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Just Compensation for Condemnation of Going Concern Value*

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The objection barring payment of going concern value and business losses incurred in condemnation proceedings has withstood repeated judicial challenges. However, a number of jurisdictions have carved out exceptions to the traditional rule of non-compensability for going concern values lost by condemnation. This article is intended to cover those judicial decisions which have modified precedent barring compensation.

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Introduction

Going concern value, goodwill, lost business profits and other related items, when taken in an eminent domain expropriation, have traditionally been treated as non-compensable by our judiciary. Legislation in some states now allows for the provision of payment for the traditionally non-compensable items. There are also a number of other jurisdictions which have judicially expanded the availability of compensation. This article will cover the changes in patterns of compensation created by legislation, and is intended to review judicial decisions which have modified standards for compensation.[1]

The United States Supreme Court Standard of Just Compensation

In *Olson* v *U.S.*,[2] the United States Supreme Court reviewed the issue of whether the actual use and special adaptability of the owners' shorelands for the flowage and storage of water may be taken into consideration in ascertaining the just compensation to the owner. The court rejected any element of value resulting subsequently to or because of the taking of the flowage. Considerations that may not reasonably be held to affect market value are to be excluded. The *Olson* court applied the standard set forth in *Monongahela* v *U.S.*[3] which relies on an indemnification theory of damages to make the owner whole for all losses created by the condemnation. The *Olson* court then cited the language of *L. Vogelstein* v *U.S.*[4] in finding that "the public may not by any means

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[1]Harjue and Clauretie, "New Directions in Eminent Domain: The Emerging Issue of Enhancement," *The Appraisal Journal*, April 1984, at 214 covers legislative modifications to the noncompensability rule.

[2]292 U.S. 246, 78 L.Ed. 1236, 54 S.Ct. 704 (1934).

[3]148 U.S. 312, 324, 37 L.Ed. 463, 467, 13 S.Ct. 622, (1892).

> . . . in any society, the fullness and sufficiency of the securities which surround the individual in the use and enjoyment of his property constitute one of the most certain tests of the character and value of the government.
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> . . . no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner, aptly expresses the scope of the constitutional safeguard against the uncompensated taking or use of private property for public purposes.

[4]262 U.S. 337, 340, 67 L.Ed. 1012, 1014, 43 S.Ct. 564 (1922).

confiscate the benefits or be required to bear the burden of the owner's bargain." In concluding its discussion on the standard for just compensation, the *Olson* court applied the language of the *Minnesota Rate Cases* holding a property owner should be indemnified for his loss.[5]

The *Olson* court then noted the language of *Mississippi and R. River Boom Company* v *Patterson*[6] in carving a broad standard that an owner should obtain payment for the highest and most profitable use of his property.

U.S. v *Miller*[7] clarified the Supreme Court's construction of "just compensation" previously set forth in *Olson* and *Monongahela* by restating the proposition "that an owner of property is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker." The *Miller* court, by viewing payment on the basis of a willing-buyer/willing-seller context, utilized an objective theory of just compensation, to avoid subjective factors created by the pendency of condemnation on the market value of the property.[8]

In *McCandless* v *U.S.*,[9] the owners claimed that they would have had the opportunity to use the property for a different and more profitable agricultural purpose than the property was presently being used for. The Supreme Court held the fact finder should determine the value if proofs were presented showing a more profitable use for the property than the then existing use. The *McCandless* court cited *Olson* language that:

> The rule is well settled that, in condemnation cases, the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value; and the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value.

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[5]230 U.S. 352, 454, 57 L.Ed. 1511, 1563, 33 S.Ct. 729 (1912), also cited at 78 L.Ed. 1241.

> He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is a property and not the cost of it that is safeguarded by state and federal constitutions.

[6]98 U.S. 403, 408; 25 L.Ed. 206, 208 (1878).

See also, *Clark's Ferry Bridge Co.* v *Public Service Commission*, 291 U.S. 227, 78 L.Ed. 767, 54 S.Ct. 427 (1933).

The *Olson* court described the highest and best use standard in stating:

> Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.

[7]317 U.S. 369, 375; 87 L.Ed. 336, 343, 63 S.Ct. 276 (1943)

> Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use and a taker who needs the land because of its peculiar fitness for the taker's purposes. These elements must be disregarded by the fact finding body in arriving at 'fair' market value.
>
> Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker.

[8]id. at 375, relying on *United States* v *Chandler-Dunbar Co.*, 229 U.S. 53, 81; 57 L.Ed. 1063, 33 S.Ct. 667 (1912)

> Thus, although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value.

[9]298 U.S. 342, 80 L.Ed. 1205, 56 S.Ct. 764 (1935).

