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NOTES

Leasehold Valuation Problem in Eminent Domain: Compensable Interest or "Speculation on a Chance"?

Almota Farmers Elevator and Warehouse Company leased land adjacent to the tracks of the Oregon-Washington Railroad and Navigation Company in the State of Washington, where it conducted grain elevator operations. It had occupied the land continuously under various leases from the railroad since about 1919, and had constructed and was using a large grain elevator and another complementary building. In 1967, when Almota's lease had seven and one-half years remaining of a twenty-year term, the United States instituted eminent domain proceedings to acquire Almota's leasehold interest by condemnation.¹ The lease contained no right to renewal, although it had customarily been renewed. Further, it provided that within six months after the lease term expired, Almota was obligated to remove its improvements; otherwise, the railroad would own them and could remove them at Almota's expense. The Government had reached a settlement with the railroad regarding the railroad's reversionary interest prior to bringing suit to condemn Almota's leasehold. In the leasehold condemnation proceeding the controversy centered on the valuation to be placed on Almota's improvements. In an unreported decision the district court ruled that just compensation required that the improvements be valued in place over their useful life without limitation to the term of the lease. The Court of Appeals for the Ninth Circuit reversed,² rejecting any award for the use of the improvements beyond the lease term. The Supreme Court of the United States granted certiorari. *Held, reversed:* In a condemnation proceeding the concept of "just compensation" is measured by what a willing buyer would have paid for the improvements, taking into consideration the possibility that the lease might or might not be renewed. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

I. VALUATION OF LEASEHOLDS IN EMINENT DOMAIN

Although the particular issue of the valuation of a tenant's improvements is a rather narrow one, it necessarily involves the broad valuation rules of eminent domain law. The Federal Constitution contains the basic provision relating to the power of eminent domain, or more specifically to the consequences of its exercise, requiring the Government to provide "just compensation" to those whose property is taken for public use.³ The

¹ The condemnation was in connection with a river improvement and navigation project. There is specific statutory authority for federal condemnation of property for navigation projects. 33 U.S.C. § 591 (1970).

² *United States v. 22.95 Acres of Land*, 450 F.2d 125 (9th Cir. 1971).

³ U.S. CONSR. amend. V.

fifth amendment applies to the federal government's exercise of the eminent domain power, but the same requirement was imposed long ago on the states by the due process clause of the fourteenth amendment.⁴ In addition, nearly all state constitutions contain provisions which expressly prohibit the states from taking property without compensation.⁵ The result of the numerous statutory and constitutional provisions, and various interpretations placed on them by the courts, is that caution should be exercised in making any generalizations regarding the exercise of eminent domain power.⁶

There are three possible standards of value to be considered in eminent domain law.⁷ These are the so-called value to the taker,⁸ the value to the owner (indemnity);⁹ and the intermediate or "market" value.¹⁰ The market value approach has been uniformly accepted by the courts as the proper measure of compensation in most cases¹¹ and represents a balancing between the interests of the condemnor and the condemnee.¹² "Fair market value" has been used synonymously as a standard, and has been defined as "the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied."¹³ The United States Supreme Court early established that compensation should put the owner in as good a position pecuniarily as he would have occupied if his property had not been taken,¹⁴

⁴ *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897).

⁵ *Kratovil & Harrison, Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 597 (1954). For a complete listing of state constitutional provisions, see 1 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1.3 (rev. 3d ed. J. Sackman 1971) [hereinafter cited as NICHOLS]. See, e.g., TEX. CONST. art. I, § 17: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . ."

⁶ See Polasky, *The Condemnation of Leasehold Interests*, 48 VA. L. REV. 477, 478 (1962).

⁷ 1 L. ORGEL, *VALUATION UNDER THE LAW OF EMINENT DOMAIN* § 12 (2d ed. 1953) [hereinafter cited as ORGEL].

⁸ This standard is ordinarily rejected, but may be considered where special availability of the property for public use is an element in the establishment of general market value. 4 NICHOLS § 12.1[5]. See, e.g., *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913), which appears to reject the value to the taker as a standard, but allows consideration of the fact that the property is situated so that it will probably be desired and available for a public purpose. See also cases cited at 3 NICHOLS § 8.61 n.1.

⁹ See, e.g., *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Northern Natural Gas Co. v. Johnson*, 278 S.W.2d 410 (Tex. Civ. App.—Amarillo 1955), *error ref. n.r.e.* See also cases cited at 3 NICHOLS § 8.61 n.95.

