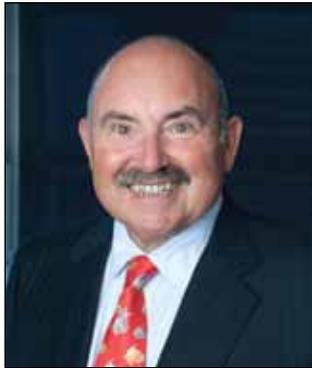


Condemnation Of Machinery And Equipment: A Case Study



Michael Rikon has practiced law in New York since 1969. Before merging his firm, Michael Rikon, P.C., with Samuel Goldstein and Sons, Mr. Rikon had a successful practice, founded in 1980, that focused on condemnation and real estate law, as well as litigation in the Court of Claims. From 1973 to 1980, Mr. Rikon served as a law clerk to the Honorable Albert A. Blinder of the New York State Court of Claims. Mr. Rikon began his law career as an Assistant Corporation Counsel for the City of New York, a position he held from 1969 to 1973, where he was a senior trial attorney in the Condemnation Division. He is a member of the American Bar Association, the Association of Trial Lawyers of America, the New York State Bar Association, New York County Lawyers Association, the Association of the Bar of the City of New York, the Nassau County Bar Association and the Suffolk County Bar Association. Mr. Rikon was the Chairman of the Condemnation Committee of the ABA Section of Real Property, Probate and Trust Law. He serves on the Special Committee of Condemnation for the New York State Bar Association, and he was the Chairman of the New York County Lawyers Association's Condemnation Committee. Mr. Rikon also contributes to professional journals in subjects related to the practice of condemnation law. In 1973 and 1974, Mr. Rikon was a special consultant to the New York State Commission on Eminent Domain and assisted in drafting New York's Eminent Domain Procedure Law. This article is based on a paper the author prepared for a seminar sponsored by the Seventh International Conference on the Valuation of Plant Machinery and Equipment Beijing, China. He can be reached at mrikon@ggrgpc.com. The author wishes to thank the following people for their contributions to this article: Professor Gideon Kanner, Irina Rykun, Dr. Chengjung Wang, Casey Pipes, William E. Blake, Amy Grasso, James Thompson, Edward McKirdy, and Keith Babcock.

Michael Rikon

Annexation, adaptability, and permanency are at the heart of determining the compensability of machinery and equipment in condemnation cases.

MENTION CONDEMNATION to the average citizen and it is likely to conjure up something to do with bulldozers and houses. What it probably won't conjure up in the minds of most members of the public is the question of what happens to machinery and equipment in condemnations cases. (This might not even occur to the majority of lawyers who don't regularly deal with real property issues.) While the topic isn't really an esoteric one, it is sufficiently specific that a review of the basics is in order. So this article is intended to do several things:

- First, to introduce the basic concept of what condemnation, or as it is also known, eminent domain, is;
- Second, to define how plant machinery and equipment would be treated. (Because this article started out as a paper for an international conference, I have also surveyed eminent domain or compulsory purchase law in various countries);
- Third, because of the very nature of machinery and equipment being trade fixtures, to review

how trade fixtures are treated in various states in the United States;

- Fourth, to focus on the law of New York because of New York's liberal definition of what is a trade fixture (New York law provides for a separate award to a trade fixture claimant in a condemnation proceeding separate and distinct from the owner of the land);
- Fifth, to provide a case study of an actual case I litigated in New York involving machinery and equipment in a woodworking plant.

CONDEMNATION • Another term for condemnation is “eminent domain.” Eminent domain is the right of the sovereign to take your property. (The power of eminent domain was first recognized in England in 1215. Article 39 of the Magna Carta reads “no free man shall be...disseised (deprived) of his freehold...except by lawful judgment of his peers, or by the law of the land.”) It is an inherent power of government that is necessary for the fulfillment of sovereign functions. Indeed, one will find nothing in the United States Constitution creating the power; only limitation on its exercise, which is found within the Fifth Amendment to the United States Constitution: “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend V, §5. (These limitations are made applicable to the States by the Fourteenth Amendment.) Eminent domain is the power of the sovereign to take property for “public use” without the owner’s consent. What is a “public use” is subject to a very broad interpretation that is outside the scope of this paper. *See, Bulldozers at Your Doorstep*, Michael Rikon, 17 Prob. & Prop. 53 (2003). What we are concerned with here is what the effects are when the power of eminent domain is exercised and real property is taken that has a plant that manufactures goods.

How are the machinery, improvements, and trade fixtures to be valued in these circumstances? This article will address the application of eminent

domain, or as it is often referred to, the “compulsory purchase” of the property. Not only does compensability in general change, but also the formula changes from country to country. It also changes in the United States from state to state.

We expect different applications of the law from country to country. But different applications and results from state to state in the United States may surprise many non-Americans. All of the American colonies exercised the power of eminent domain under the general grant of self government contained in their charters. Upon the declaration and establishment of independence, the power of eminent domain inhered in the existence of the 13 colonies as independent states. *Cincinnati v. Louisville & Nashville R.R. Co.*, 223 U.S. 390 (1912).

Definition Of A Trade Fixture

Generally, plant machinery and equivalent are broadly classified as trade fixtures when acquired by condemnation. Because more condemnation proceedings are brought in New York State than anywhere else, New York courts have well defined the subject.

Evolution Of Law

The law of trade fixtures has evolved over the years as a means to compensate a condemnee who had an interest in the land acquired that was less than a fee interest. *Buffalo v. J.W. Clement Co.*, 269 N.E.2d 895 (N.Y. 1971), *reh'g denied*, 273 N.E.2d 315 (N.Y. 1971); *Jackson v. City of Buffalo*, 106 N.E. 758 (N.Y. 1914). A claimant who was a tenant or was otherwise legally in possession would not ordinarily receive any compensation in a condemnation proceeding. Under most written leases, the law would not allow a tenant to obtain compensation for the tenant's leasehold interest, nor could the tenant recover for the loss of its goodwill. Thus, in order to compensate a tenant, as it must under the Constitution, the overriding rule of condemnation was established that “each owner, landlord or tenant, is

entitled to the value of what the Government took from him.” *United States v. Certain Property*, 306 F.2d 439, 453 (2d Cir. 1962).