In *U.S.* v *Powelson,*[10] property had been assembled over a number of years by an owner intending to construct a dam system in the area for the production of electricity. The United States Supreme Court held that the owner's potential to establish private dams was too remote to be included as part of the market value of the property.[11] The *Powelson* court concluded:

> We hold only that profits, attributable to the enterprise which respondent hopes to launch, are inadmissible as evidence of the value of the lands which were taken. Respondent is, of course, entitled to the market value of the property fairly determined.[12]

In its analysis of the dicta of *Mitchell* v *U.S.*,[13] the *Powelson* court determined that just compensation should not be granted to a business which could not be relocated when it was not the government's intent to take the business. This federal precedent that a business should not receive compensation when condemned is a corollary to the policy that it is not the government's gain for which a compensation is to be paid.[14] However, as set forth below, in Michigan, Minnesota and Pennsylvania, compensation awards for going concern value in those limited circumstances where relocation is impossible may now be allowed.

However, the reasons for limiting compensation clearly enunciated in *Mitchell* may have been somewhat modified by the subsequent cases of *U.S.* v *General Motors*[15] and *U.S.* v *Kimball Laundry.*[16]

The *General Motors* court restated the rule of *Mitchell* v *U.S.* that "the loss of goodwill which inheres to the location of the land, or other consequential losses which would ensue the sale of the property to someone other than the sovereign"[17] is not a compensable interest. The court therefore allowed compensation to be paid for a taking of property for part of the term of a lease.

In *Kimball* the Court held that the Army's occupation and use for the duration of the war of a laundry company constituted a taking of a going concern for which compen-

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[10]319 U.S. 266, 87 L.Ed. 1390, 63 S.Ct. 1047 (1942).

[11]id., 319 U.S. at 275–6; 63 S.Ct. at 1053.

> But in order for that special adaptability to be considered, there must be a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future.
>
> In the absence of such a showing, the chance of their being united for that special use is regarded "as too remote and speculative to have any legitimate effect upon the valuation. *McGovern* v *New York,* 229, U.S. 363, 372; 57 L.Ed. 1232, 33 S.Ct. 876 (1913).

[12]id., 319 U.S. at 285, 63 S.Ct. at 1057.

[13]id., 319 U.S. at 281–2 63 S.Ct. at 1056 stating:

> . . . not all losses suffered by the owner are compensable under the Fifth Amendment. In absence of a statutory mandate (*United States* v *Miller,* supra, 317 U.S. page 376, 63 S.Ct. page 281, the sovereign must pay only for what it takes, not for opportunities which the owner may lose. See *Orgel,* Valuation Under Eminent Domain (1936) §71, §73. On the one hand are such cases as *Monongahela Navigation Company* v *U.S.,* supra, where it was held that the United States had appropriated a going enterprise to its own ends and must make compensation accordingly. But it is well settled in this Court that, "Frustration and appropriation are essentially different things." *Omnia Commercial Company* v *U.S.,* supra, 261 U.S. page 513, 43 S.Ct. page 439, 67 L.Ed. 773. Thus in *Mitchell* v *United States,* 267 U.S. 341, 45 S.Ct. 293, 69 L.Ed. 644, the owner was denied compensation for the destruction of his business which resulted from the taking of his land for a public project even though the business could not be reestablished elsewhere.

[14]See *McGovern* v *New York,* 229 U.S. 363, 33 S.Ct. 876, 57 L.Ed. 1228; also *Boston Chamber of Commerce* v *Boston,* 217 U.S. 189, 195, 30 S.Ct. 459, 460, 54 L.Ed. 725 (1910).

[15]338 U.S. 1, 93 L.Ed. 1765, 69 S.Ct. 1434 (1949)

[16]323 U.S. 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945)

[17]id. at 379.

sation should be awarded. The award was based upon the reasonable rental value of the routes maintained by the laundry. However, the majority refused to award compensation for the diminution in the value of the "trade routes" of the laundry company because of the taking of a property interest for an indeterminate period of time.

Most jurisdictions apply the general rule that unless the government is taking a property for the same purpose for which it was used by the private owner, no compensation will be paid for going concern value.[18] However, in *U.S.* v *Kimball,* the Supreme Court allowed an award even though the government ostensibly had no use for the customer list which was being paid for in a temporary taking of laundry routes for use by the Army during wartime. The Supreme Court determined that:

> "We conclude, therefore, that since the government for the period of its occupancy of petitioner's plant has for all practical purposes preempted the trade routes, it must pay compensation for whatever transferable value their temporary use may have had."[19]

The majority held that whenever the transferable value of these trade routes, their temporary use by the government must be paid for. The dissenting minority held that the trade routes were wholly useless to the government and therefore should not be compensable without consideration of whether the taking was temporary or permanent. The Supreme Court further limited compensation under these circumstances to the transferable interest; basing compensation upon rental value only as the alternative valuation, and the payment upon a temporary taking only.

States Denying Payment of Going Concern Value

Many states deny recovery for payment of any goodwill or going concern value attached to the property. In Kentucky,[20] Wyoming,[21] Arkansas,[22] Texas,[23] and Utah,[24] proof of business loss, going concern value and goodwill are considered too speculative and uncertain to be included as a part of a market value determination.