¹⁰ See, e.g., *United States v. New River Collieries*, 262 U.S. 341 (1923); *State v. Vaughan*, 319 S.W.2d 349 (Tex. Civ. App.—Austin 1959). See also cases cited at 4 NICHOLS §§ 12.1 n.12 and 12.2 n.1; 1 ORGEL § 17 n.8.

¹¹ 1 ORGEL § 17. The "fair market value" standard has been codified with respect to federal navigation projects since the condemnation in *Almota*: "[T]he compensation to be paid for real property taken by the United States above the high water mark of navigable waters of the United States shall be the fair market value of such real property . . ." 33 U.S.C. § 595a (1970).

¹² See 1 ORGEL § 12: "Perhaps, however, we may prefer some composite, or compromise basis of compensation, determined partly by benefit and partly by injury." Market value has been termed an intermediate, objective test. Johnston, "Just Compensation" for Lessor and Lessee, 22 VAND. L. REV. 293 (1969).

¹³ 4 NICHOLS § 12.2[1].

¹⁴ *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893). For a

however, application of the market value rule has clearly not led to as full indemnity to the condemnee as the language might at first suggest. In a frequently cited opinion, *United States v. Miller*,¹⁵ the Supreme Court stated that "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."¹⁶ The result has been a process of judicial inclusion and exclusion of factors that may properly be considered in determining compensation under the fifth amendment.¹⁷ The elements of value which have been excluded from valuation have been called a "catalogue of emasculating exceptions."¹⁸ One particularly relevant exception is the traditional exclusion of the expectancy of the renewal of a leasehold as a factor in compensation;¹⁹ this involves the more particular issue of the valuation of a leasehold.

The same doctrines which apply to the condemnation of a fee are applicable to the valuation of the leasehold.²⁰ It has been judicially established that lessees have such an interest in property of a type which allows them to be classified as "owners" in the constitutional sense, and to be entitled to compensation for the taking of their interest.²¹ Thus, the market value of the leasehold is generally the measure of compensation,²² which follows from the market value approach to the valuation of the fee. The legal problems may be particularly complex where the condemnor first takes the fee and later proceeds against the lessee.²³ However, the lessee's interest should not be affected by this approach.²⁴

The expectancy or possibility of renewal of a lease where there is no legal right to renewal is a factor which may increase the market value of the

collection of United States Supreme Court cases applying this rule, see Annot., 19 L. Ed. 2d 1361, 1367 (1968).

¹⁵ 317 U.S. 369 (1943).

¹⁶ *Id.* at 375.

¹⁷ For a discussion of judicial inclusion and exclusion by the Supreme Court, see generally Annot., 19 L. Ed. 2d 1361 (1968). Examples of excluded factors are "injury to or destruction of the business conducted on the realty, loss of profits or good will, and the expense of removing removable fixtures and personal property from the premises." *Id.* at 1365.

¹⁸ Kratovil & Harrison, *supra* note 5, at 616. The "fair market value" test was severely criticized as not meeting the constitutional imperative of "just compensation" in Bigham, "Fair Market Value," "Just Compensation," and the Constitution: A Critical View, 24 VAND. L. REV. 63 (1970); and was criticized as "capricious" in Johnston, *supra* note 12, at 297.

¹⁹ See notes 25-30 *infra*, and accompanying text.

²⁰ 1 ORGEL § 126.

²¹ See, e.g., *A. W. Duckett & Co. v. United States*, 266 U.S. 149 (1924); *Texas Pig Stands v. Krueger*, 441 S.W.2d 940 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.* See also cases cited at 2 NICHOLS § 5.23 nn.2-4.

²² See, e.g., *Carlock v. United States*, 53 F.2d 926 (D.C. Cir. 1931); *Frankfurt v. Texas Turnpike Authority*, 311 S.W.2d 261 (Tex. Civ. App.—Texarkana 1958). See also cases cited at 4 NICHOLS § 12.42[3] n.51.

²³ "The leasehold problem from the lawyer's point of view is not a source of particular concern where the entire fee and all the interests therein are condemned at the same time It is, rather, in those rare cases where the condemnor condemns the fee subject to a leasehold estate and then later proceeds against the lessee to condemn his interest that the legal and appraisal problems become complicated." Horgan, *Some Legal and Appraisal Considerations in Leasehold Valuation Under Eminent Domain*, 5 HASTINGS L.J. 34 (1953).

