virginia M. Britton Trust*, 563 N.W.2d 674 (Mich. 1997).

3. Intention to make the article a permanent accession to the freehold.²¹

While courts applying the traditional fixture test typically analyze the property by reference to annexation, adaptation, and intention, they do not always apply those prongs the same way in condemnation cases as they do in other types of actions.

On its face, the **Afixture@** test is far narrower than the **Afunctional unit@** or **Aassembled economic unit@** test. As applied, however, many courts use the concept of **Aconstructive annexation@** under the **Afixture test@** to reach the same result as would have been reached under the more modern tests. In addition, some courts take a relaxed view of the **Aintention@** prong in order to allow recovery of **Aloss of value@** for tenant-owned trade fixtures.

Prong 1: Annexation to the Realty

To become a fixture, an article of personal property must generally become attached to the realty. There are two types of annexations: actual or constructive. Items have been considered constructively annexed to the realty, when, even though they are not physically attached to the realty, either (a) their removal would impair their value as well as the value of the realty, or (b) they are intended to be used with other items considered to be fixtures and therefore part of the realty.²²

Prong 2: Adaptation to the Use of the Realty

Adaptation refers to the relationship between (a) the alleged fixture and (b) the use which is made of the realty to which the alleged fixture is annexed.²³ The test is not

²¹*Id.* at 615.

²²*City of Buffalo v. Michael*, 209 N.E.2d 776 (N.Y. Ct. of App. 1965).

²³*Premonstratensian Fathers v. Badger Mutual Insurance Co.*, 175 N.W.2d 237 (Wisc. 1970).

adaptability to the realty, but to the use to which the realty is put.²⁴

²⁴*Id.*

Prong 3: Intention to Make Permanent Accession to the Realty

Many courts apply a special rule when applying the intention test to tenant-owned trade fixtures. Under this rule, even if, under the lease, the tenant is allowed **B** or the landlord may require the tenant **B** to remove the fixture and the conclusion of the lease term **B** the item is still considered a fixture as between the condemnor and the condemnee tenant, if the item would be considered a fixture if owned by the landlord. Thus, for example, an outdoor advertising sign, attached to the roof of a building, was deemed to be a fixture, the loss in value to which the condemnor was required to pay, even though (a) the tenant's lease term expired before the taking, (b) the landlord required the tenant to remove the sign, and (c) the tenant, in fact, removed and retained the sign.

Practical Considerations in the Determination of Whether an Article is a Fixture

Some courts defer until trial the determination of whether an article is a fixture,²⁵ and in many cases deferring this issue until trial is acceptable to both parties. Leaving this issue unresolved until trial can subject one or both parties to uncertainties and risks, which can be eliminated by an early resolution by the court.

The following are some situations in which one or both parties might seek to secure an early determination of whether a particular item is a fixture:

- 3.1 An appraiser for one side or the other may be unsure whether the item will be acquired (and thus needs to be appraised) or whether it will be relocated (in which case, depending upon the law of the jurisdiction, it may not need to be appraised).

²⁵See, e.g. *Wayne County v. Virginia M. Britton Trust*, 563 N.W.2d 674 (Mich. 1997).

3.2 A bank or other lender may hold a chattel mortgage on a piece of equipment. Under the security agreement, the owner may have the right to relocate the item from the premises. Whether or not the property is deemed acquired may determine whether the secured party should be named as a party to the condemnation case.

- 3.3 The condemning authority may have requested proposals from demolition contractors. In determining their proposed contract prices, the contractors, in turn, may need to know what items they will be entitled to keep and sell when they demolish the building.
- 3.4 The condemnee may be unable to relocate its machinery and equipment to a new site. It could decide to first assert, in the condemnation case, that its machinery and equipment are fixtures and that it should be able to recover the value-in-place of the machinery and equipment. However, the condemnee may also wish to preserve a **fall-back** position in the event that the court rules against it. If the court rules that the machinery and equipment are merely items of personal property, and the only measure of compensation to which the condemnee is entitled is the actual cost of moving, then the condemnee may wish to preserve its right to file a **direct loss** claim under the Federal Relocation Act. Under the agency's rules relating to **direct loss** claims, the condemnee (**displaced person**) must first conduct a sale of the items. The condemnee may not wish to conduct a sale of the items until after the court rules on the issue because the court may view removal of the items from the premises as inconsistent with the **displaced person** claim that they are fixtures. On the other hand, if the owner is required to surrender possession of the property in advance of the trial and the issue is deferred until trial, the owner may be required to make a risky choice: it can either (a) leave the machinery and equipment on the premises, which may enhance its argument that they should be treated as fixtures but jeopardize its **direct loss** claim, or (b) sell its machinery and equipment in order to perfect its **direct loss** claim but detract from its claim that the equipment are fixtures.

The Modern Tests: The Assembled Economic Doctrine, The Functional Unit Doctrine, and The **Personal Property** Severance Damage Doctrine

Personal property, whether attached to the real estate or not, is protected by the just compensation clauses of the federal and state constitutions.

