

APPRAISAL INSTITUTE 2011 ANNUAL MEETING

KEY BANKRUPTCY AND CONDEMNATION ISSUES FOR VALUATION CONSULTANTS

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Robert J. Miller
BRYAN CAVE LLP
Two N. Central Avenue
Suite 2200
Phoenix, AZ 85004
Phone: 602-364-7043
E-mail: rjmiller@bryancave.com

K. Erik "Rick" Friess
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
1900 Main Street, 5th Floor
Irvine, CA 92614-7321
Phone: 949-553-1313
rfriess@allenmatkins.com

Panel Outline

- Introduction and Welcome
- Introduction of Panelists and Their Practices
- Choosing an Appraiser
- Issues with Appraisers and Appraisals
- The Appraisal Profession
- Daubert Challenges
- USPAP, Rule 26, File Maintenance
- Opportunities for Appraisers
- Marketing Appraisal Services
- Questions and Answers

Panelists & Practice Areas

Robert J. Miller

Bryan Cave LLP

Phoenix, AZ

Bankruptcy, Restructuring & Creditors Rights

K. Erik “Rick” Friess

Allen Matkins Leck Gamble Mallory & Natsis LLP

Irvine, CA

Eminent Domain and Real Estate Litigation

Bankruptcy Case Study

- Two resort properties in California
- \$110mm in CMBS secured debt; \$20mm in subordinated debt; \$4mm in vendor debt
- Resort #1 as is value: \$25-30mm;
- Resort #2 as is value: \$70-90mm
- EBITDA/debt service capacity of the resorts

Prebankruptcy Stage

- Loan modification/forbearance negotiations
- Role of financial consultant and/or appraiser
- Outcome – interim peace or global solution

Initial Chapter 11 Stage

- Initial financial analysis
- Cash collateral and/or DIP loan process
- Adequate protection valuation process and consultant's role
 - Prepare or verify property projections
 - Testify on value of the lender's collateral
 - Testify on issues of adequate protection

Mid-Term Chapter 11 Stage

- Negotiations regarding a global solution
- Cash Collateral and/or DIP loan maintenance
- Stay relief – valuation litigation and consultant’s role
 - Proof: Equity in property and ability to formulate a facially confirmable plan
 - Consultant assignment #1 – valuation based on debtors’ use of property
 - Consultant assignment #2 – cash flow and debt service capacity for restructured debt
 - Consultant assignment #3 – adequate protection

Final Chapter 11 Stage

- Loan modification/forbearance negotiations
- Global consensual solution and restructured/new debt structure
- Contested plan confirmation – consultant’s role
 - Proof: plan feasibility
 - Consultant assignment #1 – cash flow and debt service capacity for restructured debt
 - Consultant assignment #2 – term and interest rate for secured creditor cram down
 - Consultant assignment #3 – sale or refinance exist at end of plan term and required proof
- Full Cram Down Plan
 - New value exception elements
 - Consultant assignment – value of restructured equity and equivalence to new value contribution

EMINENT DOMAIN BASICS

- 1) Basic Concepts
- 2) Basic Process

EMINENT DOMAIN: *Basic Concepts*

- Condemnation? Eminent Domain?
What is it?
 - What is it used for?
 - What is “just compensation”?

EMINENT DOMAIN: *What is it?*

- Power of the government to take property for “public use” – without the owner's consent – upon paying just compensation.
- The theory is that the sovereign (the government) holds the ultimate and superior title; our Constitution limits that power by requiring the payment of just compensation.

AN EXAMPLE OF WHY THE POWER EXISTS



EMINENT DOMAIN: *What is it Used For?*

- Must be for a “**Public Use**” –
but the Term is not well defined by the Constitution or by Statute.
- **Traditional Public Uses Include:**
 - Roads
 - Schools
 - Electrical Utilities
- **Non-Traditional Uses Include:**
 - Environmental Mitigation
 - Acquisition of a Professional Sports Team (the Oakland Raiders)
 - Redevelopment

“JUST COMPENSATION”

- Just Compensation in California is defined as “**fair market value**”: (Code Civ. Proc., § 1263.310.)
(The statutory definition of “fair market value” is somewhat different than the definition appraisers usually use.)
- **Objective Test:** Fair market value is an objective standard; evidence that an owner has a special affection for the property, or that the property possesses unique value to the owner, is not considered. (E.g., it doesn’t matter that Farmer Brown’s family has owned the property for generations; it is still valued objectively.)

“SEVERANCE DAMAGES”

- When a condemning agency takes only part of a property, just compensation must include compensation for the “part taken” and compensation for damages to the “remainder” property, or “**severance damages.**”
- Severance damages are those caused by:
 - The **severance of the part from the remainder** (e.g., chopped buildings, odd-shaped remainder, access impairment).
 - The **construction and use of the project** as proposed (e.g., noise and fumes from a freeway, loss of view).
- Any “**benefits**” from the project (e.g., increased traffic count from a widened road) are offset against severance damages (but not compensation for the part taken).
- Different, “before-and-after” test in federal courts and some states

“SEVERANCE DAMAGES”



EMINENT DOMAIN BASIC PROCESS

1. Pre-Offer

- Notice of Intent to Appraise
- Meeting with Appraiser

2. Offer

- Written Offer
- Negotiation
 - Information Packet
 - \$5,000 Appraisal Fee to Owner in California

EMINENT DOMAIN BASIC PROCESS (Cont'd.)

3. Resolution of Necessity and Filing of Litigation
 - Notice of Hearing and Hearing on Resolution of Necessity
 - Filing and Service of Complaint

4. Possession

EMINENT DOMAIN BASIC PROCESS (Cont'd.)

5. Litigation Steps

- Withdrawal of Deposit
- Ordinary Discovery
- Trial Setting
- Appraisal and Other Expert Discovery
 - Exchange
 - Depositions
- Trial
- Appeal

Choosing an Appraiser

Issues With Appraisers and Appraisals

The Appraisal Profession

Daubert Challenges

USPAP and Rule 26

Opportunities for Appraisers

Marketing Appraisal Services

Questions and Answers