²⁴ 2 NICHOLS § 5.23.

leasehold. In an early Maryland case²⁵ compensation was allowed for the possibility of renewal which increased market value, while other courts have refused to allow compensation in such situations on the basis that such an expectation does not amount to a legal right.²⁶ In *United States v. Petty Motor Co.*²⁷ the Supreme Court of the United States appeared to establish firmly that an expectancy of a renewal did not add to the tenant's compensable interests,²⁸ and recent state court decisions have tended to follow this rule.²⁹ The attitude reflected in these decisions has not gone uncriticized. For example, a number of years before *Petty Motor Co.* one commentator wrote: "The value of land, and of most other objects of value, is based almost entirely upon unenforceable expectations in regard to the conduct of other persons. When the courts, in any connection, arbitrarily refuse to consider such expectations, they are closing their eyes to the most important facts of economic existence."³⁰ Perhaps in response to such criticism, the overall trend in the law has been in the direction of an expanding scope of compensability.³¹

II. VALUATION OF TENANT'S IMPROVEMENTS

The tenant's expectation of renewal may be particularly important where he has expended a considerable amount of money on improvements, planning to renew the lease and continue to enjoy the benefits of the improvements. This situation involves the additional complexities of evaluating trade fixtures and improvements, an area of condemnation law which has posed particularly difficult problems of valuation.³² It is established that the tenant has a right to compensation for his interest in the improvements and trade fixtures which he would have a right to remove at the end of his lease.³³ Thus, the tenant has a right to "separate compensability,"

²⁵ *Mayor of Baltimore v. Rice*, 73 Md. 307, 21 A. 181 (1891). Significantly the court said, "It would be confiscation, pure and simple, to take it from him without paying its value." *Id.* at 311, 21 A. at 182.

²⁶ One of the most frequently cited authorities is Mr. Chief Justice Holmes' opinion in *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185, 59 N.E. 763, 765 (1901): "Even if such intentions added to the salable value of the lease, the addition would represent a speculation on a chance, not a legal right."

²⁷ 327 U.S. 372 (1946).

²⁸ *Id.* at 380 n.9.

²⁹ See, e.g., *Stroh v. Alaska State Housing Authority*, 459 P.2d 480 (Alas. 1968); *In re Urban Redevelopment Authority*, 440 Pa. 321, 272 A.2d 163, 166 (1970) (expectancy termed "sheer speculation").

³⁰ Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 254 (1931).

³¹ "Lately there has been a pronounced shift toward genuine recognition of the principle of indemnity." Kratovil & Harrison, *supra* note 5, at 616. It has been predicted that there will be an "increase in the trend to indemnification" in the future. Polasky, *supra* note 6, at 536.

³² See Snitzer, *Valuation and Condemnation Problems Involving Trade Fixtures*, 16 VILL. L. REV. 467 (1961); Comment, *Effect of Lease Term Upon Rate of Depreciation in Trade Fixture Condemnation Awards*, 26 WASH. & LEE L. REV. 77 (1969); Comment, *Eminent Domain: Depreciated Reproduction Cost in the Valuation of Trade Fixtures*, 14 WM. & MARY L. REV. 431 (1972); Note, *Compensation for a Lessee's Trade Fixtures in Condemnation Proceedings*, 1966 WIS. L. REV. 1215.

³³ 4 NICHOLS § 13.121; 1 ORGEL § 110.

a concept which should be distinguished from "separate valuation."³⁴ Under the general rule of valuation, the so-called "unit rule,"³⁵ the tenant is not entitled to a separate valuation of his improvements as distinct from the value of his leasehold interest.³⁶ The usual statement of the market value of a leasehold is that it is equal to the excess of the rental value over the rent reserved,³⁷ and the measure of damage for loss of improvements is the increased market value of the leasehold interest by reason of the buildings and fixtures, after deducting their value as removed.³⁸ A tenant may have difficulty in proving how much his improvements add to the overall market value,³⁹ so it becomes important whether or not he can use the in-place value of the improvements as a measure of this enhancement. The pre-*Almota* rule as to when the in-place value could be so used was stated in these terms:

[T]he structural value of the buildings and fixtures may be a fair test of what they add to the market value of the leasehold, if they are well adapted to the best use of the property. *But in such case, the lease must be of such duration that it will outlast the fixtures, or must contain a covenant of perpetual renewal at the option of the tenant.*⁴⁰