Neither the federal nor state **A**just compensation@ clauses differentiate between real and personal property.²⁶ Some courts have thus determined that, under certain circumstances, the constitutional guarantee of just compensation requires the condemning authority to pay for loss in value to remaining personal property, in the same manner as that clause requires the condemnor to pay for reduction in value to untaken land.²⁷ In requiring the condemning authority to pay for a loss in value to movable personal property, not condemned by the taking, the New Jersey Supreme Court has noted:

There is no logical reason ... why a condemnee, although compensated for the market value of his land and buildings, should suffer all other loss incidental to the taking thereof for the public benefit. See, *Village of Ridgewood v. Steel Investment Corp.*, 28 N.J. 121 (1958). And our courts have recognized that a denial of compensation for every such loss could result in a failure to comply with the constitutional requirement of just compensation. Thus, where less than the entire parcel owned by a condemnee has been taken, allowance has been made for the consequential damages occasioned to an untaken parcel ...²⁸

The Assembled Economic Unit Doctrine

In 1970, the Pennsylvania Supreme Court established a doctrine known as **A**The Assembled Economic Unit Doctrine.@²⁹ The court explained the doctrine as follows:

²⁶ *Baldwin Park Redevelopment Agency v. Irving*, 156 Cal. App. 3d 428, 435 (2d Dist. 1984).

²⁷See, e.g. *Gallant v. State*, *supra*.

²⁸*Gallant v. State*, *supra* at 403, 404.

²⁹*Singer v. Oil City Redevelopment Authority*, 261 A.2d 594 (Pa. 1970).

In those instances where all or most of the machinery, equipment and fixtures of the economic unit are removable without significant injury to them, such that the economic unit is susceptible of continuance, as a comparable economic unit, in a new location, *only* those items of machinery, equipment and fixtures *not removable* from the condemned structure are to be considered a part of the realty taken by the condemnor. The economic position of the condemnee is preserved in this case, without the applicability of the Assembled Economic Unit Doctrine, for the Code provides: (1) in " 608 for the reimbursement of expenses incurred in removing, transporting and reinstalling machinery, equipment and fixtures *not forming* a part of the real estate of the condemned structure; (2) in " 610 for the reimbursement of reasonable expenses incurred in moving personal property other than machinery, equipment and fixtures (inventory would be included in this category); and (3) in " 609 for damages resulting from a substantial loss of patronage due to the relocation. Being, in addition, compensated under " 602 for the land and building taken, the condemnee is left in the same economic position he would have been in had there been no condemnation, except he is in a new location.

If the condemnee in the above example chooses not to relocate, he will similarly be in the same economic position as previously. Even if there is no market for his business, one must assume there would have been none also had he chose to sell his business on his own initiative. He always has the option of relocating the business until such time as the market becomes favorable. In addition, if a significant portion of the value of his business is derived from his steady patrons, he may still receive damages under " 609, even if he chooses not to relocate and sells the business to another. However, when such a portion of the assembled economic unit is not removable from the condemned property that which is so removable will not constitute a comparable economic unit in a new location, then *all* machinery, equipment and fixtures, whether loose or attached, which are vital to the economic unit and a permanent installation therein, will be considered a part of the realty under the Assembled Economic Unit Doctrine, so as to entitle the condemnee to compensation therefor under "" 601, 602 and 603(3). To hold otherwise would leave condemnee only with scattered pieces of second-hand machinery, equipment and fixtures, most probably significantly depreciated in value when severed from the economic unit. Since the condemnee cannot maintain his economic position by moving to a new location, the statutory scheme will not grant him "just compensation" without the applicability of the Assembled Economic Unit Doctrine. Likewise, when the nature of the business requires a unique building for its operation, such that no other building within a reasonable distance is adaptable to the functioning of this business, then the condemned building, itself, will be considered an essential part of any meaningful economic unit in this industry. In this situation, even though all or most of the machinery, equipment and fixtures are removable, since no new site is available, condemnee cannot maintain his economic position by relocating. Therefore, machinery, equipment and fixtures which are vital to the economic unit and a permanent

installation therein will be considered a part of the real estate of the condemned property under the Assembled Economic Unit Doctrine. Only thus can the condemnee receive "just compensation."³⁰

The Pennsylvania court established the Assembled Economic Unit Doctrine by holding that it was only logical that the Assembled Industrial Plant Doctrine, which it had applied to condemnation cases for the first time three years earlier,³¹ should apply to all cases.³² The Assembled Industrial Plant Doctrine, in turn, was a doctrine which the Pennsylvania courts had applied to bring the plant machinery within the tax assessment base and to resolve disputes between (a) vendee and creditors of the vendor, (b) owner and trustee in bankruptcy. The Assembled Industrial Plant Doctrine simply held that:

Whether fast or loose ... all machinery which is necessary to constitute (the industrial plant) and without which it would not be a manufactory at all must pass for a part of the freehold.³³

The Assembled Economic Unit Doctrine has been applied to allow an owner of a meat processing plant the right to recover the value-in-place of **A**loose@ (physically removable) equipment, left on the premises by the owner.³⁴

The Ohio Supreme Court has considered, but rejected adoption of the Assembled Economic Unit Doctrine, explaining that **A**while that doctrine may be attractive for its relative ease of application, this court remains convinced that it is too

³⁰*Id.* at 600.

³¹*Gottos v. Allegheny County Redevelopment Authority*, 229 A.2d 869 (Pa. 1967).

