Eminent Domain: A Legislative Proposal for the Reimbursement of Condemnees' Attorney's Fees

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Eminent Domain: A Legislative Proposal for the Reimbursement of Condemnees' Attorney's Fees

Society's ever increasing need for transportation facilities and electrical power, and our rapidly growing consumption of other natural resources, is now, more than ever before, necessitating the exercise of the power of eminent domain by state and federal governments and by other authorized parties. Both the United States and Indiana constitutions condition the exercise of the power of eminent domain by providing that the condemnor must receive "just compensation" for his land. Yet it has long been held that this guarantee does not compel the reimbursement of attorney's fees incurred by the landowner in condemnation proceedings. This interpretation is hard to justify since the policy behind the "just compensation" clauses is to insure that the landowner is made whole.

Recent studies reveal that abusive negotiation tactics are being utilized by condemnors, or their agents, in an effort to obtain property at less than fair market prices. The condemnee is thus forced to incur substantial attorney's fees to secure a judicial determination of a fair amount. In light of the difficulty of convincing the courts to re-evaluate their long-standing construction of the "just compensation" clauses, the duty rests with the legislatures to provide relief for condemnees by equalizing the relative economic positions of the condemnor and condemnee. While some legislatures have responded to the need for reform, the solutions adopted to date either fall short of making the landowner whole in every case or leave gaps allowing condemnors to persist in their current practices. It is submitted that the only effective solution is to allow the condemnee to recover his attorney's fees from the condemnor in

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1 For an example of corporations normally given the power of eminent domain, See Ind. Code § 32-11-5-1 (1976).
2 "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
3 "No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." Ind. Const. art. I, § 21.
every case where the judicially determined "just compensation" exceeds the condemnor's final offer before trial.

EMINENT DOMAIN PROCEEDINGS TO DETERMINE "JUST COMPENSATION"
The Statutory Approach to Determining "Just Compensation"

Familiarity with the typical condemnation proceeding is essential to an understanding of the problem. Since the procedure followed in Indiana is similar to that of most other states, and also to federal practice, it will be used as a reference from which to approach a solution.

Before initiating a condemnation proceeding the condemnor is required to make an effort to purchase the property. If a suitable price cannot be agreed upon, the condemnor must institute a suit to condemn the property. Thereupon the court will appoint three appraisers to determine the fair market value of the property to be taken and also any damages sustained and benefits realized by the condemnee. At this point either party can except to the appraisal and demand a trial by jury. Regardless of which party excepts to the appraisal, the condemnee has the burden of proving the fair market value of the property appropriated. Within this setting the condemnee will incur substantial attorney's fees and other expenses of litigation in order to determine the just compensation he is entitled to receive for his property.

The determination of just compensation is a judicial, rather than a legislative, function. The question of the necessity of the appropriation, however, is deemed to be a legislative, or political, question which will not be reviewed by the courts. As a result, the landowner facing a condemnation proceeding has little hope of successfully challenging the physical taking of...

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9For an excellent treatment of the Indiana law on eminent domain see INDIANA CONTINUING LEGAL EDUCATION FORUM, EMINENT DOMAIN IN INDIANA (1976).
15Seaboard Air Line Ry. v. United States, 261 U.S. 299, 304 (1923); Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893); Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 315 (1795); United States v. 100 Acres of Land, 468 F.2d 1261, 1268 (9th Cir. 1972), cert. denied, 414 U.S. 822 (1973). In Monongahela Navigation Co. v. United States, 148 U.S. 312 (1892), the Court said:
   The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. . . . The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.
16Id. at 327.
17Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).
his property and is left only with the constitutional promise of receiving just compensation for the land taken.

The just compensation guaranteed to the condemnee "must be a full and perfect equivalent for the property taken." This has been construed to mean "substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken." To comply with this requirement the courts consistently use the concept of "fair market value" to determine the appropriate compensation. This is commonly defined as "what a willing buyer would pay in cash to a willing seller."17

The Constitutional Guarantee of "Just Compensation"

It has long been held that the just compensation guarantee of the fifth amendment of the United States Constitution does not require that the condemnee be reimbursed for his attorney's fees. This is based upon the rationale that "this just compensation . . . is for the property, and not to the owner." But some state courts have reached the opposite construction of the same phrase in their state constitutions, and their reasoning is persuasive:

3United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 81 (1913); Albersen Cemetery Ass'n v. Fuhrer, 192 Ind. 606, 618, 137 N.E. 546, 547 (1923); 4 Nichols' supra note 3, § 12.2.
5E.g., Dohany v. Rogers, 281 U.S. 362, 368 (1930); United States v. 100 Acres of Land, 468 F.2d 1261, 1270 (9th Cir. 1972), cert. denied, 414 U.S. 822 (1973); United States v. 2353.28 Acres of Land, 414 F.2d 965, 972 (5th Cir. 1969); United States v. 15.3 Acres of Land, 158 F. Supp. 122, 125 (M.D. Pa. 1957); United States v. 251.81 Acres of Land, 50 F. Supp. 81, 83 (W.D. Ky. 1943).

In Dohany v. Rogers, 281 U.S. 362 (1930), it was said: "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain. See Joslin Mfg. Co. v. City of Providence, supra, [262 U.S. 668, 675.]" Id. at 368. It is submitted that Joslin is not authority for such a holding. The issue presented in Joslin, as it bears upon just compensation, was whether injury to a business conducted upon property taken for public use constituted an element of just compensation. The Supreme Court held that it did not. An analysis of the Court's opinion does not lead to the conclusion, or even the inference, that attorney's fees are not an element of just compensation. Nevertheless, Dohany has repeatedly been cited as authority for such a holding and seems to be so firmly entrenched as a precedent that it probably could not be successfully challenged.

10Jacksonville Expressway Authority v. Henry G. Du Pree Co., 108 So. 2d 289 (Fla. 1958); New Jersey Turnpike Authority v. Bayonne Barrel & Drum Co., 110 N.J. Super. 506, 266 A.2d 164 (1970). In Du Pree the Florida Supreme Court held that the condemnee is entitled to reimbursement for his attorney's fees under the Florida Constitution, saying:

This court is committed to the doctrine that attorney's fees are to be awarded only in cases where statute or special contract provides for them. This is the general rule
Under present-day conditions the traditional approach of requiring a condemnee, in all cases, to bear the expense of legal fees and expert witnesses is inequitable and an unfair burden placed upon the landowner. We are mindful that the condemnee is in a far different position than the average defendant. If the average defendant is in court, it is usually because he has committed an act of commission or omission. A condemnee becomes a litigant merely because he owns land that the sovereign wishes to acquire. The sovereign must pay just compensation for such land. Does a condemnee receive just compensation or is he "made whole" if he must expend large sums of money to insure that he gets a fair price for his land? We think not.\(^{21}\)

