



**PennState**  
Dickinson Law

**DICKINSON LAW REVIEW**  
PUBLISHED SINCE 1897

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Volume 77  
Issue 2 *Dickinson Law Review* - Volume 77,  
1972-1973

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1-1-1973

## Eminent Domain: Attorney Fees in Condemnation-A Defense of the Pennsylvania Position

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### Recommended Citation

William R. Muir Jr., *Eminent Domain: Attorney Fees in Condemnation-A Defense of the Pennsylvania Position*, 77 DICK. L. REV. 316 (1973).

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# EMINENT DOMAIN: ATTORNEY FEES IN CONDEMNATION—A DEFENSE OF THE PENNSYLVANIA POSITION

## INTRODUCTION

In 1971 Pennsylvania took a major step in modernizing its Eminent Domain Code.<sup>1</sup> On December 29, of that year, P.L. 84, the Eminent Domain Code of Pennsylvania, was amended.<sup>2</sup> The essence of the new amendments is to add to the Code provisions for payment of special damages to condemnees defined under the code as displaced persons.<sup>3</sup> Included in these amendments is a provision granting to the condemnee reimbursement for reasonable appraisal, attorney, and engineering fees actually incurred; limited in amount, however, to five hundred dollars.<sup>4</sup> This Comment will examine the reimbursement provision to the Pennsylvania Eminent Domain Code and compare the Pennsylvania reimbursement provision with alternative provisions in effect in other jurisdictions.

The term "eminent domain" refers to the power vested in a sovereign to expropriate private property for public use.<sup>5</sup> A sovereign in American jurisprudence may be either the federal or state government.<sup>6</sup> In Pennsylvania the sovereign is, of course, the Commonwealth and, in addition, those entities vested with the power of eminent domain by the laws of the Commonwealth.<sup>7</sup> The power of the sovereign to expropriate private property is

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1. PA. STAT. ANN. tit. 26, § 101-903 (1971):

The Pennsylvania legislation was passed in response to the Federal Uniform Relocation Assistance and Real Property Acquisitions Act of 1970 (otherwise known as the Musky Bill) 42 U.S.C. § 4601-4655 (1971). The Federal Act made available federal financial assistance to any state agency which provided necessary lands incident to a federal public improvement project, provided that that state implemented legislation compatible with the Federal Act.

2. *Id.*

3. PA. STAT. ANN. tit. 26, §§ 601A, 602A, 603A, 604A, 605A, 606A (1971).

4. PA. STAT. ANN. tit. 26, § 610 (1971).

5. See 1 R. BUSHONG, PENNSYLVANIA LAND LAW 143, 144 (1st ed. 1938); 2 J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 7 (3d ed. 1971) [hereinafter cited as NICHOLS]; P. DRUM, THE LAW OF VIEWERS IN PENNSYLVANIA § 101a, at 142 (1st ed. 1940); I. LEVEY, CONDEMNATION IN U.S.A. § 1 (1st ed. 1969) [hereinafter cited as LEVEY].

6. See generally E. SNITZER, PENNSYLVANIA EMINENT DOMAIN § 201-(3)-1 (1st ed. 1965) [hereinafter cited as SNITZER].

7. See PA. STAT. ANN. tit. 40, § 201(3), (5) (1971).

unique in that it is "not necessarily created either by constitution or statute, but is an inherent attribute of sovereignty itself."<sup>8</sup> Nevertheless, this power is regulated by federal<sup>9</sup> and state<sup>10</sup> constitutional provisions, which require that the property be expropriated for a public use<sup>11</sup> and that just compensation<sup>12</sup> be made to

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8. *Winger v. Aires*, 89 A.2d 521, 371 Pa. 242 (1952).

9. U.S. CONST. amend. V, provides in pertinent part:

[N]or [shall any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

10. PA. CONST. Article 1, Section 10, provides in pertinent part:

[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made, or secured.

