

Presentation of
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Judge Horn asked me to use my fifteen minutes to talk about three important takings topics, any one of which could easily consume an entire panel. Accordingly, my discussion of each topic will be short, pithy and quite possibly a tad superficial.

The first topic is the distinction between permanent physical occupations of property and regulatory restrictions on the use of property. Fixing the line between these two categories is important because a different takings analysis applies to each type of government action. In a regulatory takings case, the outcome generally turns on the degree of economic impact (measured in relation to the property as a whole), the reasonableness of the owner's expectations, and the character of the government action. By contrast, a physical occupation (at least a permanent one) will generally be treated as a per se, or automatic taking, whether the government action affects the entire property or only a part, and without regard to the other factors typically considered in a regulatory takings case. When there is uncertainty about which category applies, the Supreme Court has said the preference should be for the multi-factor regulatory takings analysis rather than the per se approach.

In its 2002 Tahoe-Sierra decision the Supreme Court grounded the distinction between physical and regulatory takings in the text of the Fifth Amendment, stating that the "plain language requires the payment of compensation" when the government engages in a physical appropriation. By contrast, the Court said, the constitutional text contains no "comparable reference" to regulation. As a result, regulatory takings doctrine rests on a "more complex" analysis designed to identify, by a kind of process of analogy, those regulatory actions that are so burdensome they are "tantamount" to physical appropriations. A few years later in Lingle the Supreme Court expressed the same idea,

stating that the objective in regulatory takings cases is to identify those regulations that are the “functional equivalent” of a “classic taking,” that is, a physical taking.

In Tahoe-Sierra the Court offered various examples of cases falling on one side or the other of the line between these categories. On the physical side, the Court listed a government takeover and use of a privately held warehouse, a state law authorizing cable companies to place equipment on the roof of a private apartment building, and military aircraft landing and taking off a few feet above a private home. On the other side of the line the Court cited a regulation prohibiting eviction of tenants unwilling to pay higher rent, zoning ordinances and restrictions on mining activity, and a prohibition on development in private airspace. The distinction, so far as it is capable of being captured in a single sentence, is between cases where the government physically occupies private property or requires the owner to submit to occupation by third parties and cases where the government restricts uses of private property.

Twenty five years ago the Supreme Court in the Loretto case explained the distinction in terms that still seem valid today. First, the Court said that the “power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights,” and an infringement of that right “is perhaps the most serious form of invasion of an owner's property interests.” To my mind, the Court overstated somewhat the importance of this stick in the bundle of rights; the fact that Great Britain recently adopted a law granting the public a right to roam across essentially any unenclosed portion of the British countryside suggests that upholding the right to exclude in every context is not actually essential to the preservation of Anglo-Saxon property rights. Nonetheless, I think the Court’s focus on the value of property for preserving

privacy, as opposed to, say, securing development opportunities, has some basic validity. And “some validity” was all the Court was aiming at because its second justification for this per se rule was that it is important that takings law contains some rules. The Armstrong principle of fairness and justice is evocative but not very helpful in producing a predictable jurisprudence. The per se rule for physical occupations is best understood as an effort by the Supreme Court to create at least one narrow island of relative predictability in a sea of ad hoc analysis.

This Court has struggled with defining the line between physical and regulatory takings on numerous occasions, but I will mention just three. In the Stearns case the Court held that the application of the federal Surface Mining Control and Reclamation Act to restrict mining rights, including a right of access to the minerals, effected a physical taking, but the Federal Circuit took the opposite view on appeal. In Tulare Lake and Casitas, this Court -- indeed one judge, persuaded to reconsider his first ruling by the supervening Supreme Court Tahoe-Sierra decision -- first ruled that a restriction on the exercise of appropriative water rights constitutes a physical taking and later ruled that such a restriction could only be challenged as a regulatory restriction. Lastly, the recent and much discussed Bailey case has developed the apparently novel idea, based partly on the Supreme Court’s distinction between physical takings and regulatory takings, that claims based on physical occupations accrue exclusively at the time of the alleged taking, but that, in a regulatory takings context, each successive owner of the property should be entitled to seek compensation for an alleged taking that accrued prior to acquisition of the property.

Finally, it is useful, at least analytically, to distinguish these types of potential takings from a third type – direct expropriations. This category includes explicit exercises of the eminent domain power, of course, but also cases where the government, through its actions or legal mandates, appropriates private property for its own use or use by third parties. These kinds of government actions are also generally subject to per se analysis.