Other jurisdictions, such as Indiana, have enacted statutes that loss of profits and goodwill do not constitute compensable interests. The going concern value of a business is the difference between a dead plant and a live one. It is generally a percentage of the physical property loss.[25]

Other state judiciaries will allow compensation awards for business-related items or when a public utility is being taken.[26] Payment of going concern value for a public utility

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[18]See footnotes 26–29 infra.

[19]338 U.S. at 16, 93 L.Ed. at 1777, 69 S.Ct. at 1443.

[20]*Commonwealth Dept. of Highways* v *Fister,* 373 SW2d 720 (1963); *Commonwealth Dept. of Highways* v *Rogers,* 399 SW2d 706 (1965); *Commonwealth Dept. of Highways* v *Silver,* 487 SW2d 926 (1972).

[21]*State Highway Commissioner* v *Peters,* 416 P 2d 390 (1966).

[22]*Arkansas State Highway Commission* v *Highfill,* 248 Ak 541, 452 SW2d 846 (1970); *Arkansas State Highway Commission* v *Wallace,* 247 Ak 157, 444 SW2d 685 (1969).

[23]*Huckabee* v *State,* 431 SW2d 927 (1968); *State* v *Zaruba,* 418 SW2d 499 (1967).

[24]*State* v *Ouzounian,* 26 Utah 442, 491 P.2d 1093, (1971).

[25]*Public Service Co. of Indiana, Inc.* v *Morgan Co. Rural Electric Membership Corp.,* 360 NE2d 1022 (1977). Indiana Code §32-11-1-6.

[26]Arizona (*City of Phoenix* v *Consolidated Water Co.,* 415 P2d 866, 101 Ariz 43 (1966))

Wisconsin (*Milwaukee and Suburban Transportation Co.* v *Milwaukee,* 72 Wisc 2nd 252, 240 NW2d 503 (1978))

Massachusetts (*Gloucester Water Supply Company* v *City of Gloucester,* 60 NE 977 (1901))

The underlying policy creating support for payment of the taking of a going concern is well stated in *New Jersey Highway Authority* v *Rue,* 41 NJ Super. 385, 125 A2d 305 (1956). The Court noted

is a logical corollary to the general rule of *McGovern*[27] that it is what is being taken and not the taker's gain for which compensation is to be paid. *Kimball Laundry* stated the policy as:

". . . Because gain to the taker, on the other hand, may be wholly unrelated to the deprivation imposed upon the owner, it must also be rejected as a measure of public obligation to requite for that deprivation.

"The value compensable under the Fifth Amendment, therefore, is only the value which is capable of transfer from owner to owner and thus of exchange for some equivalent."[28]

Community Redevelopment Agency v *Abrams*[29] states the policy reasons for payment of a going concern value when a public utility is taken:

". . . first the utility is uniquely adapted for a particular purpose and cannot be separately sold; second, the plant is so uniquely connected with the other parts of the business that if one is destroyed, all are destroyed; and third all chances of re-establishing the utility are destroyed and the condemnor will itself enjoy the benefits and other intangible aspects of goodwill which are given up."[30]

In denying going concern value, *Abrams* also relied on the traditional theory that "in the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may justifiably be excluded."[31]

Framework for Carving an Exception to the Noncompensability Rule

A. Applications of Highest and Best Use

Certain jurisdictions are liberal in admitting evidence of enhanced special value which effectively, albeit if indirectly, include goodwill or going concern value. For example, in Connecticut the value of the business is not ordinarily considered in determining the market value of the land unless the business value enhances the value of the property and the highest and best use of the property would affect what an individual would be willing to pay for it.[32] The highest and best use theory also applies in Alaska,[33] Virginia,[34] Vermont,[35] Mississippi,[36] and Delaware.[37]

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that business profits are not a separate element of compensation but the proof of business profits may be admissible. Although a condemnor does not acquire the going concern value of a business as the loss hinges on speculative elements, a different situation may exist where a condemnation involves a temporary use of the business as a going concern or a seizure of the property for continued operation. The value of the going concern is as important to the City in furnishing services to the public as are the tangible assets being taken.

[27]See fn 14 supra.

[28]fn 15 supra 69 U.S. at 1437–8, 338 U.S. at 5.

[29]15 Cal 3d 813, 543 P.2d 905 (1975), cert. den. 429 U.S. 869, 50 L.Ed. 2d 144, 97 S.Ct. 180.

[30]15 Cal 3d 813, 543 P2d 405, citing *Sawyer* v *Commonwealth*, 182 Mass 245, 65 NE 52 (1902).

[31]Compare the "consequential damage" standard of *Mitchell* v *U.S.*, 267 U.S. 341 69 L.Ed. 644, 45 S.Ct. 293 (1924) cited in fn 13 supra.

Arguably, *Kimball* and *G.M.* have somewhat retreated from the iron-clad rule that all consequential damages are speculative and therefore never compensable.