11. See, e.g., *Cole v. La Grange*, 113 U.S. 1 (1884); *Garlapp v. Mississippi Power Co.*, 280 Ala. 368, 194 So. 2d 527 (1967); *Alaska Gold Recovery Co. v. Northern Mining & Trading Co.*, 7 Alaska 386 (Dist. Ct. 1926), *rev'd on other grounds*, 20 F.2d 5 (9th Cir. 1927); *Cienega Cattle Co. v. Atkins*, 59 Ariz. 287, 126 P.2d 481 (1942); *City of Little Rock v. Raines*, 241 Ark. 1071, 411 S.W.2d 486 (1967); *Sutter County v. Nicols*, 152 Cal. 688, 93 P. 872 (1908); *Driverless Car Co. v. Armstrong*, 91 Colo. 334, 14 P.2d 1098 (1932); *Faist Steel Co. v. Bridgeport*, 60 Conn. 278, 22 A. 561 (1891); *Clendaniel v. Conrad*, 3 Boyce 549, 83 A. 1036 (Del. 1912); *Hirsh v. Block*, 267 F. 614, 50 App. D.C. 56, *rev'd on other grounds*, 256 U.S. 135 (1920); *Marvin v. Housing Authority*, 133 Fla. 590, 183 So. 145 (1938); *Beazley v. De Kalb County*, 210 Ga. 41, 77 S.E.2d 740 (1953); *King v. Oahu R.R. & Land Co.*, 11 Haw. 717 (1st Cir. Ct. 1899); *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931); *Department of Pub. Works & Bldgs. v. Farina*, 29 Ill. 2d 294, 194 N.E. 209 (1963); *Kessler v. Indianapolis*, 199 Ind. 420, 157 N.E. 547 (1927); *Welding Supply Co. v. City of Des Moines*, 256 Iowa 973, 129 N.W.2d 666 (1964); *Strain v. Cities Service Co.*, 148 Kan. 393, 83 P.2d 124 (1938); *Bell's Comm. v. Bd. of Educ.*, 192 Ky. 700, 234 S.W. 311 (1921); *Crichton v. Lee*, 209 La. 561, 25 So. 2d 229 (1946); *Paine v. Savage*, 126 Me. 135 A. 664 (1927); *Cannata v. City of New York*, 24 Misc. 2d 694, 204 N.Y.S.2d 982 (1960); *Lacy v. Montgomery*, 181 Pa. Super. 640, 124 A.2d 492 (1956); *Weyel v. Lower Colorado River Authority*, 121 S.W.2d 1032 (Tex. Civ. App. 1938).

12. See, e.g., *West v. Chesapeake & Potomac Tel. Co. of Baltimore City*, 295 U.S. 662 (1935); *Hays v. Inghan-Burnett Lumber Co.*, 217 Ala. 524, 116 So. 689 (1928); *In re Forsstrom*, 44 Ariz. 472, 38 P.2d 878 (1934); *Young v. City of Gurdon*, 169 Ark. 399, 275 S.W. 890 (1925); *City of Oakland v. Schenck*, 197 Cal. 456, 241 P. 545 (1925); *San Luis Valley Irr. Dist. v. Hoff-singer*, 85 Colo. 202, 273 P. 827 (1929); *Northeastern Gas Transmission Co. v. Collins*, 138 Conn. 582, 87 A.2d 139 (1952); *Kittinger v. Rossmann*, 12 Del. Ch. 276, 112 A. 388 (1921); *Bd. of Pub. Instruction of Dade County v. Town of Bay Harbor Islands*, 81 So. 2d 637 (Fla. 1955); *State v. Pollitt*, 220 Ind. 543, 45 N.E.2d 480 (1942); *Prickett v. Belvue Drainage Dist.*, 159 Kan. 136, 152 P.2d 870 (1944); *In re Rodgers*, 243 Mich. 517, 220 N.W. 808 (1928); *Connor v. Chanhassen Twp.*, 249 Minn. 205, 81 N.W.2d 789 (1957); *Weinel v. Box Britte County*, 108 Neb. 293, 187 N.W. 939 (1922); *In re Northern Boulevard City of New York*, 258 N.Y. 136, 179 N.E. 321 (1932); *Lucas v. Carrey*, 167 Ohio 416, 149 N.E.2d 238 (1958); *Kelly v. Oklahoma Turnpike Authority*, 269 P.2d 359 (Okla. 1954); *Northwestern Ice & Coal Storage Co. v. Multnomach County*, 228 Or. 507, 365 P.2d 876 (1961); *Andress v. Zoning Bd. of Adjustment*, 410 Pa. 77, 188 A.2d 709 (1963); *State Airport Comm. v. May*, 51 R.I. 110, 152 A. 225 (1930); *State v. Hale*, 136

the owner of the property. This Comment will deal exclusively with the latter element, and in particular the extent to which attorney and related fees should be considered in computing just compensation.

## II. HISTORICAL EXCURSUS

### A. General

The first pronouncements in Pennsylvania for the expropriation of private property came during William Penn's Proprietorship.<sup>13</sup> These pronouncements made no provision for compensation to the owner of the expropriated property.<sup>14</sup> It has been suggested that the failure to provide for compensation was largely due to the "vast acreage available and the beneficence of William Penn and other land owners."<sup>15</sup> Perhaps due to a decrease in beneficence, later acts, beginning with The Act of November 27, 1700, provided for compensation to the owners of land expropriated by the sovereign.<sup>16</sup>