Thus, the rule was such that a tenant whose improvements outlasted the remaining lease term could not recover the structural value of the improvements. It was recognized, however, that universal use of the unit rule could lead to inequities, and the Court of Appeals of New York held it inapplicable in the leading case of *Marraro v. State*.⁴¹ In *Marraro* the court required the tenants' fixtures to be separately valued and described

³⁴ This means that the tenant is entitled to be compensated for his improvements separate from compensation for the leasehold. However, the improvements are usually valued by how much they increase or enhance the market value of the leasehold rather than being valued separately. Thus, "separate compensability" is distinguishable from "separate valuation." Note, *supra* note 32, at 1222-23.

³⁵ See Annot., 1 A.L.R.2d 878 (1948). The rule frequently involves the "undivided fee" concept in which the realty is evaluated as if under single ownership to set the maximum on the award. Thus, the land, buildings, and fixtures are valued as an economic unit, and the award is later apportioned between the lessor and lessee. Under the "unit rule" the lessee's award is the market value of his leasehold, and the in-place value of his improvements is not considered as a separate item. See Polasky, *supra* note 6, at 515-17. The undivided fee concept was not specifically involved in *Almota* since the Government had settled with the lessor and was condemning only the leasehold. 409 U.S. at 477 n.4.

³⁶ See, e.g., *Texas Pig Stands v. Krueger*, 441 S.W.2d 940 (Tex. Civ. App.—San Antonio 1969), *error ref. n.r.e.*; *Brazos River Conservation & Reclamation Dist. v. Adkisson*, 173 S.W.2d 294 (Tex. Civ. App.—Eastland 1943), *error ref.* See also cases cited at 4 NICHOLS § 13.121[1] n.3.

³⁷ The term "rental value" means "the value of the use and occupancy of the leasehold for the remainder of the tenant's term," and "rent reserved" means the "agreed rent which the tenant would pay for such use and occupancy." *United States v. Petty Motor Co.*, 327 U.S. 372, 381 (1946). See, e.g., *In re City of New York*, 195 Misc. 842, 82 N.Y.S.2d 55 (Sup. Ct. 1948). See also cases cited at 1 ORGEL § 126 n.108.

³⁸ See, e.g., *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 979 (1936); *Lower Nueces River Water Supply Dist. v. Sellers*, 323 S.W.2d 324 (Tex. Civ. App.—San Antonio 1959), *error ref. n.r.e.* See also cases cited at 4 NICHOLS § 13.121[1] n.6.

³⁹ The Second Circuit concluded that such a requirement, in most cases, "would effectively deny any significant compensation for the fixtures." *United States v. Certain Property*, 344 F.2d 142, 146 (2d Cir. 1965).

⁴⁰ 4 NICHOLS § 13.121[1] (emphasis added).

⁴¹ 12 N.Y.2d 285, 189 N.E.2d 606, 239 N.Y.S.2d 105 (1963).

the measure of damages as reproduction cost less depreciation, that is, the in-place value.⁴² The Court of Appeals for the Second Circuit adopted the holding in *Marraro* as applying to federal government condemnation of real estate in New York State.⁴³ These decisions, and an additional decision in the Court of Appeals for the Second Circuit,⁴⁴ led one commentator to discern a commendable development toward compensation for in-place value without regard to the unit rule or enhancement.⁴⁵ This development was clearly advanced by the Second Circuit in its 1968 decision of *United States v. Certain Property*,⁴⁶ where the issue presented was the proper rate of depreciation to be applied to valuation of the fixtures.⁴⁷ The court held that the proper rate of depreciation was one "computed in the first instance on the basis of useful life and without regard to the term of the particular lease."⁴⁸ The result was thus to allow the in-place value of the improvements *without regard to the lease term*. Judge Friendly reasoned that:

We are unable to follow the panel majority in assuming that tenants under short-term leases will generally not be able to derive any value from their fixtures beyond the expiration of their leases. The contrary is proved not only by common experience but by the record of frequent lease renewals in this very case. Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons. . . . Thus, even when the lease has expired, the condemnation will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or a new tenant—the only two people for whom the fixtures would have a value unaffected by the heavy costs of disassembly and reassembly.⁴⁹

Judge Friendly's pragmatic approach was explicitly rejected by the Ninth Circuit in its consideration of *Almota's* arguments.⁵⁰ The Ninth Circuit considered the question to be simply one of compensation for the expectancy of renewal of the leasehold, which it refused to allow. It did not accept *Almota's* argument that *Petty Motor Co.* could be distinguished because no buildings were involved in that case. The court recognized that the Second Circuit decision supported *Almota's* position, but refused to perform the "alchemy" it said the Second Circuit had performed in converting "items, which would have weight in the thinking of a speculator,

⁴² This measure was to be used in certain circumstances, such as where the fixtures were custom built or expressly adapted for the premises. *Id.* at 296, 189 N.E.2d at 612, 239 N.Y.S.2d at 113.