[32]*Housing Authority of City of Bridgeport* v *Lustig*, 139 Conn 73, 90 A2d 169 (1952).

[33]*Ketchian Cold Storage Co.* v *State*, 491 P.2d 143 (1971).

(Alaska has an exception to the general rule which permits introduction of evidence of income when a condemnation is of unique commercial property.)

[34]*Andersen* v *Chesapeake Ferry Co.*, 186 Va. 481, 43 SE2d 10 (1947). (Ferry boat)

[35]*Sharp* v *Transportation Board of the State of Vermont*, 141 Vt 480, 451 A2d 1074 (1982).

[36]*Bear Creek Water Assoc.* v *Town of Madison*, 416 So.2d 399 (1982). (Miss.) (Water supply system)

[37]*State* v *Davis Concrete of Delaware, Inc.* 355 A2d 883 (1976).

In New Jersey, going concern value of the condemned property is not considered as separately compensable because the loss hinges on speculative elements. However, where there is a temporary or continued use of the business and the losses are supported by evidence, these elements may be compensable.[38]

In New York, going concern value is a separately compensable item when the condemning authority takes and uses the intangible as well as tangible assets of the condemned operation.[39]

B. Liquor License Exception

A number of jurisdictions have carved out an exception for situations in which a license cannot be relocated. For example, in Minnesota loss of going concern value is not generally compensable. However, where a non-transferable liquor license which gives a property intrinsic value and the license is not movable, compensation has been allowed for the loss of going concern value.[40]

In determining that the value of a liquor license should be compensated, the Pennsylvania judiciary maintains that everything which gives the land intrinsic value is a proper element to be considered by the fact finder. This is based on the reasoning that the party injured should be put in as good a position as he would have been had the condemnation not occurred.[41]

In both Minnesota and Pennsylvania a liquor license itself is property, and is therefore considered to be a constitutionally compensable item. The impossibility of using the license at another location because of regulations prohibiting a transfer serves the basis for allowing compensation in both states and provided the framework for the Michigan decisions that follow.

C. Michigan Alteration Of The General Rule That Going Concern Value And Goodwill Are Not Compensable

Michigan has the judicially most liberal definition of when going concern value may be paid as part of just compensation. The legal framework for this liberal construction is derived from *Grand Rapids and Indiana Railroad Company* v *Weiden*.[42] However, in the next eighty years following the *Weiden* decision, the Michigan judiciary followed the restrictive general rule that just compensation was not intended to include going concern or goodwill losses.[43]

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[38]*Beech Forest Hills, Inc.* v *Morris Plains*, 127 N.J. Super 574, 318 A2d 435 (1974).

[39]*Matter of City of New York 5th Avenue Coach Lines*, 18 N.Y. 2d 212, 273 N.Y.S.2d 52 (1966).

[40]*Mattson* v *Saugen*, 238 Minn 402; 169 NW2d 37 (1969).

[41]*Redevelopment Authority of Philadelphia* v *Lieberman*, 461 Pa. 208, 336 A2d 249 (1975).

[42]70 Mich App 390, 395, 38 NW 94 (1888).

> . . . both of the appellants were using their property in lucrative businesses, in which the locality and its surrounding had some bearing on its value. Apart from the money value of the property itself, they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not and a dimunition of business facilities may lead to serious results. There may be cases where the loss of a particular location may destroy business altogether, for want of access to any other that is suitable for it. Whatever damage is suffered, must be compensated. Appellants are not legally bound to suffer for petitioner's benefit. Petitioner can only be authorized to oust them from their possessions by making up to them the whole of their losses.

[43]*In re Edward Jeffries Homes Housing Project*, 306 Mich. 638, 11 NW2d 272 (1943), the Michigan Supreme Court found ". . . The loss of goodwill is not an element of compensation where the business is not taken for a use as a going concern."

The modern preceptor of the exception was carved out in *State Highway Commission* v *L & L Concession Company*.[44] In *L & L*, the owner was a tenant of a food stand at a race track which was condemned for a highway. At the trial, the owner presented an offer of proof explaining his operation and its "special adaptability to continue as an expectancy of renewal of the lease." The owner claimed that the business was destroyed by the condemnation of the race track and compensation should be paid for what the property was best adapted for. The appellate court found the trial court erred in refusing to allow evidence to be presented that the owner had a special advantage due to the monopolistic position that it held at the race track rather than conventional customer goodwill. The property was specially adapted to this favorable position, therefore compensation may be made for the going concern value itself.

The *L & L* Court then determined that because the condemning authority does not intend to operate the business, the courts have been unwilling to award compensation unless the destruction of the business was a necessary consequence of the condemnation. The *L & L* Court placed heavy reliance upon *Jackson* v *U.S.*[45] and *Saugen* to support the conclusion that going concern value may be paid for when there is a nontransferable license being destroyed by the taking.