In the early days of the settlement of Pennsylvania there existed, in addition to beneficence, another custom which also had the effect of ameliorating the consequences of the sovereign's power of eminent domain. This custom was known at the time as the Six Per Cent Rule.<sup>17</sup> In the sale of vacant lands by the sovereign, six acres were added without cost for every hundred sold. These six acres were neither specified nor segregated, but were merely added to the tract which then totaled one hundred and six acres. The purpose behind this practice was that whenever the sovereign deemed necessary the construction of a public road through any territory, it could be effected by simply repossessing the gratuitous acreage.<sup>18</sup> The shortcomings of this system are easy to imagine and its prevalence was short-lived.<sup>19</sup>

The first constitutional guarantee to the citizens of the Commonwealth that private property could not be expropriated "without just compensation" came with the adoption of the Pennsylvania Constitution of 1790.<sup>20</sup> And every constitution enacted by

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Tex. 29, 146 S.W.2d 731 (1941); *State Highway Comm. v. Crockett*, 203 Va. 796, 127 S.E.2d 354 (1962); *Hogue v. Port of Seattle*, 54 Wash. 2d 799, 341 P.2d 117 (1959).

13. See P. Lewis, *Eminent Domain in Pennsylvania*, PA. STAT. ANN. tit. 26, at 6-7 (1958) [hereinafter cited as Lewis], citing *Duke of Yorkes' Book of Laws*, 95.

14. Lewis, *supra* note 13, at 8.

15. *Id.*

16. Act of November 27, 1700, 2 Stat. 118 ch. 88, § 3 [Pa. 1700] (repealed 1705).

17. Lewis, *supra* note 13 at 16.

18. *Id.*

19. *Id.* at 17, 18.

20. PA. CONST. of 1790, Art. IX, § 10 (1790), provides in pertinent part:

the Legislature since 1790 has included a similar provision.<sup>21</sup>

### B. *Just Compensation*

Just compensation<sup>22</sup> from the conceptual viewpoint of reimbursement has been defined as that compensation which will put the owner of property taken in as "good position pecuniarily as he would have occupied if his property had not been taken."<sup>23</sup> In practical terms this generally means:

The compensation to be awarded . . . is the amount that in all probability would have been arrived at by fair negotiation between an owner willing to sell and a purchaser desiring to buy, and in making that estimate, there should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining.<sup>24</sup>

Thus, in the context of this Comment the question may be stated: If the condemnee had not incurred attorney fees but for the condemnation,<sup>25</sup> and if he is to be put in a position as though his property had not been taken, are his attorney fees thereby included in just compensation?<sup>26</sup> To illustrate this question, suppose the following facts: A is the owner of Blackacre which the Pennsylvania Department of Transportation, an entity which has acquired the power of eminent domain under the laws of the Commonwealth,<sup>27</sup> condemns in its entirety for a proper purpose. Suppose further, that the Commonwealth through its condemning agency offers A \$50,000.00 for his property. A, who has received

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[N]or shall private property be taken or applied to public use without the consent of his representatives, and without just compensation being made.

21. PA. CONST. of 1783, Art. I, § 10 (1783), provides in pertinent part:

[N]or shall private property be taken or applied to public use without the consent of his representatives, and without just compensation being made.

PA. CONST. of 1874, Art. I, § 10 (1874), provides in pertinent part:

[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being made or secured.

22. See generally 29A C.J.S. Eminent Domain § 97 (1965). See also cases cited note 11 *supra*.

23. 2,953.15 Acres of Land, more or less, in Russell County, State of Alabama v. United States, 350 F.2d 356 (4th Cir. 1965).

24. United States v. 243.22 Acres of Land Situated in Village of Farmingdale, Town of Babylon, Suffolk County, 48 F. Supp. 177 (E.D.N.Y. 1942).

25. See generally C. McCORMICK, DAMAGES § 60 at 234 (1st ed. 1935) [hereinafter cited as McCORMICK].

26. See text accompanying notes 46-50 *infra*.

27. See PA. STAT. ANN. tit. 26, § 201(3) (1964).

several offers from other interested buyers substantially greater than the Commonwealth's offer, is convinced the value of his land is far in excess of the Commonwealth's offer. Perplexed, A consults an attorney whose opinion is in concert with his own. In refusing the Commonwealth's last offer of \$60,000.00, the controversy is settled in court where A is awarded a \$100,000 verdict which is affirmed on appeal. To prove his case, A has incurred \$15,000 reasonable expenses for attorney fees and related expenses. May A recover his \$15,000 expenses in addition to his \$100,000.00? By the overwhelming weight of authority in this country the answer is no.<sup>28</sup> In summation of this general conclusion it has been stated:

The costs recoverable in eminent domain proceedings include only the usual court costs, and the owner is not made whole for the expense he is put to in asserting his right to compensation. Under the ordinary statute costs do not include counsel fees. . . .<sup>29</sup>

Several states permit recovery in limited instances.<sup>30</sup> A majority of the states, however, fail to have any statutory authority at all regarding reimbursement of attorney fees.<sup>31</sup> Of the states which take a position on this issue, several different procedures are employed. In order to better evaluate them we shall first examine the Pennsylvania procedure for the reimbursement of attorney fees in eminent domain proceedings.

