Hastings Law Journal

Volume 20 | Issue 3 Article 3

1-1969

Condemnation

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IV. Condemnation

A. Discovery of Expert Opinions—United States v. Meyer, 398 F.2d 66 (9th Cir. 1968).

The case of *United States v. Meyer*[1] made an important contribution toward ensuring that the requirement of "just compensation" in eminent domain proceedings would not be merely an empty phrase. In a decision which will have a great impact in many fields besides condemnation, the Ninth Circuit, represented in this case by Judges Hamlin, Jertberg and Browning, held that the proper scope of civil discovery proceedings in condemnation actions included the opinions and conclusions of experts hired by the opposing side. This was not the first instance in which a federal court had reached this position, but it was the first instance in which a circuit court had squarely faced and settled this important issue.[2] The district courts, receiving no guidance from the Federal Rules of Civil Procedure, had not been able to achieve uniformity.[3] Their decisions had ranged from allowing an adversary to conceal even the names of his experts to the liberal position adopted in this case.[4]

The *Meyer* case arose from a landowner's attempt to gain disclosure of the opinions and conclusions of appraisers hired by the Government with respect to such issues as total value and most profitable use. The Government failed to obtain a court order protecting its experts from such questioning, but even so it ordered its experts not to answer. An appeal from the refusal to issue the desired protective order and from the dismissal of the action resulting from the Government's refusal to answer was brought to the Ninth Circuit. The Ninth Circuit affirmed the refusal to issue the desired protective order but reversed the district court's dismissal of the condemnation proceeding on the ground that the complete dismissal was an inappro-

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[1] 398 F.2d 66 (9th Cir. 1968).

[2] Sach v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948), did allow a liberal disclosure procedure but seemed to stop at requiring the disclosure of *factual* information.

[3] For a thorough discussion of this issue, see Comment, *Discovery of Expert Opinions and Conclusions in Condemnation Proceedings in Federal and California Courts*, 20 HAST. L.J. 650 (1969); J. MOORE, J. LUCAS & B. GARFINKEL, MOORE'S FEDERAL PRACTICE, ¶ 26.24, at 1523-36, ¶ 33.17, at 2343-64 (2d ed. 1968).

[4] *See generally* Comment, *Discovery of Expert Opinions and Conclusions in Condemnation Proceedings in Federal and California Courts*, 20 HAST. L.J. 650 (1969).

priate penalty since the right of the Government to take the land had never been challenged.[5]

The court's overall view of the purpose of discovery proceedings seemed to play a large role in the decision. Although the Federal Rules of Civil Procedure contained no direct provision on this issue, they did provide that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[6] Judge Browning wrote: "Because land appraisal is complex and technical, usually evidence on the issue of value consists principally of the opinions of opposing experts."[7] Since value is very often the only issue in a condemnation proceeding, to deny disclosure of the opinions which provide the criteria for reaching a judgment is to frustrate the entire purpose of discovery. That purpose is to "make a trial less a game of a blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[8]

With such a frame of reference, it was not at all surprising that the court failed to be moved by arguments against disclosure that had been successful in the past. The argument that Meyer had not shown "good cause" why the requested information should be disclosed was summarily rejected. Without a clear idea of the line of attack that the opposition will use, it is practically impossible for an attorney to present an efficient cross-examination or an effective rebuttal.[9] The court also rejected the fairly well established fact-opinion distinction which exempted all opinions from disclosure. Since no support for this distinction could be found in the Federal Rules, the court felt the circumstances involved in condemnation cases demanded that it be dropped.[10]

Another Government theory was that since the appraisals were carried out in order to help their attorneys reach a settlement, the surveys were entitled to immunity from disclosure under the "work-product of an attorney" doctrine set down in *Hickman v. Taylor*.[11] The court felt that this case was distinguishable from *Hickman* in that here there was no invasion of the attorney's mind or files and that, unlike the situation in the *Hickman* case, the desired information was not available from another source.[12] The court agreed that "an individual who is aware of material facts cannot, simply by repeating

5 398 F.2d 66 (9th Cir. 1968).

6 FED. R. CIV. P. 1.

7 United States v. Meyer, 398 F.2d 66, 69 (9th Cir. 1968).

8 United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (Douglas, J.).

9 United States v. Meyer, 398 F.2d 66, 75 (9th Cir. 1968).

10 *Id.* at 72-73.

11 329 U.S. 495 (1947).

