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Inverse Condemnation Actions Present Unique Problems When Determining “Just Compensation”

I. INTRODUCTION

The concept of eminent domain has existed for centuries;¹ “[t]he first formal declaration of the related just compensation principle occurred in France’s 1789 Declaration of the Rights of Man and of the Citizen.”² Today, the Fifth Amendment of the Constitution requires just compensation.³

In order to determine just compensation, a court must first decide the date from which the taken property will be valued (“date of valuation”).⁴ There are many different methods that courts employ when determining the date of valuation in inverse condemnation actions. Some courts look to the date of possession while others look to a much later date.

Having different methods for determining a date of valuation creates perverse incentives for both condemnors and condemnees. Improper valuation dates create perverse incentives because, depending on what the real estate market is doing, either party can manipulate the system, or lack thereof, in order to achieve an unjust result. If property values are depreciating, then using a date of valuation that comes after the date of taking unfairly penalizes the condemnee.⁵ Conversely, if property values are appreciating, then using a date of valuation subsequent to the date of taking unfairly penalizes the condemnor.⁶ In addition to the date of valuation

1. See Christopher Bauer, Comment, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, 2003 BYU L. REV. 265, 268–69.

2. *Id.* at 269. The declaration reads: “[P]roperty being inviolable and sacred, no one ought to be deprived of it, except in cases of evident public necessity, legally ascertained, and on condition of a previous just indemnity.” THE DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN § XVII (Fr. 1789) (emphasis added).

3. U.S. CONST. amend. V (reads in pertinent part: “nor shall private property be taken for public use, without just compensation”).

4. Bauer, *supra* note 1, at 274.

5. Dep’t of Transp. v. Shaw, 345 N.E.2d 153, 161 (Ill. App. Ct. 1976).

6. *Id.*

problem, the date that courts decide when interest begins to accrue is also important when determining just compensation.⁷

There is no literature that describes the problems that courts face when determining just compensation in inverse condemnation actions. This Comment discusses those problems and proposes workable solutions.

Part II of this Comment discusses the various methods used to determine the date of valuation in inverse condemnation actions and concludes by proposing a consistent solution. There are three methods that courts typically use to determine the date of valuation in inverse condemnation actions. The first method uses the date of possession or trespass as the date of valuation, the second method uses the date of trial, and the third method uses the date that the condemnor's actions substantially affected the landowner's use and enjoyment of his property. These methods all have their shortcomings and cannot produce just results in all cases. Nevertheless, a valuation date produces the most just results when the property is valued at the time of taking because compensation is required when the property is taken. When the condemnor takes property by physical occupation or trespass, the property should be valued from the date of occupation. When the condemnor takes property due to its substantial interference, the property should be valued from the date that the interference became a taking.

Part III of this Comment discusses the methods that courts use in determining the date that interest begins to accrue. Courts use various methods for determining the date that interest accrues in an inverse condemnation action. The most just method is to set the date that interest accrues, the date of taking, and the date of valuation as the same date.

II. METHODS OF DETERMINING THE DATE OF VALUATION

Broadly speaking, there are two types of eminent domain actions. They are commonly referred to as direct condemnation actions and inverse condemnation actions. Direct condemnation actions occur when the condemnor⁸ initiates a condemnation action before taking property.⁹ Inverse condemnation actions are “[a]ctions brought by

7. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9–11 (1984).

8. For the purposes of this Comment, “condemnor” means both government entities and private entities who are vested with the taking power.

9. *See generally Kirby Forest Indus.*, 467 U.S. at 3–5. A direct condemnation action is

landowners alleging that a taking of their property has resulted from activities of the public agencies or private bodies vested with authority to condemn.”¹⁰

Furthermore, there are three different types of inverse condemnation actions. The first type is when a condemner physically invades or trespasses on private property without bringing condemnation proceedings, and the property owner is forced to bring the condemnation action.¹¹ The second type happens when “the landowner’s land has been taken and the action is brought to recover damages to the land not taken that the property owner alleges have not been compensated in the original and formal eminent domain proceeding.”¹² And the third type happens “when no land has been formally and physically taken by the condemning authority, but the property owner alleges that he has suffered compensable damages resulting from the taking of certain of the bundle of property rights comprising his ownership.”¹³

Constitutionally, just compensation requires that “the property owner [be put] in as good a position as he or she would have occupied if the taking had not occurred.”¹⁴ The just compensation requirement protects not only the property owner, but also the condemner.¹⁵ The idea that just compensation also protects the condemner has been discussed in both federal and state courts.¹⁶ For

also known as a “straight-condemnation” action. *Id.* at 3.

10. ROBERT R. WRIGHT & MORTON GITELMAN, *LAND USE IN A NUTSHELL* 160 (4th ed. 2000); *see also* *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F. Supp. 530, 539 (D. Or. 1980) (“The term ‘inverse condemnation’ is used to describe a cause of action against a governmental entity to recover the value of property taken by the entity even though no formal exercise of the power of eminent domain has been completed.”).

11. *See, e.g., Calmat of Ariz. v. State ex rel. Miller*, 859 P.2d 1323, 1324–26 (Ariz. 1993).

12. *Dep’t of Transp. v. Shaw*, 345 N.E.2d 153, 160 (Ill. App. Ct. 1976), *aff’d in part, rev’d in part*, 369 N.E.2d 884 (Ill. 1977).

13. *Id.*

14. Bauer, *supra* note 1, at 273. *See, e.g., Kirby Forest Indus., Inc.*, 467 U.S. at 10; *Lange v. State*, 547 P.2d 282, 285 (Wash. 1976) (“It is well established that the condemnee is entitled to be put in the same position monetarily as he would have occupied had his property not been taken.”).

15. *See* 3 NICHOLS ON EMINENT DOMAIN § 8.06[2] (“Ordinarily compensation should be just to the condemner as well as to the condemnee.”).

16. *See, e.g., United States v. 564.54 Acres of Land*, 441 U.S. 506, 516 (1979) (“The guiding principle of just compensation . . . is that the owner of the condemned property ‘must be made whole *but is not entitled to more.*’” (emphasis added to last six words) (quoting *Olson v. United States*, 292 U.S. 246, 255 (1934))); *United States v. L.E. Cooke Co.*, 991 F.2d 336, 341 (6th Cir. 1993) (“[O]vercompensation is as unjust to the public as

example, the California Court of Appeal noted that “the constitutional requirement for the payment of ‘just compensation’ is not only for the benefit of the landowner, but also for the benefit of the public.”¹⁷

In order to determine just compensation, courts must first determine the valuation date of the taking.¹⁸ Some states set the valuation date by statute.¹⁹ It is crucial that, when determining just compensation, courts first determine the date of valuation because land values can change over time.²⁰

Inverse condemnation actions present unique problems when determining just compensation. In a direct condemnation action, the taking is usually close to the trial date; therefore, it is easier to determine a valuation date that is just. In inverse condemnation actions, however, the taking may or may not be close to the trial date. This can create problems for courts as they try to determine what valuation date will produce a just compensation award.

Courts use various methods when determining the date of valuation in inverse condemnation actions. The three most common methods used are: (1) the date that the condemnor unlawfully possessed or trespassed on the landowner’s land; (2) the date of trial, date of summons, or date of judgment (collectively referred to as “the date of trial”); and (3) the date that the condemnor’s actions substantially affected the landowner’s use and enjoyment of his property.²¹ All of these methods, by themselves, render unjust results because they either fail to foresee actions that have no physical invasion, or the valuation date is not close to the date of taking. The solution is to have a date of valuation rule that fixes those problems.

undercompensation is to the property owner”); *City of Fresno v. Cloud*, 26 Cal. App. 3d 113, 123 (1972).

17. *City of Fresno*, 26 Cal. App. 3d at 123.

18. Bauer, *supra* note 1, at 274 (“[B]efore a condemnor can award just compensation, it must properly determine the compensation amount, which requires setting a date of valuation.”); *see also* *Mount Laurel Twp. v. Stanley*, 885 A.2d 440, 441 (N.J. 2005) (“One of the key components in determining what constitutes just compensation in exchange for an eminent domain taking is the date of valuation of the private property subject to condemnation.”).