Indiana courts have construed article I, sec. 21, of the Indiana Constitution in a manner similar to the United States Supreme Court's construction of the fifth amendment.\(^{22}\) The leading case is *State v. Holder*,\(^{23}\) where the State of Indiana filed a complaint to condemn property owned by Holder in order that the state might construct a highway.\(^{24}\) The court, with no objection by the condemnee, appropriated the land and appointed appraisers. The state filed exceptions to the amount found by the appraisers and demanded a trial by jury on the amount of damages. One day before the trial was to commence the state made a motion to withdraw its exceptions; the motion was granted. The trial court, however, ordered the state to pay $500 in attorney's fees and $100 for professional witness and trial preparation fees to the condemnee. The Supreme Court of Indiana reversed, over a vigorous dissent by Mr. Chief Justice Arterburn.\(^{25}\) The court, while not expressly addressing the constitutional definition of "just compensation,"\(^{26}\) held that although Indiana

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108 So. 2d at 294 (footnotes and citations omitted).
23"Where the State of Indiana, or an agency thereof, seeks to appropriate property for the construction or maintenance of a highway, the condemnor, contrary to the normal procedure, see IND. CODE 32-11-1-1 (1976), is not required to make an initial offer to purchase. See IND. CODE 32-11-1-9 (1976).
25See notes 32-35 infra & text accompanying.
26Even though the majority in *Holder* did not specifically hold that attorney's fees are not an element of just compensation, the reasoning therein inescapably leads to that conclusion. It
EMINENT DOMAIN

statutes provide that the condemnor shall pay all costs of an eminent domain proceeding,27 the term "costs" encompasses neither attorney's fees28 nor those of expert witnesses.29 In a concurring opinion Mr. Justice Prentice rejected the condemnee's contention that the allowance of attorney's fees and witness' fees was permissible under Indiana Trial Rule 41 (A)(2)30 since the expenses of litigation would not have been recoverable had the cause proceeded to trial.31

Mr. Chief Justice Arterburn, dissenting vehemently, did address the constitutional issue, and additionally, opined that these awards were proper under Trial Rule 41 (A)(2):

As it is applicable to condemnation cases, as well as general civil litigation, this Rule may be employed to implement the Constitutional clause [Article I, sec. 21, of the Indiana Constitution] which specifically requires just compensation when land is taken for public use. . . .

In my opinion, the Indiana Constitution means what it says. "Just compensation" is making one whole for what is taken from him by the State's action.32

After acknowledging the common law rule that attorney's fees are generally not recoverable as part of the damages in a lawsuit,33 the Chief Justice admonished this country for refusing to "sever the ties of antiquity even though many courts have cried out against the injustice of failing to fully compensate..."

seems likely that this was the Court's intention and that the matter was considered since the dissenting opinion of Mr. Chief Justice Arterburn did address that issue. But whether intended or not, Holder has been interpreted and cited as holding that attorney's fees are not a constitutional element of just compensation. See Harding v. State ex rel. Dept. of Natural Resources, ___ Ind. App. ____, 337 N.E.2d 149, 150 (1975); State v. Carter, 300 Minn. 495, 497 n.1, 221 N.W.2d 106, 107 n.1 (1974) (construing a similar provision of the Minnesota Constitution).

27"The costs of the proceedings shall be paid by the plaintiff [condemnor], except that in case of contest, the additional costs thereby caused shall be paid as the court shall adjudge." IND. CODE § 32-11-1-10 (1976).
29Id. at 559, 295 N.E.2d at 801.
30IND. R. TRIAL P.41 (A)(2), provides in part: "except as provided in subsection (1)... an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."
32Id. at 341, 295 N.E.2d at 802 (citation omitted).
33Id. The United States is the only country in the world that follows the so-called "American Rule" that a litigant must bear the cost of attorney's fees incurred to assert his legal rights. Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CALIF. L. REV. 792, 792 (1966). See C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 61 (1955). That the courts' modern justifications for adherence to this rule are of questionable validity suggests that they are being guided more by precedent than sound analytical reasoning. See, e.g., Aleska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974); Fleischmann Distilling Corp. v. Maier Brewing Co., 306 U.S. 714 (1967). The underpinnings of the American Rule are becoming increasingly weakened by the attack of legal writers. See, e.g., Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 HARV. L. REV. 849 (1975); Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 CALIF. L. REV. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation, 49 IOWA L. REV. 75 (1963); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 MINN. L. REV. 610 (1931); McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 FORDHAM L. REV. 761 (1972); Posner, An
condemnees incurring substantial expense in defending themselves or their property. The dissenting opinion concluded with a review of abusive tactics practiced by many condemnors and the need for allowance of attorney's fees in order to comply with constitutional guarantees. Thus, despite persuasive arguments to the contrary, most courts continue to hold that attorney's fees are not recoverable as an element of just compensation, but are allowable only where specifically authorized by statute. It would seem that these constitutional provisions, and the purpose for which they were drafted into the constitutions, would lead to a contrary conclusion. Even if the compensation to be given is for the property and not to the owner, such compensation is not in fact given when the condemnee must incur attorney's fees to arrive at that amount. The basic purpose of the fifth amendment of the United States Constitution and article I, section 21, of the Indiana Constitution is to make the condemnee whole when his property is appropriated for public use. The individual landowner should not be forced to bear any of the burden of the cost of the land to be used for the public benefit. Yet that is precisely what he must do when the condemnor adheres to an offer that is less than the fair market value of his property, necessitating


\textsuperscript{10}Id. at 343-48, 295 N.E.2d at 804-06. As Mr. Chief Justice Arterburn stated:

As judges, we are not unaware of the abuse of condemnation proceedings by the state by long drawn out litigation and delays. . . . .

. . . . . Here the state sought the condemnees' property. . . . Instead of accepting those determinations of the independent appraisers, the government filed objections and proceeded to play cat and mouse with the condemnees. . . . Under these circumstances, if the condemnees are not allowed to recover these expenses, can it honestly be contended that they have received just compensation under the Constitution? I think not.

\textsuperscript{11}Id. at 346-48, 295 N.E.2d at 805-06 (citations omitted).

\textsuperscript{12}See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967) (trademark infringement case); Paterson v. City of Eufaula, Alabama, 330 F.2d 608 (5th Cir. 1964); State v. Holder, 260 Ind. 336, 295 N.E.2d 799 (1973); Honey Creek Corp. v. WNC Development Co., ___ Ind. App. ___, 331 N.E.2d 452 (1975); State v. Carter, 300 Minn. 495 221 N.W.2d 106 (1974). See also 30 C.J.S. Eminent Domain § 586 (1965); 26 A.L.R.2d 129 (1952).

\textsuperscript{13}See note 19 supra & text accompanying.

\textsuperscript{14}As we said in Stolze v. Milwaukee & L.W.R., 113 Wis. 44, 88 N.W. 919 (1902):

It cannot have been the purpose of the framers of the constitution that a person compelled to surrender his property for public uses shall have any less as compensation therefor than a full equivalent, measured by all reasonable rules. That must include all necessary expenses incurred by him in the enforcement of his rights. . . .