³²*Singer v. Oil City Redevelopment Authority*, *supra*, at 600.

³³*Gottos v. Allegheny County Redevelopment Authority*, *supra*, at 871.

³⁴*March v. Redevelopment Authority of Philadelphia*, 342 A.2d 131 (Comm. Ct. Pa. 1975).

sweeping in scope and fails to take sufficient account of the particular present in individual cases.³⁵

Functional Unit Doctrine

About the same time as Pennsylvania was applying the Assembled Industrial Plant Doctrine to condemnation cases, New Jersey adopted the Functional Unit Doctrine. In *State of New Jersey v. Gallant*,³⁶ the New Jersey Supreme Court was asked to decide whether an owner of physically removable looms could recover their loss in value caused by the taking. The court defined the issue as follows:

We return now to the immediate problem before us, i.e., whether the concept of just compensation as outlined above may require that defendants receive an award for their looms. We believe it may be. As above noted, the record discloses that only defendants introduced proof concerning the looms. This testimony was stricken on plaintiff's motion, and plaintiff offered no counter-evidence on that issue. From the stricken proofs it could be concluded that before condemnation the looms were an integral and valuable part of a going business housed in defendant's factory. Upon condemnation defendants could either retrieve merely the looms' secondhand value or, if they had elected to remove them to their new premises, suffer the economic loss attendant upon the necessarily expensive and intricate removal procedures.

³⁵*Masheter v. Boehm, supra* at 539- 540.

³⁶202 A.2d 401, *supra*.

The value of a factory containing industrial equipment employed in the business for which the property is being used is ordinarily greater than that of an empty and idle building. Such equipment in place adds more to the value of the realty than its second-hand salvage value separated from the premises. An owner, who is under no duress, and where the building and machinery are a functional unit, would undoubtedly sell only at a price which would reflect that increased value. Where, therefore, a building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them, is substantial, compensation for the taking should reflect that enhanced value. This, rather than the physical mode of annexation to the freehold is the critical test in eminent domain cases. See *Harvey Textile Co. v. Hill*, 135 Conn. 686, 67 A. 2d 851 (Sup. Ct. Err. 1949); *Jackson v. State*, *supra*.³⁷

The Personal Property Severance Damage Doctrine

The most **Aprogressive@** of all decisions as to the application of the just compensation clause to personal property used in a business is California=s Second Circuit Court of Appeal=s decision in the case of *Baldwin Park Development Agency v. Irving*.³⁸ Future decisions providing owners of furnishings, fixtures, and equipment with greater protection, in the event of takings, will no doubt rely in part on the principles acknowledged and applied in this case.

In *Irving*, the condemnee utilized its property as an automobile salvage yard. Its business inventory, worth \$312,000, consisted of junked cars and used automobile parts. When notified of the taking, the owner began an extensive search for another site with a zoning designation which would allow the relocation of the business. The search was initially limited to

³⁷*Id.* at 404.

³⁸156 Cal. App. 3d 428 (2d Cir. 1984).

the immediate area surrounding the subject property and was then enlarged as replacement sites were not available within the condemnee=s market area. Despite the owner=s efforts, no sites could be located to which the business could be relocated. With no relocation site to which to move the inventory, the condemnee sold the cars and parts for \$50,000 and claimed the difference between their \$312,000 value and the \$50,000 salvage price as part of just compensation in the eminent domain case. The trial court granted the condemnor=s motion *in limine* to exclude evidence of the devaluation of the inventory caused by the taking.

The Court in *Irving* stated that:

The essential question to be resolved on this appeal is whether the condemner=s conduct entitles defendant to an award of damages for the value of her business inventory less the amount obtained at the salvage sale. The agency maintains that such personal property is, as a matter of law, noncompensable in an action for condemnation of real property and that as a consequence defendant may not be indemnified for the loss allegedly incurred here. We have concluded, however, that since the condemnatory act in and of itself resulted in the devaluation of her stock in trade, she is entitled to be compensated for the loss in question.³⁹

After recognizing that the just compensation clause draws no distinction between real and personal property, the California court noted that:

The law in California and elsewhere has long recognized compensable consequential damage to property rights which, while not actually **A**taken, are damaged or destroyed by the physical appropriation of the owner=s property. There seems to be no logical reason why that principle should not apply with equal

³⁹*Id.* at 434.

force where, in condemning real property, personal property, though not **A**taken,⁴⁰ is damaged or its value destroyed.⁴⁰

The court reversed the trial court=s judgment, and distinguishing the *Irving* case from the facts in a prior California Supreme Court=s decision⁴¹ holding damages to personal property noncompensable, held as follows:

⁴⁰*Id* at 435.

⁴¹*Community Redevelopment Agency v. Abrams*, 543 P.2d 905, 81 ALR 3d 174 (1975).

Where the removal or relocation of either tangible or intangible personal property, under the circumstances of the particular case, is made impossible by the condemnatory act itself, then the owner=s just compensation should not be limited by and arbitrary notion that it eminent domain any particular form of recognized property right is noncompensable.