19. Bauer, *supra* note 1, at 274.

20. *Calmat of Ariz. v. State ex rel. Miller*, 859 P.2d 1323, 1327 (Ariz. 1993) (“Timing is critical to valuation because it affects the fairness of the compensation when property values fluctuate between the date of the condemnor’s entry and the summons’ date.”).

21. *See, e.g.*, *United States v. Clarke*, 445 U.S. 253, 258 (1980); *Hayden v. Bd. of Cnty. Comm’rs*, 580 P.2d 830, 834 (Colo. App. 1978); *Twp. of W. Windsor v. Nierenberg*, 695 A.2d 1344 (N.J. 1997).

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A. Using the Date of Physical Occupation or Trespass as the Date of Valuation

Usually, “[w]hen a taking occurs by physical invasion,” courts use the method that values the property on the date that the condemnor unlawfully possessed or trespassed on the property owner’s land.²²

1. The date of physical occupation or trespass method

The United States Supreme Court held that “[w]here Government physically occupies land without condemnation proceedings, ‘the owner has a right to bring an “inverse condemnation” suit to recover the value of the land *on the date of the intrusion by the Government.*’”²³

This approach to determining the date of valuation in inverse condemnation actions has been followed in several states.²⁴ For example, the Arizona Supreme Court followed this approach in *Calmat of Arizona v. State ex rel. Miller*.²⁵ In *Calmat*, the State filed a condemnation action on October 11, 1985, against Calmat for the purpose of expanding a bridge on Calmat’s land.²⁶ However, the state “took no further action to bring the case to trial”²⁷ and in November 1986 “the condemnation action was dismissed for failure to prosecute.”²⁸ In December 1985, however, “the state posted a bond, obtained an order of immediate possession, *and erected permanent structures on the property.*”²⁹ As a result, Calmat, the private property owner, filed an inverse condemnation action against

22. *Clarke*, 445 U.S. at 258 (noting that “[w]hen a taking occurs by physical invasion . . . the usual rule is that the time of the invasion constitutes the act of taking, and ‘[i]t is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued’” (quoting *United States v. Dow*, 357 U.S. 17, 22 (1958))).

23. *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 320 n.10 (1987) (quoting *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 (1984)).

24. *See, e.g., Calmat*, 859 P.2d at 1324–1328; *State Highway Comm’n v. Stumbo*, 352 P.2d 478, 484 (Or. 1960); *Maxey v. Redevelopment Auth. of Racine*, 288 N.W.2d 794, 805 (Wis. 1980).

25. *See* 859 P.2d at 1323.

26. *Id.* at 1324.

27. *Id.*

28. *Id.*

29. *Id.* (emphasis added).

the state in June 1987.³⁰ Relying on an Arizona statute,³¹ Calmat argued “that the property should be valued as of the summons’ date in the inverse condemnation action.”³² The trial court, over the state’s objection,³³ held that the statute applied to inverse condemnation actions, and the date of valuation was set as the summons’ date in the inverse condemnation action.³⁴ After the jury returned a rather large verdict for Calmat, the trial court questioned its own ruling on the date of valuation.³⁵ The trial court judge stated, “[h]aving now seen the evidence, and now having a better sense of the extent of the windfall [to Calmat], the Court has serious doubts about the correctness and the justness of [using the date of summons’ as the] valuation date.”³⁶ Consequently, the court granted a new trial to the state and Calmat appealed.³⁷ The appellate court held that the trial court’s initial ruling as to the valuation date was correct, “and that the trial court had erroneously granted the state’s motion for a new trial.”³⁸

The Arizona Supreme Court disagreed and found that the proper valuation date should be the date of the state’s original entry.³⁹ Even though, up to this point, the Arizona Supreme Court had held that other aspects of the eminent domain statutes were applicable to inverse condemnation actions, the court held that it was improper to apply the date of valuation statute to inverse condemnation actions.⁴⁰ The court found that the Arizona statute fulfilled the purpose of just compensation “in a direct condemnation action because the property is valued at a point close in time to the

30. *Id.*

31. ARIZ. REV. STAT. ANN. § 12-1123(A) (2009) (“For the purpose of assessing compensation and damages [in regards to condemnation actions], the right to compensation and damages shall be deemed to accrue at the date of the summons, and its actual value at that date shall be the measure of compensation and damages.”).

32. *Calmat*, 859 P.2d at 1324.

33. *Id.* (“The state argued that § 12-1123(A) was a direct condemnation statute and did not apply to an inverse condemnation action.”).

34. *Id.* at 1324–25. The difference in the date of entry that the state was arguing for and the date of summons in the inverse condemnation suit was eighteen months. *Id.*

35. *Id.*

36. *Id.* at 1325.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 1326–28.

actual taking.”⁴¹ However, the court found that, due to the timing differences in direct and inverse condemnation actions, the statute did not fulfill the purpose of just compensation in inverse condemnation actions.⁴² The court explained that “[t]iming is critical to valuation because it affects the fairness of the compensation when property values fluctuate between the date of the condemnor’s entry and the summons’ date.”⁴³ The court went on to explain how, if the court applied the date-of-valuation statute as written, “the property owner [would] either be over- or under-compensated, depending on whether the value of the property increases or decreases between the date of entry and the later summons’ date.”⁴⁴ The court then held that “[b]ecause the taking of possession constitutes a ‘taking’ of property, . . . the date of valuation in an inverse condemnation action should be set as of the date of entry.”⁴⁵

2. The date-of-possession or date-of-trespass method is inadequate for determining the date of valuation

There are two major inadequacies to using the date-of-possession or date-of-trespass method in inverse condemnation proceedings. The first inadequacy is that not all inverse condemnation actions involve a physical invasion—some are regulatory takings.⁴⁶ The second inadequacy is that this method, by itself, does not deter a potential condemnor from acting in bad faith.⁴⁷

First, using the date of physical occupation or trespass does not account for inverse condemnation actions that do not involve physical invasions. While this method may or may not be applicable

41. *Id.* at 1326.

42. *Id.* The court explains that using the date of summons, as the Arizona statute directs, is logical in a direct condemnation action because it “fairly . . . represent[s] the date of taking.” *Id.* at 1327 (quoting *Maxey v. Redevelopment. Auth.*, 288 N.W.2d 794, 804 (Wis. 1980)). The court went on to explain that “the summons’ date in an inverse condemnation action bears no relation to the date of the taking. When an inverse condemnation action is filed, the condemning agency, by definition, has already taken the condemnee’s property.” *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1328.

46. *See, e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); *Dep’t of Transp. v. Shaw*, 345 N.E.2d 153, 160 (Ill. App. Ct. 1976), *rev’d in part on other grounds*, 369 N.E.2d 884 (Ill. 1977).

47. Determining the date that interest begins at the time of entry can minimize this shortcoming.

to the second type of inverse condemnation action,⁴⁸ it is definitely not applicable to the third type, because in that instance there is no physical occupation or trespass.⁴⁹ A good date-of-valuation rule or statute should account for the various types of inverse condemnation actions in order to ensure consistency.

Second, using the date-of-physical-occupation or date-of-trespass test does not deter potential condemners from acting in bad faith. Consider the following hypothetical: Blue Village wants to expand its sewer system. It buries its pipe in an unimproved desert area that Blue Village assumes no one will care about or notice. Five years later, the owners of the unimproved desert attempt to develop their land, and find out that they cannot because there is a sewer line running across their property. The property owners then file an inverse condemnation action. If the court used the date-of-physical occupation or date-of-trespass test, then the property owners would be stuck with an early valuation date that may or may not be just for them, depending on property values, and Blue Village would get the benefit from either acting in bad faith (by knowingly burying a sewer line on someone else's land) or failing to perform due diligence. Additionally, condemners have greater incentives to take property in bad faith because property owners are unable to get punitive damages in a condemnation action.⁵⁰

Using the date-of-physical occupation or date-of-trespass as the date of valuation in inverse condemnation actions is inappropriate because it does not account for situations where there is no physical occupation or trespass, and it inadequately deters condemners from acting in bad faith.