### III. REIMBURSEMENT OF ATTORNEY FEES AND RELATED FEES IN EMINENT DOMAIN PROCEEDINGS IN PENNSYLVANIA

Prior to the enactment of section 610 of the Pennsylvania Eminent Domain Code in 1971,<sup>32</sup> Pennsylvania law failed to provide for the reimbursement of attorney fees in the normal condemnation proceeding. Pennsylvania law did provide, however, for the reimbursement of such fees in three exceptional situations. These three situations, sections 406(e), 408, and 609,<sup>33</sup> under which attorney fees were entirely recoverable by the condemnee, have been continued as exceptions to the newly enacted section 610 and will be analyzed in great detail in the discussion which follows.

Newly enacted section 610<sup>34</sup> of the Pennsylvania Eminent Domain Code, entitled "Limited Reimbursements of Appraisal, Attorney, and Engineering Fees," provides:

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28. See generally NICHOLS, *supra* note 5, § 4.109 at 532.

29. NICHOLS, *supra* note 5, § 8.64 at 538.

30. See text accompanying notes 65-72 *infra*.

31. See *Hearings on S. 1351 Before the Subcom. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 2d Sess. at 57 (1968), where it is indicated in Appendix III that 34 states have no legislation on attorney fees in eminent domain proceedings.

32. *McQuade v. Richland Water Co.*, 39 Pa. C.C. 587 (1912).

33. PA. STAT. ANN. tit. 26, § 406(e), 408, 609 (1971).

34. PA. STAT. ANN. tit. 26, § 610 (1971).

The owner of any right, title, or interest in real property acquired or injured by an acquiring agency, who is not eligible for reimbursement of such fees under sections 406(e), 408, or 609 of this Act, shall be reimbursed in an amount not to exceed five hundred dollars (\$500.00) as a payment toward reasonable expenses actually incurred for appraisal, attorney and engineering fees.<sup>35</sup>

Thus, save the exceptions, noted as sections 406(e), 408 and 609, the condemnor in a Pennsylvania eminent domain proceeding must reimburse the condemnee for reasonable appraisal, attorney and engineering fees actually incurred in an amount not to exceed five hundred dollars.

The exceptions to section 610, under which a condemnee may recover his attorney fees and related expenses in their entirety, generally pertain to those situations in which the condemnor relinquishes the condemned property, either by force of law or voluntarily, within one year from the date of filing a declaration of taking, or has failed to comply with the statutory requirement that notice of the declaration of taking be promptly filed.<sup>36</sup> Thus, section 408 provides that:

The condemnor, by filing a declaration of relinquishment in court within one year from the filing of the declaration of taking . . . [and the] condemned property is relinquished, the condemnee shall be reimbursed by the condemnor for reasonable appraisal, attorney and engineering fees and other costs and expenses actually incurred because of the condemnation proceedings.<sup>37</sup>

Just as section 408 pertains to the condemnor's voluntary relinquishment of the condemnee's property and provides compensation for the condemnee's reasonable expenses therefor, likewise, section 406(e) provides the same measure of compensation when the condemnor subsequent to filing a declaration to taking is forced by operation of law to relinquish the condemnee's property.<sup>38</sup> Section 406(e) provides for full compensation of reasonable appraisal, attorney, and engineering fees where, "preliminary objections are finally sustained which have the effect of finally terminating the condemnation."<sup>39</sup> Finally, section 609 provides that where the condemnor has expropriated property anywhere in the Commonwealth and has failed to file a declaration of taking "a judgment awarding compensation to the condemnee for the taking

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35. *Id.*

36. PA. STAT. ANN. tit. 26, §§ 406(e), 408, 609 (1971).

37. PA. STAT. ANN. tit. 26, § 408 (1964).

38. PA. STAT. ANN. tit. 26, § 406(e) (1964).

39. *Id.*

of the property shall include reimbursement of reasonable appraisal, attorney, and engineering fees and other costs and expenses actually incurred."<sup>40</sup>

In sum, under the present Pennsylvania Eminent Domain Code, the condemnee will receive some reimbursement for his reasonable attorney fees and related expenses actually incurred. If the expropriation is improper, as defined under sections 406(e), 408 and 609, the condemnee is fully compensated for these expenses. If, on the other hand, the expropriation is deemed proper, the condemnee will receive an amount not to exceed \$500.00 for the reasonable expenditure actually incurred for attorney fees and related expenses. The following examples should clarify this latter payment.

