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The "Undivided Fee" Rule — A Rule of Valuation or Highway Robbery?

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**THE “UNDIVIDED FEE RULE” --
A RULE OF VALUATION, OR HIGHWAY ROBBERY?¹**

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A rule of valuation much beloved by condemnors, has it that where there are several interests in the property being condemned, it is to be valued by the so-called “undivided fee rule,” which presupposes that the subject property is owned by one person who holds an “undivided” fee simple title to it.² Once the value of the property is so determined, the lump sum awarded as the taken property’s fair market value is apportioned in a second-stage hearing in which the owners of the various interests present evidence of value of their respective interests and awards for their respective interests are made to each. Since by then the condemnor’s liability has been determined by the jury’s first-stage valuation verdict, the condemnor no longer has any interest in such an apportionment proceeding.³

The competing rule, is the so-called “aggregate of interests” rule in which the value of each property interest in the subject property (e.g., leasehold, easement.

¹ For a fuller discussion of the “undivided fee rule” and its limitations, see Gideon Kanner, *And Now, For a Word From the Sponsor: People v. Lynbar, Inc. Revisited*, 5 Univ. San Francisco L. Rev. 39 (1970).

² There is no doctrinal basis for this assumption, although efforts have been made to justify it on the grounds that a condemnation is a proceeding *in rem* – against the property rather than against the owner. This, as shown presently is doctrinally unsupported. Moreover, the classification of a proceeding as *in rem* only means that the judgment of the court in such a case determines title or the status of property as against the entire world, not just among the parties to the lawsuit. Black’s Law Dictionary (Bryan A. Garner, ed., 1999) at 797. That has nothing to do with how one arrives at the value of the property that is the subject of the *in rem* proceedings. Moreover, property does not have rights – people do, and it is those constitutional rights that are being enforced in a condemnation action. The *in rem* approach thus substitutes label affixation for legal analysis. Finally, *in rem* or not, owners of all property rights in the subject property must be given notice and an opportunity to be heard on the issue of just compensation to which they are entitled, and to present their valuation evidence.

³ See e.g., *Hemmerling v. Tomlev, Inc.*, 67 Cal.2d 572, 63 Cal. Rptr. 1 (1967)

etc.) is determined separately,⁴ and the respective awards are added up to produce the aggregate, total sum which the condemnor is required to pay.⁵

Fortunately, in most cases application of the “undivided fee rule” produces results that are not significantly different from the “aggregate of interests” approach, so that ordinarily, choosing between these two approaches does not present a problem. But there are cases where consideration of the separate interests in the subject property does have an impact on total compensation, and this is where the fun begins.

Typically, condemnors profess to be committed to the “undivided fee rule,” arguing that they are taking the fee simple title to the subject property and therefore should be required to pay only for it, for that is what they acquire. This argument is often embellished by assertions that this is a logical result because the sum of the parts cannot exceed the value of the whole, and all they want to do is to value the whole property being taken. Though frequently repeated, the latter assertion is nonsense because mathematics tells us that while the whole cannot be more than the sum of its parts, *it also cannot be less* than the sum of its parts. So to the extent mathematics is pertinent here, it tells us that the whole can be neither more nor less than the sum of its parts, which does not address the effects of the “undivided fee rule.”

Proponents of the “undivided fee rule” argue that the condemnor should only be required to pay for what it takes, and since what it takes is the fee simple title that is what it should pay for. This position is wrong on several counts.

First, it is doctrinally wrong. To say that the condemnor acquires “the fee title” is misleading. By condemning the “fee simple title” the condemnor acquires each and every property right and interest in the subject property and the owners of

⁴ See e.g., Cal. Code Civ. Proc. § 1260.220 (b)

⁵ Id. § 1260.220 (a).