\textsuperscript{15}Id. at 59, 88 N.W. at 924.
recourse to the courts and often an expensive trial by jury to insure that he will receive the full value for his land. Since the condemnee must then pay out a substantial portion of his judicially determined "just compensation" in attorney's fees and expert witness fees it cannot be said that in the end he is "made whole" for what was taken from him. The United States and Indiana Constitutions should be construed to provide for no less.

It is sometimes asserted that to allow the condemnee to recover his attorney's fees would pose a risk to the "public treasury." But this argument is also inadequate to justify withholding the constitutional guarantee of just compensation from the landowner. Since it is for the public benefit that his property is being taken, the "public treasury" should bear the full cost of that benefit.

**EMINENT DOMAIN: ABUSES AND POSSIBLE REMEDIES**

*Abuse of the Eminent Domain Power*

An examination of current procedures followed by condemnors in eminent domain proceedings demonstrates the need for relief for landowners. A few years ago a revealing study was conducted of the condemnation process of Nassau County, New York.39 Under the practices followed, the negotiator who represented the county in price discussions with the landowners was limited in authority to a certain fraction of the county's own appraisal.40 The

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40Id. at 433. The County's appraisal procedures are especially revealing. Appraisers were selected from a list of "fixed fee appraisers" who were paid based upon the frontage of the property taken. No consideration was given to the character of the property, time used in making inspections, or the complexity involved in determining the value of the land to be appropriated. Such work is profitable only on a volume practice. *Id.* at 438. That such a procedure is questionable accuracy is supported by the County's own policy of departing from it where the taking was substantial or complicated. In such cases, an outside appraiser, taken from a second list, is used and he receives a fee far above the "fixed fee appraiser." *Id.* at 439.

That this type of practice is not unusual is shown by the chart below which discloses the losses suffered by some condemnees where the local board of education took their property for the expansion of an elementary school. Note particularly the disparity between the board's own appraisal and the offers that were made to the condemnees.

<table>
<thead>
<tr>
<th>Plaintiff-Owner</th>
<th>Board of Education Appraisal</th>
<th>Letter of Offer</th>
<th>Judgment Order</th>
<th>Attorney Fees</th>
<th>Appraisal Cost</th>
<th>Net to Homeowner</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ashley</td>
<td>$20,500</td>
<td>$16,000</td>
<td>$20,500</td>
<td>$900.00</td>
<td>$100.00</td>
<td>$19,500 - $1,000.00</td>
</tr>
<tr>
<td>Cold</td>
<td>16,500</td>
<td>15,500</td>
<td>17,500</td>
<td>800.00</td>
<td>100.00</td>
<td>16,600 + 100.00</td>
</tr>
<tr>
<td>Hill</td>
<td>17,750</td>
<td>13,600</td>
<td>18,000</td>
<td>880.00</td>
<td>100.00</td>
<td>17,020 - 730.00</td>
</tr>
<tr>
<td>Kampe</td>
<td>15,000</td>
<td>11,500</td>
<td>16,000</td>
<td>900.00</td>
<td>100.00</td>
<td>15,000</td>
</tr>
<tr>
<td>Lawson</td>
<td>16,500</td>
<td>15,000</td>
<td>17,000</td>
<td>800.00</td>
<td>100.00</td>
<td>15,600 - 900.00</td>
</tr>
<tr>
<td>Rhodes</td>
<td>17,000</td>
<td>11,500</td>
<td>17,500</td>
<td>1,200.00</td>
<td>100.00</td>
<td>16,200 - 800.00</td>
</tr>
<tr>
<td>Rogers</td>
<td>21,000</td>
<td>16,000</td>
<td>22,000</td>
<td>1,200.00</td>
<td>100.00</td>
<td>20,700 - 300.00</td>
</tr>
<tr>
<td>Thomas</td>
<td>18,500</td>
<td>15,000</td>
<td>20,000</td>
<td>1,000.00</td>
<td>100.00</td>
<td>18,900 + 400.00</td>
</tr>
<tr>
<td>Wilson</td>
<td>16,000</td>
<td>14,000</td>
<td>17,000</td>
<td>600.00</td>
<td>100.00</td>
<td>16,300 + 300.00</td>
</tr>
</tbody>
</table>

Rhodes v. City of Chicago, 516 F.2d 1373, 1376 n.7 (7th Cir. 1975).
investigators determined that this fraction ranged from 60 to 85 percent of the county's appraisal. There was also evidence that the negotiator was encouraged to attempt a settlement below even the authorized percentage; occasionally, the tentative settlement secured by the negotiator was so unconscionably low that the county representative ordered further price discussions.

The results of the county's practices demonstrates the unjust financial hardship upon the landowners. Where the negotiations resulted in a settlement agreement, only 15.7 percent of the condemnees received an amount equal to or greater than the county's low appraisal. Of the remainder, 56.9 percent received less than 50 percent of the low appraisal. The investigators attributed these surprising results to the amicable rapport initially established between the negotiators and the condemnees, the lack of knowledge and experience on the part of the condemnee, and the financial burden of often having to vacate the premises and obtain substitute housing even before price negotiations on the old property had begun. The inherent unfairness of the county's condemnation procedures is further emphasized by the fact that 84.7 percent of the condemnees who pursued their cases to trial received or bettered the county's low appraisal.

The inequity inflicted upon the landowners in Nassau County is not an isolated situation. In Senate hearings on a proposed bill that would have allowed the recovery of attorney's fees in federal condemnation cases similar
abuses were revealed. One case was reported where a federal agency repeatedly dismissed a condemnation proceeding after judicial determination of "just compensation," forcing the landowner to incur repeated litigation expenses. The statements and testimony of several attorneys disclosed many instances where the landowner received far more at trial than was offered by the condemnor, and those who had represented condemnees emphasized the hardship suffered by landowners who fought to receive fair compensation.

The appraisal of property is not an exact science. It is based upon the opinion, experience, and expertise of the individual appraiser. Naturally, differences of opinion with respect to value will occur. In addition, an appraiser in a condemnation case is often confined by guidelines imposed by the condemning authority and legal doctrines as to valuation. The investigations which have been conducted, however, have illustrated a disparity between initial offers and final court awards which exceed any acceptable variation in appraisals.

In the past few months the Eminent Domain Study Committee of the Indiana Legislative Council has been conducting meetings to gather information and formulate policies leading to a revision of Indiana eminent domain laws. The minutes of those meetings provide a graphic account of the nature of current condemnation practices followed in Indiana. Consistent with the investigations discussed above, the Indiana group found that most problems occurred in the negotiation stage of condemnation proceedings. Many landowners complained about the behavior and tactics of the persons conducting the negotiations. Indeed, one landowner reported acts of violence allegedly

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Id. at 1.

Id. at 8 (statement of Senator Wayne Morse).

Id. at 36, 40, 52-53. In one case the landowner was initially offered $350 for the property to be taken by the federal government. This was increased to $5,800 just before trial. At trial the condemnee received $88,319.51 for the property. But to receive this award the owner had to expend $25,921.12 in litigation costs, including $18,879.44 for attorney's fees. Thus, the condemnee actually received $62,398.39 for the property or, alternatively, 70.6 percent of the judicially determined "just compensation." Id. at 53 (letter of Roland Boyd).