Suppose in the following hypothetical that the condemnation is proper. Nevertheless, the condemnee contests the sufficiency of the condemnor's offer and the controversy is resolved in the trial court which finds the condemnor's offer sufficient, and where the condemnee thereby incurs the following expenses which the court determines are reasonable:

appraisal fee -	\$100.00
attorney fee -	200.00
engineer fee -	125.00
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Total	\$425.00

Under section 610, regardless of a finding of damages, the condemnee will receive the full amount of expenses or \$425.00.<sup>41</sup>

Now suppose in our next example that the trial court finds the condemnor's offer insufficient by several thousand dollars. In addition, the court finds the following expenditures reasonable:

appraisal fees -	\$ 500.00
attorney fees -	1000.00
engineer fees -	200.00
<hr/>	
Total	\$1700.00

Since the limit on recovery is \$500.00 under section 610, regardless of the fact that the condemnor's offer was insufficient and the condemnee was compelled by the exigencies of the circumstances to seek a proper recovery in a court of law, the condemnee will recover \$500.00 toward the payment of his reasonable attorney fees and related expenses.<sup>42</sup>

The Pennsylvania statutory procedure for determining just compensation in eminent domain proceedings with respect to attorney fees and related expenses we shall label for comparison pur-

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40. PA. STAT. ANN. tit. 26, § 609 (1964).

41. The fact that attorney fees are recoverable (up to \$500.00) regardless of whether the case is taken to court is peculiar to Pennsylvania. This will be most significant in the forthcoming discussion of the various statutory procedures in effect in other jurisdictions.

42. PA. STAT. ANN. tit. 26, § 610 (1971).

poses the statutory limit recovery.<sup>43</sup> As noted earlier there are several alternative statutory procedures currently in effect in other jurisdictions.<sup>44</sup> An analysis of the merits and demerits of the Pennsylvania procedure follows an analysis of these alternative statutory procedures.

#### IV. APPROACHES TO THE REIMBURSEMENT OF ATTORNEY FEES AND RELATED EXPENSES IN EMINENT DOMAIN PROCEEDINGS

##### A. Full Reimbursement

In recent years there has been increased support for the proposition that attorney fees be included in just compensation awards in eminent domain proceedings.<sup>45</sup> Notwithstanding this fact, only one state, Florida, has statutory authority which provides for the complete reimbursement of reasonable attorney fees incurred in eminent domain proceedings.<sup>46</sup>

The pertinent Florida statute provides that:

The petitioner shall pay all reasonable costs of the proceedings in the circuit court, including a reasonable attorneys' fee to be assessed by the court.<sup>47</sup>

In addition, however, the Florida Supreme Court has indicated that even without statutory authority, it would still permit recovery of attorney fees,<sup>48</sup> adding that failure to do so "would fall far short of a practical attempt to make the owner whole."<sup>49</sup>

The rationale behind the full recovery of attorney fees in eminent domain proceedings is generally based on two propositions. The first proposition is that there is an unequal bargaining position between the federal or state government (condemnor) and the owner of the expropriated property (condemnee).<sup>50</sup> The second is that the condemnation of private property forces the owner to incur expenses in asserting his right to compensation and a failure to reimburse for such expenses would be a taking of property without just compensation.<sup>51</sup>

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43. See notes 73-78 and accompanying text *infra*.

44. See note 33 *supra*.

45. Note, *Attorneys' Fees in Condemnation Proceedings*, 20 *HAST. L.J.* 694 (1969); D. Foerster, *A Look at Condemnation Attorneys' Fees*, 46 *FLA. B.J.* 130 (1972) [hereinafter cited as Foerster].

46. *FLA. STAT. ANN.* § 73.091 (1965).

47. *Id.*

48. *Jacksonville Expressway Authority v. Dupree*, 108 So. 2d 289 (Fla. 1959).

49. *Id.* at 294.

50. See generally Foerster, *supra* note 46, at 131.

51. *LEVY*, *supra* note 5, § 47 at 464.

