

# Report From Counsel

Insights and Developments in the Law

Spring 2003

## Courts Begin Putting the Brakes on “Takings”

The power of government to take private property for a public use, with payment of fair compensation, has been nearly unassailable in our legal system. In most condemnation cases, the right to take the property is a foregone conclusion, and the parties litigate only the amount of compensation. Courts generally have deferred to the government's articulation of a public purpose for the taking, even when private parties also benefit.

---

*In most condemnation cases, the right to take the property is a foregone conclusion, and the parties litigate only the amount of compensation.*

---

In recent years, there has been a trend toward closer scrutiny of a proposed condemnation to find a paramount public purpose, and even to stop the proceedings where one is lacking. Property owners targeted for a taking are receiving a more sympathetic hearing when they contend that the true beneficiary of the proceedings is not the public but simply another private party with designs on the property.

Although they were largely unsuccessful, challenges to takings as lacking a public purpose first arose in urban renewal cases. The government would condemn blighted property so that it

could be redeveloped, usually by private developers. The government could point to the overriding public benefits from such revitalization of property and could successfully argue that benefits to private parties were incidental.

In successful attacks on use of the condemnation power, it is harder to find the public use and easier to see private profit as the motivation for the taking. For example, in one case, the

developer of an automobile racetrack wanted some neighboring land for a parking lot, but the company that owned the land did not want to sell it. The developer reached an agreement with a regional authority that had condemnation powers, by which the developer would pay for proceedings to condemn the land in return for getting the property from the authority imme-

*Continued on page four.*

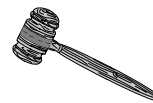
---

## Case by Case

### Long-Arm Jurisdiction Falls Short

Robert found just the excavator he wanted advertised on an Internet auction site. Before making the successful bid, he contacted the seller through e-mail and received assurances from her that the product was in good condition. Robert then traveled to the seller's home, which was several states away, and bought the excavator. When the equipment did not perform as expected and the seller did not respond to Robert's request for a partial refund, Robert sued the seller in his home state.

Robert's lawsuit failed because the seller was not subject to the jurisdiction of the courts in Robert's home



state. For a nonresident to bring herself within the reach of a state's "long-arm" jurisdiction, she must purposefully have benefited from the privilege of doing business in that state. Perhaps the seller could have foreseen that residents of any state might bid on the excavator, but that was insufficient to bring her into the courts in Robert's state. She had no control over who would ultimately be the winning bidder, nor could she exclude bidders from particular jurisdictions.

Also weighing against subjecting the seller to litigation was the isolated nature of the transaction and the fact

*Continued on page four.*

---

# ADA and Small Businesses

The Americans with Disabilities Act (ADA) prohibits disability discrimination in employment for employers with 15 or more employees. The prohibition is far-reaching and covers hiring, firing, and everything in between, such as promotions, benefits, and harassment in the workplace. The smallest of businesses are not affected by the ADA because of the 15-employee threshold for coverage. The ADA does apply, however, to many of the roughly 25 million small businesses in the nation.

## Who Is Protected?

The ADA protects three categories of individuals: those with a physical or mental impairment that substantially limits one or more major life activities (like sitting, standing, or sleeping); those with a record of such an impairment, such as a person who had debilitating cancer but is now in remission; and those who are regarded by employers as having such an impairment, even though the individuals otherwise are not so impaired as to be “disabled” under the ADA. Regardless of the category, the ADA protects only persons who are qualified, that is, they meet job-related requirements and can perform essential functions for the job, with or without a reasonable accommodation.

## Hiring

While an employer can ask an applicant a wide range of questions concerning job qualifications, the ADA does not allow medical examinations or questions about disability until the employer has made the applicant a conditional job offer. An exception is recognized for questions directed to an apparently disabled applicant about whether a reasonable accommodation will be required.

After a job offer is made, an employer can ask any disability-related questions and require medical examinations, so long as these requirements apply to everyone in the same job cate-

gory. For example, if, during a medical examination required of all employees in a job involving the use of dangerous machinery, it is revealed that an applicant has frequent and unpredictable seizures, the employer can withdraw a job offer to that individual.

## Medical Information

Once a person is on the job, the ADA allows required medical examinations or questions about a disability only where there is a reasonable belief, based on objective evidence, that a par-

ticular employee will not be able to perform essential job functions or will pose a direct threat because of a medical condition. As an example, if a normally reliable employee has told her employer that a new medication she takes makes her lethargic, and she begins to make many mistakes, the employer can ask her how long the medication can be expected to affect job performance.