Although most cases involving fixtures involve claims by tenants, it is clear that fee owners are also entitled to recover for the trade fixtures that they have installed, in addition to the value of their real property. New York State’s highest court, the Court of Appeals has observed that:

“New York takes a broad view in evaluating what improvements are to be regarded as (trade) fixtures. Not only is machinery deemed a fixture ‘where it is installed in such manner that its removal will result in material injury to it or the realty, or where the building in which it is placed was specially designed to house it, or where there is other evidence that its installation was of a permanent nature,’...but also those improvements which are used for business purposes and which would lose substantial value if removed.... This formulation of the rules permits equitable treatment of the owner of fixtures (and) signifies a recognition of the obvious realities confronting the business community.”

Rose v. State of New York, 246 N.E.2d 735, 739 (N.Y. 1969), quoting *Matter of City of New York (Whitlock Ave)*, 16 N.E.2d 281, 282 (N.Y. 1938); See also, *Matter of City of New York*, 84 N.E. 1105, 1107 (N.Y. 1908).

Classic Definition Of A Fixture

A fixture is “a thing of an accessory character annexed to houses or lands which become, immediately on annexation, part of the realty itself.” *Oxford English Dictionary* 986 (2d ed. 1989), citing as reference *Wharton Law Lex*. A fixture is a chattel attached to the realty. *Matter of City of New York (Triborough Bridge)*, 288 N.Y.S. 697 (N.Y. Sup. Ct. 1936), *aff’d per curiam*, 12 N.Y.S. 2d 887 (N.Y. App. Div. 1939). A chattel is an article of personal property that is any species of property not amounting to a freehold or fee in land. *People v. Holbrook*, 13 Johns.

90 (N.Y. Sup. Ct. 1816). The term “trade fixtures” means many things to lawyers in different contexts. In the law of eminent domain, it denotes a claim for compensation for the taking of fixtures, equipment, and improvements made to a property. The claim may be brought by a tenant or an owner of the real property.

The compensability of trade fixtures in a condemnation case differs vastly from state to state. Many states use the definition derived from *Teaff v. Hewitt*. 1 Ohio St. 511 (1853). *Teaff* defined trade fixtures as items that are annexed to the realty, are adapted or applied to the use or purpose of that part of the realty to which they are connected and are intended to be permanent. California, for example, calls trade fixtures “improvements.” The California statute defines improvements as “any machinery or equipment installed for use on property.” If the item cannot be removed without substantial damage or loss to either items or property, it is an improvement. Cal. Civ. Proc. Code §1263.205. By contrast, the term “fixtures” in New York has been loosely applied to articles which are annexed to the realty. *Matter of City of New York (Allen St)*, 176 N.E. 377 (N.Y. 1931)

Condemnor Takes All

When land is taken under the power of eminent domain, the condemnor takes title to everything annexed to the land, whether classified as buildings or as fixtures. *Jackson*, supra. The old common law rule was that everything attached to the freehold is considered part of the real estate. 2 Kent, *Commentaries* 467 (12th ed. 1873). This was changed in New York law to protect the interests of the one who installed the improvement. *Matter of Mayor*, 57 N.Y.S. 657 (N.Y. App. Div. 1899).

Acknowledgment Of Tenant Hardship

The law of landlord and tenant recognized the hardships in not allowing the tenant to remove its fixtures. *McRae v Central Nat’l Bank*, 66 N.Y. 489

(1876); *McKee v. Hanover Fire Ins. Co.*, 81 N.Y. 38 (1880). In a 1907 condemnation case, the Appellate Division, First Department, stated:

“As between landlord and tenant, the tenant is allowed to remove fixtures annexed to the freehold, but it is only as between landlord and tenant that the rule of the common law that anything that was annexed to the freehold by a substantial connection becomes a part of the realty has been relaxed. The city is not the landlord, and as against the tenant has not acquired the landlord’s rights, but is taking this property against the wish of both the landlord and the tenant for its own purposes. The rule that exists as between landlord and tenant, which has been evolved by the courts to prevent injustice to the tenant, should not be applied so that a beneficial use of the property is taken from the tenant without making him a fair compensation for the property as a whole.”

Matter of City of New York (North River Waterfront), 103 N.Y.S. 908, 910 (N.Y. App. Div. 1907), *aff’d per curiam*, 81 N.E. 1162 (N.Y. 1907).

A SURVEY OF EMINENT DOMAIN IN OTHER COUNTRIES

• We must rely greatly on published materials for the sources of this information, but believe the information provided is reliable and helps in terms of comparison.

Canada

In Canada, expropriation is governed by federal or provincial statutes. Under these statutory regimes, public authorities have the right to acquire private property for public purposes, so long as the acquisition is approved by the appropriate government body. Once property is taken, an owner is entitled to “be made whole” by compensation for: the market value of the expropriated property, injurious consequence to the remainder of the property (if any), disturbance damages, business losses and

special difficulties relocating. Owners can advance claims for compensation above that initially provided by the expropriating authority by bringing a claim before the court or an administrative body appointed by the governing legislation. http://en.wikipedia.org/wiki/Eminent_domain.

Europe

In many European nations, the European Convention on Human Rights provides protection from appropriation of private property by the state. Article 8 of the Convention states that “Everyone has the right to respect for his private and family life, his home and his correspondence” and prohibits interference with this right by the state, unless the interference is in accordance with law and necessary in the interests of national security, public safety, economic well-being of the country, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others. This right is expanded by Article 1 of the First Protocol to the Convention, which states that “Every natural person or legal person is entitled to the peaceful enjoyment of his possessions.” Again, this is subject to exceptions when state appropriation of private possessions is in the public interest, is in accordance with law, and, in particular, is to secure payment of taxes. *Id.*

France

In France, the Declaration of the Rights of Man and of the Citizen similarly mandates just and preliminary compensation before expropriation; and a “declaration d’utilite publique” is commonly required, to demonstrate a public benefit. The Declaration reads “property being an inviolable and sacred right no one can be deprived of it, unless the public necessity plainly demands it, and upon condition of a just and previous indemnity.”