Regarding the first proposition, no one familiar with real estate appraising would deny that two honest appraisers may reach significantly different conclusions as to the value of a given piece of property. The myriad factors which must be taken into account in a proper estimate, such as business loss, severance, highest and best use, comparative sales and many others, give some indication why this should be so.<sup>52</sup> The government with its resources has the capability of employing a staff of attorneys, appraisers, and engineers in order to determine in accordance with its own standards a value for the property in question, as well as the capacity to marshal these experts, should litigation prove necessary. The private citizen, taken unawares by the condemnation, generally speaking, is unable to properly judge the adequacy of the government's offer, especially in light of the complex factors which must be considered.<sup>53</sup> If real estate appraising were an exact science or if one were convinced of the sanctity of the acquiring agency's judgment, there would be no need to challenge the offer for the property. Experience, however, appears to negative both contentions. Real estate appraising is an opinion, and like all opinions achieves little distinction if it is the only one heard. In similar fashion, the good faith of the condemnee has been dramatically attacked by a published report on New York's eminent domain procedures called "The Nassau County Study."<sup>54</sup> In this study it was empirically demonstrated that, despite New York's constitutional guarantee of "just compensation," the county's negotiators were instructed to settle at amounts which the authors concluded were not to exceed 60% to 85% of the county's lower appraisal.<sup>55</sup> The common fact that appraisers may honestly differ by substantial margins alone justifies the condemnee's need to be represented by counsel. The disconcerting fact that the condemnor may seek to acquire the property for less than its market value, perhaps in a misguided effort to save taxpayers money, is proof positive of this need. Thus, without counsel to consult as to the factors to be considered in deciding fair market value, and without an independent appraisal figure to gage the sufficiency of the government's offer, the condemnee is indeed in an unequal bargaining position.

Regarding the second proposition the argument is made that if the condemnee's attorney is, in fact, necessary to a proper determination of just compensation, the condemnee will fail to receive just compensation when from his award, which by definition is

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52. For a list of these factors see PA. STAT. ANN. tit. 26, §§ 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 610.1, 611, 612, 613, 601A, 603A, 604A, 605A.

53. See note 33 *supra*.

54. Berger and Rohan, *The Nassau County Studies—An Empirical Look into the Practices of Condemnation*, 67 COL. L. REV. 430 (1967).

55. *Id.* at 445.

just compensation, he must subtract his attorney fees and related expenses. This contradiction becomes more dramatic when it was only through the efforts of his counsel that the condemnee received his constitutionally guaranteed just compensation. Early recognition of this apparent contradiction was demonstrated in an 1895 New York decision, *City of Brooklyn v. Long Island Water-Supply Co.*,<sup>56</sup> where the court stated:

A person or a corporation, whose property is sought to be taken under condemnation proceedings, is entitled to be heard at every step of the process, and in justice should be compensated not only for the land or property taken, but should be indemnified against all costs and expenses reasonably incurred either in resisting the appropriation or in the proceeding for ascertaining the compensation to be made.<sup>57</sup>

In effect, the supporters of full attorney fee reimbursement contend that failure to fully reimburse the condemnee for these expenditures violates the constitutional requirement of just compensation. At first blush, there is much appeal to the full reimbursement argument. However, it is submitted that it suffers from a substantial weakness in its encouragement of litigation. A prime consideration in determining whether to reject a condemnor's offer and go to court would generally be the expense of the suit as compared with the chance for success. If the cost of litigation is borne by the condemnor, the choice of whether to go to court is remarkably simplified because the condemnee has virtually nothing to lose and everything to gain. Conversely, the advocates of full recovery posit the proposition that reimbursement of attorney fees will actually lessen litigation.<sup>58</sup> Their argument is that by dealing with a more informed condemnee, the condemnor will of necessity become more forthright and more susceptible to compromise and settlement.<sup>59</sup> Absent empirical proof, one is left to proceed upon one's own view of human nature. It is submitted, however, that an informed condemnee who needn't be concerned with the costs of trial nor his attorney fee is more prone to litigate. Those states which have recognized a need to reimburse attorney fees, but have at the same instant also recognized the concomitant incentive to litigate, offer an intriguing resolution.<sup>60</sup> A discussion of this procedure follows.

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56. 148 N.Y. 107, 42 N.E. 413 (1895).

57. *Id.* at 109, 42 N.E. at 413.

58. See Foerster, *supra* note 45, at 131.

59. *Id.*

60. See notes 62-65 and accompanying text *infra*.

## B. *Attorney Fees Reimbursed When Trial Court Verdict Exceeds the Condemnor's Last Offer*

Two states have statutory provisions whereby the condemnor must pay attorney fees and related expenses when the trial award exceeds the condemnor's last offer.<sup>61</sup> The reasoning behind this statutory scheme is simple. Since the trial award is just compensation, if the condemnor's offer was less, it was by definition less than just compensation. Therefore, the condemnee should not be penalized (by having his attorney fees subtracted from his award) for proving what he constitutionally deserved in the first instance. Conversely, if the trial court's award is equal to or less than the condemnor's offer, then the condemnee is required to pay his expenses to atone for the frivolity of his suit.

This reimbursement procedure is identical to that which is proposed by a tentative draft of the Model Eminent Domain Code prepared by the Committee on Condemnation Law of the Real Property, Probate and Trust Section of the American Bar Association.<sup>62</sup> Although the tentative draft of the Model Eminent Domain Code was first published in 1967, the support for this position has been minor.<sup>63</sup> The reason for this is not surprising.