AThis is so because, as was said in *People v. Superior Court* ... the constitutional concept of just compensation expresses a principle of fairness. If any compensable constituent element of value, ... is omitted in arriving at just compensation this constitutional mandate has not been met. Every rule of condemnation law, be it statutory or decisional, for determining value of land taken in condemnation, must in its every application conform to this constitutional mandate.@ (Citations omitted).⁴²

The court in *Irving* distinguished itself from the California Supreme Court=s earlier decision in *Community Redevelopment Agency v. Abrams*.⁴³ In *Abrams*, the court held, the owner lost the value of his personal property because he was unwilling to relocate, whereas in *Irving*, the owner lost the value of her personal property because she was unable to relocate. The court thus distinguished between a loss caused by the taking (in *Irving*) and a loss caused by the personal circumstances of the condemnee himself (in *Abrams*).

Some courts have chosen not to follow the rule announced in *Irving*,⁴⁴ while other courts have applied the test and found that

⁴²*Id.* at 436.

⁴³*Supra.*

⁴⁴*See, e.g. State Department of Transportation v. Sun Island Boats, Inc.*, 510 So.2d 603 (Fla. 3d DCA 1987), *rev. den.* 518 So.2d 1278 (Fla. 1987).

the condemnee had not proven that the condemnatory act, itself, had caused the loss.⁴⁵

Federal Law

⁴⁵See, e.g., *County of San Diego v. Cabrillo Lanes, Inc.*, 10 Cal. App. 576 (4th DCA 1992).

In determining whether an item is a fixture,¹ for purposes of determining whether the condemning authority is required to compensate its owner for loss of value, federal courts apply state law ²... not because (state law) is binding upon federal courts under *Erie R.R. v. Thompkins* (citation omitted) but because federal substantive law takes the practical view the state rule should be adopted. If federal courts insisted on developing a divergent body of law, property owners in planning their affairs would be compelled to take account of two conflicting rules of compensability, never knowing until the moment of taking which one governed. See, *United States v. Certain Property, etc. (Il Progresso)*, 306 F.2d 439 (2d Cir. 1962).³ *United States v. 1,132.50 Acres of Land, Etc.*, 441 F.2d 356, 358 (2d Cir. 1971). See, also, *United States v. Bechtold Co.*, 129 F.2d 473 (8th Cir. 1944); *Carmichall v. United States*, 273 F.2d 392 (5th Cir. 1960); *United States v. 19.86 Acres of Land*, 141 F.2d 344 (7th Cir. 1944).

Application of the Unit Rule and the Contributory Value Rule

The unit rule, which is recognized and generally applied in most jurisdictions, provides that the value of condemned property is to be determined as a unit, rather than by adding the separate values of component parts of the property. Also, according to the unit rule, the value of the property is not to be determined by adding the value of the separate qualitative interests (or estates) in the property.

The contributory value rule provides that the value of any one component of the property should be the amount by which that component contributes to the overall (unit) value of the property.

While the unit rule and contributory value rules are ordinarily applied to properties in which the fee owner owns both the building and the fixtures, the courts generally make an exception for tenant-owned trade fixtures. Thus, in the case of multi-purpose and multi-tenant buildings, many courts have held that the tenants are entitled to a separate award for the value

of their fixtures,⁴⁶ and the value of the fixtures may be determined by application of the cost approach.⁴⁷

⁴⁶See, e.g. *Marraro v. State of New York*, 189 N.E.2d 606 (N.Y. Ct. of App. 1963).

⁴⁷*Id.*

The federal courts have also applied these exceptions to the unit and contributory value rules.⁴⁸ Judge Hand has written:

Indeed, we think that it is an undue simplification to extract from the books any **Unit Rule** whatever, in the sense of general authoritative direction. What has happened, so far as we can see, is that, as different situations have arisen the courts have dealt with them as specific facts demand.⁴⁹

In *United States v. Certain Property (Manhattan)*, the Second Circuit rejected application of the Unit Rule to tenant-owned trade fixtures because to do so would be to **A...** translate a formula which produces fair results in many cases into a categorical imperative that must be applied regardless of its consequences.⁵⁰

A tenant may also be entitled to the separate (as distinguished from contributory) value of its fixtures under a provision of the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act. That Act, not only requires certain agencies to pay compensation for the relocation or direct loss of tangible personal property, but it prescribes policies which the acquiring agency must follow in the appraisal of the real estate. Section 4652 (b) of the Act provides as follows:

⁴⁸*United States v. City of New York*, 165 F.2d 526 (2d Cir. 1948); *United States v. Certain Property (Manhattan)*, 344 F.2d 142 (2d Cir. 1965).

⁴⁹*United States v. City of New York*, *supra* at 528.

⁵⁰ 344 F.2d 142,146.

For the purpose of determining the just compensation to be paid for any building, structure, or improvement required to be acquired by subsection (a) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of the term, and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired, or the fair market value of such building, structure, or improvement for removal from the real property, whichever is greater, shall be paid to the tenant therefore.⁵¹ (Emphasis supplied).

The statute provides no definition of **A**the fair market value of such building, structure, or improvement for removal from the real property.**@** However, if the article involved is considered an **A**improvement**@** under the act, then to the extent this measure of value may exceed the contributory value of the article, the Federal Relocation Act may provide the owner with a more liberal measure of compensation than is allowed under its state=s condemnation law.