The French Code of Expropriation provides the meaning of “fair” by stressing compensation for harms to the property owner. The Code’s first

underlying principle of “previous” is defined as payment before the action of eminent domain. The expropriator may only take possession “unless and until previous payment” has been made. In other words, payment must be made before possession takes place. Expropriation Code. Art. L. 12-1 and 15-1. In practice, if the public authority does not pay before assuming possession, the property owner may simply claim interest on the payment. Expropriation Code, R. 13-78. According to the Code of Expropriation, a fair indemnity must repair the “totality of the harm” to the property owner. Article L. 13-13 of the Code of Expropriation. Darling, Skillen and Wu, *Just compensation valuation schemes after a flood disaster in France, California and Louisiana*. Boalt School of Law (April, 2006).

The French Code Law defines two mandatory valuation categories that define the “totality of the harm”: primary compensation and ancillary compensation. Primary compensation focuses on compensation for the lost value of the actual property. Ancillary compensation includes all other costs involved in the relocation and reparation of harm, as defined and limited by the Code.

In Great Britain, there is a special court devoted to eminent domain, the court of compulsory purchase. In France, there is also a special court, the court of expropriation.

United Kingdom

In England and Wales, and other jurisdictions that follow the principles of English law, the related term compulsory purchase is used. The landowner is compensated with a price agreed to or stipulated by an appropriate person. Where agreement on price cannot be achieved, the value of the taken land is determined by the Lands Tribunal, a court consisting of one barrister and two chartered surveyors. The operative law is a patchwork of statutes and case law. The principal Acts are the Lands Clauses Consolidation Act of 1845, the Land Compensation Act 1961, the Compulsory Purchase Act

1965, the Land Compensation Act 1973, the Acquisition of Land Act 1981, part IX of the Town and Country Planning Act 1990, the Planning and Compensation Act 1991, and the Planning and Compulsory Purchase Act 2004. According to an excellent article by Geoff Fisher, FRICS:

“The determination of the proper compensation basically operates as an adversarial system. The claimant is encouraged to employ an experienced surveyor to advise them and act on their behalf in securing compensation with reasonable surveyors’ fees being reimbursed. The surveyor will assess the market value and his losses according to the Compensation Code.”

Geoff Fisher, *Compulsory Purchase Compensation, Right of Way* (Sept. ? Oct. 2010), available at www.irwaonline.org/eweb/upload/sep_web_compulsorycompensation.pdf.

The claimant’s surveyor first investigates the claimant’s property interest and the circumstances of the dispossession, and prepares “Heads of Claim.” He or she is likely to apply for an advance payment to help finance relocation and the purchase of another property, and will advise the claimant as to relocation and “mitigation of loss” — an established principle of Disturbance Compensation.

A typical claim for compulsory purchase of an owner-occupied home or business may include:

- Market value — at the valuation date of property interest acquired — freehold, leasehold, or tenancy;
- Disturbance claim;
- Removal costs;
- Arrangement fee for mortgage transfer.

For a business — temporary and permanent loss of profits (an accountant’s advice may be called in to assess the losses of profit):

- Loss payment — potentially 10 percent of compensation for intangible losses;
- Statutory interest on compensation from entry date;
- Surveyors' fees and legal costs — full reimbursement.

When the claimant is a tenant, the market value of the lease may be nominal but the claimant is usually still entitled to disturbance compensation based on relocation costs, loss of profits and other factors. Investment owners may be able to claim loss of rent, and the costs of purchasing another property of similar value as reinvestment.

Germany

The Basic Law for the Federal Republic of Germany states in its Article 14 (3) that “an expropriation is only allowed for the public good” and just compensation must be made. It also provides for the right to have the amount of the compensation reviewed by a court.

Italy

Esproprio, or more formally espropriazione per pubblica utilita (literally “expropriation for public utility”), in Italy takes place within the frame of civil law. The law regulating expropriation is the D.P.R. n.327 of 2001, amended by D. Lgs. n.302 of 2002; it supersedes the old expropriation law, the Royal Decree n.2359 of 1865. Also other national and regional laws may apply. The general provisions for the expropriation stem from Article 42 of the Italian Constitution and Article 834 of the Codice Civile. Expropriation can be total (the whole property is expropriated) or partial; permanent or temporary.

Nazionalizzazione (“nationalization”), instead, is provided for by Article 43 of the Constitution; it transfers to governmental authority and property a whole industrial sector, if it is deemed to be a natural or de facto monopoly, and an essential service of

public utility. The most famous nationalization in Italy was the 1962 nationalization of the electrical power sector. *Id.*

China

In China, eminent domain is not a well-recognized and discussed term because the Chinese law system is quite different from the legal system of the United States or United Kingdom and private property not so well protected in China.

Since the foundation of People's Republic of China in 1949, private property was not encouraged and most property, including plant and machinery, belonged to the country or government. In that early period, there was no need to discuss eminent domain in China, because these properties could be exchanged or allocated without payment.

China began to reform in the 1980s and private property ownership has been encouraged since then. With more and more people owning private property, the problems arose when the government needed to take the land or property away. The rights of the owner were not well defined and disputes were common.

The Chinese government gradually accorded private ownership of urban housing because it believed that private property rights were a driving force for economic growth. Chenglin Liu, *The Chinese Takings Law From a Comparative Perspective*, 26 Wash. U.J. L. & Pol'y. 301 (2008). The major rise in home sales came after the State Council issued *The Decision in Deepening Urban Housing Reform* in 1994. Both private homeownership and per capita living space increased dramatically. *Id.*, at 312. By amendment to Article 10 of the Constitution, the right to the use of land was permitted to be transferred in accordance with the law. Xian Fa Art. 10 (1988). But while China's homeowners may own their homes, there is still no fee title absolute to the land as this is restricted to 70 years.