This procedure, by its very nature, provides for reimbursement of attorney fees *only* when the controversy is resolved in court.<sup>64</sup> If the condemnee secures legal advice as well as a professional appraisal, on the basis of which he decides to accept the condemnor's offer and eschew a court battle, he must pay for those expenses out of his "just compensation."

## C. *Full Recovery When Condemnor Relinquishes the Condemned Property*

Approximately one fourth of the states provide for reimbursement of attorney fees and related expenses when the condemning authority relinquishes the property following condemnation.<sup>65</sup>

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61. IOWA CODE § 472.33 (1966).

The applicant shall pay all costs of the assessment made by the commissioners and reasonable attorney fees and costs incurred by the condemnee as determined by the commissioners if the award of the commissioners exceeds one hundred ten per cent of the trial offer of the applicant prior to condemnation.

OREGON REV. STAT. § 35.345:

The costs and disbursements of the defendant, including a reasonable attorney fee and reasonable expenses . . . shall be . . . recovered from the condemnor unless the condemnor tendered the defendant, before commencing the action, an amount equal to or greater than that assessed by the jury.

62. 2 A.B.A. REAL PROPERTY, PROBATE AND TRUST, § 504(E) (1967).

63. See note 61 *supra*.

64. An examination of the Iowa and Oregon Statutes cited at note 61 *supra*, demonstrates this fact.

65. Alabama, California, Connecticut, Hawaii, Iowa, Maryland, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New York, North Dakota, Ohio, South Carolina.

The Pennsylvania Eminent Domain Code, as noted earlier, has a similar provision.<sup>66</sup> One possible rationale for this procedure is expressed in *Los Angeles v. Abbott*,<sup>67</sup> where the California Supreme Court stated that in the absence of such a provision the possibility existed whereby the condemnor, if dissatisfied with a particular jury verdict, could "abandon the action, pay the nominal costs, retry the action, and repeat this process until a satisfactory award was arrived at."<sup>68</sup> The official comment to the applicable Pennsylvania Statute, justifies full reimbursement following relinquishment simply because the condemnee's land has been "tied up."<sup>69</sup> However, the explanation which sounds most in concert with principles of damages was noted in a Pennsylvania case, *Baker v. Detrich*,<sup>70</sup> where the superior court stated in support of its decision to include in the condemnee's verdict his reasonable counsel fee:

The allowance should be limited to such a sum as would restore the defendants as far as possible to the position in which they were at the commencement of the proceeding to terminate. . . .<sup>71</sup>

Principles of equity and good conscience would appear to commend this provision. The condemnee has suffered a significant disruption, for which reason the subsequent relinquishment reveals to be wanting. To make him whole should be the desired goal under such circumstances.

#### D. *Statutory Limit Reimbursement*

The statutory limit reimbursement procedure provides for the recovery of reasonable attorney fees and related expenses with the added provision that the recovery not exceed a predetermined statutory limit.<sup>72</sup> To date Pennsylvania is the only state which has adopted this particular statutory scheme. The rationale behind this statutory scheme is generally one of compromise. First, there is a recognition of the frequently unequal bargaining position between the condemnor and the condemnee.<sup>73</sup> By providing for some reimbursement, the condemnee is encouraged to retain counsel and profit by his advice. In addition, in Pennsylvania, not only are attorney fees covered by this statute, but so too are ap-

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66. PA. STAT. ANN. tit. 26, § 408 (1964).

67. 217 Cal. 184, 17 P.2d 993 (1932).

68. *Id.* at 200, 17 P.2d at 998.

69. See Official Comment to PA. STAT. ANN. tit. 26, § 408 (1964).

70. 85 Pa. Super. 202 (1925).

71. *Id.* at 205.

72. See, e.g., PA. STAT. ANN. tit. 26, § 610 (1971).

73. See notes 53-56 and accompanying text *supra*.

praisal and engineering fees up to \$500.00.<sup>74</sup> Thus, the condemnee is extended every opportunity to obtain preliminary advice in order to form an educated opinion with regard to the propriety of the condemnation itself, as well as the sufficiency of the condemnor's offer. These expenses the condemnee may recover regardless of whether the matter is taken to court, and regardless of the verdict, should he go to court.<sup>75</sup> Since the recovery is by definition limited, the condemnee must make his decision whether to litigate on the sole issue of his estimate of success based upon his view of the evidence.

It is also argued that the statutory limitation of reimbursement of attorney fees and related expenses encourages settlements. One reason for this argument is based upon the observation of eminent domain litigation under prior Pennsylvania law. Under that statutory scheme, in which attorney fees were not compensated, when a condemnee did obtain an attorney, frequently he demanded additional compensation hoping to defray his attorney expenses thereby. Thus, it is argued that many times condemnation matters were litigated over exiguous amounts for the disguised motive of covering attorney fees.