48. The second type is when "part of the landowner's land has been taken and the action is brought to recover damages to the land not taken that the property owner alleges have not been compensated in the original and formal eminent domain proceeding." *Shaw*, 345 N.E.2d at 160.

49. The third type is "when no land has been formally and physically taken by the condemnation authority, but the property owner alleges that he has suffered compensable damages resulting from the taking of certain of the bundle of property rights comprising his ownership." *Id.*

50. *See, e.g.*, *Clemmer v. Rowan Water, Inc.*, No 0:04CV165(HRW), 2006 U.S. Dist. LEXIS 6965, at *17 (E.D. Ky. Feb. 23, 2006) (finding that a property owner could not seek punitive damages in an inverse condemnation action because "punitive damage claims are precluded by the doctrine of reverse condemnation").

B. Using the Date of Trial as the Date of Valuation

There are numerous states that do not use the date of possession or trespass as the date of valuation.⁵¹ Instead some jurisdictions use the date of trial as the date of valuation. Courts tend to rely on three different rationales when determining that a date of valuation should be set as the date of trial. The first rationale is simply to apply a date-of-valuation statute, which statute clearly only contemplates direct condemnation actions, to the inverse condemnation action. The second rationale focuses on the fault of the parties. The third rationale argues that since a lawful taking does not take place until trial, the valuation of the property should be determined at the time of taking.

1. Applying the direct-condemnation-date-of-valuation statute

Just over half of the states have date-of-valuation statutes.⁵² Some of those states have held that those statutes apply in inverse condemnation actions as well as direct condemnation actions.⁵³ For example, in *Hayden v. Board of County Commissioners*, the Colorado Court of Appeals found that the date of valuation in an inverse condemnation action was the date of trial.⁵⁴ In *Hayden*, the plaintiffs had granted a temporary easement to the State in order to complete a highway project.⁵⁵ The plaintiffs had expressed “a willingness to grant a permanent right-of-way” if the county would commit to extend a different road.⁵⁶ Apparently, the county never committed to the road extension, and the State presumably remained on the temporary easement because the plaintiffs filed an inverse

51. See, e.g., *Mehl v. People ex rel. Dep't of Pub. Works*, 532 P.2d 489, 495 (Cal. 1975); *Hayden v. Bd. of Cnty. Comm'rs*, 580 P.2d 830, 834 (Colo. App. 1978); *Cnty. of Clark v. Alper*, 685 P.2d 943, 949 (Nev. 1984); *Williams v. Henderson Cnty. Levee Dist. No. 3*, 59 S.W.2d 93, 96 (Tex. Comm'n App. 1933).

52. Bauer, *supra* note 1, at 278 (stating that “twenty-nine states have a valuation date statute of some kind”).

53. See, e.g., *Hayden*, 580 P.2d at 834; *Alper*, 685 P.2d at 949. The court held that Nevada’s date-of-valuation statute applied to an inverse condemnation action that set the date of valuation as the date of trial. *Alper*, 685 P.2d at 949. The court also found that “[i]nverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings.” *Id.*

54. 580 P.2d at 834.

55. *Id.* at 832. The easement was granted in January 1968 and was to end no later than January 1969. *Id.*

56. *Id.*

condemnation action in 1974.⁵⁷ In December 1975, the trial court “found that a taking had occurred.”⁵⁸ The trial court also found that that the date of valuation was the date of trial.⁵⁹

On appeal, the appellate court affirmed the trial court and held that the date of trial was the correct date of valuation.⁶⁰ Relying on precedent, the court reasoned that “an inverse condemnation action is based on *Colo. Const.* Art. II, Sec. 15, and is to be treated as an eminent domain proceeding, conducted *strictly* according to the procedures set out in [Colorado’s] eminent domain statute”⁶¹ The applicable statute in *Hayden* states that the date of valuation is the date that the petitioner is authorized by agreement to take possession of the property, or “the date of trial or hearing to assess compensation, whichever is earlier.”⁶² The court reasoned that since there was no agreement for a permanent easement, the trial court was correct in finding that the date of trial was the correct date of valuation.⁶³

2. *Looking at the fault of the parties*

The second rationale that some states use for establishing the date of trial as the date of valuation is fault based.⁶⁴ States that look to fault when determining a date of valuation vary on which party they look to for fault. However, there are two main approaches: courts will either look to see if the property owner is *not* at fault for

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 834.

61. *Id.* at 833–34 (emphasis added).

62. *Id.* at 834. The statute may have been amended since then, but it reads substantially the same. It is interesting to note that the plain language of the statute seems to show that the legislature had intended the statute to apply only to direct condemnation proceedings, since the statute references the *petitioner* taking possession, which clearly implies the condemnor and not the condemnee. Despite the plain language, the court still held that the statute applies to inverse condemnation proceedings. COLO. REV. STAT. § 38-1-114(2)(a) (1973).

63. *Hayden*, 580 P.2d at 834.

64. *See, e.g.*, *Mehl v. People ex rel. Dep’t of Pub. Works*, 532 P.2d 489, 495 (Cal. 1975); *Williams v. Henderson Cnty. Levee Dist. No. 3*, 59 S.W.2d 93, 96 (Tex. Comm’n App. 1933) (finding that when a condemnor took property without complying with the law, “it was proper for the trial court to estimate the value of the land taken or damaged as of the date of the trial.”).

the delay in seeking his or her remedy,⁶⁵ or courts will look to the fault of the condemnor.⁶⁶

In *Mehl v. People ex rel. Department of Public Works*, the trial court found that the state's construction of a freeway right next to the Mehl's property was a taking.⁶⁷ The trial court established that the date of trial, 1971, was to be the date of valuation, even though construction of the culvert, which constituted the taking, was completed in 1965.⁶⁸ The state appealed.⁶⁹

The California Supreme Court affirmed the trial court's decision to use the date of trial as the date of valuation.⁷⁰ The court reasoned that "if the landowner is not at fault in failing to promptly pursue his remedy in inverse condemnation, he should enjoy the benefit of any increase in the value of his land at the time of trial."⁷¹ The court deferred to the trial court's findings that the property owners were not at fault for the delay in the proceedings and held that "it was not erroneous to evaluate the property as of the time of trial."⁷²

3. Using the date of the "lawful" taking

The third rationale that states use for establishing the time of trial as the date of valuation in inverse condemnation actions is that property must be *lawfully* taken in order to establish compensation.⁷³

65. See *Mehl*, 532 P.2d at 495.

66. *Anderson v. Port of Seattle*, 304 P.2d 705, 707-08 (Wash. 1956). The court found that when the condemnor takes property in "advance of condemnation proceedings, [the condemnor] cannot insist that the compensation awarded in the condemnation proceedings be fixed as of the date of the unlawful entry." *Id.*

67. *Mehl*, 532 P.2d at 491-92.

68. *Id.* at 491-92, 494.

69. *Id.* at 491.

70. *Id.* at 495.

71. *Id.*

72. *Id.*; see also *Mt. San Jacinto Cmty. Coll. Dist. v. Super. Ct.*, 117 Cal. App. 4th 98, 105 (2004). The court found that even though the established rule for determining the date of valuation in inverse condemnation actions is the date of entry, "where the property has increased in value after the time of the invasion, . . . a later valuation date applies, provided the property owner is not at fault or 'culpable' for failing to diligently pursue its available remedies."

73. See, e.g., *Gully v. Sw. Bell Tel. Co.*, 774 F.2d 1287, 1291-92 (5th Cir. 1985) (finding that because Texas has indicated that the date of taking is the date that the condemnor lawfully takes possession, "value of the property condemned was correctly computed as of [the trial] date"); *Bartz v. Bd. of Supervisors*, 379 S.E.2d 356, 359 (Va. 1989) (finding that a taking does not occur until legal title passes to the condemnor); *White v. Highway Comm'r*, 114 S.E.2d 614, 616 (Va. 1960), *superseded by statute as recognized in Bartz*, 279 S.E.2d 356; *W. Va. Dep't of Highways v. Roda*, 352 S.E.2d 134, 139 (W. Va.