In 2004, Chinese Constitution Law was amended. Article 20 states that the country could confis-

cate land for the public interest in accordance with laws and affords compensation. Article 22 provides that the country can confiscate other private property owned by the people, for the public interests in accordance with laws and afford compensation.

In 2007, China enacted a law to protect private property explicitly. Joseph Kahn, *China Backs Property Law, Buoying Middle Class*, New York Times, March 16, 2007, available at www.nytimes.com/2007/03/16/world/asia/16china.html. The 2007 law was intended to protect the interests of farmers and of urban residents when their homes are subject to eminent domain. Inadequate compensation is the major issue in eminent domain takings. It has been noted that there is no room to contest the public purpose of the project for which the property is being taken in China. But we can make the same argument in the United States. *See, Kelo v. City of New London*, 545 U.S. 469 (2005). *See also, Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a Partnership of Planning?* Rikon, 4 Alb. Gov't L. Rev. 154 (2011).

However, land and real property are the main concern of the 2007 law. Plant and machinery are not well discussed. There are regulations about the compensation for the property issued by various government agencies. Generally, property is to be valued by a qualified valuation company and the valuation result will be the basis for the compensation. Some governments also issued valuation guidance for the valuation for compensation.

For the valuation purposes, plant and machinery are divided into two groups. For properties that could be reused in other locations, the packaging fee, transportation fee, and maintaining fee would be considered part of the basis for compensation. For the properties that could not be reused, the replacement value and depreciation would be considered.

After 2008, there are some changes in the valuation policy. For the properties that could not be reused, the compensation will be based on the replacement cost. The remaining parts and value of the properties belong to the party who takes the property.

Note that the government or administration plays the most important role in such issues. All of these compensation and valuation policies are issued by different government agencies at various levels. There might be some conflict within these regulations. So the compensation policy and valuation policy, mainly for land and property including plant and machinery, become the focus in China with lots of disputes and discussion.

China continues to show that property value is important to the country's growth. According to a document released by the China Ministry of Finance, the Chinese government has made clear that it views the valuation industry as an important part of the mission of promoting economic development but also of safeguarding the country's economy and the interest of the general public. Caiqi (2009) No. 453; *see also*, China Appraisal Society (2010) Notice No. 7. Thus, the need arises for bigger, stronger, and higher-level appraisal firms to undertake valuations of major domestic projects.

Russia

The Russian Federation has adopted a Civil Code that controls the compulsory taking of private property and the payment of compensation for the loss of the assets. According to the Civil Code, Article 55, Conditions and Procedure for Seizing Plots of Land for State or Municipal Needs:

“Taking, in particular, by means of compulsory purchase of plots of land for state or municipal needs shall be effected on the grounds established by Article 49 of the present Code. ... Compulsory taking of a plot of land for state or municipal needs may be accomplished only on the condition of a

preliminary and equivalent compensation of the value of the plot of land under a court decision. ... The procedure for compulsory purchase of a plot of land for state or municipal needs from its owner, procedure for setting the compulsory purchase price of a plot of land compulsorily purchased for state or municipal needs, procedure for termination of the right of ownership and use of a plot of land in the case of its being taken for state or municipal needs, the rights of the owner of a plot of land subject to compulsory purchase for state or municipal needs shall be established by civil legislation. ... An owner's rights shall be subject to dispute in a court initiated by the owner."

The only law adopted that considers requisition of movable property is the Federal Law No. 160-FZ of July 9, 1999, On Foreign Investment In The Russian Federation (with the Amendments and Additions of July 25, 2002, December 8, 2003, July 22, 2005, June 3, 2006, June 26, 2007, April 29, 2008). Article 8 of the law provides: "The Guarantee of Compensation in Case of Nationalization and Requisition of the Assets of a Foreign Investor or Commercial Organization with Foreign Investment."

The assets of a foreign investor or commercial organization with foreign investment is not subject to enforced seizure, including nationalization or requisition, with the exception of the cases and on the grounds provided in a federal law or international treaty of the Russian Federation.

Requisition in the case of the foreign investor or commercial organization with foreign investment shall be refunded for the value of the assets subjected thereto. Upon the expiration of the effective term of the circumstances in connection with which the requisition was effected, the foreign investor or commercial organization with foreign investments shall be entitled to claim in accordance with the judicial procedure that the assets preserved be returned but they shall refund the compensation

amount they received less the loss in the value of the assets.

In case of nationalization the foreign investor or commercial organization with foreign investors shall be reimbursed for the assets nationalized and other losses. Disputes about the reimbursement of losses shall be resolved in accordance with the procedure set forth in Article 10 of the present Federal Law.

But having a statute that appears to provide a fair approach does not necessarily mean that justice will be had. The Russian judicial system does not receive good marks. According to a report by NPR, many Russians have no faith in the judicial system. "They assume that many judges are corrupt or will just side with the most powerful person in the room." *In Russia, Defendants Find Justice Isn't Blind*. Jan. 26, 2011, David Greene, National Public Radio, available at www.npr.org/2011/01/26/133226240/in-russia-defendants-find-justice-isnt-blind?ft=1&f=3. The lack of judicial fairness and stability hinders an environment open for investment. In an article published in *Bloomberg Businessweek*, it was reported, "Russia has attracted less private equity money than other emerging markets — \$1.4 billion over the past three years compared with \$28.6 billion for China, \$15 billion for India and \$5 billion for Brazil, according to the Emerging Markets Private Equity Assn." *Bloomberg Businessweek*, available at www.businessweek.com/magazine/content/11_19/b4227037709131.htm (Apr. 28, 2011).

Australia

In Australia, section 51 (xxxix) of the Australian Constitution permits the Commonwealth Parliament to make laws with respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." The material that follows is from www.wikipedia.org/wiki/ eminent_domain. See Commonwealth of Australia Constitution Act (<http://www.austlii.edu.au/au/legis/cth/consol>

[act/coaca430/s51.html/](#)). This has been construed to mean that just compensation may not always include monetary or proprietary recompense, rather it is for the court to determine what is just. It may be necessary to imply a need for compensation in the interests of justice, lest the law be invalidated. *Andrews v. Howell* (1941) 65 CLR 255 ([www.austlii.edu.au/au/cases/cth/HCA/2000/58.html?query=](#)).