The Michigan judiciary then sought in *Detroit* v *Whalings*[46] to delineate when going concern would be paid. In *Whalings*, the condemned tenant made a claim for the loss of goodwill at a clothing store which was located in the same area for over one hundred years. The tenant claimed that there was no other site in the downtown area of Detroit in which he could relocate. The court distinguished *Whalings* from the *L & L* decision on the basis that *Whalings* did not enjoy a monopoly and its customers were not the "captive audience" that existed at the *L & L* race track concession stand. Further, there seemed to be a possibility of finding a suitable location nearby, whereas in *L & L* there was no suitable alternative location. But the dicta of *Whalings* provide the test of when compensation should be paid for going concern. The application test, paraphrasing *Whalings* from 43 Mich App 1, 10 which could be given as a jury instruction, is as follows:

> . . . to determine that a taking requires compensation for losses of going concern value you must find with a degree of reasonable certainty that all suitable locations to which this business may relocate have been condemned or are unavailable, proof of destruction of this business because it is almost dependent on the location will then require payment of going concern value.[47]

The *Whalings* language also applies a standard by which a well-located business in the middle of an area clearance urban renewal project would be more likely to be paid for going concern value as long as this would not be redundant of other damages.[48]

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[44]31 Mich App 222, 187 NW2d 465 (1971).

[45]103 F Supp 1019 (Ct. Cl. 1952).

[46]43 Mich App 1, 202 NW2d 816 (1972), leave denied 388 Mich 813 (1972).

[47]The language from which the test is paraphrased may be found at 43 Mich 1, 10, 202 NW2d 816, 821.

> "It is clear that if Whalings is unable to relocate, that inability is caused by the fact that all suitable locations are, at present, occupied by other businesses, not because all suitable locations have been condemned. Admittedly, the ultimate effect on Whalings may be the same. But the difficulties of proof involved in the two fact situations are quite different. Where all suitable locations are condemned, proof of destruction of a business almost totally dependent on the location admits of a degree of certainty not possible in the instant case."

[48]id. at 10

> ". . . the possibility of finding a suitable location nearby with the same or nearly the same convenience factors is not foreclosed by reason of the condemnation herein. In the *L & L* case, a 'suitable location nearby' could only be within the racetrack grounds. The possibility of such relocation was foreclosed by reason of the condemnation of the entire racetrack. For this case to come within the facts of *L & L*, the entire downtown area would have to be included in the condemnation order."

In *City of Lansing* v *Wery*, the Michigan Court of Appeals approved a trial court determination that "the premises were adapted for a particular highly productive use no way dependent on the ownership by the particular defendants."[49] The *Wery* owner was the tenant operating a restaurant near local governmental offices and was denied the opportunity to relocate to a comparable site. The trial court made a specific finding that this was a unique operation at a unique location. Additionally, the *Wery* court held "compensation should be made for the going concern value where the operation depended greatly on that location, and any significant move would so greatly impair its business as to nearly destroy it."[50] The additional factors of the uniqueness of the location and the near destruction caused by condemnation may create an alternative test to that established by *Whalings* above.

In *State Highway Commissioner* v *Gaffield*,[51] the Michigan Court of Appeals reviewed *L & L* to determine what facts were required for recovery of going concern value.[52] Payment would be made when there was an exclusive license, total destruction of the business, or no possibility of relocation and the award was not redundant of other items of compensation.

Gaffield further clarified factors which would form a basis for recovery under the *Wery* standard as a unique operation in a unique location, or a business primarily dependent on the location, or evidence that the requirement of a move would nearly destroy the business, and the use of the business was not dependent on the ownership.

D. Sovereign Immunity Issue

Detroit v *Whalings*[53] leads one to conclude that a claim of tort damage would fail in a condemnation setting because of the general rule that sovereign immunity protects governmental bodies in the exercise of their functions. However, as the demise of sovereign immunity grows throughout the nation,[54] the denial of recovery for going concern value because a government agency is condemning the property will not suffice in the future.

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[49]68 Mich App 158; 242 NW2d 251 (1976), leave denied 397 Mich 828 (1976).

[50]Id. 68 Mich App 158, 165; 242 NW2d 51, 55.

[51]108 Mich App 88; 310 NW2d 281 (1981).

[52]Id. 108 Mich App at 91, 310 NW2d 283 relying upon *L & L* stated:

". . . going concern value can be awarded if it is necessary to render the compensation full, if it is not redundant of other damages awarded and if the business has been totally destroyed by the taking."

[53]*Whalings* fn 44 supra, 43 Mich at 11 202 NW2d at 821 held:

Respondent-appellant also argues that there is an analogy between a condemning authority and a tortfeasor and thus going-concern value allowed in a tort case case should also be allowed in a condemnation case. The power of the public to take private property is carefully limited by constitution and statute with the right to attack initially the authority to take. Such is not the case where a wrongful act is done tortiously. In fact, the power of eminent domain is a vital right of a people exercised through its governing body. *Livonia Twp School Dist* v *Wilson*, 339 Mich 454 (1954).

[54]*Evans* v *Board of County Comrs.*, 174 Colo. 97, 482 P.2d 968 (1971), judicially abrogated the sovereign immunity rule in the state.