Threat of Condemnation and Project Influence

With regard to tenant-owned fixtures, their removability is often a factor affecting their compensability and their useful life is often a factor affecting their value. Since the condemnatory process affects removability and useful life, issues regarding threat of condemnation and project influence often arise in cases involving tenant-owned fixtures.

Where a tenant=s removal of fixtures was found to be caused by the threat of condemnation, the tenant=s removal of the fixture prior to the taking has been held to have no effect on

⁵¹42 USCS Sec. 4653.

the condemnor=s obligation to pay for its loss in value due to the taking.⁵²

⁵²*City of Buffalo v. Michael, supra.*

The scope of the project rule⁵³ has also been applied to exclude any consideration of the project or the condemnation in determining the useful life of the fixtures. In *Almota Farmers Elevator & Warehouse Co. v. United States*,⁵³ the federal government condemned a building, which the tenant had leased, under successive leases, for 48 years. The building contained machinery and equipment used in the tenant's business. On the date of taking, the existing lease had seven and a half years to run, and the condemnor argued that the equipment should be valued as though they had a remaining life of seven and a half years. The tenant, in turn, argued that it was entitled to the market value of the machinery and equipment, taking into account the possibility that the lease would be renewed. The Government, in turn, argued that it would be unlawful and unfair to allow the equipment to be valued with reference to any useful life longer than the remaining term of the lease, in part, because (a) the Government could purchase the fee and wait until the expiration of the lease term to take possession of the land, and (b) the tenant would then have no further expectancy of continued occupancy.

In response to this argument the Supreme Court held:

The Government must pay just compensation for those interests probably within the scope of the project from the time the Government has committed to it.⁵³ It may not take advantage of any depreciation in the property taken that is attributable to the project itself. At the time of the taking in this case, there was an expectancy that the improvements would be used beyond the lease term. But the Government has sought to pay compensation on the theory that at the time there was no possibility that the lease would be renewed and the improvements used beyond the lease term. It has asked that the improvements be valued as though there were no possibility of continued use.

⁵³409 U.S. 470 (1973).

That is not what a private buyer would have paid Almota. (Citations omitted).⁵⁴

If there had been no condemnation, Almota would have continued to use the improvements during a renewed lease term, or if it sold the improvements at the end of the lease term, it would have been compensated for the buyer=s ability to use the improvements in place over their useful life. As Judge Friendly wrote for the Court of Appeals for the Second Circuit:

⁵⁴*Id.* at 477-478.

Lessors do desire, after all, to keep their properties leased, and any existing tenant usually has the inside track to a renewal for all kinds of reasons **B** avoidance of costly alterations, saving of brokerage commission, perhaps even ordinary decency on the part of landlords. Thus, even when the lease has expired, the condemnation will often force the tenant to move or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant **B** the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefits of assumptions, contrary to common experience, that the fixtures would be removed at the stated term.@

It seems particularly likely in this case that Almota could have sold the leasehold at a price that would have reflected the continued ability of the buyer to use the improvements over their useful life. Almota had an unbroken succession of leases since 1919, and it was in the interest of the (landlord) as fee owner to continue leasing the property, with its (existing building and fixtures). In a free market, Almota would hardly have sold the leasehold to a purchaser who paid only for the use of the facilities over the remainder of the lease term, with Almota retaining the right thereafter to remove the facilities **B** in effect, the right of salvage.⁵⁵

Removal of FF&E from the Property

⁵⁵*Id.* at 474 and 475.

The removal of furnishings, fixtures, and equipment from the condemned property by the owner has been treated differently in different jurisdictions.

In Arizona, for example, a tenant has been held to be barred from recovery for loss in value because it removed and retained its alleged fixtures after the taking.⁵⁶ In Florida, on the other hand, an owner who removes heavy industrial machinery from the premises is entitled to recover the economic loss in value or moving expenses for those items.⁵⁷

In New York, in one case, an owner who retained and relocated his machinery was limited to recovery of moving costs.⁵⁸

In New Jersey and Florida, the removal of machinery and/or equipment by its owner from certain types of property after the taking has been held not to bar the owner from claiming the difference between value-in-place and salvage value for the machinery and/or equipment.⁵⁹

Choosing Between Relocation Assistance Benefits and the Eminent Domain Award

In certain instances, the condemnee will need to decide whether to seek compensation for a particular loss under the Federal Relocation Act or in the condemnation case. While it is impossible to list all of the pertinent considerations which may arise in every case, the following are some factors which may enter into the decision:

- 3.5 Relocation benefits are not taxable by the federal government, whereas the condemnation award may be.

⁵⁶*State v. Willey*, 401 P.2d 410 (Ariz. 1965).

⁵⁷*Malone v. Division of Administration, State of Florida Department of Transportation*, 438 So.2d 857 (Fla. 3d DCA 1983), rev. den. 450 So.2d 487. , but note that when moving costs are claimed, they cannot exceed the difference between the value-in-place and salvage value.

⁵⁸*Rose v. State of New York*, *supra*.

⁵⁹*Housing Authority of the Borough of Clementon v. Myers*, 280 A.2d 216 (N.J. 1971) and *Malone v. Division of Administration, State of Florida Department of Transportation*, *supra*.