Property subject to resumption is not restricted to real estate as authority from the Federal Court has extended the states' power to resume property to any form of physical property. For the purposes of section 51 (xxxii), money is not property that may be compulsorily acquired. A statutory right to sue has been considered "property" under this section. *Smith v. ANL Ltd* (2000) 204 CLR 493 ([www.austlii.edu.au/au/cases/cth/HCA/2000/58.html?query=](#)).

The Commonwealth must also derive some benefit from the property acquired, that is, the Commonwealth can "only legislate for the acquisition of Property for particular purposes." Australian Constitutional Commission, Final Report of the Constitutional Commission vol. 1 (Canberra: Australian Government Publishing Service, 1988): 600. ISBN 0-644-06897-3. Accordingly, the power does not extend to allow legislation designed merely to seek to extinguish the previous owner's title. *Mutual Pools and Staff Pty Ltd v. Commissioner of Taxation* (1992) 173 CLR 450 ([http://www.austlii.edu.au/au/cases/cth/HCA/1992/4.html/](#)). The states and territories' powers of resumption on the other hand are not so limited. Section 43(1) of the Lands Acquisition Act of 1998 (NT) grants the Minister the power to acquire land "for any purpose whatever." Lands Acquisition Act 1998 (NT), s 43. ([http://www.austlii.edu.au/au/legis/nt/consol_act/laa192/s43.html/](#)). The High Court of Australia interpreted this provision literally, relieving the Territory government of any public purpose limitation on power. This finding permitted the Territory gov-

ernment effectively to acquire land subject to Native Title.

South America (Chile)

Art. 19, N°24, of the Chilean Constitution establishes that "No one, in any case, can be deprived of its ownership, the property of such ownership or any of the essential attributes or faculties of the ownership, except by a general or special law that authorizes the expropriation by the cause of public utility or national interest, as qualifies by the legislator. The expropriated will be able to claim over the legality of the expropriatorial act before regular courts and will always have the right to an indemnification for the patrimonial damage effectively caused, which will be established by an amiable agreement or by a sentence handed down according to law for said Courts." [http://en.wikipedia.org/wiki/eminent_domain](#).

EMINENT DOMAIN IN THE UNITED STATES • The Fifth Amendment to the United States of American Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It is the last clause of the Fifth Amendment, known as the takings clause, which limits the power of eminent domain by requiring that "just compensation" be paid if private property is taken for public use. The Fifth Amendment was extended to

the states by the Fourteenth Amendment. *Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897).

The measure of the amount of “just compensation” is normally equated to “the market value of the property at the time of the taking contemporaneously paid in money.” *Olson v. United States*, 292 U.S. 246, 255 (1934). But this does not necessarily mean that trade fixtures are paid for separately. This is a matter left to each state for each state has separate rules as to whether trade fixtures, machinery, and equipment are distinct property interests. The federal government may also use condemnation to acquire property, but, for valuation, the United States District Court will apply the law of the State where the property is located. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

In New York, for example, trade fixtures are a distinct property interest in eminent domain proceedings, having their own rules of law and valuation. More importantly, no State has approached the degree of compensation awarded to a tenant who makes valuable additions to the demised premises as New York does. An award or compensation for machinery and equipment will be computed separately in New York. It may be made to an owner or a tenant. (If the owner of the real estate (fee) is also the owner of the trade fixtures, a court may rule that no trade fixtures award is appropriate because the real estate is being valued on a highest and best use that is different from the actual use.)

Alabama

The Alabama code includes the following definition Section 18-1A-3:

“(10) IMPROVEMENT. Includes any building or structure and any facility, machinery, or equipment that cannot be removed from the real property on which it is situated without substantial damage to the real property improvement.

(15) PERSONAL PROPERTY. Any property other than real property which is affixed or directly related to the real property to be acquired.

(16) PROPERTY. An interest in real or personal property under the law of this state.

(17) REAL PROPERTY. Land and any improvements upon or connected with land; and includes an easement, servitude, or other interest therein.”

Section 18-1A-28 of the Code of Alabama, provides:

“A condemnor that acquires any interest in real property shall also acquire at least an equal interest in all buildings, structures, or other improvements located upon the real property acquired, which the condemnor requires to be destroyed or removed or which will be adversely affected by the use to which the real property will be put.”

The statute defines the measure of compensation as follows:

“If a building, structure, or other improvement to be acquired by a condemnor under Section 18-1-28 is owned by a tenant:

It shall be deemed for the purpose of determining compensation to be a part of the real property to be acquired notwithstanding the right or obligation of the tenant, as against the owner of any other interest in the real property, to remove it at the expiration of his term; and

The compensation awarded shall include an amount sufficient to pay the tenant the larger of (i) the enhancement to the fair market value of the real property contributed by the improvement, or (ii) the fair market value of the improvement assuming its removal from the real property. (Sec. 18-1A-29).”

California

California provides in its eminent domain law that when property is taken, an owner may recover

the fair market value of improvements that cannot reasonably be relocated. Thus, California eliminated the concept of fixtures in eminent domain altogether in 1976. The statutory law calls for compensation for “improvements pertaining to the realty,” which includes things like furniture in hotels and furnished apartments.

Florida

How a condemnation clause handles compensation for trade fixtures is a fertile area for disputes regarding a commercial tenant’s interest in real estate compensation. If in the lease agreement the tenant waives his or her right to share in the real estate compensation, the tenant should make sure to explicitly preserve his or her right to recover for trade fixtures the tenant has installed on the leasehold. During the course of the leasehold, many commercial tenants install trade fixtures that can legally morph from personal property of the tenant to part of the real estate owned by the landlord, depending upon how they are installed. If the commercial tenant is allowed to share in the compensation paid for the real estate, the tenant will typically recover the value of any lost fixtures less any salvage value as an element of severance damages. On the other hand, if the equipment is determined to be personal property, no compensation is due for any reduction in value the equipment may suffer upon its removal and relocation. Therefore, a condemnation clause that excludes the tenant from sharing in compensation paid for the real estate and does not explicitly preserve compensation for trade fixtures may deprive the tenant of compensation for trade fixtures because, in order to be eligible to recover severance damages, the trade fixtures must be considered part of the real estate. George Reynolds *Rights of Commercial Tenants in Eminent Domain*, 85 Fla. B. J. 9 (Jan. 2011).