Pittman v *City of Taylor*, 398 Mich. 41, 247 NW2d 512 (1976), Provisions of Governmental Immunity Act are to be strictly construed. MCLA §691.1401 et. seq.

Cauley v *City of Jacksonville*, Fla 403 So.2d 379 (1981).

However, please see *Ross* v *Consumers Power Co*, ____ Mich ____ (1985). Sovereign immunity may now be reverting to the old more stringent standard.

E. The Analogy To Payment Of Lost Profits In Search Of Contract Actions

An enlightened view is developing that damages for loss of anticipated profits should be awarded when proven to a reasonable degree of certainty.[55] For example, Michigan has abandoned the "new business"/"interrupted business" distinction of summarily rejecting claims by new businesses for lost future profits caused by breach of contract.[56]

Allowing damage awards for businesses not yet open creates an underlying principle completely at variance with the *Abrams* and *Kimball* dicta that consequential and going concern damages are speculative and therefore never compensable as part of just compensation.

F. Redundancy Issues

Ordinarily no compensation is allowed for the goodwill or going concern value of a business operated on the real estate being condemned. The most often quoted reason for the above rule is the concern that such payment may be redundant. The exclusion of going concern value is also predicated upon the theory that when there is a taking of land only the physical assets are taken by the condemnor. The going concern value remains in the owner who is at liberty to utilize such value by re-establishing his business elsewhere.[57] However, when the owner can show that such separate damage for going concern would not be duplicative of any other damage awards received, an award has

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[55]*Fera* v *Village Plaza, Inc.*, 396 Mich 639; 242 NW2d 372 (1976).

[56]Id. 396 at 644, 242 NW2d at 374;

See also, *Godwin* v *Ace Iron & Metal Co.*, 376 Mich. 360, 368, 137 NW2d 151, 156 (1965), in which the Michigan Supreme Court after determining fraud occurred, found that the introduction of evidence should be liberally allowed in order to prove damage.

> . . . But where the injury to some degree is found, we do not preclude recovery for lack of precise proof. We do the best we can with what we have. We do not, "in the assessment of damages, require a mathematical precision in situations of injury where, from the very nature of the circumstances precision is unattainable." Particularly is this true where it is defendant's own act or neglect that has caused the imprecision. *Purcell* v *Keegan*, 359 Mich 571, 576, 103 NW2d 494, 496.

The liberal rules allowing the introduction of evidence which are allowed in contract breach and tort actions do not require absolute precision in proof of damages. See *McCullagh* v *Goodyear Tire*, 342 Mich 254–5, 69 NW2d 731, 737, citing *Eastman Kodak* v *Southern Photo Materials*, 273 U.S. 359, 379, 47 S.Ct. 400, 7 L.Ed. 684 (1927). Further, the burden of proving lack of mitigation transfers to the party committing the wrongful conduct. This standard of liberal introduction of evidence and the change of the burden of proof of mitigation has not as yet been applied to condemnation because of the basic policy that neither the condemnor nor the condemnee is to be considered "at fault," rather that there is a public need for the property interest being taken and the owner should not be placed in a worse position nor bettered because of the need of the condemnee's property interest.

The *Fera* court cited 5 *Corbin On Contracts* §1022, pp. 139–140, which stated, in part:

> "The law requires that this evidence shall not be so meager or uncertain as to afford no reasonable basis for inference, leaving the damages to be determined by sympathy and feelings alone. The amount of evidence required and the degree of its strength as a basis of inference varies with circumstances."

[57]*In re Edward Jeffries Homes Housing Project*, 306 Mich 638, 651; 11 NW2d 272,276 (1943), the Michigan Supreme Court stated, ". . . a good plumber should be able to continue his business in almost any location and do as well as he formerly did."

See also *Banner Milling Co.* v *State*, 240 N.Y. 533, 148 NE 668 (1925).

> Damages and compensation as used in this statute are synonymous. If it were the intention of the Legislature to add the words of the original statute (Laws of 1911, Chap 746) damages to the goodwill of a business conducted on the property taken, the title and the body of the act should have been more specific.

been allowed.[58] Arguably, when a condemnee is paid for the highest and best his property is adaptable for, he has received compensation for that going concern or goodwill value which is not transferable but inherent in the property itself.

The *Uniform Eminent Domain Code,* without any fear of awarding duplicative damages, provides for compensation to owners for the loss of business goodwill or going concern value without regard to whether the taking is total or partial.[59] The drafters of the Code avoid the problem of redundancy by including certain Code limitations and by requiring the owner to mitigate the damages suffered when reasonably possible.[60]

Conclusion

Judicial and legislative actions in some jurisdictions may be a precursor of a trend allowing compensation for going concern value elsewhere because of the waning of three policies which previously supported denial of payment.