3.6 The unit, contributory value, and/or consistent use rule may apply in the condemnation case, whereas one or more of those rules may not apply under the Federal Relocation Act.

- 3.7 Under the condemnation law of many jurisdictions, the amount which the condemnee recovers for actual moving costs may not exceed the estimated value of the articles moved;⁶⁰ whereas there is no such limitation on moving costs under the Federal Relocation Act.
- 3.8 Under the Federal Relocation Act, the amount which a displaced person may recover for the direct loss of tangible personal property may not exceed the estimated cost of moving it within 50 miles⁶¹ and may require the claimant to conduct a liquidation sale of the property;⁶² whereas, depending upon the jurisdiction, there may not be such limitations on the recovery of the value in place of the property under condemnation law.
- 3.9 The owner may be able to receive compensation quicker under one approach.
- 3.10 Receipt of compensation under one process may subject the compensation to claims of creditors, while receipt of compensation under the other approach may not.
- 3.11 Depending on the substantive law of the jurisdiction and the employment agreement between the attorney and client, receipt of compensation in the condemnation case may either (a) entitle the owner to recovery of attorney=s fees from the condemnor, (b) result in a higher attorney=s fee, and/or (c) have a bearing on liability and the amount of the condemnee=s recoverable costs.**
- 3.12 Securing pre-trial payments of relocation assistance benefits can have various effects on the condemnation trial. It can:

⁶⁰See, e.g. *Housing Authority of the Borough of Celementon v. Myers*, 280 A.2d 216 (N.J. 1971) and *Malone v. Division of Administration, State of Florida Department of Transportation*, *supra*.

⁶¹42 USCS Sec. 4622 (a) (2); 49 CFR Sec. 24.303 (a) (10).

⁶²49 CFR Sec. 24.303 (a) (10).

- 3.121.1Simplifying and shorten the trial.
- 3.121.2Raise issues of application of the collateral source rule and contractual interpretation, if the parties do not have a clear understanding as to how the receipt of relocation assistance benefits will interrelate, if at all, with the issues at trial.
- 3.121.3Can generate documents and other evidence which can be used to prove another issue at trial.

3.121.4 Affect the jury's perception of the good faith of one party or the other.

Just Compensation for Furnishings, Fixtures, and Equipment

Where Have We Been, and Where Should We Go?

One Lawyer's Opinion

Where Have We Been

Over the years, the courts have struggled to devise methods, doctrines, and formulas by which to determine just compensation in cases in which the taking affects an owner's furnishings, fixtures, and equipment.

In the earliest days, condemning authorities recognized no financial responsibility for anything other than the land they needed for their public projects. Since they only needed the land, they only condemned the land. If the land happened to be improved with a building or other structure B not to mention fixtures and equipment B that was of no concern to the condemners. As far as they were concerned, the structures remained the property of the owners. They could move them off the premises if they jolly well wanted to.

The courts then adopted the principle that, at a minimum, the condemnation was like a private land sale: title to all structures attached to the land went with the land when the land was conveyed. Coupled with the notion that just compensation was to be determined, not by what the taker needed or gained, but what the owner lost, just compensation was held to include the value of all buildings attached to the land.

But what about the stuff@ that was inside the buildings?

In the industrialized states, that stuff@ was becoming heavier and more expensive. Since the cost of moving personal property from the condemned land was considered a consequential damages,@ and therefore, noncompensable, condemning authorities began arguing that machinery and

equipment was movable personal property, and not real estate. Those courts placing the financial welfare of the public over that of the owners or strictly construing traditional concepts of property law, agreed with the condemning authorities. The owners in those jurisdiction were often required to bear the expense of relocating their operations for the public good. Other courts, however, felt that, in fairness, owners of industrial properties should not be required to bear the expense of relocation simply because the public needed their property for a public purpose. Since moving costs were not considered part of the just compensation guarantee, those courts began applying the traditional Afixture@ test to assure that owners recovered just compensation for the economic effect of the taking.

But all machinery and equipment is technically movable.

Since much of this equipment was extremely expensive, and since the condemnor was often not required to pay for their relocation, the battle lines were now drawn as to whether an item was a fixture or merely an article of personal property. Conservative courts applied the fixture test the same way in condemnation cases as they had in other actions. More progressive courts applied it differently in condemnation cases so that items which may not have been considered fixtures in, for example, a mortgage foreclosure action, were considered fixtures in the condemnation case.

It soon became apparent, however, that the value of the owner=s property and the extent of the owner=s loss was not always governed by whether an article was a fixture or whether the court could make enough exceptions and extensions to the fixture rule to assure that the owner received something close to indemnification.

In 1970, Congress passed the Uniform Relocation and Real Property Acquisition Policies Act, and then, at least with regard to federal and federally assisted projects, owners were able to recover relocations costs. Many states also passed statutes requiring the payment of moving costs. With the ability to recover compensation for moving costs, far fewer owners needed to assert that their machinery and equipment constituted fixtures.

Thus, by the 1970's at least, most owners were assured a decent chance of recovering fair compensation for the effect that the taking had on their furnishings, fixtures, and equipment.

Who was left behind?

There are still owners whose properties are not taken by federal or federally assisted projects, so that they are not protected by the Federal Relocation Act. There are still states that do not provide compensation for the cost of moving personal property from the land which was condemned.