These courts reason that property is not lawfully taken until, among other things, court proceedings have been initiated.⁷⁴

This approach was demonstrated in *White*. In that case, a corporation conveyed two lots to Virginia's state highway commissioner ("the Commissioner") in order to build a highway.⁷⁵ However, this corporation did not own the lots, Ms. White and Ms. Jacox (the "Plaintiffs") did.⁷⁶ The Plaintiffs did not discover that a highway had been built on their property until fourteen years later.⁷⁷ Upon discovering that a highway had been built on their property, the Plaintiffs went to the Commissioner, but the parties were unable to agree on the value of the property.⁷⁸ The Commissioner then filed a condemnation proceeding, and the lower court found that the date the property should have been valued at was 1943, the date that the Commissioner took physical possession of the property.⁷⁹ The Virginia Supreme Court found that "the entry of the Commissioner on their land in 1943 was unauthorized and unlawful."⁸⁰ The court then held that:

the time of taking, with reference to which compensation is to be made, means the time at which the property is taken *lawfully* by appropriate legal proceedings. Conversely, it does not mean the time at which the property is taken unlawfully and without legal authority, as was done in this instance.⁸¹

Therefore, the court held that the Plaintiffs' property was not taken until it was lawfully taken some fourteen years later.

1986) (holding that "the date of take for the purpose of determining the fair market value of property for the fixing of compensation . . . is the date on which the property is lawfully taken by the commencement of appropriate legal proceedings"); *Koerber v. New Orleans*, 84 So. 2d 454, 458 (La. 1955) (finding that the date of valuation is the date that the property was taken lawfully).

74. See generally *Gully*, 774 F.2d at 1291-92; *Koerber*, 84 So.2d at 459; *Bartz*, 379 S.E.2d at 359; *White*, 114 S.E.2d at 616; *W. Va. Dep't of Highways*, 352 S.E.2d at 139.

75. *White*, 114 S.E.2d at 615.

76. *Id.*

77. *Id.* The improper conveyance was granted in 1946, but the Plaintiffs did not discover that the road had been built on their property until 1957. *Id.*

78. *Id.*

79. *Id.* at 616.

80. *Id.*

81. *Id.* (emphasis added).

4. Using the date of trial as the date of valuation is not just in inverse condemnation actions

Using the date of trial as the date of valuation in inverse condemnation actions encourages both parties to “game the system.” In a rising real estate market, this method encourages property owners to delay as long as possible before filing their inverse condemnation claim.⁸² On the other hand, in a declining real estate market, this method encourages the government to take property early and to “drag out negotiations in the hope of a favorable moment to demand condemnation.”⁸³ It is clear that in either situation, “just compensation” as required by the constitution is not met.

Because in inverse condemnation actions the date of physical taking always precedes the legal proceeding, using the date of trial as the date of valuation in *inverse condemnation actions* is inappropriate.⁸⁴ It is inappropriate because it renders unjust results, and it allows parties to strategically abuse the court system.

a. Using a direct-condemnation-date-of-valuation statute in inverse condemnation actions is irrational. A direct-condemnation-date-of-valuation statute does not contemplate the unique problems that inverse condemnation actions present. The Wisconsin Supreme Court addressed this very issue in *Maxey v. Redevelopment Authority of Racine*.⁸⁵ The *Maxey* court had to determine what date of valuation to use when determining the value of property in an inverse condemnation action.⁸⁶ The court recognized that there was

82. *See Calmat of Ariz. v. State ex rel. Miller*, 859 P.2d 1323, 1328 (Ariz. 1993); *see also* *Dep’t of Transp. v. Shaw*, 345 N.E.2d 153, 162 (Ill. App. Ct. 1976), *aff’d in part, rev’d in part*, 369 N.E.2d 884 (Ill. 1977). The court found that a date of valuation set as the date of trial was appropriate because a “property owner can bring [an inverse condemnation] action within the period of the statute of limitations” and it allows the “owner some leeway to determine when he shall seek redress for wrongs or unauthorized acts allegedly committed.” *Id.* This reasoning was rejected on appeal when the Illinois Supreme Court held that the date of valuation was “the date of the physical closing of [the] road.” *Shaw*, 369 N.E.2d at 888.

83. *Anchorage v. Nesbett*, 530 P.2d 1324, 1335 (Alaska 1975) (quoting *State Highway Comm’n v. Stumbo*, 352 P.2d 478, 483 (Or. 1960)). *See* *United States v. Dow*, 357 U.S. 17, 21–22 (1958) (finding that in cases where the government enters into possession of property prior to filing a claim, it is inappropriate to consider the time of filing as the time of taking because the government can reduce the amount of money it would have to pay to the landowner simply by not filing suit until the market is more favorable for the government).

84. *See, e.g., Maxey v. Redevelopment Auth. of Racine*, 288 N.W.2d 794, 804 (Wis. 1980).

a statute that fixed the date of valuation in a *direct condemnation action*, but found that “[t]hose portions of the eminent domain statutes which arguably could lead to the conclusion that a different date [other than the date of taking] should be used . . . not only make no sense in the case of an inverse condemnation but also, as a matter of legislative intent, are of doubtful applicability.”⁸⁷ The court reasoned that the statutes did not apply to inverse condemnation actions because, unlike direct condemnation actions where the date of taking is contemporaneous with the legal action, the date of taking in inverse condemnation actions precedes the legal action.⁸⁸ The court also reasoned that because property values fluctuate, a date of valuation that comes later than the date of taking would either unfairly enrich or unfairly penalize the property owner.⁸⁹

Several other courts have followed this reasoning.⁹⁰ The *Hayden* court was correct in pointing out that the *principles* of “just compensation” apply to inverse condemnation as well as direct condemnation actions.⁹¹ However, the *Hayden* court was wrong

85. *See id.* Other courts have chosen to ignore date-of-valuation statutes when they render unjust results. *Cnty. of Dona Ana v. Bennett*, 867 P.2d 1160, 1164–65 (N.M. 1994) (finding that the state’s date-of-valuation statute was inapplicable because it would provide inadequate compensation for the landowner); *Utah State Rd. Comm’n v. Friberg*, 687 P.2d 821, 828–30 (Utah 1984) (finding that because the state’s date-of-valuation statute, as applied to Friberg’s facts, did not constitute just compensation, it was inapplicable).

86. *Maxey*, 288 N.W.2d at 804.

87. *Id.* at 805.

88. *Id.* at 804 (“[I]n an inverse condemnation, the date of taking, by definition, is required to antedate the commencement of the proceedings and is a jurisdictional prerequisite of the inverse condemnation action.”).

89. *Id.* (“A valuation on the date of filing, if it is to coincide with the commencement of the action, would therefore unjustly enrich the property owner if the value of the property appreciated following the taking, or in the usual case, would unfairly penalize him if the property’s value were diminishing as a result of condemnation blight.”).

90. *See Fla. Dep’t of Transp. v. St. John’s Water Control Dist.*, 981 So. 2d 605, 606 (Fla. Dist. Ct. App. 2008) (“[I]n an inverse condemnation proceeding, the date of valuation for compensation is the date that the property was wrongfully appropriated by the condemning agency.”); *Jackson Mun. Airport Auth. v. Wright*, 232 So. 2d 709, 714 (Miss. 1970) (“[F]luctuations in the general economy[or] changes in the character of the neighborhood . . . are factors capable, at least, of materially altering market values and, consequently, of affecting the amount due as compensation.”); *Rose v. City of Lincoln*, 449 N.W.2d 522, 527 (Neb. 1989) (quoting *Dep’t of Transp. v. Shaw*, 345 N.E.2d 153, 161 (Ill. App. 1976) (“[V]aluation at the date of filing might have the effect of unjustly enriching the property owner . . . or of unfairly penalizing him, if property rights were depreciating.”)); *Hurley v. State*, 134 N.W.2d 782, 784–85 (S.D. 1965) (“[T]he correct date or time that compensation is to be ascertained is the date of the taking or damaging . . .”).