First, there is an expansion in the attitude of our courts that special use or adaptability attached to land is an advantage which should be compensated for as part of the eminent domain transaction. The problem in determining whether value stems from good management or from a special type of going concern or goodwill may end up being a factual question after a showing has been made of a near total destruction of a property interest. Once a monopoly position, or license, or near total destruction is shown, whether relocation was not possible, and the value of the going concern may become issues for factual determination.

A second element favoring compensation for going concern value or business losses is the growing reliance on qualified business appraisers with experience in valuing business as a going concern. The American Society of Appraisers now has a business valuation discipline which is developing more precise standards for the practitioner in this complex field.

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[58] *L & L,* at 235 held:

But where the valuations of the estates of lessor and lessee in land do not reflect going concern value of the lessee's business there operated, then, . . . the going concern value can, without making the total damages awarded redundant, and, if full compensation is to be paid, must be determined and awarded to a businessman whose business has been destroyed by the taking.

Nassau County v *Cohen,* 384 N.Y.S.2d 761, 39 N.Y.2d 574, 349 NE2d 861 (1976).

See also, *Gaffield,* footnote 50 supra.

[59] *Uniform Eminent Domain Code,* §1016(a), (1974):

(a) In addition to fair market value determined under Section 1004, 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 only if the owner proves that the loss (1) is caused by the taking of the property or the injury to the remainder, (2) cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill; (3) will not be included in relocation payments under Article XIV, and (4) will not be duplicated in the compensation awarded to the owner.

[60] The comment to §1016 states, in part,:

Section 1016 is intended to reverse the general rule but widely criticized rule under which compensation for loss of business goodwill is not allowed in eminent domain. See *Auraria Businessmen Against Confiscation, Inc.* v *Denver Urban Renewal Authority,* (Colo. 1974) 517 P.2d 845; Aloi and Goldberg, *A Reexamination of Value, Goodwill, and Business Losses in Eminent Domain,* 53 Cornell L.Q. 604 (1968). It provides compensation for loss of goodwill in both a whole or a partial taking; but such loss is recoverable only to the extent it cannot reasonably and economically be prevented by relocation or other efforts by the owner to mitigate.

The determination of loss of goodwill is governed by the rules of evidence generally applicable to such a determination and not by the special rules of evidence relating to property valuation in eminent domain contained in Article XI. See Comment to Section 1103. In addition, the burden of proof under this section is upon the owner. Compare Section 904 (neither party has burden of proof on issue of amount of compensation).

Business interests would not be compensated because of their speculative nature. Yet, in breach of contract cases courts may award damages for prospective losses for businesses that have not as yet opened.[61] The underlying theory in these cases that the party being damaged by the breach should be "placed in the same position as they would have been in had the breach not occurred" is similar to the language used in condemnation proceedings.[62] Because there is no greater speculation in determining business damages than those occurring in breach of contract actions, perhaps the judiciary will take a less restrictive view of limiting compensation for going concern takings.

The distinction between allowing a party to be made whole in contract actions, including redress for lost profits, yet not allowing the same party to be made whole in condemnation, even though the same language is used in both cases, may be based upon absence of fault in condemnation.

Possibly fault in the idea of a condemnation itself may not be a factor which allows for redress for all losses. However, in certain limited circumstances, such as the recent "Poletown" condemnation in Detroit, where the condemnor made major businesses move eight months after giving the owners notice that the condemnation would occur might be such an egregious abuse that the absence of fault theory normally applied to condemnations should not apply. Although it may be arguable that neither party is at fault in a condemnation action, certainly the government should make every attempt to mitigate the damage to the owner.

The third policy is closely intertwined with the above policies. The judiciary is beginning to recognize that, on a case by case basis, there may be situations in which relocation is impossible or there is a special adaptability of a use or license which should be quantified in terms of compensation. The perception is grounded upon the market-

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[61]Compare the judicial willingness to award damages in a breach of contract for a business not yet opened in *Fera*, footnote 56 supra, with the absolute refusal of the *Powelson* Court to allow hopes of profits in the future enterprise to be part of the evidence of the highest and best use in determining fair market value.

In *Goodwin* v *Coe Pontiac*, 62 Mich App 405, 233 NW2d 598 (1975) the court cited 5 *Williston, Contracts* (rev ed), §1338, p 3763 which held that the remedy for breach of contract was to ". . . put the plaintiff in as good a position as he would have been in had the defendant kept his contract." The court held that when not conjectural or speculative, lost profits would fall within the parameters of making the damaged party whole.

[62]Compare the notion of indemnification as set forth in *Olson*, fn 5 supra, with the tort action of *Gowdy* v *U.S.*, 271 F Supp 733 (1967), in which Judge Fox of the Western District of Michigan cited the language from a number of condemnation cases in his holding that:

> Fair compensation is that which puts the plaintiff in as good a condition as he would have been if the injuries had not occurred. Anything short of this is inadequate. A person who causes an injury to another should not be allowed to cast any portion of the actual or appreciable loss on the party whom he has injured. *Olsen* v *City of Dearborn*, 290 Mich 651, 288 NW 295 (1939); *Fisk* v *Powell*, 349 Mich 604, 84 NW2d 736 (1937); *In re State Highway Commissioner*, 249 Mich 530, 229 NW 500 (1930); *Grand Rapids & Indiana R. Co.* v *Heisel*, 47 Mich 393, 11 NW 212 (1882).