Illinois

Illinois does not allow a separate trade fixture award. It also apportions the multiple interests in any property into one total award. *Dept. of Transportation v. White*, 636 N.E.2d 1204 (Ill. App. Ct. 1994).

Maryland

With respect to payment for trade fixtures in the context of leasehold interests, according to the Report of the State of Maryland Task Force on Business Owner Compensation in Condemnation Proceedings, Maryland would follow the law as outlined by 4 Julius Sackman, *Nichols on Eminent Domain*, §13.07[2] (Cum. Supp. 2005). A tenant is entitled to be paid just compensation for the value of his leasehold in the real property condemned. *Id.* (citing § 12D.04[1]). If the tenant has installed or erected structures or other permanent improvements on the leased property, and the lease provides that the tenant is entitled to remove them during or at the end of the lease term, the tenant is entitled to be compensated for the taking of those improvements. *Id.* The tenant does not receive payment for the fixtures separately, but by the increased market value of the leasehold interest by reason of the fixtures. *Id.*

The fair market value of the fixtures (replacement/reproduction cost less depreciation) “may be a fair test of what they add to the market value of the leasehold if they are well adapted to the best use of the property” and the lease is of such duration that it may outlast the fixtures or contains a covenant of perpetual renewal at the tenant’s option. *Id.* Evidence of the cost to remove fixtures, damage to them by removal, and value of fixtures lost because they are incapable of removal may be admitted — not as providing specific items of damage, but as a means of demonstrating value of the unexpired term. *Id.*

Regarding compensation for trade fixtures in the context of relocation, because Maryland provides no right to separate just compensation for

trade fixtures aside from their contribution to the value of the real property, it may be most beneficial to argue that the trade fixtures do not constitute permanent fixtures at all, but are instead personal property of the business. Specifically, if the highest and best use for the real property is not the existing business, the trade fixtures will not be compensated separately in the condemnation proceeding. And, even if the existing use were the highest and best use, the trade fixtures — as permanent fixtures to the real property — would likely contribute very little value to the just compensation award for the real property.

On the other hand, if the trade fixtures are instead argued to constitute “personal property” they may be compensable under business relocation benefits if the condemnation is one governed by Uniform Relocation Assistance statute. (Note: the federal regulations provide that the purchase of capital assets, such as trade fixtures, is not a compensable expense.) 49 C.F.R. §24.304(b)(1).

Maryland agencies generally recognize trade fixtures as personal property and compensate for trade fixtures under the statute in one of two ways in the context of relocation benefits.

First, they may be reimbursed for the lesser of: (a) the cost to disconnect, move, and reinstall the fixture; or (b) the cost to replace the fixture with another item that performs the same function. *See* 49 C.F.R. §24.301(g)(16). Generally, the harder it is to move, the better off you are. The cost to disconnect, move, and reinstall includes details such as installing the appropriate utility lines, electricity, gas, ventilation, and anything else that is needed to reinstall the item. In Maryland, some agencies will require the displaced business to install the item first, and then seek reimbursement. Other agencies will pay up front, but require proof of installation.

The second option is really the manner in which a business can be “compensated” for trade fixtures. If a business simply seeks to walk away from the business and be paid for trade fixtures, or

if the fixture is unable to be moved, the displaced business may be paid for that property. It will be paid the lesser of: (a) the cost to disconnect, move, and reinstall the fixture; or (b) the fair market value in place of the item, less the proceeds from its sale. *See* 49 C.F.R. §24.301(g)(14). Fair market value is determined through personal property appraisers. Presumably, if an agreement upon price cannot be reached, the matter would be appealed and the value of the personal property could be litigated. At least one Maryland condemnation attorney has pursued the matter in the federal court, although jurisdiction was not challenged by the state agency.

One caution is necessary to Maryland practitioners seeking a fair market value payment for the trade fixture. Some Maryland agencies take the position that if a displaced business receives a payment for the actual direct loss of the trade fixture, the business has the obligation to remove the fixture from the property, as well. This can be at a very substantial cost. Other agencies have no such requirement. Any practitioner should clarify this with the agency early on.

Massachusetts

In Massachusetts, it appears that the only way you can recover for trade fixtures is if you can tie them into a specialty and use the depreciated reproduction cost method (cost approach), which is limited to special purpose properties. Massachusetts follows the undivided fee rule.

Nebraska

Nebraska has no certain trade fixture law. What is done is to prepare a fixture inventory, to make it clear what items are not clearly personal property but are not clearly affixed to the real estate. The inventory includes items that are being purchased by the public, with prices set for public purchase, buy back, and salvage. This is not always followed and is fairly new, but it is gaining acceptance and use as a fair method of handling questionable items. The

practice is very helpful, particularly with things such as steel grain bins and irrigation wells and equipment.