91. *Hayden v. Bd. of Cnty. Comm’rs*, 580 P.2d 830, 834 (Colo. Ct. App. 1978).

when it strictly applied a direct-condemnation-date-of-valuation statute that set the date of valuation at the date of trial.⁹² The *Hayden* court was wrong because using the date of trial as the date of valuation in the inverse condemnation action, even when there was a statute directing the court to do so, was inappropriate because it rendered unjust results. The results were unjust because the condemnor had “taken” the land much earlier.

b. Fault should not be a factor when determining the date of valuation. Considering fault or bad faith either on the part of the condemnor or, the lack of fault by the condemnee, should not be a factor when determining property value. Fault should not be considered because, even when a condemnor takes in bad faith, the condemnee bears some fault in any delay in bringing an action to court. At least one court has recognized that a property owner who fails to assert his rights is as much at fault as the wrongful trespasser.⁹³ The property owner in *Mehl* was not being a responsible landowner and should have born some fault for waiting six years to bring an inverse condemnation action.⁹⁴

Additionally, just compensation requires that the property owner be put in the same monetary position as he would be in if his property had not been taken.⁹⁵ The only logical reason that a court would want to look at fault or bad faith would be to deter others from that behavior. Damages in this sense can be seen as punitive, and punitive damages are prohibited in eminent domain cases.⁹⁶ Therefore, using a later valuation date based on the fault, or lack thereof, of either party is inappropriate when determining the date of valuation.

92. *Id.*

93. *State Highway Comm'n v. Stumbo*, 352 P.2d 478, 483 (Or. 1960) (finding that a property owner who fails “to assert his rights seasonably when the law gives him ample remedy, is hardly less at fault than the trespasser”).

94. *Mehl v. People ex rel. Dep't of Pub. Works*, 532 P.2d 489 (Cal. 1975).

95. *See Almeta Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473–74 (1973) (finding that just compensation requires that the property owner be “put in the same position monetarily as he would have occupied if his property had not been taken”).

96. *See, e.g., Clemmer v. Rowan Water, Inc.*, No 0:04CV165(HRW), 2006 U.S. Dist. LEXIS 6965, at *10–17 (finding that a property owner could not seek punitive damages in an inverse condemnation action because “punitive damage claims are precluded by the doctrine of reverse condemnation”).

c. Using the date of lawful taking as the date of valuation—in inverse condemnation actions—is completely inappropriate. Even though this rationale looks to the date of taking as the date of valuation, it is still inappropriate because it does not recognize that property might actually be taken much earlier. Using the date of trial for the date of valuation because the taking is not lawful until trial may be appropriate in a direct condemnation action; however, it is inappropriate in an inverse condemnation action. It is inappropriate in an inverse condemnation action because the taking in an inverse condemnation action—by definition—occurs before the proceeding.⁹⁷ And by following this reasoning, courts are per se not allowing inverse condemnation. In a declining real estate market, this reasoning only encourages condemnors to take early because they know that by the time the action goes to court the property would be worth significantly less.

C. Using the Date that the Condemnor Substantially Affected the Condemnee's Use and Enjoyment of His Property as the Date of Valuation

New Jersey's date-of-valuation statute contemplates inverse condemnation actions.⁹⁸ The statute provides that the date of valuation is determined at the "earliest" of four options: (1) the date that the condemnor possess the property "in whole or in part"; (2) the date that the condemnation proceeding commences; (3) the date that the condemnor acts in a way which "substantially affects the use and enjoyment of the property by the condemnee"; or (4) "the date of a declaration of blight by the governing body."⁹⁹ While this statute does not specifically mention "inverse condemnation actions," it is clear that options (1) and (3) contemplate inverse condemnation actions.

New Jersey's first option is the "date of physical occupation or trespass" rationale that most jurisdictions use.¹⁰⁰ New Jersey's second

97. *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.").

98. *See* N.J. STAT. ANN. § 20:3-30 (West 2009).

99. *Id.* Option (4) has some abandonment requirements that are inapplicable to inverse condemnation actions. *Id.*

100. *See supra* Part II.A.

option is the date of trial.¹⁰¹ New Jersey's third option allows the property to be valued on the date that the condemnor "substantially affect[ed] the use and enjoyment of the property."¹⁰² By requiring a court to use the "earliest" of the four date of valuation options, New Jersey is attempting to solve some of the date-of-valuation problems that inverse condemnation actions create. New Jersey attempts to solve these problems by setting the date of valuation close to the date of taking. However, New Jersey's statute creates perverse incentives and gives unjust compensation.

1. New Jersey's "substantially affected" test

The "substantially affected" test allows a court to value property from the time government action "substantially affects the [property owner's] use and enjoyment of his property."¹⁰³ In *Township of West Windsor v. Nierenberg*, the New Jersey Supreme Court held that "a letter written by a municipality to a *potential* condemnee 'substantially affect[ed]' the value of the property, thereby setting the valuation date pursuant to N.J.S.A. 20:3-30(c)."¹⁰⁴ The property owners in *Township of West Windsor* formed Princeton Manor Associates ("PMA") in 1987.¹⁰⁵ PMA's purpose was to develop property that it had purchased from the Nierenbergs.¹⁰⁶ However, "some time prior to 1987, the property . . . was designated on the Township's Master Plan as a potential site for West Windsor's proposed Community Park."¹⁰⁷ PMA submitted a subdivision plan and application "to the Township on May 13, 1988."¹⁰⁸ Over the next month, PMA received two letters dealing with potential problems with their application.¹⁰⁹ The second letter stated that PMA's property was not entirely served by public sewers and that "percolation tests and soil log data for the property would be required before the application would be considered further."¹¹⁰

101. *See supra* Part II.B.

102. N.J. STAT. ANN. § 20:3-30.

103. *See id.*; Twp. of W. Windsor v. Nierenberg, 695 A.2d 1344 (N.J. 1997).

104. 695 A.2d at 1346, 1358 (emphasis added).

105. *Id.* at 1346.

106. *Id.*

107. *Id.*

108. *Id.* The plan was in compliance of the specific zoning that applied to PMA's property.

109. *Id.*

110. *Id.*

PMA had to decide to either wait seven months and perform a percolation test that cost \$40,000, or “attempt to have the municipal sewer plan amended to provide service to the entire property.”¹¹¹ However, while PMA was studying their options, they received a letter from the Township Administrator.¹¹² The letter was to serve as “formal notification that West Windsor [sic] Township may acquire [the] property for the purpose of establishing a Community Park.”¹¹³ The letter also informed PMA that the Township of West Windsor (the “Township”) had already received part of the funding it needed and had applied for a low-interest loan.¹¹⁴ After receiving the letter, PMA’s counsel advised PMA “that they could not secure Township approval for enlargement of the sewer system when the Township appeared intent on condemning the property.”¹¹⁵ Six months later, PMA’s counsel wrote a letter to the Township informing them that PMA had “found it impossible . . . to proceed with the development plans previously filed.”¹¹⁶ He also informed the Township that PMA still had “not even received an appraisal or any form of offer.”¹¹⁷ The Township responded that they were still in the process of determining the value and would inform PMA when they could begin negotiating.¹¹⁸

After two years of negotiating, PMA filed an inverse condemnation suit “seeking . . . just compensation for the Township’s alleged destruction of the value of its property.”¹¹⁹ However, negotiations between PMA and the Township continued until PMA rejected several offers.

After several experts testified concerning whether or not the July 1988 letter substantially affected PMA’s use and enjoyment of the property, the trial court concluded that it did and determined the property should be valued as of the July 1988 letter.¹²⁰ The trial

111. *Id.*

112. *Id.* at 1346–47.