My second topic is how, assuming a case presents a regulatory takings claim, the courts are supposed to go about measuring the economic impact of a regulatory restriction. Courts have traditionally approached this issue using the so-called with and without approach, that is, by comparing the value of the property at issue subject to the restriction with the value the property would have if the restriction were lifted. These calculations are typically made based on appraisers' estimates of market value using a comparable sales approach or some other appraisal technique.

In recent years, several decisions of the Federal Circuit and of this Court have suggested an alternative approach, focusing on the degree to which the regulation reduces the profitability of a particular investment. In Cienega Gardens, the Federal Circuit, invoking this approach, ruled, as to handful of model plaintiffs, that a federal law temporarily limiting the ability of investors to opt out of a federal program capping rent levels resulted in a taking. More recently, in Rose Acre Farms, this Court, on remand from the Federal Circuit, applied a similar approach to support the conclusion that a temporary shut down of egg farms suspected to be the source of salmonella poisoning resulted in a taking.

The use of the profitability measure raises several issues of concern, including (1) whether this approach provides an equitable method for measuring economic impact, given that a given regulatory restriction will produce a much bigger impact on marginal operations than highly profitable ones under this method, simply because the firms are near the brink of failure, and (2) whether this approach has the unintended effect of undermining or circumventing the property as a whole rule by providing an alternate pathway to recovery for claimants who might otherwise not be able to demonstrate significant adverse economic effects.

On September 25, 2007, the Federal Circuit, in the latest round in the Cienega Gardens litigation, this time in a ruling handed down by an unusual seven-judge panel, issued a new decision pointing in a different direction. The Court did not repudiate the prior panel decision involving the model claimants, but limited that ruling to its facts. In this latest decision the Federal Circuit reversed a finding of a taking, primarily on the ground that the profitability or so-called “return on equity” approach failed to account for the property as a whole.

My final topic is the tension between contract claims and takings claims against the United States.

It is important at the outset to distinguish suits against the government based on alleged interference with purely private contracts as opposed to contracts to which the United States is itself is party. In cases involving purely private contracts, a breach of contract action against the United States is obviously not an option. So the only recourse, at least before the U.S. Court of Federal Claims, is under the Takings Clause.

Venerable but apparently still controlling Supreme Court authority suggests that takings claims based on alleged interferences with private contracts should be very difficult to sustain. Eighty five years ago, in Omnia Commercial Co. v. United States, the Court announced a seemingly blanket rule that the Takings Clause is not implicated so long as the government has not appropriated contract rights, that is, stepped into the shoes of the contracting parties, but merely obstructed the parties' performance. Fifteen years ago, in Concrete Pipe the Court articulated a similarly narrow view: "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them." In that case, a unanimous Supreme Court had no difficulty rejecting a taking claim challenging federal legislation overriding pension contracts based on a Penn Central analysis

The Cienega Gardens case which I have just discussed, represents the most recent, high profile example of this kind of takings-of-private-contracts litigation. In historical perspective, I think it is fair to say, the 2003 Federal Circuit decision upholding the takings claim of the model plaintiffs was anomalous. The 2007 decision, which arguably says, at a minimum, that contract rights get no more protection under the Takings Clause than other property rights, seems more consistent with Supreme Court precedent.

Turning to cases where the contract is with the federal government, and the claim is that the United States took some action that impaired the claimant's contract right, parties often seek to assert takings claims and contract claims that parallel each other.

The rule laid down in this Circuit, as reaffirmed most recently a few weeks ago in the City Line Joint Venture case, is quite straightforward: Where a breach of contract claim will lie, the taking claim should be dismissed. As Judge Allegra has cogently explained in a recent case, this rule appears to be based on two rationales. The first is that where the parties have defined their relative rights through a voluntary contract, the terms of the contract, rather than abstract concepts of property, should generally govern the resolution of their disputes. The second rationale is that the availability of contract remedies (whether or not they actually succeed) should vitiate a takings claim, because ultimately the property right created by a contract is simply the right to sue in the event of an alleged breach. So long as the claimant can exercise his or her right to sue on the contract, that property right is preserved.

With that whirlwind tour, I will pass the baton and look forward to your questions and comments.