*Continued on page three.*

---

# Solo 401(k) Retirement Plans

As a result of recent tax law changes, a new retirement savings account is now available for “owner-only businesses.” An “owner-only business” is either a business that employs only the owner and immediate family members or a business that employs only the owner and employees who by law may be excluded from participation in retirement plans. Excludable employees include employees under age 21, employees with less than a year of service or who work less than 1,000 hours per year, certain union employees, and certain nonresident alien employees.

The new plan, sometimes called an Individual (k) plan, can be set up both by incorporated businesses or unincorporated businesses such as sole proprietorships and partnerships. When compared with other types of business retirement plans, an Individual (k) plan allows more flexibility in its funding and larger contribution amounts.

The two components of an Individual (k) plan are a profit-sharing contribution from the employer (up to 25% of compensation) and an employee salary deferral (up to \$12,000 in 2003). Combining those two components, the

maximum contribution on behalf of any one business owner is a whopping \$41,000 in 2003. Contributions are discretionary each year.

The maximum salary deferral amount will increase by \$1,000 per year through 2006. In addition, for individuals who are age 50 or older, the Individual (k) plans, like 401(k) plans for larger businesses, allow “catch-up” contributions in amounts that will increase annually through 2006. For 2003, the maximum catch-up contribution is \$1,000.

Business owners are eligible to take personal loans from Individual (k) plans, so long as the plan document allows for plan loans. They may borrow as much as \$50,000 in cash, or 50% of the balance in their account, whichever is less. Borrowing from an Individual (k) plan carries the same downside as with conventional 401(k) plan borrowing, however, making this move a last resort for many. Aside from undermining the accumulation of a large balance growing tax-free in the account, a loan, if not paid back on time, will be considered a distribution by the IRS, triggering income taxes and a 10% penalty.

# Credit Reporting Agency Held Accountable for Errors

Judy discovered that her credit report from a large credit reporting agency erroneously included about a dozen accounts for a different person, also named Judith. The report identified Judy as using that person's name as an alias. Unfortunately, the "other" Judith, who did exist, had a checkered debt-paying history that was erroneously presented as Judy's in the credit report.

Judy's own spadework revealed that the credit reporting agency had merged her information with that of the second Judith because they had similar first names, were born in the same year, were from the same part of the country, and, most importantly, their Social Security numbers differed by only one digit. This initial computer mistake was bad enough, but what ultimately led to a very large damages verdict for Judy was the inadequate response of the reporting agency once Judy had brought the errors to its attention.

The agency deleted some of the accounts that did not belong in Judy's report, but it kept most of them after supposedly verifying them with creditors. This "verification" was very superficial and did not convey to the creditors the information Judy had provided. In effect, the agency simply asked each creditor, "Is this what you reported?" Fully three years after Judy notified the reporting agency of the erroneous information in her report, some of it remained, and the undeserved stain on her credit was as obvious as ever. To add insult to injury, some of the deleted information from the second Judith even reappeared on Judy's report.

The situation came to a head when the erroneous credit report caused Judy to be denied a mortgage. By supplying

*The situation came to a head when the erroneous credit report caused Judy to be denied a mortgage.*

still more information to the agency, including a supportive letter from the "other" Judith, and contacting creditors herself, Judy eventually cleaned up her credit report and got out from under the shadow of a stranger's unpaid debts. By then, however, she was a wreck emotionally, and the damage to her credit reputation was only beginning to be restored. A jury verdict

made the credit reporting agency pay for these injuries, but sent an even louder message in a large award of punitive damages.

The success achieved in Judy's lawsuit was largely due to her own diligence. The steps she took are practically a blueprint for what someone should do when credit reporting errors are made and then left uncorrected by an agency. It took years in her case, but Judy prevailed in the end by making telephone calls, keeping notes and documents, contacting creditors directly, and even enlisting the aid of the debtor whose poor credit history had appeared in Judy's credit report.

## ADA and Small Businesses

*Continued from page two.*

### Reasonable Accommodation

The ADA differs from most other employment discrimination laws in imposing an accommodation duty on employers. If a disabled person needs a reasonable accommodation in order to apply for, or perform, a job, the employer generally must provide it unless to do so would create an undue hardship. An undue hardship means significant difficulty or expense, based on an employer's resources and operations.