113. *Id.* at 1347.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1348.

120. *Id.* The court found that even though the letter said that the Township “may” acquire PMA’s property, “the word ‘may’ is so overwhelmed by the other aspects of the letter” that PMA was justified in concluding that the Township was going to acquire the property. *Id.* at 1349–50.

court “reasoned that the Township’s letter impeded development, thereby significantly diminishing the possibility that the land would be put to its highest and best use as a residential development.”¹²¹

On appeal, the court held that “the letter did not substantially affect [PMA’s] use and enjoyment of the property”¹²² and that PMA could have continued with the subdivision process, which would have forced “the Township to determine its acquisition plans.”¹²³ The appellate court recognized that PMA “would have incurred significant expenses” in continuing with the subdivision process, but the court indicated that these expenses were business risks.¹²⁴ The New Jersey Supreme Court overturned the appellate court and reasoned that the Township’s letter did substantially affect PMA’s use and enjoyment of the property.¹²⁵

2. Using the “substantially affected” test for determining the date of valuation renders unjust results.

Determining the date of valuation using the “substantially affected” test renders unjust results for both condemners and condemnees.¹²⁶ Property values fluctuate, and this test creates perverse incentives for either party to attempt to obtain a favorable date of valuation. This test also allows for valuation dates to precede the date of taking.

As discussed earlier, property values can increase or decrease depending on market conditions.¹²⁷ The majority in *Township of West*

121. *Id.* at 1350.

122. *Id.* at 1351. The court reasoned that the letter did not promise that the Township would condemn, but only that it might. It also reasoned that PMA knew, before it purchased the property, that the Township had already listed the property as a potential site for a community park. *See id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1357. The New Jersey Supreme Court reasoned that even though PMA could have continued its attempts to develop, the Township’s letter had substantially affected PMA’s use and enjoyment of the property because PMA thought that any attempts “would have been futile.” *Id.*

126. The substantially affected test can also promote secrecy. The dissent in *Township of West Windsor* noted that the majority’s decision “discourages municipalities from informing property owners about possible plans to acquire their property.” *Id.* at 1363 (O’hern, J., dissenting). This test promotes secrecy because property values may already be going down, and developers like PMA may not be able to get subdivision approval. As such, why should municipalities give property owners a windfall by announcing *potential* plans that may or may not actually happen?

127. *See supra* Part I.

Windsor thought that the “substantially affected” test would protect both condemnors and condemnees.¹²⁸ However, this test can create perverse incentives for either party to attempt to obtain a favorable date of valuation and, depending on what the real estate market is doing, to drag out negotiations.

The “substantially affected” test used in combination with the principle that a condemnor can inform a property owner of intent to condemn and later abandon those condemnation proceedings denies just compensation to condemnees.¹²⁹ Consider the following hypothetical: The town of Greenville wants to build a park and has three sites to choose from. Property values in the area are dramatically increasing, so Greenville decides to send intent-to-condemn letters to all three properties effectively “freezing the date of valuation” as the date of the letter. Greenville can then go through the process of determining which property it will actually condemn. After making its decision, Greenville can then inform the property owners at the other two sites of its intent to abandon the condemnation proceedings. In a rising real estate market, Greenville gets the benefit of an early valuation date.

The “substantially affected” test can also unjustly enrich property owners. *Township of West Windsor* is a great example of how a property owner can be unjustly enriched. In *Township of West Windsor*, PMA purchased property that it knew was a potential site for a park.¹³⁰ PMA attempted to get approval for subdivision, but the Township denied the application.¹³¹ PMA then received a letter from the Township informing the developer that the Township *may* condemn the property.¹³² PMA then *decided* not to spend the extra money it would take to *attempt* to get approval to subdivide.¹³³ By holding that the date of valuation should be the date of the letter of intent, the New Jersey Supreme Court allowed PMA to get the

128. 695 A.2d at 1358 (finding that “[c]ondemnors are not prejudiced by [the substantially affected test] and, in fact, may benefit from its application in instances where governmental action precipitates a substantial increase in the value of the subject property”).

129. *See* *Thompson v. Tualatin Hills Park & Recreation Dist.*, 496 F. Supp. 530 (D. Or. 1980) (finding that the government could abandon a condemnation proceeding without there being a taking in a case where a property owner had an option to purchase a right of way which he later declined due to the condemnation proceeding).

130. 695 A.2d at 1351.

131. *Id.* at 1346.

132. *Id.* at 1347.

133. *Id.*

benefit of an early date of valuation in a declining market.¹³⁴ PMA received this benefit without any showing that it would have gotten approval to subdivide in the absence of condemnation.¹³⁵ Applying the “substantially affected” test created perverse incentives for PMA to “sit” on the property without any business risk and get the benefit of a larger compensation award.

Applying the “substantially affected” test allows for the date of valuation to precede the taking.¹³⁶ The Utah Supreme Court stated that using a date of valuation that precedes the actual taking may not “reflect a fair valuation of the property and [may] not therefore constitute ‘just compensation.’”¹³⁷ This is especially true when the court uses the “substantially affected” test in an inverse condemnation action. In an inverse condemnation action, “the property owner is ‘required to show that there has been substantial destruction of the value of [his or her] property and that [the taking party’s] activities have been a substantial factor in bringing this about.’”¹³⁸ Because plaintiff’s use and enjoyment of his property would be substantially affected before there was a substantial destruction of the value of his property, the property would be valued at a time *before* the law recognizes that the property has even been taken.

D. The Method for Determining Date of Valuation Should be the Date of Physical Occupation/Trespass or Date that Condemnor’s Interference Became a Taking.

Just compensation begins with determining a proper date of valuation. Taken property should be valued at the time that the property is taken.¹³⁹ It is clear that the most unjust results happen when courts use a date of valuation that is different than the date of

134. *See id.* at 1358.

135. *Id.* at 1357.

136. *See id.* at 1356–57.

137. *Utah State Rd. Comm’n v. Friberg*, 687 P.2d 821, 829 (Utah 1984) (finding that “[w]hen valuation is fixed at a date prior to the actual taking and the value of the property increases during a prolonged condemnation proceeding . . . the valuation does not reflect a fair valuation of the property and does not therefore constitute ‘just compensation . . .’”).

138. *Twp. of W. Windsor*, 695 A.2d at 1356 (first alteration in original) (quoting *Wash. Mkt. Enters. v. City of Trenton*, 343 A.2d 408, 416 (N.J. 1975)).

139. *United States v. Dow*, 357 U.S. 17, 22 (1958) (finding that the “event which gives rise to the claim for compensation” is to be the date of valuation).

taking. As discussed earlier, there are problems with the various approaches courts use when determining a valuation date.

The method of valuing the property at the date of possession or trespass does not help a court determine a date of valuation when there is no physical trespass or possession. In addition, using the date of possession or trespass might encourage condemnors to act in bad faith.

The method of using the date of trial also has many problems. When the date of valuation is the date of trial, it allows for unjust results because property values can fluctuate greatly if the date of the actual taking and the date of trial are separated by a large amount of time. It is unjust when property is valued either higher or lower than its value at the time of taking. Depending on the situation, this method is unjust to either the condemnor or the condemnee.

Some courts use the date of trial as the date of valuation because they want to give the property owner greater compensation. This reasoning is very shortsighted because these courts are creating rules that, depending on the real estate market, do not always benefit the property owners. Other courts have reasoned that since one party was more at fault, they should bear the financial burden. This reasoning is effectively awarding punitive damages, which is inappropriate when determining just compensation.¹⁴⁰

Using the date that the condemnor “substantially affected” the condemnee’s use and enjoyment of the property as the date of valuation is improper because it creates perverse incentives for both parties. In rising markets, condemnors will prematurely inform property owners of intent to take, thus substantially affecting the property owner’s use and enjoyment, and freezing the date of valuation. In declining markets, the property owner will try to show that he was substantially affected from the earliest possible date. This method also allows for the date of valuation to precede the date of taking.

