

Unique Issues Relating to Case Evaluation in Formal Condemnation Cases

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In some respects, formal condemnation cases are different than other types of cases due to a modification of the traditional American Rule relating to the burden of litigation expenses including attorney fees. The Uniform Condemnation Procedures Act ("UCPA") requires condemning authorities to reimburse litigation expenses including expert witness fees (regardless of whether the property owner obtains an increased amount of just compensation) and attorney fees (only if the property owner receives increased just compensation). The legislature has recognized that property owners should be entitled to obtain unbiased expert assistance when evaluating the reasonableness of a condemning authority's good faith offer. In addition, the condemning authority and not the property owner should bear the burden of litigation expenses if the good faith offer is insufficient.

Case Evaluation for formal condemnation cases has unique procedural and tactical features as a result of the manner in which the burden of litigation expenses and attorney fee burdens are shifted. These unique features stem from three sources. First, generally only just compensation is included in the Case Evaluation award and additional amounts are left for future determination and calculation. Second, a Michigan Supreme Court decision results in the potentially one-sided application of rejecting party costs. Finally, a provision of the UCPA that requires payment of Case Evaluation sanctions to the trial court rather than the prevailing party that has yet to be addressed by the Michigan appellate courts is likely unconstitutional.

Notwithstanding MCR 2.403(M)(1), Case Evaluation Awards Generally Exclude Reimbursable Attorney Fees, Costs and Statutory Interest

MCR 2.403(M)(1) governs the effect of the acceptance of Case Evaluation:

(M) Effect of Acceptance of Evaluation.



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(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice.

The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered.

(emphasis supplied). Despite the language of MCR 2.403(M)(1), Case Evaluation awards generally exclude reimbursable attorney fees, costs and statutory interest. The practice of specifically excluding attorney fees, costs and interest is so engrained that experienced evaluators will generally only enter an award inclusive of these three additional elements upon the stipulation of the parties. This practice is effective in producing increased settlements for several reasons.

First, the calculation of compensable interest under the UCPA is simply a matter of mathematical computations

and, as such, is not contestable. Therefore, it is inefficient to ask case evaluators to spend time making those calculations and speculative to ask case evaluators to guess at the date on which the award will be paid if both parties accept the award. Similarly, in many cases the condemning authority does not contest the reimbursement of attorney fees. Because MCLA 213.66(3) reimburses attorney fees based upon the standard contingency fee arrangement reached between a property owner and its attorneys, the attorney fees are also generally a matter of mathematical computation. Finally, condemning authorities often resolve issues relating to reimbursement of expenses upon provision of ledgers detailing such expenses or provision of actual invoices. Simplifying the Case Evaluation process by excluding interest, costs and attorney fees makes no practical difference if the matter settles through Case Evaluation and these additional condemning authority obligations are not contested. However, if these items were included, a party might reject the Case Evaluation award due to its perception that one of these extra amounts was miscalculated. In such a case, it would be wholly inappropriate to allow the interest, cost and attorney fee “tail” to “wag” the just compensation “dog.”

In addition, the potential rapid increase in interest and reimbursable litigation expenses could significantly skew a Case Evaluation award that included these items. Obviously, interest as well as reimbursable attorney fees that include 1/3 of the interest will increase due to the passage of time even if the just compensation award remains the same. In addition, complicated cases can involve a variety of expert witnesses including real estate appraisers, civil engineers, architects, land planners, business valuation or accounting experts, tree appraisers and fixture appraisers.

A significant percentage of the expert costs incurred in a tried case would be back-loaded and would occur after Case Evaluation. Therefore, a rejecting property owner would obtain the benefit of adding these increased expenses to the ultimate award in order to “puff” the recovery and avoid the imposition of rejecting costs.

In Many Cases, Only the Property Owner Faces the Potential of Sanctions for Rejecting Case Evaluation

A relatively recent Michigan Supreme Court decision that overturns long-standing precedent from the Michigan Court of Appeals affects the imposition of Case Evaluation sanctions.

