



ARTICLES

Recovering Business Goodwill in Condemnation Cases

By Anthony F. Della Pelle and Cory K. Kestner – February 16, 2011

A potential client walks into your office after learning that his business property will be taken by eminent domain. The business owner has worked long and hard to develop a successful business on the property and is now worried that the business's goodwill will be lost forever. You remember learning in law school that businesses are not generally entitled to recover for goodwill, but that recently a case came out that challenged that general premise. Additionally, you remember that eminent domain is based on equitable principles, and that a property owner must be placed in as good a position pecuniarily as he or she would have been if the property was not taken. You tell your client that you will investigate the situation to ensure that you provide the best possible guidance.

In denying recovery, courts have historically relied on the position that the property owner is being compensated for the real property actually taken and that the business can continue its operations at a new location. This general principle fails to address certain distinct situations that have been recognized in statutes and case law. Researching whether or not an exception can be used in your client's specific case can be reduced to several questions: 1) Does my jurisdiction have a statute addressing the recovery of business goodwill? 2) Does my state recognize an exception that would permit my client to recover for business goodwill? 3) Are my client's claims speculative, or can they be supported by evidence? The first two questions focus on the substantive issue presented, while the third question directly relates to the valuation process in every case whether controlled by statute or case law.

Statutes

The first step is to research whether or not your state has a statute covering the recovery of goodwill in condemnation actions. Several states have enacted "goodwill" statutes to define goodwill and the circumstances of its compensability in condemnation proceedings. Wyoming's statute is actually entitled "Loss of Goodwill" and provides that "the owner of a business conducted on the property taken, or on the remainder if there is a partial taking, shall be compensated for loss of goodwill." Wyoming's courts, however, have not provided any guidance on the statute's limits in any later cases. Colorado specifically provides for "moving expenses and actual direct losses of property including, for business concerns, goodwill and lost profits that are reasonably related to relocation of the business."

Florida will pay damages for loss of business goodwill under the rubric of business damages. Business damages are available under Florida statute 73.071(3)(b) when a business meets the following requirements: (1) The business holds a property interest in the land being acquired; (2)



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the taking is only a partial taking, and no damages will be paid if the entire property is taken; (3) the business must have operated on the site for five or more years; and, (4) the damages result directly from the loss of property. Construction activities or other impacts associated with construction are not compensable. Affected businesses must submit a written settlement offer to Florida's Department of Transportation that includes an explanation of the nature, extent, and amount of monetary damages being claimed. The offer must be prepared by the business owner, a certified public accountant, or an expert familiar with the business. The business must also submit adequate business records to substantiate the claim. Florida will either review the claim and supporting records internally or hire an outside CPA or business-damage expert to review the claim. The ultimate amount of business damages to be paid will be negotiated with the owner or determined through condemnation proceedings.

If your state does not have a goodwill statute permitting recovery in condemnation actions, then it is time to ask question number two, whether there is a caselaw exception that can be applied to your client's situation.

Caselaw Exceptions

It is important to recognize the type of exception that will apply to your specific case because that will control the facts and arguments you will rely upon. Five exceptions have been identified in caselaw.

Temporary Takings

Temporary takings have been found to create compensable claims for business losses because the property owner does not have the ability to relocate like he or she would for a permanent taking. The U.S. Supreme Court, in the leading case *Kimball Laundry Co. v. United States*, faced this issue when the U.S. military occupied a laundry facility during World War II. They found this distinction is noteworthy because, unlike the usual fee taking in a condemnation case that allows a business to relocate the business operations to a new location (and presumably to receive relocation assistance payments therefore), the owner who is subjected to a temporary taking retains none of the going-concern value that it formerly possessed, and the taker fully occupies the owner's shoes for some temporary period of time. The major elements identified by the court are a temporary interruption based on government occupation and an inability to relocate operations during the interruption. The courts upholding this exception have not been concerned with whether or not the occupied property is used by the government, but rather that the owner has been denied use of the property. Finally, the displaced owner will need to prove the amount of loss suffered because of the taking.

Unique Location

Another potential exception that is recognized by some states is that goodwill may be compensable when the location of a business is so unique that the business would be destroyed by moving to another location. Condemnees must argue that the business is successful because of a unique competitive advantage gained by the specific location, and not a general advantage of

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being on a busy street. One example is a pharmacy located directly across the street from a hospital, and another is a concession operator at a racetrack with a contract to operate as the sole concession vendor. These unique location traits represent specific benefits gained by the individual business owner versus the general benefit of being located on a busy commercial street that could be replicated and thus rejected by the courts as a reason to recover losses.

Licenses

The “unique location” logic applied in the “failure to relocate” cases has also been applied to award goodwill for the loss of a license. Although courts generally hold that a license is not compensable property, they have found licenses constitute a definite economic asset of monetary value for its owner even when only considered a mere privilege as far as the relation between the government and the licensee is concerned. The ability to move the license to another location becomes an important consideration in cases dealing with liquor or other specific-use licenses that may have restrictions on the zones where they can be issued. License-taking courts often rely on the fact that a condemnee cannot move the goodwill to another location and ignore whether the government chooses to take advantage of the business use. Instead, the courts rely on the interference with the business owner’s ability to operate the business by removing the licensee’s use of the license to establish a claim to recover for calculable losses. The proofs to be established under this exception are not that the location itself was unique, but rather that the location is important because no other location existed to where the license could be relocated.

Inverse Condemnation

Some state courts have allowed the recovery of goodwill in inverse-condemnation actions because the taking was categorized as temporary and interfered with the operation of the business or lease. Typically, the complaining party in an inverse-condemnation action must establish both government interference with the property and that the interference caused a taking that denied the business owner use and enjoyment of the business. Additionally, recovery under this exception is not speculative because the limited period of interference restricts in the cases it has permitted the parties to establish an actual damage amount. The business owner must then first show that the government interference occurred, and afterward present proofs establishing the specific financial loss suffered by the owner during the taking period.

Franchisee

Franchisees have not exactly been recognized as an exception to recover because no case has been found that actually permitted a franchisee to recover goodwill as part of a condemnation action. Instead, each of the cases has denied a franchisee the right to be compensated for goodwill because the franchise agreement permitted the franchisor to terminate the agreement upon the commencement of a condemnation action. However, the D.C. Court of Appeals in *Eyob Mamo v. District of Columbia* did not preclude admitting goodwill testimony in future cases where the facts would support admitting such testimony. Thus, if a franchisee were contractually permitted to seek damages in a condemnation action, then a valuation argument may be viable.

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Conclusion

A business owner's attorney should be prepared to educate the court on the nuances of the goodwill exceptions applicable to the business owner's case. Business owners claiming the loss of business goodwill bear the burden of establishing a legal and factual foundation for their claim, but that foundation can be well supported by existing caselaw. The judicially recognized exceptions, especially *Kimball*, which is the law of the land, and the established caselaw, provide abundant legal and factual bases for developing a claim.

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