A proper date of valuation should not only be just, it should also be consistent. A consistent method for determining the date of valuation will encourage parties to settle out of court because both parties will know, from the outset, which date of valuation is used by

140. A party could bring a claim that is related to their taking claim and ask for punitive damages, but punitive damages should not be contemplated in the just compensation requirement of the Fifth Amendment. *Clemmer v. Rowan Water, Inc.*, No 0:04CV165(HRW), 2006 U.S. Dist. LEXIS 6965, at *16 (E.D. Ky. Feb. 23, 2006).

the court.¹⁴¹ The *Stumbo* court recognized the benefit of a consistent method for determining the date of valuation. The court reasoned that when there is a consistent method for determining the valuation date “[t]here will be no motive on either side to drag out negotiations in the hope of a favorable moment to demand condemnation.”¹⁴²

A proper date of valuation statute should be the earlier of the date of physical occupation or trespass, or the date the potential condemnor’s interference became a taking. This method is just to both the condemnor and the condemnee because the date of valuation will be the date of the actual taking. When the date of valuation is the date of taking, courts do not have to worry about depreciating or appreciating land values.

Where there is a physical possession or trespass, the court should use the date of the possession or trespass as the date of valuation because that is the date of taking. This is the majority rule followed by the United States Supreme Court and several states.¹⁴³

Where there is no actual possession or trespass, the court should use the date that the government interference became a taking. This method fills any gaps that using the date of physical occupation or trespass leaves. Using the date that the condemnee’s interference becomes a taking will be used in the second and third types of inverse condemnation cases.

In the second type of inverse condemnation actions, where the property owner is compensated for part of his land that has been taken, but brings an action alleging damages to the land that has not

141. See Bauer, *supra* note 1, at 282 (stating that “[v]aluation date statutes also attempt to provide consistency and predictability. With a clearly established valuation date, the triers of fact and the parties to condemnation actions can determine the appropriate valuation date and develop reasonable expectations about the required evidence and the ultimate result. Also, condemnors will know in advance of a condemnation action how the property will be valued, and knowing this information may affect the decision to take the property.”).

142. State Highway Comm’n v. Stumbo, 352 P.2d 478, 483 (Or. 1960).

143. First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A., 482 U.S. 304, 320 n.10 (1987); City of Anchorage v. Nesbett, 530 P.2d 1324, 1335 (Alaska 1975); Calmat of Ariz. v. State *ex rel.* Miller, 859 P.2d 1323, 1327 (Ariz. 1993) (en banc); Fla. Dep’t of Transp. v. St. John’s Water Control Dist., 981 So. 2d 605, 606 (Fla. Dist. Ct. App. 2008); Hulsey v. Dep’t of Transp., 498 S.E.2d 122, 126 (Ga. Ct. App. 1998); Tibbs v. City of Sandpoint, 603 P.2d 1001, 1005 (Idaho 1979); Adams v. Parish, 978 So. 2d 1202, 1208 (La. Ct. App. 2008); Jackson Mun. Airport Auth. v. Wright, 232 So. 2d 709, 715 (Miss. 1970); Rose v. City of Lincoln, 449 N.W.2d 522, 527 (Neb. 1989); Hurley v. State, 134 N.W.2d 782, 784 (S.D. 1965).

been condemned,¹⁴⁴ the date of valuation would be the date that the condemnor's actions became a taking. Depending on the particular circumstances, the second type of inverse condemnation actions will have one of two different valuation dates: (1) the date that the original piece property was "taken," or (2) the date that the condemnor's interference became a "taking."

In the third type of inverse condemnation actions, where the condemnor does not formally or physically take any land but the condemnor interferes with the property owner's "bundle of rights" to a degree that constitutes a taking,¹⁴⁵ the date of valuation will be the date the court determines that the interference became a taking. Determining the date that the government's interference became a taking could be a comment in and of itself. However, a court could use the ripeness test discussed in *Palazzolo v. Rhode Island*. In *Palazzolo*, the United States Supreme Court determined that generally a party cannot bring a regulatory taking claim until it is ripe.¹⁴⁶ The Court discussed how a takings claim "is not ripe unless 'the government entity charged with implementing the regulation[] has reached a final decision.'"¹⁴⁷ The *Palazzolo* court went on to reason "once it becomes clear that the agency lacks the discretion to permit any development . . . a takings claim is likely to have ripened."¹⁴⁸

While *Palazzolo* involved an agency regulation, the same reasoning could be used for any other regulatory taking. Under the ripeness test there are two possible dates of taking. If an ordinance, regulation, or statute is passed that allows for exceptions, then the date of taking is the date that the agency, city council, or whatever group is responsible for approving or disapproving the exception makes a final decision. If the ordinance, regulation, or statute does not allow for exceptions then the date that the ordinance, regulation, or statute took effect would be the date of taking.

When courts are faced with a situation where there is a statute that sets the date of valuation as the date of trial, they should do what Wisconsin did in *Maxey* and find that the statute does not apply

144. See *Dep't of Transp. v. Shaw*, 345 N.E.2d 153, 160 (Ill. App. Ct. 1976), *aff'd in part, rev'd in part*, 369 N.E.2d 884 (Ill. 1977).

145. See *Bauer*, *supra* note 1, at 273.

146. *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001).

147. *Id.* (emphasis added) (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)).

148. *Id.* at 620.

to inverse condemnation actions because it is irrational.¹⁴⁹ This reasoning has also been followed in other jurisdictions.¹⁵⁰

One problem with the suggested method for determining the date of valuation is that it does not deter the condemnor from acting in bad faith. One way to deter bad faith is through punitive damages; however, as discussed above, punitive damages should have no place when determining just compensation.¹⁵¹ However, as discussed below, awarding interest can substantially increase a compensation award and might deter some condemnors from acting in bad faith.

III. DETERMINING THE DATE AT WHICH INTEREST BEGINS TO ACCRUE

The date that the court determines that interest should accrue (the “date of interest”) is also very important when determining just compensation in inverse condemnation actions. The Supreme Court of the United States found that adding interest to property value is a part of just compensation “as required by the Fifth Amendment.”¹⁵² Just like determining the date of valuation, courts use various dates to determine the date of interest.¹⁵³ Courts should set the date of interest as the date of taking. If this Comment’s suggestions are used, then the date of taking, date of valuation, and the date of interest will all be the same date.

149. *Maxey v. Redevelopment Auth. of Racine*, 288 N.W.2d 794, 805 (Wis. 1980) (deciding not to follow a statute that would have required a valuation date that was much later than the date of taking).

150. *See, e.g., Mayor of Baltimore v. Kelso Corp.*, 380 A.2d 216 (Md. 1977).

151. *See supra* note 140.

152. *Albrecht v. United States*, 329 U.S. 599, 603 (1947) (finding that “the reasoning on which interest is added to value as a part of ‘just compensation’ in court condemnation proceedings is . . . that when a court determines just compensation, it first fixes bare value at the time of the taking and adds a sum to compensate for deferred payment of bare value so as to make the property owner whole as required by the Fifth Amendment.”).

153. *Calmat of Ariz. v. State ex rel. Miller*, 859 P.2d 1323, 1328 (Ariz. 1993) (en banc) (interest awarded from the date of entry); *Mehl v. People ex rel. Dep’t of Pub. Works*, 532 P.2d 489, 495 (Cal. 1975) (interest awarded from the date the condemnation is appreciable); *Cnty. of Clark v. Alper*, 685 P.2d 943, 950 (Nev. 1984) (interest awarded from the time of taking); *Bartz v. Bd. of Supervisors*, 379 S.E.2d 356, 360 (Va. 1989) (no interest on a compensation award that is timely paid).

A. Courts That Use the Date of Trial as the Date of Valuation Use Different Dates of Interest

This Comment discussed the three rationales that courts use when they determine that the date of valuation is the date of trial. These rationales consist of: following an eminent domain statute, looking at fault, and looking to when a lawful taking happens. However, not surprisingly, these same courts have established different dates of interest.