See Hearings on S.1351, supra note 10.

See generally Foerster, A Look at Condemnation Attorneys' Fees, 46 Fla. B.J. 130, 131 (1972): "[T]he appraiser often finds himself in a dilemma caused either by conflicting legal opinion or misinterpretation of court cases, or by a request for an opinion of value or damages based on unrealistic conditions and circumstances." AMERICAN BAR ASSOCIATION NATIONAL INSTITUTES, CONDEMNATION, COMPENSATION AND THE COURTS 31 (1969). See also AMERICAN INSTITUTE OF REAL ESTATE APPRAISERS, CONDEMNATION APPRAISAL PRACTICE (1961); A.L.I. & A.B.A. GUIDE, supra note 19.

Suggested Legislation of the Eminent Domain Study Committee of the Indiana Legislative Council (1976) [hereinafter cited as Minutes of (date)] [on file at the INDIANA LAW JOURNAL].

caused by the condemnor having turned the community against him, and intimated that the death of two elderly condemnees of heart attacks may have been accelerated by the harassing tactics of the condemners.57

The testimony of representatives of Indiana condemnors, particularly public utilities, provides a descriptive portrayal of the procedure routinely followed in acquiring property. Many condemnors contract with out-of-state corporations, which specialize in land and land rights buying, to conduct negotiations with condemnees.58 Some protection against negotiation abuse is available through contractual provisions which provide that an individual landbuyer may be removed from the project within twenty-four hours of the condemnor’s request.59 The condemnor’s liability for the acts of these corporations is limited to actions performed within the scope of those corporations’ authority.60 Although these out-of-state landbuying corporations are licensed by the state real estate board, the individuals employed by them may not be licensed land brokers.61

One ever-increasing group of condemnors is public utility corporations. Much of their land appropriation is for rights—of—way rather than a fee simple. Here the Committee found an unique practice. The initial offer made by the utility is based upon a lineal foot estimate of the cost of the entire project.62 This practice ignores any consideration of the character or quality of the specific parcel through which the right of way is being sought. Only if such an offer is rejected by the landowner is an actual appraisal made of the property.63

One of the most frequent complaints of the landowners is the large attorney’s fees they are forced to incur to insure that they receive adequate compensation for their appropriated property.64 Actual case histories presented to the Committee revealed that it was common for a condemnee to receive substantially more from a court award than from the condemnor’s final offer;65 but much of this gain was lost through the expenditure of at-
torney's fees. The condemnors understandably objected to any provision in eminent domain laws for the reimbursement of those fees.\textsuperscript{66}

It is apparent from these independent investigations that the failure to allow the recovery of attorney's fees gives the condemnor a distinct bargaining advantage. The landowner is faced with a difficult choice. He knows, or the condemnor will inform him, that unless he accepts the amount offered he will incur substantial litigation expenses by proceeding to trial. The mere threat of litigation has a coercive impact which, in some cases, forces a litigant to succumb to that pressure rather than assert his rights. His decision will be based upon his judgment as to how much he could reasonably receive from a judicial determination of a fair amount. If the value of the property sought is small, the condemnee will nearly always yield to the condemnor's offer and accept a price below the true "just compensation."\textsuperscript{67}

**Possible Remedies: The Experience in Various States**

The most often asserted argument against any scheme to reimburse the condemnee's attorney's fees is that it would increase the amount of litigation.\textsuperscript{68} Of course the relative merit of this argument will depend upon the

<table>
<thead>
<tr>
<th>Final Offer</th>
<th>Court Award</th>
<th>Attorney's Fees</th>
<th>Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. $2,440</td>
<td>$4,886</td>
<td>$815</td>
<td>100%</td>
</tr>
<tr>
<td>2. 30,000</td>
<td>48,029.44</td>
<td>6,010</td>
<td>60%</td>
</tr>
<tr>
<td>3. 4,140</td>
<td>9,800</td>
<td>1,887</td>
<td>137%</td>
</tr>
<tr>
<td>4. 6,442</td>
<td>13,650</td>
<td>2,410</td>
<td>111%</td>
</tr>
</tbody>
</table>

Further, a representative of the State Highway Commission presented a summary of highway land acquisition costs. In the period from 1965 to 1975:
1. There were 1,271 land takings resulting in jury awards. The total appraised (or fair market) value for these cases was $16.1 million, the actual amount paid to the landowners was $34.4 million plus an additional $1.1 million in interest lost on amounts on deposit in the courts. On the average, jury awards were 95\% higher than the appraised value.
2. There were 1,993 cases settled in court in which the average award was 30\% greater than the appraised value. The 1,993 cases had an appraised value of $18.1 million, and the highway department actually paid $25.4 million.
3. The voluntary land acquisitions amounted to 13,645 cases in which the total amount paid, $103 million, represented the total appraised value.

Minutes of August 31, 1976, supra note 54, at 4.
\textsuperscript{66}Minutes of August 31, 1976, supra note 54, at 3-4; Minutes of August 17, 1976, supra note 54, at 2-3.
type of statutory scheme in effect. A statute that provided for full recovery of attorney's fees to the condemnee regardless of the outcome of the lawsuit would increase litigation since the landowner would have nothing to lose by proceeding to court.69

The opposing argument is that the allowance of the recovery of attorney's fees would actually reduce the amount of litigation because it would encourage the settlement of cases without trial.70 This view assumes that by being faced with reimbursing the landowner for his attorney's fees if the case goes to trial, the condemnor will exercise more care and seek a more accurate appraisal before beginning negotiations.71 It would also discourage any deceitful bargaining tactics on the part of the negotiators.

In view of the oppressive negotiation tactics being used by condemnors, the condemnee's need for greater bargaining power is apparent. Since the courts continue to construe the "just compensation" clause as not encompassing attorney's fees, the legislature must respond with a statutory scheme that will equalize the bargaining power, and at the same time protect those condemnors who do make good faith offers. That the landowner's plight has been recognized is shown by recent state and federal legislation which provides for the recovery of attorney's fees in certain limited situations. In Indiana, landowners who are forced to bring inverse condemnation actions,72 or those against whom condemnation proceedings are abandoned, can recover their reasonable attorney's fees.73 The federal government has enacted similar protection for condemnees in federal land acquisitions.74

Various statutory schemes have been suggested or adopted by the several states to equalize the bargaining power of the condemnor and condemnee by allowing the recovery of attorney's fees. One approach, adopted in Florida,75 is to allow recovery in all cases regardless of whether the litigation results in an award greater than the condemnor's final offer before trial. Even though

69 For suggested ways to avoid this extreme result by placing appropriate restrictions in the legislation, see notes 82-90 infra & text accompanying.
72 IND. CODE 32-11-1-12 (1976).
75 "The petitioner shall pay all reasonable costs of the proceedings in the circuit court, including a reasonable attorney's fee to be assessed by that court." FLA. STAT. ANN. § 73.091 (West Cum. Supp. 1976).