By the same token and most significantly, it is also argued that this procedure for limited reimbursement will encourage settlement for additional reasons. Where the monetary difference between the condemnor and the condemnee over just compensation is small or the amount of the controversy is small in nature, the condemnor will be more susceptible to compromise when he knows that the condemnee, fortified by having his expenses compensated, at least to the statutory amount, cannot be intimidated into shunning a court battle by the fear of having the verdict consumed by his attorney fees.<sup>76</sup>

#### E. No Recovery

By far most states fail to provide any statutory procedure for the reimbursement of attorney fees and related expenses in eminent domain proceedings.<sup>77</sup> This position is in keeping with the tradition in this country where, in the main, counsel fees and expenses of suit are not recoverable, but are sustained by the person who incurs them.<sup>78</sup>

The English practice is altogether different.<sup>79</sup> There the costs

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74. See note 36 and accompanying text *supra*.

75. Pennsylvania is the only state which provides for attorney fees reimbursement even when the case is settled out of court.

76. See note 77 *infra*. This point is noted for comparison purposes with other statutory recovery schemes which reimburse attorney fees only when the case is taken to court. See the Florida Statute note 48 *supra*.

77. McCORMICK, *supra* note 25, § 60 at 234.

78. *Id.* at 235.

79. *Id.*

recoverable by the successful party to an action include the reasonable expense incurred for counsel fees.<sup>80</sup> Following the colonial period, the courts of this country, with few exceptions,<sup>81</sup> ruled that no attorney fees may be awarded except those provided by statute.<sup>82</sup> The reasoning for this position was that to impose such penalties upon the loser would serve to inhibit access to the courts.<sup>83</sup> Another argument was that the assessment of counsel fees was an additional burden placed upon the court which may well serve to prolong the original cause.<sup>84</sup> Nevertheless, the fact that state legislatures have sought in very few instances to change by statute the traditional American approach to the recovery of attorney fees bespeaks the uniqueness with which eminent domain is considered in the American system of jurisprudence.

It is submitted that the reasons for these statutory changes regarding reimbursement of attorney fees and related expenses in eminent domain proceedings can be found in those reasons submitted in the advancement of each of the aforementioned statutory schemes which advocate some form of reimbursement. Some are reasons of logic, most are reasons of public policy. The choice, it should be noted, however, is not just among those schemes which provide for some form of attorney fee reimbursement, but also whether there should be reimbursement at all.

## V. CONCLUSION

It is submitted that the adversary system will best insure just compensation for the condemnee. Furthermore, legal advice at every step in the condemnation will insure the best adversary system. Therefore, it is submitted that that policy which encourages the condemnee to obtain counsel will best insure the goal of just compensation. To secure that policy, the condemnor should reimburse (if only conditionally) the condemnee for his attorney fees and related expenses.

Once it has been determined that just compensation requires some form of attorney fee reimbursement, there remains the question of the best form that reimbursement should take. It is submitted that the statutory limit recovery procedure as enacted in

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80. *Id.*

81. Divorce proceedings is a prime example. *See, e.g.,* Ortman v. Ortman, 203 Ala. 167, 82 So. 417 (1919); Walker v. Walker, 190 Cal. 575, 213 P. 967 (1923); Crane v. Crane, 128 Md. 214, 97 A. 535 (1916).

82. McCORMICK, *supra* note 25, § 60 at 235-36.

83. *Id.*

84. *Id.*

Pennsylvania, coupled with the full recovery where the condemnor relinquishes the condemned property is best. In deciding this issue, the following factors should be determinative: (1) That which will encourage retention of counsel; (2) That which will encourage settlement and compromise; and (3) That which will not encourage litigation. The no recovery procedure forces settlement by intimidation, especially in small claim controversies, and patently fails to encourage retention of counsel. The full recovery procedure encourages retention of counsel but also seems to encourage litigation by relieving the condemnee of any financial burden regarding the litigation. The full recovery when the trial court's verdict exceeds the condemnor's last offer is more reasonable but will penalize a good faith effort to challenge the sufficiency of the condemnor's offer when the verdict is equal to or less than the condemnor's last offer. Most notably, this procedure will only pay counsel fees when they grow out of a law suit.

It is submitted that, on the average, the statutory limit recovery of attorney fees and related expenses best achieves the stated goals. First, it guarantees reimbursement of attorney fees up to a particular limit and thereby encourages retention of counsel whether the case goes to court or not. Second, it encourages settlement by producing a more informed condemnee and, indirectly, a condemnor less recalcitrant to compromise. Third, it will not encourage litigation because after the statutory limit is exhausted, the condemnee must pay for his additional expenses from his own resources.

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