Most accommodations are not expensive or burdensome. A diabetic employee may need regular breaks to eat properly and monitor blood sugar and insulin levels, or a blind employee may need someone to read information posted on a bulletin board. If more than one accommodation will work, the

employer may take the option that is less costly or easier to provide.

In addition to the undue hardship defense, an employer need not provide an accommodation which:

- assists an individual off the job;
- removes or alters the essential functions of a job;
- lowers production or performance standards; or
- excuses violations of rules on good conduct.

### Helpful Handbook

The Equal Employment Opportunity Commission, which is charged with enforcement of the ADA, has issued a new handbook to help small businesses comply with the ADA. The handbook provides many examples of factual situations with which small businesses could be confronted. The ADA primer can be accessed online at [www.eeoc.gov](http://www.eeoc.gov).

*Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

---

## Online Banking

Banks that rely on the Internet and other low-cost ways to provide service, as opposed to “bricks and mortar” branch offices, can save on expenses and pass the savings along to customers in higher returns on deposits and lower interest rates on loans. Online banking also gives customers the convenience of being able to monitor their accounts and complete transactions around the clock, without waiting for mailed statements or being limited by office hours.

The flip side of online banking is that, if a problem arises, you cannot sit down face-to-face with someone from the bank to resolve it. There is also a premium on doing research to check out the legitimacy of an unfamiliar and remote institution before you entrust it with your money and private information. A good place to start is the “About Us” section of a bank’s website, which should at least give basic contact information. If it does not, that in itself should raise suspicions. Other warning signs include names or websites that are only slightly different from those of well-known institutions and rates of return that are far out of line with what other banks are offering. It is a good idea to confirm that an institution is federally insured by contacting the Federal Deposit Insurance Corporation or searching its “Institution Directory” at [www3.fdic.gov/idasp](http://www3.fdic.gov/idasp).

Like any bank customer, users of online banking institutions are well-advised to safeguard private identification information, keep good records, and monitor transactions and balances regularly. Online banking customers also have the protection of federal laws such as the Equal Credit Opportunity Act, the Truth in Lending Act, and the Truth in Savings Act. Those who decide to do their banking solely in front of a computer screen especially should know about the Electronic Fund Transfer Act, which deals with consumer rights involving electronic banking transactions.

## “Takings”

*Continued from page one.*

diately after the condemnation. A state supreme court found that this transparent arrangement to take land so that it could benefit the racetrack developer was a misuse of the eminent domain power. As the court put it, that power “is to be exercised with restraint, not abandon.”

In another successful challenge to a condemnation, a city tried to take land owned by a church in order to turn the land over to a major discount retailer. The property had been vacant for a decade, despite having been declared a blighted area. The city tried to use blight removal and redevelopment of the property to justify its actions. This reasoning was undermined by the city’s denial of permits sought by the

church for more church buildings on the property, even though such a use would have eliminated blight just as well as the commercial use favored by the city.

The more believable motive for the city was its desire to generate more revenue by putting a taxable business on what had been tax-exempt church property. But the city had other ways to generate revenue. As to both of the city’s ostensible goals—blight removal and generation of revenue—the city was “using a sledgehammer to kill an ant.” In issuing an injunction against the condemnation proceedings, the court characterized the condemnation as resting only on “the desire to achieve the naked transfer of property from one private party to another.”

---

## Case by Case

*Continued from page one.*

that she was not a commercial seller and was using a third party’s site. A different result might have been achieved against a business that used its own website to advertise itself and make transactions across state lines.

## Liability for Independent Contractors

In another case, a manufacturing company contracted with a security firm to provide a security guard. The guard shot and killed an individual who was trespassing, but not for criminal purposes, on company property, after the person had obeyed the guard’s order to lie on the ground. The company argued that it could not be held liable for the negligent acts of an independent contractor, but a state supreme court ruled otherwise.

The court agreed that the security firm and its guard were independent contractors. The manufacturing company’s downfall was an exception to the rule of no liability for acts of independent contractors. If the work to be performed is inherently dangerous, the work can be delegated to an independent contractor, but the duty to use reasonable care *cannot* be avoided by the employer. Work is inherently dangerous when it involves a foreseeable risk of physical harm to others and requires special precautions.

In the case of the trigger-happy security guard, who was armed and instructed to “deter” thieves and vandals, dangerous confrontations between the guard and persons entering the property were contemplated. In the context of such danger, the independent contractor status of the guard became a mere legal technicality that did not shield the manufacturing company from liability.