The Florida Supreme Court has suggested that even without this statutory authorization the reimbursement of a condemnee's attorney's fees might be compelled by the "just compensation" clause of the Florida Constitution. Jacksonville Expressway Authority v. Henry G. Dupree Co., 108 So.2d 289 (Fla. 1956).
this approach would seem to be the one most likely to promote frivolous or unjustified litigation, it does not appear to have had that effect in application as demonstrated by the strong defense of the procedure by the Florida legal community.

Another approach, adopted in North Dakota, is to allow the recovery of the landowner's attorney's fees at the discretion of the court. The trial judge who hears the evidence would be in the best position to evaluate the merits of the landowner's case and could therefore assess the condemnee's attorney's fees accordingly. In determining what constitutes a reasonable attorney's fee several factors are normally considered, such as "the amount and the character of the services rendered, the results obtained, the customary charge for the services rendered, and the ability and skill of the attorney."

While a discretionary approach would discourage vexatious lawsuits, it does suffer from some defects. There might well be an adverse effect on independent advocacy if the attorney's compensation depends upon the pure whim of the judge before whom he argues. In one state which has adopted a discretionary scheme for all civil cases, the avalanche of appeals has become so great that the state bar association has passed a resolution calling for a repeal of the enabling legislation.
Recognizing that the appraisal of property is not an exact science, a statutory scheme could contain a built-in degree of latitude requiring the judicial determination of just compensation to exceed the condemning authority's final offer by a fixed amount or percentage before requiring the reimbursement of attorney's fees. For example, in Alaska the landowner is allowed to recover his attorney's fees only if the court award is at least ten percent greater than the amount previously made available to him. From the landowner's standpoint, the fairness of this approach depends upon the value of the property appropriated. If the value is small, such as where the condemning authority is taking only a right-of-way, the slight loss to the owner (potentially ten percent in Alaska) might be worth the benefit of discouraging frivolous litigation. But in today's market the ever-increasing

(a) Allowance to Prevailing Party as Costs.

(1) Unless the court, in its discretion, otherwise directs, the following schedule of attorney's fees will be adhered to in fixing such fees for the party recovering any money judgment therein, as part of the costs of the action allowed by law:

<table>
<thead>
<tr>
<th>Attorney's Fees in Average Cases</th>
<th>Contested</th>
<th>Without Trial</th>
<th>Non-Contested</th>
</tr>
</thead>
<tbody>
<tr>
<td>First $2,000</td>
<td>25%</td>
<td>20%</td>
<td>15%</td>
</tr>
<tr>
<td>Next $3,000</td>
<td>20%</td>
<td>15%</td>
<td>12.5%</td>
</tr>
<tr>
<td>Next $5,000</td>
<td>15%</td>
<td>12.5%</td>
<td>10%</td>
</tr>
<tr>
<td>Over $10,000</td>
<td>10%</td>
<td>7.5%</td>
<td>5%</td>
</tr>
</tbody>
</table>

Should no recovery be had, attorney's fees for the prevailing party may be fixed by the court as a part of the costs of the action, in its discretion, in a reasonable amount.

(2) In actions where the money judgment is not an accurate criteria for determining the fee to be allowed to the prevailing side, the court shall award a fee commensurate with the amount and value of legal services rendered.

(3) The allowance of attorney's fees by the court in conformance with the foregoing schedule is not to be construed as fixing the fees between attorney and client.

It may well be that the huge number of appeals on the issue of attorney's fees is caused by the statutory guidelines of Rule 82, as well as the trial judge's exercise of discretion. It has been suggested that a requirement that the judge give articulated grounds for his determination of the fee award would reduce the number of appeals and deter abuse of discretion. Comment, After Alyeska: Will Public Interest Litigation Survive?, 16 SANTA CLARA L. REV. 267, 300 (1976).

(See note 53 supra & text accompanying.

Costs and attorney's fees incurred by the defendant shall not be assessed against the plaintiff, unless: . . . (2) the award of the court was at least ten (10) percent larger than the amount deposited by the condemning authority or the allowance of the master from which an appeal was taken, . . . .” ALAS. R. CIV. P. 72 (k).

While this is the general statutory scheme for reimbursement of attorney's fees in eminent domain proceedings, the judge is given further discretion to allow attorney's fees where "necessary to achieve a just and adequate compensation of the owner." Id. at 72 (k)(4). It is noteworthy that Rule 72 was not cited in Comment, Award of Attorney's Fees in Alaska: An Analysis of Rule 82, 4 U.C.L.A.-ALAS. L. REV. 129 (1974) for causing the great number of appeals, as were the portions of the Alaska Rules of Civil Procedure that allow the recovery of attorney's fees in other civil suits.
value of land coupled with a ten percent margin of "appraisal error" could result in a substantial loss to the condemnee.83

A final approach to the statutory allowance of attorney's fees is to allow it in all cases, but limited to a fixed amount. This is the practice now followed in Pennsylvania, with the maximum allowance fixed at $500.84 This compromise measure falls far short of making the landowner "whole" since it is meant to cover not only attorney's fees, but also appraisal and engineering fees.85 Clearly, a small statutory limit on recovery of attorney's fees, like the $500 ceiling in Pennsylvania, amounts to no more than dangling a carrot in from the condemnee. With today's cost of legal services it is the rare case where such a small amount would cover the cost of attorney's fees in a condemnation case, to say nothing about expert witness fees and other expenses of litigation.86 If a statutory limit is to be imposed, the least that could be ex-

83For example, if a house and lot worth $50,000 were being taken, the landowner would have to be reasonably assured of increasing the award more than $5,000 before it would be worth his while to go to trial. Yet this is a substantial amount from the homeowner's point of view, and in the case of commercial urban property the result would be even more extreme. Of course this could be avoided by reducing the allowable margin of error to 2-5%. Even though it might be said that this small a percentage could lead to the quibbling, and possible litigation, over small sums of money in the case of low-valued property, it seems unlikely that a condemnee would be willing to invest the time and incidental expenses (travel, loss of wages, etc.) necessary for a full trial over such sums.

84"The owner of any right, title, or interest in real property acquired or injured by an acquiring agency . . . shall be reimbursed in an amount not to exceed five hundred dollars ($500) as a payment toward reasonable expenses actually incurred for appraisal, attorney and engineering fees." PA. STAT. ANN. tit. 26, § 1-610 (Purdon Supp. 1977).

Pennsylvania provides for full recovery of these fees where the landowner successfully challenges the condemnor's right to appropriate the property or procedures followed by the condemnor, where the condemnation is revoked by the condemnor, and where the condemnee is forced to bring an inverse condemnation proceeding. PA. STAT. ANN. tit. 26, §§ 1-406(e), 1-408, and 1-609 (Purdon Supp. 1977).