New Jersey

New Jersey follows the “functional unit” test to determine the compensability of trade fixtures and equipment. *State by State Highway Comm’r v. Gallant*, 202 A.2d 401, 405 (N.J. 1964). If the real estate and the fixtures together constitute a functional unit they will be deemed compensable as realty, but only to the extent that they enhance the value of the land and building. In the *Gallant* case, looms and associated textile manufacturing equipment were held to be compensable. (“The value of a factory containing industrial equipment employed in the business for which the property is being used is ordinarily greater than that of an empty and idle building. Such equipment in place adds more to the value of the realty than its second-hand salvage value separated from the premises.”) The *Gallant* court specifically distinguished the concept of compensability in an eminent domain proceeding from other contexts, such as landlord-tenant or lender-borrower. Generally, the value of machinery and equipment is its replacement value less depreciation from all sources and is most specifically reflected in the cost approach. There is no conceptual reason why the other approaches to value would not be applicable, but there is no ordinarily adequate data on comparable sales and leases to reliably estimate the value of trade fixtures that may or may not have been included in the sale or lease. Moreover, finding comparables that sold with machinery and equipment that was sufficiently similar to those in the subject property to be useful indicators of value is highly problematic. The concept of functional unity is not always easy to apply. For example, in *Town of Montclair v. D’Andrea*, 351 A.2d 397 (N.J. Super. Ct. App. Div. 1976), the court held that certain items of equipment used in the operating of a restaurant such as a cash register, a toaster, etc., were not com-

pensable, even though it seems clear that such items are necessary for a restaurant to function. The court in *D’Andrea* looked to the language of the Eminent Domain Act of 1971, N.J. Stat. Ann. 20:3-1 et seq. to reintroduce requirements relating to physical annexation and the like.

New York

New York takes a broad view of what is a compensable trade fixture. *Rose v. State of New York*, 246 N.E.2d 735 (N.Y. 1969). These are items sufficiently annexed to the freehold to become assimilated as part of real estate, yet still retain an individual identity. *Matter of City of New York (Allen St.)*, supra, 176 N.E. at 380; *Hamilton v. Austin*, 36 Hun. 138 (N.Y. Sup Ct., 1885). Real estate is distinguished from personal property by its fixed, permanent, and immovable character. A fixture, therefore, will be considered as real estate and compensated for in a condemnation proceeding if it was added to the premises with the intention that it become a permanent accession to the freehold. The existence of this intention is determined from the circumstances of each case. *McRea*, supra, 66 N.Y. at 496.

Ohio

But it is not exactly so in Ohio, where the facts of each case must be considered, taking into account the nature of the property, the manner in which it was annexed, the purpose for the annexation, the degree of difficulty of removal, and the extent of the economic loss in removing same. *Masheter v. Boehm*, 307 N.E.2d 533 (Ohio 1974).

Oregon

The pattern jury instruction for condemnation cases provide:

“Trade Fixtures — When [an owner/a lessee] of property installs on the property fixtures or equipment that are essential to the operation of the business conducted thereon for its highest and best use,

and such fixtures or equipment becomes an integrated part of the building by being imbedded in concrete or permanently fastened with the intention that they should remain a permanent part of the building for the operation of such a business, then such fixtures or equipment so installed constitutes what is generally termed trade fixtures.

“If you find that the defendants have installed such trade fixtures on their property for use in the operation of their business, and installed them in the manner which I have heretofore mentioned with the intention that the trade fixtures should remain permanently a part of the property, then in determining the value of the property and its improvements, you should take into account and give consideration to the value of such fixtures and equipment as part of the defendant’s property insofar as they may enhance the cash market value of such property.”

Pennsylvania

Under the assembled industrial plant doctrine, Pennsylvania courts look to the economic impact upon fixtures taken in eminent domain. Pennsylvania holds that where machinery, equipment, and fixtures were vital to an industrial unit, even though removable, they will be considered part of the real estate and will be compensated when a manufacturer cannot locate elsewhere. *Gottus v. Redevelopment Auth. of Allegheny County*, 229 A.2d 869 (Pa. 1967). Pennsylvania recently adopted an Eminent Domain Code in 2006. Section 707 of the code, 26 Pa. Cons. Stat. Ann. §707, provides as follows:

“Notice to condemnee — In the event the condemnor does not require for its use machinery, equipment or fixtures forming part of the real estate, it shall so notify the condemnee.

Condemnee election — The condemnee may within 30 days of the notice elect to remove the machinery, equipment or fixtures unless the time is extended by the condemnor.

If the condemnee so elects, the damages shall be reduced by the fair market value of the machinery, equipment or fixtures severed from the real estate.”

South Carolina

In South Carolina, there is no statute on point, but there is some case law. Basically, there would be no separate award, and the courts will do their best to make it personal property, so there is no award at all. *See, e.g., Creative Displays, Inc. v. South Carolina Highway Department*, 248 S.E.2d 916 (S.C. 1978).

Texas

Texas applies a three-factor test to determine if an item of personalty has become a trade fixture:

- Is it a permanent part of the realty to which it is affixed by the mode and sufficient of annexation, either real or constructive?
- What is the adaptation of the article to the use or purpose of the realty? and
- What is the intention of the party who annexed the chattel to the realty?

The third criterion dealing with intention is preeminent, whereas the first and second criteria constitute evidence of intention. Intent is made apparent by objective manifestations. If personalty would be a fixture if attached to the land, then a condemning authority must pay for such property as real estate in a condemnation action. *Harris County Flood Control District v. Roberts*, 252 S.W. 3d 667, 670 (Tex. App. 2008), *citing, Logan v. Mollis*, 686 S.W.2d 605 (Tex. 1985).

Virginia

In Virginia, an owner is entitled to compensation to the extent that fixtures enhanced the market value of the property taken. The three general tests are as follows:

- Annexation of the chattel to realty, actual or constructive;
- Its adaptation to the use or purpose to which that part of the realty to which it is connected is appropriated; and
- The intention of the owner of the chattel to make it a permanent addition to the freehold.

Annexation v. Intention

Annexation is not by itself necessary to render an article a fixture. The nature of the item or the use to which it is put in the condemnee's business may require fastening by bolts, screws, or other devices of affixation that will secure the item without preventing it from being readily removed and used elsewhere, with like utility and without injury to the item itself or the freehold. It is the intention of the annexor into which the courts inquire and not the manner of fixation, if any. An item may be completely freestanding and be a compensable trade fixture.

In eminent domain cases, the courts have found the intention when they are faced with articles that would have little value when removed or when the removal will result in material damage to the realty or to the item. *United States v. General Motors*, 323 U.S. 373 (1945); *City of Buffalo v. Michael*, 209 N.E.2d 776 (N.Y. 1965); *Marraro v. State*, 189 N.E.2d 606 (N.Y. 1963), *Matter of City of New York (Seward Park Slum Clearance)*, 200 N.Y.S.2d 802 (N.Y. App. Div., 1960).