⁴³ *United States v. Certain Property*, 306 F.2d 439 (2d Cir. 1962).

⁴⁴ *United States v. Certain Property*, 344 F.2d 142 (2d Cir. 1965).

⁴⁵ Snitzer, *supra* note 32, at 505-06.

⁴⁶ 388 F.2d 596 (2d Cir. 1968). This decision was approved by the Supreme Court of the United States in *Almota*.

⁴⁷ For a more detailed discussion of depreciation rate, see Comment, *Effect of Lease Term Upon Rate of Depreciation in Trade Fixture Condemnation Awards*, 26 WASH. & LEE L. REV. 77 (1969).

⁴⁸ 388 F.2d at 601.

⁴⁹ *Id.*

⁵⁰ *United States v. 22.95 Acres of Land*, 450 F.2d 125, 129 (9th Cir. 1971).

into Fifth Amendment 'property' and thence into dollars."⁵¹ The Supreme Court granted certiorari in *Almota* to resolve this conflict.⁵²

III. ALMOTA FARMERS ELEVATOR & WAREHOUSE Co. v. UNITED STATES

In *Almota* the United States Supreme Court expressly approved the Second Circuit's 1968 holding in *United States v. Certain Property*, quoting at some length from Judge Friendly's opinion.⁵³ The Court thus placed its imprimatur on the liberalizing trend of decisions in the Second Circuit, a trend which could be traced back to the New York Court of Appeals decision in *Marraro*.

Mr. Justice Stewart, writing for the majority, emphasized the importance of fair market value in determining just compensation, and found fault with the lower court's holding because it had "failed to recognize what a willing buyer would have paid for the improvements."⁵⁴ The Court distinguished *Petty Motor Co.* in that *Petty Motor Co.* did not involve the fair market value of improvements.⁵⁵ This distinction had been expressly rejected by the Ninth Circuit. The Court took pains to distinguish the instances where compensation has not been allowed for recognized losses, such as business losses,⁵⁶ and was careful not to change those rules. The Court clearly disapproved any attempt by the condemnor to reduce the value it would have to pay for the leasehold by first obtaining the fee.⁵⁷ Mr. Justice Powell emphasized this particular issue in his concurring opinion and referred to this method on the part of the condemnor as "salami tactics."⁵⁸

⁵¹ *Id.*

⁵² 409 U.S. at 473. In opposing certiorari the Government contended that the matter did not warrant further review. It contended that the Second Circuit decision had "simply disagreed with the government's computation of an appropriate salvage value for the fixtures when the leases expired." Brief for the United States in Opposition at 5, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

⁵³ 409 U.S. at 474-75.

⁵⁴ *Id.* at 474.

⁵⁵ *Id.* at 476. The Court distinguished the "incorporeal expectation" of renewal in *Petty Motor* from the real improvements which were taken in *Almota*. In *Petty Motor* the Government condemned the temporary use for public purposes of a building which had several tenants. Some of the tenants were tenants under oral contracts on a month-to-month basis. One tenant held a lease with an option for renewal. One tenant's lease contained a "termination on condemnation" clause. The valuation of improvements was not involved in any of the leases. In fact, the issue on which certiorari was granted was the allowance of costs of moving and reinstallation of equipment, rather than a taking of the equipment. In setting the valuation standards to be observed on remand the Court adverted to the valuation of an expectancy of renewal: "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights." 327 U.S. at 380 n.9.

⁵⁶ 409 U.S. at 476 n.2.

⁵⁷ *Id.* at 477-78.

⁵⁸ The context makes clear what Justice Powell meant by "salami tactics": "[I]t would be unjust to allow the Government to use 'salami tactics' to reduce the amount of one property owner's compensation by first acquiring an adjoining piece of property or another interest in the same property from another property owner." *Id.* at 480.