1. Some courts have found that the date of interest should be the time of taking

In *County of Clark v. Alper*, the Nevada Supreme Court determined that the date of valuation was the date of trial.¹⁵⁴ The court found that the date of interest should be different than the date of valuation and held that the date of interest should be the date of possession—a date earlier than the date of trial.¹⁵⁵

The court rejected the county's argument that giving the property owners the benefit of a later valuation date and an *earlier* date of interest constituted double recovery.¹⁵⁶ The court found that "[a]lthough the landowner has been benefited by the time of trial valuation, he or she has still been deprived of the use of the proceeds that should have been paid at the time of the taking."¹⁵⁷ The court reasoned that "[t]he intent of the legislature by enacting [the date of valuation statute] was . . . to force the government to bring a condemnation action to trial."¹⁵⁸ The court seemed to be indicating that by giving the property owners the benefit of a later valuation date and an earlier date of interest, it was punishing the condemnor for not bringing the action to trial.

154. 685 P.2d at 949 (finding that "[i]nverse condemnation proceedings are the constitutional equivalent to eminent domain actions and are governed by the same rules and principles that are applied to formal condemnation proceedings").

155. *Id.* at 949–50.

156. *Id.* at 949. The county argued that since the property had appreciated between the time of taking and the time of trial, the property owners were already compensated for the time between the taking and compensation. *Id.*

157. *Id.* at 950. The court went on to say that "[s]uch an award is proper notwithstanding the fact that the value of the property was fixed as of the date of trial and the fact that the property's value at the time of trial was more than its value at the time of the taking." *Id.*

158. *Id.*

This approach is inappropriate for a couple of reasons. First, it unjustly compensates the property owner by giving him a double benefit. And second, using this rule as a way to punish a condemnor for not bringing an action in court is inappropriate because this rule does not contemplate the different kinds of inverse condemnation proceedings.

A double benefit is what can happen when a court applies a date of valuation statute that was meant for direct condemnation actions to an inverse condemnation action. There would have been no problem in applying the date-of-valuation statute in *Alper* with date of interest if *Alper* had been a direct condemnation action. In a direct condemnation action, the taking does not occur until trial. Therefore, in a direct condemnation action the date of taking, the date of trial, and the date of interest are all on or around the same time. This is what the statute in *Alper* contemplated. It does not work in inverse condemnation actions.

By relying on its interpretation of the intent of the legislature—that the date of valuation statute is the legislature’s way of trying to force the condemnor to bring direct condemnation actions—the *Alper* court did not foresee the situations where the condemnor does not think that it is “taking” anything. As discussed earlier in this Comment, there are a few different types of inverse condemnation actions.¹⁵⁹ Inverse condemnation actions can consist of regulatory takings.¹⁶⁰ Regulatory takings can be very hard for property owners to prove, and condemnors would be justified in assuming, in the majority of cases, that there was not a taking.¹⁶¹ Awarding a later valuation date and an earlier valuation date—in an attempt to force condemnors to use their taking power—is wholly inappropriate in inverse condemnation actions involving regulatory takings.

2. Some courts have found that the date of interest should be the date that the landowner became aware of the taking

In *Mehl*, the California Supreme Court held that the date of valuation was the date of trial as long as the “landowner is not at fault in failing to promptly pursue his remedy.”¹⁶² The *Mehl* court

159. See *supra* Part II.

160. See *supra* note 46 and accompanying text.

161. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

162. *Mehl v. People ex rel. Dep’t of Pub. Works*, 532 P.2d 489, 495 (Cal. 1975).

found that the date of interest should be the date that the landowner became aware of the taking.¹⁶³

Although not as extreme as *Alper*, because the property owner was already compensated for the loss of compensation with a late valuation date, the *Mehl* method allowed for a double recovery. However, unlike the court in *Alper*, which offered reasons it was giving what might have seemed to be unjust, the court in *Mehl* gave no real reason why it found that the date of interest was earlier than the date of valuation.¹⁶⁴

3. Some courts have found that the date of interest should be the date of trial

In *Bartz v. Board of Supervisors*, the Virginia Supreme Court held that the date of valuation was the date of trial because a “lawful” taking does not occur until a “compensation award [has been] paid and legal title passed.”¹⁶⁵ The court, using the same reasoning, held that the date of interest should be the same date.¹⁶⁶

In application this means that a landowner is not ever entitled to interest because if legal title does not pass until the money has been paid to the landowner, then interest will not be required. This method of determining the date of valuation and interest is flawed in many ways.¹⁶⁷ This method does not meet the requirements of “just compensation” that the Constitution requires. Under this approach a condemnor knows it can take property early without worrying about paying any increase in land values, since the condemnor will not be required to pay interest from the time that it actually “took” the property.

B. Some Courts that Use the Date of Possession as the Date of Valuation Use the Same Date as the Date of Interest

When a court determines that the date of valuation is the date of possession, it seems most appropriate to set the date of interest from that date also. In *Calmat*, the Arizona Supreme Court held that the

163. *Id.* (finding that interest should be awarded from the date that the taking becomes “appreciable”).

164. *Id.*

165. *Bartz v. Bd. of Supervisors*, 379 S.E.2d 356, 359 (Va. 1989).

166. *Id.*

167. *See supra* Part II (discussing why this method for determining the date of valuation is inappropriate).

date of valuation was the date of possession.¹⁶⁸ The court then determined that the property owner is entitled to interest from the same date.¹⁶⁹

Looking to an Oregon Supreme Court case, the court in *Calmat* recognized that “one weakness . . . [in] valuing the property as of the date of entry was that the property owner would be deprived of the reasonable rental value of the land for the period of the state’s wrongful occupation.”¹⁷⁰ This weakness was fixed by awarding the property owner “interest on the property’s value measured from the date of entry.”¹⁷¹

This approach seems to be appropriate except for the inverse condemnation actions (especially regulatory takings) where there is no possession or trespass. It is difficult to determine what date of interest the *Calmat* court would use in an inverse condemnation action where there was no physical possession or trespass by the government. The court could award interest from the date that the interference became a taking, or award it from the day that the court decided it was a taking. A clear, certain rule will encourage parties to settle and discourage litigation.¹⁷²

C. The Date of Interest Should Be the Same Date as the Dates of Taking and Valuation

The basic principles of just compensation seem to require that the date of taking and the date of interest be the same date because interest should be required from the date that compensation is due. Under this Comment’s suggested method, the date of interest in inverse condemnation actions would begin either from the date of possession or trespass, or the date that the condemnor’s actions became a taking. Ensuring that interest begins from this date will also help deter potential condemnors from acting in bad faith because they will have to pay interest from the date that the property

168. *Calmat of Ariz. v. State ex rel. Miller*, 859 P.2d 1323, 1328 (Ariz. 1993) (en banc).

169. *Id.*

170. *Id.* (citing *State Highway Comm’n v. Stumbo* 352 P.2d 478, 483 (Or. 1960)).

171. *Id.* The court also found that this reasoning “is consistent with United States Supreme Court’s holding in *Seaboard Air Line Ry. v. United States*, where the Court held that a property owner is entitled to interest running from the date of the government’s entry where the government takes possession before ascertaining or paying compensation.” *Id.* (citing *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 306 (1923)).

172. *Stumbo*, 352 P.2d at 484 (citing *Parks v. City of Boston*, 15 Pick. 198, 208 (Mass. 1834)).

was taken, and interest can substantially increase a compensation award.

IV. CONCLUSION

The methods that courts currently use to determine the date of valuation and date of interest in inverse condemnation actions do not consistently provide just compensation. The method that uses the date of possession or trespass as the date of valuation is improper because it does not contemplate scenarios in which there is no physical possession. The methods that use the date of trial as the date of valuation and the date that the condemnor's actions substantially affected the landowner's use and enjoyment are improper because the property is not valued at the date the property was taken. Additionally, courts are very inconsistent when determining the date that interest accrues in inverse condemnation actions. The most just method is to set the date that interest accrues, the date of taking, and the date of valuation as the same date.

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