It is said that this procedure encourages the condemnee to seek legal and other expert advice and, thus, enables him to make an informed decision as to the adequacy of the condemning authority's offer. It is also believed that this procedure will encourage settlement because the condemnor will increase his offer since he is aware that the condemnee will not hesitate to proceed to trial secure in the knowledge that his attorney's fees will be reimbursed. Comment, Eminent Domain: Attorney Fees in Condemnation—A Defense of the Pennsylvania Position, 77 DICK. L. REV. 316, 327-28 (1973).

Critics of the statutory limitation plan believe there is no need for a ceiling on the recovery of attorney's fees because the courts, on the whole, properly exercise their discretion in determining reasonable fees. Since the judge will limit recovery to a reasonable fee, only a foolish attorney would unnecessarily take the time of the court. Thus, it is believed that a statutory limit on attorney's fees would both encourage unnecessary litigation and increase the cost of land acquisition since the court would fix fees according to that limitation. Foerster, A Look at Condemnation Attorney's Fees, 46 FLA. B.J. 130, 132-35 (1972). The determination of a reasonable attorney's fee is guided by the CODE OF PROFESSIONAL RESPONSIBILITY, CANON 2, DISCIPLINARY RULE NO. 2-106.


86For some examples of attorney's fees held to have been reasonable in eminent domain cases, see Annot., 58 A.L.R.3d 201, § 6 (1974); 56 A.L.R.2d 13, § 64 (1957); 2 S. SPEISER, ATTORNEY'S FEES § 14:135 (1973). See also Annot., 57 A.L.R.3d 475 (1974) (Amount of Attorney's Compensation in Absence of Contract or Statute Fixing Amount).
pected is that it be a realistic one. But with the great variance of attorney’s fees actually incurred, because of the difference in complexity and value of the property of each case, it is submitted that no statutorily limited reimbursement scheme will succeed in making a landowner “whole” in every case.

Possible Remedies: Uniform Codes for Eminent Domain

The effectiveness of many of the state-enacted schemes has been diluted, as shown previously, by the limits placed on reimbursement by the adopting legislature. An even greater exercise in futility was a proposed draft of a Model Eminent Domain Code prepared by the Committee on Condemnation Law of the Section of Real Property, Probate and Trust Law of the American Bar Association. Under section 504E the condemnee may be allowed to recover his attorney’s fees if the court award exceeds the condemnor’s offer, but only where nonallowance would “invoke serious hardship” on the condemnee. While section 504E might encourage fairer offers by the condemnor to avoid incurring litigation expenses, any effectiveness of this provision is destroyed by requiring a finding of “serious hardship” before permitting reimbursement. It is difficult to give any real meaning to such a term. A court would most likely look for a serious financial hardship to trigger the award of attorney’s fees. This would lead to the unjustifiable result that in similar cases a poor condemnee could recover his attorney’s fees while a wealthy condemnee would be denied recovery. The condemning authority could continue to use unscrupulous bargaining tactics in dealing with a wealthy condemnee because of the prerequisite “serious hardship.”

In response to the criticism of antiquated eminent domain laws, the National Conference of Commissioners on Uniform State Laws has recommended a proposed solution, adoption of the Uniform Eminent Domain Code. Several provisions have been suggested that would tend to curb oppressive bargaining practices by the condemning authority. In addition, provision is

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87 MODEL EMINENT DOMAIN CODE § 504E provides:
Where the ultimate award is more than the offer of the condemnor, the Trial Judge shall have the authority to cause the condemnor to reimburse the [condemnee] . . . for its attorney’s fees and other reasonable expense, but his authority shall exist only in those instances where the trial judge finds affirmatively that to do otherwise would invoke serious hardship on the condemnee.
89 For a discussion of the effect of § 504E in inverse condemnation and abandonment proceedings, see Id. at 711-12.
90 UNIFORM EMINENT DOMAIN CODE § 203(a) provides:
Before initiating negotiations for the purchase of property, the condemnor shall establish an amount which it believes to be just compensation therefor and promptly shall submit to the owner an offer to acquire the property for the full amount so established. The amount shall not be less than the condemnor’s approved appraisal of just compensation for the property.
In addition, § 207 provides:
made for the recovery of litigation expenses where the court award exceeds
the condemnor's offer.

The recovery of attorney's fees is dependent upon a formal offer of settle-
ment. Pursuant to section 708 either party may file and serve on the other
party an offer of settlement shortly before trial. If the defendant landowner
makes an offer under section 708, and it is rejected by the condemning
authority, he will be reimbursed for his attorney's fees subject to the limita-
tions of section 1205, which provides:

(a) If the judgment determines that the plaintiff has the right to take all
or part of the defendant's property, the costs incurred by the defendant shall
be claimed, taxed, and allowed to the defendant by the same procedure as in
their civil actions, except as otherwise provided in this section.

(b) If the amount of compensation awarded to the defendant by the
judgment, exclusive of interest and costs, is equal to or greater than the
amount specified in the last offer of settlement made by the defendant under
Section 708, the court shall allow the defendant his costs under subsection (a)
and in addition his litigation expenses in an amount not exceeding the
greater of [ ] dollars or [25] percent of the amount by which the com-
ensation awarded exceeds the amount of the plaintiff's last offer of settle-
ment made under Section 203 or 708.

(c) If the amount of compensation awarded to the defendant by the
judgment, exclusive of interest and costs, is equal to or less than the amount
specified in the last offer of settlement made by the plaintiff under Section
708, the defendant shall not be entitled to his costs incurred after the date of
service of the offer.)

In order to compel an agreement on the price to be paid for the property, a con-
demnor may not advance the time of condemnation, defer negotiations or condemna-
tion and the deposit of funds in court for the use of the owner, nor take any other ac-
tion coercive in nature.

*UNIFORM EMINENT DOMAIN CODE § 708 provides:

(a) Not less than [ten] days before the trial on the issue of the amount of com-
pen sation, either party may file and serve on the other party an offer of settlement,
and within [five] days thereafter the party served may respond by filing and serving his
offer of settlement. The offer shall state that it is made under this section and specify
the amount, exclusive of interest and costs, which the party serving the offer is willing
to agree is just compensation for the property sought to be taken. The offer supersedes
any offer previously made under this section by the same party.

(b) An offer of settlement is deemed rejected unless an acceptance in writing is
filed and served on the party making the offer, before the commencement of the trial
on the issue of the amount of compensation.

(c) If the offer is rejected, it may not be referred to for any purpose at the trial,
but may be considered solely for the purpose of awarding costs and litigation expenses
under Section 1205.

(d) This section does not limit or restrict the right of a defendant to payment of
any amounts authorized by law in addition to compensation for the property taken
from him.

*Id. § 1205. “Subsection (c), however, is in brackets to indicate that it should be omitted if
a withholding of costs in the adopting state would violate state constitutional requirements.”