Judge Fox also allowed an award for future damages of pain, suffering, impairment of earning capacity and other physical losses.

See also *U.S.* v. *Rio Grande Western R. Co.*, 547 F2d 1101 (1977).

In *Albe Marle Paper Co.* v *Moody*, 95 S.Ct. 2362, 422 U.S. 405, 45 L.Ed. 2d 280 (1975), in determining whether a party suffering from racial discrimination should obtain relief for the past economic injustice, the court relied on the *Louisiana* v *United States*, 380 U.S. 145, 154 S.Ct. 817, 822 13 L.Ed.2d 709 (1965) determination that where a legal injury is of an economic nature:

> [t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.

place itself; if a willing buyer and a willing seller are going to pay for the going concern value because of the unique factors relating to the location of the property interest, the amount should be included as part of condemnation damages. As sovereign immunity declines, the judiciary will be more amenable to allowing compensation for all losses arising directly from condemnation activity.

Michigan Postcript

Subsequent to the acceptance of this article, Michigan Court of Appeals opinions have refined the rules delimiting payment of going concern.

The appellate cases have been adjudicated in Michigan due to the City of Detroit's Central Industrial Park project, commonly called the "Poletown Project." The Central Industrial Park project was an undertaking unprecedented in size and speed which was initiated to mitigate the general instability and economic weakness created by urban blight and changing industrial technology. The project involved the simultaneous condemnation of over 1,600 residential, commercial and industrial properties of approximately one square mile in the City of Detroit. The end purpose of the project was to deed the property to General Motors in order that the Company would build a Cadillac Assembly Plant. The Michigan Supreme Court determined that the "Poletown Project" constituted a public use because of the general economic instability caused by the demise of the auto industry in the 1970's. *Poletown Neighborhood Council vs. Detroit,* 304 NW 2d 455 (1981).

The Michigan Court of Appeals issued four published opinions relating to payment of just compensation for business losses.

In *City of Detroit vs. Michael's Prescriptions,* 373 NW 2d 219 (1985), an appellate panel determined that a pharmacy which could not be transferred to a new site may obtain recovery of going concern value. The court noted that the determination was on a case-by-case basis and stated that "specific factual analysis is required."

> "Generally, however, recovery will be allowed where the business derives its success from a location not easily duplicated or where relocation is foreclosed for reasons relating to the entire condemnation project. In large condemnation projects, such as Poletown, involving the elimination of an entire segment of the residential and business community, transferability of neighborhood businesses is often foreclosed." 373 NW 2d 224.

The *Michael's* panel determined that the trial court judge correctly allowed testimony of going concern value to be presented to the jury. The Court distinguished *Whalings* and *Gaffield.* "This respondent did not provide the type of specialized product that would encourage its established customers to continue patronage in a new and more distant location."

The Michigan Court of Appeals determined that business interruption damages are part of just compensation. An appellate panel upheld the trial court admission of evidence allowing the alleged items of loss to be included in the jury's computation of just compensation. *City of Detroit vs. Hamtramck Community,* 379 NW 2d 405 (1985).

In *City of Detroit vs. Colbert,* 380 NW 2d 45 (1985), the service station franchisor entered into a settlement in which the parties agreed that any loss of goodwill, going concern value, locational advantage or business opportunity was assigned to the tenant. At the trial, the tenant established that he had worked for the franchisor for a number of years as a supervisor and had analyzed gas station sales to determine the value of service stations. The appellate panel affirmed the trial court's admission of the owner's testimony.

In *City of Detroit vs. Campbell,* 380 NW 2d 88 (1985), the trial court granted the condemnor's motion to exclude any evidence as to the going concern value of a bar.

The Appellate Court reversed in holding that *Michael's Prescriptions* would apply to the taking of Campbell's location. The *Campbell* panel again noted that a case-by-case determination of the transferability of the subject business must be conducted. The appellate panel also stated that because of the "unique and extensive condemnation project" it would allow payment for non-transferable going concern value. The Court reversed the trial court's exclusion of the testimony prior to trial in noting that "in his analysis of this Court's prior opinions, (he must) take the nature of the Poletown condemnation into account." 380 NW 2d 92.

What may have occurred in these Michigan cases is that there has been no expansion of payment of going concern at all. Rather, the appellate panels have determined that the oppressive nature of the Poletown project required some special relief be granted to those owners who lost their valuable properties so that a General Motors Cadillac plant could be built. In the future, it is possible that appellate courts will take a more restrictive view of when compensation for going concern should be awarded. However, it can be stated with certainty that the traditional rule of non-compensability will continue to be more successfully attacked whenever the end purpose of the project is essentially private.