In *Department of Transportation v Dyl*, the Michigan Court of Appeals determined that because MCR 2.405, which governed sanctions for mediation as it was then called, and MCLA 213.66(3), which requires reimbursement of property owners’ attorney fees, served separate purposes, a property owner could be reimbursed for attorney fees under both even if that property owner was “being reimbursed twice for the same legal services.” In *McAuley v General Motors Corp.*, which involved Case Evaluation sanctions and statutory reimbursement of attorney fees under the Handicappers Civil Rights Act, the Michigan Supreme Court discussed *Dyl* at length. While acknowledging that a property owner could obtain a recovery under both the Case Evaluation rule and the UCPA to the extent that such recoveries did not overlap, the Supreme Court’s dicta effectively precludes double recovery by property owners.

The effect of this ruling creates a hardship upon property owners when determining whether to accept or reject a Case Evaluation award. In most cases, *McAuley* puts all of the burden on a

property owner when determining whether to accept or reject a Case Evaluation award. The property owner recognizes its potential liability for costs while a condemning authority may generally reject with impunity, since it is already obligated to reimburse attorney fees and costs incurred following Case Evaluation.

However, nothing requires a property owner to seek reimbursement exclusively through the UCPA, which caps reimbursable attorney fees in a manner that parallels the 1/3 contingency fee arrangement utilized by the vast majority of property owner counsel. In small cases, obtaining reimbursement of attorney fees on an hourly basis following a trial may yield a greater recovery to the property owner than the contingency fee, even where the property owner prevails. In small cases, the potential Case Evaluation sanction that a property owner could owe if a trial occurred would be a greater percentage of the just compensation awarded. It is precisely this type of case in which the potential coercive effect of one-sided sanctions could come into play. Therefore, condemning authorities should be forewarned against summarily rejecting reasonable Case Evaluation awards with the hope of ratcheting a lower settlement once the parties have disclosed their settlement postures.

MLCA 213.66(3) Which Requires Case Evaluation Sanctions to be Paid to the Court as Court Costs is Constitutionally Questionable.

MCLA 213.66(3) requires payment of Case Evaluation sanctions to the trial court rather than to the opposing party:

If the agency or owner is ordered to pay attorney fees as sanctions under Michigan court rule 2.403 or 2.405,

those attorney fee sanctions shall be paid to the court as court costs and shall not be paid to the opposing party unless the parties agree otherwise.

This statutory provision is constitutionally questionable for two primary reasons.

First, Const 1963, Art 3, § 2, incorporates the separation of powers doctrine into the Michigan Constitution. It states:

The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

The authority to promulgate the Michigan Court Rules is vested in the judicial branch and exercised by the Michigan Supreme Court. As such, legislation that effectively amends specific provisions of the Michigan Court Rules is likely a

usurpation of authority granted to the judicial branch. As such, the specifics of MCR 2.403 that require payment of Case Evaluation sanctions to the opposing party should prevail.

In addition, in the context of the application of the doctrines of collateral estoppel and res judicata, the Michigan appellate courts have recognized the same sovereign doctrine. This doctrine recognizes that powers vested in discreet government bodies flow from the same sovereign and, as such, these discreet bodies are deemed to be the same party. The same sovereign doctrine has been applied in cases involving Michigan Department of Social Services and the Jackson County Prosecutor, the Oakland County Concealed Weapons Licensing Board and the Wayne County Prosecutor, and the state Attorney General and the state Auditor General.

MCLA 213.66(3) is of dubious constitutionally in that it essentially requires a government condemning

authority to pay itself Case Evaluation sanctions. This is particularly problematic when the condemning authority is a county road or drain commission involved in litigation before the circuit court of that county.

While the constitutionality of MCLA 213.66(3) has not been addressed by the Michigan appellate courts to date, at least one trial court in a different circuit has deemed the Case Evaluation provision of MCLA 213.66(3) unconstitutional.

The effect of attorney fee and cost reimbursement, the potentially one-sided application of Case Evaluation sanctions and the constitutional issues raised by MCLA 213.66(3) make Case Evaluation of formal condemnation cases unique. Therefore, it is important to consider these issues carefully when making tactical decisions that could lead to unexpected consequences.

Stephon B. Bagne has specialized in representing property owners involved in condemnation proceedings during his entire career. His expertise in representing property owners in condemnation cases is widely recognized. Stephon has represented all types of property owners in a variety of situations including vacant and improved property, partial and total takings, easement and fee acquisitions, involving commercial and residential properties. Stephon has successfully challenged the necessity of takings and negotiated less onerous acquisitions in partial taking matters. He regularly speaks and writes about eminent domain and other real estate law issues for a variety of professional organizations. **Contact him at: sbagne@clarkhill.com or 313-965-8897**

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