*UNIFORM EMINENT DOMAIN CODE § 1205, Comment. In addition, the Code provides for full
recovery of litigation expenses in inverse condemnation proceedings and where the condemnation
action is wholly or partially dismissed. *Id.* §§ 213 & 1305. See also 1 NICHOLS, supra note 5, at §
4.109 [1].
The term "litigation expenses" is defined as "the sum of the costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, necessary to prepare for anticipated or participation in actual court proceedings."94

Section 1205 has been hailed as a "salutory provision for encouraging settlements."95 This praise may be a bit premature. The burden is placed on the defendant landowner to qualify for a possible reimbursement of litigation expenses by the requirement of an offer of settlement pursuant to section 708. The condemnee is thus forced to make a tough decision. If he makes such an offer and the award of the court is less than that amount, even though it may be greater than any offer made by the condemning authority, the condemnee will not recover his litigation expenses. For example, assume that the condemnor's final offer is $20,000 and the condemnee offers to settle for $30,000 under section 708. If the court award is $28,000, the condemnee will not recover his litigation expenses, even though the judicially determined "just compensation" is 40 percent greater than the condemnor's final offer.

Because of this, the condemnee might tend to make his offer under section 708 lower than what he justifiably believes to be "just compensation" in order to insure that he will receive his litigation expenses. He is forced to gamble as to how much lower to make such an offer because he faces the risk of the condemning authority accepting his offer, with the result that in the end he will receive less than just compensation.

It appears that there is no justifiable reason for placing the burden of making this kind of decision on the defendant landowner. Although there are exceptions, the studies and investigations conducted to date96 show that more often than not the necessity of litigation of the issue of just compensation is caused by substantially low offers on the part of the condemning authority rather than the obstinacy of the landowner.

The effectiveness of section 1205 as a technique of encouraging settlement will further depend upon the dollar amount and percentage figure inserted by the adopting state legislature.97 If these figures are small the Uniform Code will fall far short of insuring that the condemnee receives "just compensation."98 In addition, if the ceiling on reimbursement is low the condemnor might well be willing to gamble on having to pay the landowner's litigation expenses, and persist in making low offers to attempt to coerce the condemnee into a low settlement. If the attempt failed, and the condemnee prevailed at trial, the small reimbursement the condemnor is forced to make

94Id. § 103(14).
96See text accompanying notes 39-67 supra.
97The brackets in § 1205(b) are to indicate that the adopting state legislature may insert the figures it deems appropriate.
98See notes 84-86 supra & text accompanying.
would be considered only an additional "cost of doing business." Such a gamble would be justified from the condemnor's standpoint if the attempt succeeded more often than it failed.

Possible Remedies: The Indiana Approach

The Eminent Domain Study Committee of the Indiana Legislative Council has proposed the adoption of provisions patterned after sections 708 and 1205. The provision for offer of settlement, section 24, does not materially differ from section 708 of the Uniform Code. The provision dealing with recoverable costs, section 25, closely follows section 1205 of the Uniform Code. The material portion, however, is section 25(b), which provides:

99Suggested Legislation, supra note 55, at 7-8. Several bills were introduced in the 1977 session of the Indiana General Assembly that would have revised Indiana eminent domain law. Indianapolis Star, Jan. 9, 1977, § 4 (City & State), at 1, col. 4. Initially it was felt that only the bills that provided for a uniform notice of offer and landowner's rights, H.B. 1300, and a convenience and necessity permit as a prerequisite to condemnation by public utilities, H.B. 1302, would be given serious consideration. Letter from Hon. John J. Thomas, Speaker Pro Tem, Indiana House of Representative, to Byron Myers (Jan. 14, 1975) [on file at the INDIANA LAW JOURNAL]. Cf. note 108 infra.

100Sec. 24. Offer of Settlement. (a) Not less than ten days before the trial on the amount of damages and benefits, either party may file and serve on the other party an offer of settlement, and within five days thereafter the party served may respond by filing and serving his offer of settlement. The offer shall state that it is made under this section and specify the amount, exclusive of interest and costs, which the party serving the offer is willing to agree is just compensation and damages for the property sought to be taken. The offer supersedes any offer previously made under this section by the same party.

(b) An offer of settlement is deemed rejected unless an acceptance in writing is filed and served on the party making the offer, before the commencement of the trial on the issue of the amount of damages and benefits.

(c) If the offer is rejected, it may not be referred to for any purpose at the trial, but may be considered solely for the purpose of awarding costs and litigation expenses under section 25 of this chapter.

(d) This section does not limit or restrict the right of a defendant to payment of any amounts authorized by law in addition to compensation for the property taken from him.


101Sec. 25. Recoverable Costs. (a) If the judgment determines that the plaintiff has the right to take all or part of the defendant's property, the costs incurred by the defendant shall be claimed, taxed, and allowed to the defendant by the same procedure as in other civil actions, except as otherwise provided in this section.

(b) If the amount of benefits and damages awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or greater than the amount specified in the last offer of settlement made by the defendant under section 24 of this chapter, the court shall allow the defendant his costs under subsection (a) and in addition his litigation expenses in an amount not exceeding the greater of one thousand dollars ($1,000) or twenty-five percent (25%) of the amount by which the compensation awarded exceeds the amount of the plaintiff's last offer of settlement made under section 24 of this chapter.

(c) If the amount of damages and benefits awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or less than the amount specified in the last offer of settlement made by the plaintiff under section 24 of this chapter, the defendant shall not be entitled to his costs incurred after the date of service of the offer.

Suggested Legislation, supra note 55, at 8.
(b) If the amount of benefits and damages awarded to the defendant by the judgment, exclusive of interest and costs, is equal to or greater than the amount specified in the last offer of settlement made by the defendant under section 24 of this chapter, the court shall allow the defendant his costs under subsection (a) and in addition his litigation expenses in an amount not exceeding the greater of one thousand dollars ($1,000) or twenty-five percent (25%) of the amount by which the compensation awarded exceeds the amount of the plaintiff's last offer of settlement made under section 24 of this chapter. 102

This proposal does not provide the protection intended or needed. The offer of settlement under section 24 is discretionary on the part of either party. 103 By failing to make such an offer the condemning authority would, in effect, be placing a $1,000 limit on any possible reimbursement of litigation expenses. As previously discussed, 104 this figure is wholly inadequate in view of today's cost of legal services and the litigation expenditures routinely incurred in condemnation proceedings. Even if the condemnor does make an offer under section 24 he could still limit any possible reimbursement by making an offer only slightly below the amount the condemnee reasonably believes to be "just compensation." For example, if the condemnor offers $25,000 where the condemnee believes the correct amount should be $30,000, and the court award is actually determined to be $30,000, the condemnee will be limited to a $1,250 recovery of litigation expenses under section 25(b). This could have the coercive effect of inducing the condemnee to accept the $25,000 offer rather than gamble upon what his litigation expenses might be at trial.