There are still owners, who through no fault of their own, are unable to relocate their machinery and equipment B much less their business inventory.

And there are still states that provide no compensation, let alone full compensation, for losses associated with these articles.

Where Should We Go

When it comes to furnishings fixtures and equipment, it is time to:

4. End the distinction between real and personal property.
5. End the distinction between direct and consequential damages.

6. Recognize that the value which FF&E has in connection with real estate is a value-in-place and does not represent noncompensable value-in-use or value to the owner.

7. Recognize that the value of tangible personal property used in a business is not the same as the intangible value of a business.

How can the courts end the distinction between personal and real property? Owners of either type of property are entitled to just compensation. **Ajust@ means Afair,@ and Acompensation@ means indemnification.** They should be paid for the losses they sustain because of the taking, whether those losses are to personal property or to real estate.

Over the years, the courts have made the determination of just compensation for personal property much more complicated than the determination of real estate. I believe that just compensation for personal property affected by a taking can easily be determined if the courts would simply follow those time-honored principles they have followed in determining just compensation for real estate.

What are those principles?

1. The constitutional requirement of just compensation is supposed to derive as much content from basic equitable principles of fairness as it does from technical concepts of property law.⁶³
2. The owner is entitled to be placed in the same position financially as he or she would have occupied had it not been for the taken.⁶⁴
3. The just compensation guarantee requires the condemning authority to pay, not only for the value of

⁶³United States v. Commodities Trading Corp., 339 U.S. 121, 123 (1950).

⁶⁴ *United States v. Miller*, 317 U.S. 369, 373 (1942).

the property it takes, but for the reduction in value of the remaining adjacent property it does not take.

4. Just compensation is to be determined by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking.⁶⁵

⁶⁵ *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, 108 So.2d 289, 291 (Fla. 1958).

5. Just compensation is determined by equitable principles, and its measure varies with the facts.⁶⁶
6. The theory and spirit of the just compensation clause requires a practical attempt to make the owner whole.⁶⁷
7. The determination of just compensation cannot be reduced to a single formula.⁶⁸
8. When considering the facts of a particular case, even fair market value may not be an appropriate measure of just compensation.⁶⁹
- .9 A lessee holds a constitutionally protected interest in the property condemned.

How, in my opinion, should these principles be applied to determine just compensation for furnishings, fixtures, and equipment **B and, by the way, business inventory, as well?**

1. The constitutional requirement of just compensation is supposed to derive as much content from basic equitable principles of fairness as it does from technical concepts of property law.

The difference between real and personal property is a technical concept of property law. The determination of whether an article of equipment is either a fixture or mere personal property depends upon an application of a technical concept of property law. Applications of these concepts should not be allowed to frustrate an owner=s ability to recover just

⁶⁶ *Orange State Oil Co. v. Jacksonville Expressway Authority*, 110 So.2d 687 (Fla. 1st DCA 1959).

⁶⁷ *Dade County v. Brigham*, 47 So.2d 602, (Fla. 1950); *Jacksonville Expressway Authority v. Henry G. Du Pree Co.*, *supra*, at 292.

⁶⁸ *United States v. Cors*, 337 U.S. 325, 332 (1949).

⁶⁹ *United States v. Commodities Corp.*, *supra*, at 374-375.

compensation for the losses he or she sustains because of a taking.

Since our constitutions protect both real and personal property, there is no need to distinguish between the two. No longer should an owner=s right to compensation for the loss in value depend upon, whether, under property law, an item of equipment is real or personal property.

2. The owner is entitled to be placed in the same position financially as he or she would have occupied had it not been for the taken.

Indemnification to the owner should be the ultimate objective of the inquest. All other considerations should be subordinate to this goal.

3. The just compensation guarantee requires the condemning authority to pay, not only for the value of the property it takes, but for the reduction in value of the remaining adjacent property it does not take.

The owner=s retention of furnishings, fixtures, and equipment should not disqualify him or her from recovering compensation, any more than an owner=s retention of adjoining real estate disqualifies the owner from recovering severance damages.

Since FF&E contributes to the value of land and building, compensation for loss in value to the equipment should also be recoverable in partial taking cases, when the owner retains ownership of the equipment on remaining adjoining property.

4. Just compensation is to be determined by taking into account all facts and circumstances which bear a reasonable relationship to the loss occasioned the owner by virtue of the taking.

The triers of fact should not be required to close their eyes to particular facts and circumstances of the case and how those facts and circumstances relate to the taking. The condemning authority should be required to **A**take its condemnee

as it finds him,@ in the same fashion as a tortfeasor is held to
Atake his victim as he finds him.@

The triers of fact should be allowed to consider how the taking has affected the FF&E, in place, owned by the particular owner. The owner should be required to mitigate his or her losses, but should not be required to relocate. The test should be reasonableness. It should be the province of the trier(s) of fact to determine whether the condemnee could or could not relocate and whether, under the circumstances, it is reasonable to even expect the condemnee to relocate. To be sure, consideration of a particular owner=s age and physical condition introduces factors relating to the particular owner instead of factors relating to the particular property; however, if indemnification is the ultimate goal, then the traditional notion of disregarding a particular owner=s attachment to the property should be subordinated in this instance.