The issue of separate valuation was not addressed directly, it apparently being assumed that separate valuation of the improvements was appropriate. This is most likely due in some measure to the fact that the parties had stipulated the amount of compensation that Almota would receive depending on whose theory prevailed, so that separate valuation per se was not directly presented.⁵⁹

Mr. Justice Rehnquist, dissenting, emphasized the importance of "property" under the Constitution rather than the concept of fair market value,⁶⁰ and in effect pointed out that the Constitution does not require indemnification, with Almota's loss of its improvements beyond the lease term falling outside the scope of compensable interests. He also strongly suggested that the Court's holding would unsettle condemnation law.⁶¹

It is thus clear that the principal disagreement between the majority and the minority is in the respective emphases on market value and the definition of "property." The latter approach to the question of compensation has been criticized for essentially begging the question: "Just as one cannot start the process of decision by calling a claim a 'property right,' since that is really the question to be answered, one cannot dismiss a claim with the observation that property has not been 'taken,' for that, also, is the question to be answered."⁶² The reasoning of the majority can be criticized as being somewhat vague, in that there is no clear explanation as to why the presence of improvements is so important in distinguishing *Petty Motor Co.* This issue is at the very heart of the decision. In fact, the Government had argued that *Petty Motor Co.* was conclusive of the issue,⁶³ but the Court responded in only two brief sentences.⁶⁴

⁵⁹ Brief for the United States in Opposition at 3-4, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973). It is interesting to note that the condemnee argued that the court below had failed to apply the "unit rule," while the Government defended the "separate valuation" rule. Brief for the United States, *supra*, at 26-27 n.11. This is somewhat anomalous since the separate valuation rule is generally thought to be more favorable for the condemnee. See Polasky, *supra* note 6, at 535. "Whether this is one of the cases in which the value of the real estate as such is disregarded and the total value of the separate interests in the real estate is the proper measure of compensation is not yet entirely clear." 4 NICHOLS § 13.121[1]. There is authority for the proposition that the Government would have had to pay full value for the improvements if it had not first settled with the fee owner but had condemned the entire fee. "[T]he tenant is entitled to part of the award, not because the fixtures added to the value of the leasehold, but because they belonged to him and their value enters into the value of what the city has taken." *In re City of New York*, 256 N.Y. 236, 249, 176 N.E. 377, 382 (1931). "Where fixtures are taken together with the land to which they are annexed, such fixtures are not taken because they are property of the lessor or the lessee but because they are a part of the real property." Kizer, *Valuation of Leasehold Estates in Eminent Domain*, 67 W. VA. L. REV. 101, 113 (1965).

⁶⁰ 409 U.S. at 480.

⁶¹ *Id.* at 484.

⁶² Kratovil & Harrison, *supra* note 5, at 616. This is in the context of criticism of *Mitchell v. United States*, 267 U.S. 341 (1925), one of the important cases relied on by the dissent; the authors state that the reason given in *Mitchell* for the denial of compensation for damage actually suffered is hard to defend.

⁶³ Brief for the United States in Opposition at 13-14, *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

⁶⁴ "But the Court was not dealing [in *Petty Motor*] with the fair market value of improvements. Unlike *Petty Motor*, there is no question here of creating a legally cognizable value where none existed, or of compensating a mere incorporeal expectation." 409 U.S. at 476.

The opinion is also somewhat unilluminating in its failure to address the possible effect on previous holdings of its emphasis on fair market value and the "willing buyer—willing seller" rationale. If this rationale were applied strictly, then perhaps compensation would be allowed for losses that had previously been excluded, as suggested by the dissent.⁶⁵ Despite these problems of vagueness, the opinion is certainly significant in its support of the trend toward more equitable awards.⁶⁶

There are countervailing factors which should be considered when evaluating the probable effect of *Almota*. First, there would seem to be ample room for courts to distinguish *Almota* on the facts since it involves a rather unusual combination of circumstances: (1) prior settlement with the fee owner; (2) long history of renewal with no renewal clause; (3) no condemnation clause in the lease which might have obviated the situation;⁶⁷ and, finally, (4) the improvements which may last significantly longer than the lease period. Also, any prediction of more liberal awards would have to take into consideration *United States v. Fuller*,⁶⁸ the companion eminent domain case handed down with *Almota*. Mr. Justice Stewart joined the *Almota* dissenters to form the majority in *Fuller*, denying compensation for an admittedly valuable right which concededly would be a component of market value.⁶⁹ Mr. Justice Stewart distinguished *Fuller* in his *Almota* opinion in a rather cryptic note in which he said that "neither action by the Government nor location adjacent to public property contributed any element of value to *Almota's* leasehold interest."⁷⁰ This distinction is somewhat unconvincing when read in connection with the statement in *Almota* that "[*Petty Motor*] should not be read to allow the Government to escape paying what a willing buyer would pay for the same property."⁷¹