PROPOSED SOLUTION

The legislation proposed by the Indiana Eminent Domain Study Committee, with appropriate amendments, could be an effective deterrent against condemnor oppression. By following the format of the Uniform Eminent Domain Code it would tie in well with other revisions of the eminent domain law patterned after the uniform act. 105

It is suggested that sections 24 and 25 be amended to read as follows:

Sec. 24. Offer of Settlement. (a) Not less than 10 days before the trial on the amount of damages and benefits, the condemnor shall file and serve on the condemnee an offer of settlement, and within five days thereafter the condemnor shall respond by filing and serving his offer of settlement. 106

Sec. 25. Recoverable Costs. (b) If the amount of benefits and damages awarded to the condemnee by the judgment, exclusive of interest and costs, is

102Id. (emphasis added).
103See Section 24(a), note 100, supra.
104See text accompanying notes 84-86 supra.
105See note 99 supra.
106Subsection (b), (c) and (d) would remain the same as in the proposed draft, see note 100, supra.
greater than the amount specified in the last offer of settlement made by the condemnor under section 24 of this chapter, the court shall allow the condemnee his costs under subsection (a) and in addition his litigation expenses.107

The above amendments would prove advantageous in several ways. By making a formal offer by the condemnor mandatory under section 24 it would force one final consideration of the previous offers made by him and a cost benefit analysis could be made of the anticipated expenses of litigation against the likely award at trial to determine if meeting the condemnee's demands might be the better course.108 Since the condemnee will recover his litigation expenses if the court award exceeds the condemnor's final offer it would eliminate the use of coercive and intimidating negotiation tactics by equalizing the bargaining position of the parties. The elimination of the requirement of an offer of settlement by the landowner under section 24 in order to trigger the application of the recovery of costs provisions of section 25 avoids the landowner's dilemma of fixing the amount of his offer of settlement,109 and places the burden of insuring that a fair offer is made on the condemning authority where it rightfully belongs.110

Even with the suggested changes the condemnor is still protected where he has acted in good faith since the landowner will not be allowed to recover his litigation expenses unless the court award exceeds the condemnor's final offer. That, in itself, would discourage the condemnee from instituting unnecessary and frivolous litigation. Moreover, settlement would be further encouraged by the fact that the definition of "litigation expenses" limits recovery to "reasonable" attorney, appraisal, and engineering fees.111

107Subsections (a) and (c) would remain the same as in the proposed draft, see note 101 supra.

108If the condemnee's demand is not much greater than the condemnor's final offer it might be more feasible, from a public fiscal standpoint, to accede to that demand rather than litigate the issue.

While the bills for the reform of eminent domain law introduced in the current session of the Indiana General Assembly, note 99 supra, initially made no provision for the reimbursement of attorney's fees, an amendment was later proposed similar to that suggested by the Eminent Domain Study Committee. See notes 99-102 supra & text accompanying. Under that proposed amendment the offer of settlement, see note 100 supra, would be mandatory on the part of the plaintiff condemnor. The proposed amendment's provision dealing with recoverable costs, note 101 supra, retained the "$1,000 or 25%" limitation. Letter from Hon. John J. Thomas, Speaker Pro Tem, Indiana House of Representatives, to Byron Myers (Feb. 10, 1977) [on file at the Indiana Law Journal]. A revised version of this proposed amendment was subsequently incorporated into H.B. 1300, which was signed into law by the Governor on May 3, 1977. As finally adopted, if the award at trial exceeds the plaintiff condemnor's mandatory offer of settlement the defendant landowner shall be allowed to recover his litigation expenses, but only in an amount not to exceed $2,500. See IND. CODE § 32-11-1-10 (Supp. 1977). Although the statute as enacted is an improvement over previous law, the $2,500 limitation is still subject to the criticisms directed against any fixed-fee reimbursement plan. See notes 84-86 supra & text accompanying.

109See text accompanying notes 95-96 supra.

110See text accompanying notes 95-96 supra.

111See note 94 supra.
Through the use of accepted standards the trial judge could use this limitation to discourage the unnecessary accumulation of evidence and other such tactics to prevent any advantage being taken of the plaintiff, and to measure the true value of an attorney's services. By making the condemnee's offer under section 24 mandatory, the trial judge, after hearing the evidence, will be able to pass upon the reasonableness of the landowner's demands before trial and can use this as a factor in determining the "reasonable" litigation expenses that should be reimbursed. This would force the landowner to make a good faith offer before trial.

Admittedly, there may be a few cases where the court awards a judgment only slightly larger than the condemnor's offer with the result that the condemning authority is forced to incur the landowner's litigation expenses in spite of a good faith offer. But experience has not shown this to be the usual result. Since statutory draftsmanship can never achieve a perfect result in every case, it is better to resolve such a situation in favor of the landowner who is being forced to give up his property for public use. True, the suggested amendments might slightly increase the total cost of land acquisitions; however, the condemning authority is in the best position to spread such increased costs through the use of the taxing power or user charges, over the public as a whole who, after all, is the group that is to be benefited from the appropriation of the property. This small burden is more than outweighed by the need to truly give the condemnee what the Indiana and United States Constitutions command—"just compensation."

CONCLUSION

Eminent domain proceedings are distinctively different from other civil litigation. The defendant landowner has neither intentionally or negligently inflicted any harm on another, nor failed to perform any agreement. He is in court only because a condemning authority has decided to take his property and convert it to a public use. For this the state and federal constitutions de-

112A good example of such objective factors is found in FLA. STAT. ANN. § 73.092 (West Cum. Supp. 1976) which provides:
In assessing attorney's fees in eminent domain proceedings, the court shall consider:
(1) Benefits resulting to the client from the services rendered.
(2) The novelty, difficulty, and importance of the question involved.
(3) The skill employed by the attorney in conducting the cause.
(4) The amount of money involved.
(5) The responsibility incurred and fulfilled by the attorney.
(6) The attorney's time and labor reasonably required adequately to represent the client.
However, under no circumstances shall the attorney's fees be based solely on a percentage of the award.
113One of the factors considered in valuing the attorney's services is the increase in the court award over the condemnor's final offer.
114See notes 39-67 supra & text accompanying.
mand that he be put in as good a position financially as if his property had not been taken.

The unscrupulous bargaining tactics of condemnors revealed by recent investigations cannot be condoned or ignored. Since the courts have been unresponsive to the condemnee's plight, the task falls upon the legislatures to halt the coercion and intimidation of landowners that is prevalent in the negotiation stage. This can be done with appropriate legislation with only a slight increase, if any, in the cost of land acquisitions.

It is submitted that the only way to put the condemnee on an equal bargaining plane with the condemnor is to provide for the full reimbursement of his attorney's fees in all cases where the court award exceeds the condemnor's final offer. In this way the condemnor will be encouraged to make fairer offers and will be discouraged from following oppressive negotiation practices. Protection is afforded the condemnor by limiting the recovery to reasonable attorney's fees. Since the results of the litigation, i.e. the difference between the court award and the condemnor's final offer, is one of the objective factors to be considered in determining a reasonable fee, an unduly large amount spent for only a small gain would not always justify the full reimbursement of attorney's fees. This problem may not surface often since the average condemnee will not be willing to invest the time and incidental expense necessary to attend a trial where it appears that even if he prevails the award would likely be only slightly larger than the condemnor's offer.

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