12 United States v. Meyer, 398 F.2d 66, 74 (9th Cir. 1968).

those facts to his attorney, prevent his adversary from questioning him as to those facts either before or at the trial."[13] However, the court did say that any portion of the report that did involve an attorney's ideas would be given immunity from disclosure by a protective order.[14]

The Government's argument that any experts who were not expected to appear as witnesses at the trial should not be open to any questioning was by far its most viable one. The Government was able to point to the proposed amendments to the Rules of Civil Procedure and show that although the committee considering these proposals had been in favor of liberalizing discovery procedures in regard to experts expected to appear as witnesses, they had proposed conditioning the right to question those experts not expected to testify on a showing that disclosure was necessary to prevent undue hardship or manifest injustice.[15] The court, nevertheless, rejected this argument as well: "It would be intolerable to allow a party to suppress unfavorable evidence by deciding not to use a retained expert at trial."[16]

The court's decision is supported by a study of the condemnation practices of a New York county[17] which revealed that the ability to hide findings by not having an expert testify could play an important role in many cases. In 48 percent of the cases in which the county had two separate appraisals made of the value of the land it was taking, one appraisal was at least 10 percent higher than the other. In 12 percent of the cases, the difference between the estimates exceeded 49 percent![18] It is obvious that an economy-minded condemnor would want to keep the higher estimate secret, but it does not seem to be consistent with the goal of arriving at just compensation to allow it to do so. To prevent the burying of relevant evidence in this manner, complete disclosure of the opinions of those who will not testify is a necessity.

The court fully realized that this aspect and many other aspects of discovery proceedings were subject to abuse, but it felt the dis-

[13] Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455, 463 (1962).

[14] *See* United States v. Meyer, 398 F.2d 66, 74-75 (9th Cir. 1968).

[15] Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts relating to Deposition and Discovery*, 43 F.R.D. 211, 225 (1967) (proposed rules 26(b)(4)(A) & (B).

[16] United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968).

[17] Berger & Rohan, *The Nassau County Study: An empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967). The study was made in a county consisting mainly of New York City suburbs. The professors had full access to all the County's condemnation files.

[18] *Id.* at 440.

cretionary powers afforded the judiciary by the Rules of Civil Procedure[19] were sufficient safeguards against injustice. Subject to such safeguards, the fullest possible disclosure of facts and opinions was desirable.[20]

Another consideration that probably influenced the court to allow full discovery was the growing awareness that under present condemnation practices the condemnor has an unfair advantage over the average landowner. Studies have shown that the condemnor is not always above using its power to force down prices. Often a landowner is forced to accept a price he feels to be too low rather than engage in expensive litigation.[21] The Nassau County Study revealed that "the condemnee who agreed to settle was shockingly underpaid. Only about one in six (15.75%) realized or bettered the County's low appraisal, a sum that an impartial observer might consider a *sine qua non* for 'just' compensation."[22] The Government paid less than 50 percent of the lowest appraisal by a *Government* appraiser in about one case of every twelve![23] The power of a condemnor to use such unfair tactics would be severely limited if a full disclosure of the findings of their expert appraisers could be obtained.

It is true that a trend toward the holding of the *Meyer* case was already fairly well established,[24] but with its strong arguments and unequivocal stand, *Meyer* should do a great deal toward bringing other courts to its position. Where both parties are fully aware of all

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19 FED. R. CIV. P. 30(b).

20 United States v. Meyer, 398 F.2d 66, 75 (9th Cir. 1968).

21 *Hearings on S. 1351 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 90th Cong., 2d Sess. (1968) (testimony of Senator Morse). For another approach toward eliminating the condemnor's advantage in condemnation actions, see Note, *Attorneys' Fees in Condemnation Proceedings*, 20 HAST. L.J. 694 (1969), which supports the position that the Government should pay the landowner's legal costs if the court rules that the final Government offer was too low.

22 Berger & Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430, 442 (1967).

23 *Id.* at 443.

24 The greatest progress in liberalizing discovery procedure in regard to expert witnesses has been in fields where the issues are so complicated that the testimony of experts is vital. *E.g.*, Empire Scientific Corp. v. Pickering & Co., 44 F.R.D. 5, 6 (E.D.N.Y. 1968) (patents); Besly-Welles Corp. v. Balax, Inc., 43 F.R.D. 368, 373 (E.D. Wis. 1968) (patents); Diversified Prods Corp. v. Sports Center Co, 42 F.R.D. 3, 4-5 (D. Md. 1967) (patents); Federal Cartridge Corp. v. Olin Mathieson Chem. Corp., 41 F.R.D. 531, 535 (D. Minn. 1967) (inventor uniquely qualified to give opinion on what constitutes theft of his inventiveness); Luey v. Sterling Drug, Inc., 240 F. Supp. 632, 636 (W.D. Mich. 1965) (drugs); Meese v. Eaton Mfg. Co., 35 F.R.D. 162, 165-66 (N.D. Ohio 1964) (patents); United States v. Renault, Inc., 27 F.R.D. 23, 29 (S.D.N.Y. 1960) (anti-trust); United States v. Nysco Laboratories, Inc., 26 F.R.D. 159, 162 (E.D.N.Y. 1960) (drugs).

the circumstances, the probability of arriving at truly just compensation is greatly enhanced.

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