Almota thus provides a basically ad hoc answer to the narrow question of the valuation of a tenant's improvements under certain circumstances. It does little to clarify a confusing area of eminent domain law. The Court does not explicitly overrule or limit any of the old "emasculating exceptions" in valuation. In effect, then, the decision creates a refinement to one of the exceptions, the expectancy of the renewal of a lease, where there are improvements with a life longer than the remaining lease term. The Court's emphasis on and interpretation of market value in *Almota* hopefully can provide a basis for continuation of the trend toward more equitable awards.

⁶⁵ *Id.* at 484.

⁶⁶ For a brief discussion of the trend toward indemnification, see note 31 *supra*. See also Johnston, *supra* note 12, at 302.

⁶⁷ One practical lesson to be learned from this case is the importance of having a condemnation clause in the lease which would define the rights of the lessee in this eventuality.

⁶⁸ 409 U.S. 488 (1973).

⁶⁹ *Id.* at 491. The value for which compensation was denied in *Fuller* was the value accruing to condemned fee lands as a result of their use in combination with adjacent lands held under revocable grazing permits issued by the federal government.

⁷⁰ 409 U.S. at 476 n.3.

⁷¹ *Id.* at 476-77.

IV. CONCLUSION

Probably the best assessment of how *Almota* affects eminent domain law is that there is a new refinement to an exception to the market value concept. This would hardly seem to warrant the alarm expressed in the dissent over unsettling condemnation law.⁷² As to the asserted distinction between *Petty Motor Co.* and *Almota*, one is led to conclude that the real distinction is probably based on pragmatic, rather than theoretical, considerations. Judge Friendly's favored opinion in the 1968 decision of *United States v. Certain Property* is replete with practical considerations.⁷³ The problem of speculative damages is present in every other area of law, as well as condemnation law, and it would seem that damages based on the measurable in-place value of improvements are significantly less speculative than damages based on some indeterminate sequence of lease renewals in the future.⁷⁴ Perhaps greater clarity would result if the problem were addressed in familiar damages terms rather than terms of a semantic duel between "market value" and "property."⁷⁵

After an examination of the court-made exceptions to market value, now with the addition of *Almota* and *Fuller*, one might conclude that the real answer is that "the ultimate responsibility for developing more adequate approaches to compensation rests with the legislature."⁷⁶ One important and noteworthy result of *Almota*, however, is that by approving Judge Friendly's opinion, the Court has placed its weight on the side of the liberal Second Circuit decisions. For this reason, the impact of *Almota* may be greater when the courts look to the Second Circuit cases for guidance in interpreting the Supreme Court's reasoning. "Perhaps, in leaving the area of leasehold condemnation, all that can be predicted is that he who seeks greater certainty is likely to find that future events fall short of his desires—but he who hopes for greater equity is likely to be gratified by future developments."⁷⁷ This prediction would appear to be as valid after *Almota* as it was before.

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⁷² See note 61 *supra*, and accompanying text.

⁷³ See quotation from Judge Friendly's opinion accompanying note 49 *supra*.

⁷⁴ This is illustrated in the Ninth Circuit's opinion: "[S]hould . . . one year lessees be compensated for the loss of a five year occupancy, a 50 year occupancy, a perpetual occupancy?" *United States v. 22.95 Acres of Land*, 450 F.2d 125, 129 (9th Cir. 1971). However, Judge Madden's suggestion that the valuation of *Almota*'s improvements was just as speculative would not seem tenable. *Id.*

⁷⁵ This was suggested by Professor Cormack: "The problem is one of practical expediency. The judicial experiences in the administration of eminent domain proceedings indicate that it is important that the problem be recognized, in this field as elsewhere, as one of drawing the line between proximate and remote consequences." Cormack, *supra* note 30, at 259-60.

⁷⁶ Johnston, *supra* note 12, at 293.

⁷⁷ Polasky, *supra* note 6, at 537.