5. Just compensation is determined by equitable principles, and its measure varies with the facts.

The parties and the trier(s) of fact should not be limited to the consideration of any one particular measure of just compensation. The condemnor should be free to argue **A**estimated moving costs as a measure,@ and the condemnee should be free to argue for **A**economic loss in value.@ The choice of measure should be determined first by the parties, depending upon their interpretation of the facts, and then by the trier(s) of fact, by the application of equitable principles.

6. The theory and spirit of the just compensation clause requires a practical attempt to make the owner whole.

Over the years, courts have emphasized consideration of **A**real world@ concepts in order to assure the recovery of fair market value and just compensation for the taking of real estate. For example, the courts have encouraged consideration of such **A**real world@ factors as highest and best use,⁷⁰

⁷⁰ *United States v. Chandler-Dunbar Co.*, 299 U.S. 53, 81 ().

probability of rezoning,⁷¹ probability of assemblage,⁷² and fear of the public project as a factor affecting damages to remaining real estate.⁷³

⁷¹ *Zoning as a Factor in Determination of Damages in Eminent Domain*, 9 ALR 3d 291 (1966).

⁷² *McCandless v. United States*, 298 U.S. 342 (1936).

⁷³ *Fear of Powerline, Gas, or Oil Pipeline or Related Structure as Element of Damages in Easement Condemnation Proceeding*, 23 ALR 4th 631 (1983).

In encouraging consideration of these Areal world@ factors in cases involving real estate, the courts have engaged in a practical attempt to make the owners whole because, if their properties had not been taken, these are matters which buyers and sellers would consider in determining the prices to be paid for their properties.

The triers of fact should be able to similarly consider the Areal world@ effects which a taking causes to an owner=s furnishings, fixtures, and equipment.

7. The determination of just compensation cannot be reduced to a single formula.

The courts have consistently held that the determination of just compensation for real estate cannot be reduced to a single formula. Why then should the determination of just compensation for personal property be reduced to a single method or approach?

Depending upon the particular facts of the case, the unit, contributory value, and/or consistent use rules may or may not be applicable. Depending upon the property or the market, the value of the property might best be determined by application of the cost, market, or income approach.

The courts should remain flexible in determining just compensation for fixtures and equipment. Strict adherence to any one formula can in no way assure the determination of just compensation in all cases.

8. When considering the facts of a particular case, even fair market value may not be an appropriate measure of just compensation.

The courts have been diligent in acknowledging that the constitutional measure of compensation is Ajust compensation,@ and not necessarily Afair market value.@ Fixtures and equipment are often specialized or customized items, for which there may not exist a ready market. The trier(s) of fact should be free to refer to such factors as replacement cost in determining just compensation.

The courts should also finally recognize that it is not necessary for moving costs to fit within the fair market value paradigm to be recoverable. One of the fairest analysis of the relationship between the government, the individual, and the financial responsibility for the payment of moving costs was provided by Justice Drew in a concurring opinion in *Jacksonville Expressway Authority v. Henry G. DuPree Co.*, when he wrote:

To sustain appellant=s argument here, that the cost of removal of personal property from condemned premises may not properly be considered in determining compensation to the owner under our organic law, would be tantamount to vesting in the sovereign not only the right to force an owner to convey to the sovereign lands he does not want to convey but, in addition, to part with other property without hope of reimbursement.

Many situations could arise where the cost of removal of the personal property would greatly exceed the value of the lands taken. Lands upon which scrap iron, old automobiles, heavy building materials and things of that nature are stored are usually in remote and undesirable areas where land values are extremely low. It was never intended that the sovereign could place on the shoulders of an individual the burden of paying out his own money in order that the public could use his property against his will.

The fact that the sovereign is now engaged in great public enterprises necessitating the acquisition of large amounts of private property at greatly increasing costs is no reason to depart from the firmly established principle that under our system the rights of the individual are matters of the greatest concern to the courts. The powerful government can usually take care of itself; when the courts cease to protect the individual **B** within, of course, constitutional and statutory limitations **B** such individual rights will be rapidly swallowed up and disappear in the maw of the sovereign. If these immense acquisitions of lands point to anything, it is to the continuing necessity in the courts of seeing to it that, in the process of improving the general welfare, individual rights are not completely destroyed.⁷⁴

Justice Drew recognized that moving costs might actually exceed fair market value. Moving costs should be recoverable **B** not because they affect fair market value **B** but because their payment is necessary to put the owner in the same position financially as he or she would have been in had the property not been taken. Moving costs should be recoverable so that the owner is able to receive just compensation for the taking.

9. A lessee holds a constitutionally protected interest in the property condemned.

When it comes to the condemnation process as applied to real estate, the courts have endeavored to treat the lessor and lessee equally. It is unfair to allow owners, but not tenants, to recover moving costs as an element of just compensation.

These ideas may seem radical to some; and, in certain jurisdictions they may very well be. Adoption of them, however,

⁷⁴108 So.2d 289, 292 (Fla. 1958).

would breathe real life in the term **A** just compensation, @ when applied to furnishings, fixtures, and equipment, and would place the financial burden on the appropriate party **B** the public, for whose benefit the properties have been taken.