Removability Is Not A Test Of A Trade Fixture

Older cases involving trade fixture claims focused on the need of the claimant to establish the intention to make the item a permanent installation. Presumably, this was established by actual annexation. If an item, say a machine, was removable, it was said to be non-compensable. *Matter of City of New York (Whitlock Avenue)*, supra. Removability,

however, has long ceased to be a consideration of compensability of a trade fixture.

Fixture Test

It is clearly the law in New York that an item will be considered a trade fixture if it meets two tests:

- The item was installed in furtherance of the claimant's business (whether used or not); and
- That the fixture would lose substantial value if removed.

Whitehall Corners, Inc. v. State of New York, 620 N.Y.S.2d 126 (N.Y. App. Div. 1994).

Thus, in an appropriate case, items that normally might be considered personalty, such as tables and chairs in a nightclub, become compensable trade fixtures when it is demonstrated that they were specially designed for the premises and would suffer substantial damage if removed.

New York's New Test For Machinery

New York's highest court reviewed a trade fixture award made to a woodworking plant in *Matter of City of New York (Kaiser Woodcraft Corp.)*, 899 N.E.2d 933 (N.Y. 2008). The court adopted a new and apparently additional test for "items qualifying under the 'substantial loss' category of compensable fixtures": "devaluation of functional utility if the item is removed." We will discuss *Kaiser Woodcraft* in detail as a case study later in this article.

The Sum Of The Parts Exceeds The Whole

In condemnation, the total trade fixture installations can exceed the value of the building where they are located. Condemnors often argue that they should only be required to pay just compensation once and that by paying for trade fixtures and the fee, there is a duplication of an award. However, this argument ignores the constitutional obligation to pay each owner the value of what the Govern-

ment has taken. See my article, *Trade Fixtures in Eminent Domain Proceedings*, which appeared in the September 2009 issue of the Practical Real Estate Lawyer.

Both the New York State and Federal Constitutions mandate the payment of just compensation. In a 1962 condemnation proceeding, Judge Friendly reminded the executive branch of the command of the Fifth Amendment, “nor shall private property be taken for public use without just compensation,” and stated the overriding rule of condemnation, that “each owner, landlord or tenant, is entitled to the value of what government took from him.” *United States v. Certain Property*, 306 F.2d 439,452,453 (2d Cir. 1962). See also, *United States v. General Motors Corp.*, 323 U.S. 373, 383-84 (1945); *United States v. Certain Property*, 344 F.2d 142, 146 (2d Cir. 1965). The constitutional requirement of just compensation mandates that the property owner be indemnified so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred. *Livingston v. Mayor, & City of New York*, 8 Wend. 85 (N.Y. 1831); *Banner Milling Co v. State of New York*, 148 N.E. 668 (N.Y. 1925), cert. denied, 269 U.S. 582 (1925); *Matter of Board of Water Supply*, 14 N.E.2d 789 (N.Y. 1938); *New York, Ontario & Western R. R. Co v. Livingston*, 144 N.E. 589 (N.Y. 1924).

Just compensation is properly measured by determining what the owner has lost. *St. Agnes Cemetery v. State of New York*, 143 N.E.2d 377 (N.Y. 1957). It is axiomatic that the measure of compensation for property taken is the owner’s loss and not the taker’s gain. *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949). See also, *Matter of Port Authority (Hudson Tubes)*, 231 N.E.2d 734 (N.Y. 1967), cert denied, 390 U.S. 1002 (1968). There are also different measurements of compensation for each claimant. As noted, a trade fixture is valued as its reproduction value less depreciation, or sound value.

A fee interest will normally be valued by the capitalization of income approach or by the comparable sales approach. No condemnor will be able to demonstrate the effect that any tenant’s trade fixture had on the value of the fee. Indeed, most real estate appraisers will normally disclaim any consideration of trade fixtures in their real estate appraisals. Most premises are demised without fixtures or require extensive renovation to remove the fixtures of the former tenant.

Formula For Valuation

Plant machinery and equipment is to be valued based on its fair market value in place. This is by determining the sound value. The sound value of a trade fixture is measured by the reproduction cost less depreciation. *Universal Empire Industries, Inc. v. State of New York*, 566 N.Y.S. 2d 442 (N.Y. Ct. Cl. 1990). Note that reproduction cost (the cost of reproducing the same physical property) is not replacement cost (the cost of replacing property with property of like kind and equal quality or effectiveness). Many cost guidebooks use replacement cost data that may be acceptable for an insurance claim, but not for condemnation.

Each item is individually depreciated by considering its actual condition, maintenance, and functional ability. This is deducted from the reproduction value. Again, care should be taken not to apply a depreciation amount taken from a published schedule. Nor should a tax depreciation schedule be used. It does not matter how long a machine has been in service. Obviously, some items will depreciate more quickly than others, but the rate is the result of actual inspection by the appraiser considering all factors.

Increments Are Managed In The Valuation Of An Integrated Plant

The law of the State of New York is that the trade fixtures in an integrated plant have an enhanced value. *Jackson*, supra. See also, *Banner Milling*

Co., supra, 148 N.E. at 671-672 (1925). The court must value the claim on the basis of a turn-key installation. The condemnation in *Banner* was not of an idle piece of machinery crated and located on a loading dock. The condemnation was of an integrated facility that was designed, engineered, and constructed over several years. Each fixture was integrally related to the other. Everything was designed so that all components would complement each other. The facility was an integrated “system” installation that required a great expenditure not only of money, but of time, so that all fixtures would harmonize. In such cases, the condemnor must compensate for the expense incurred in putting the system together. See, *Matter of City of New York (Salvation Army)*, 373 N.E.2d 984 (N.Y. 1978); *Matter of City of New York (Fulton Park – Kerievsky)*, 395 N.Y.S.2d 99 (N.Y. App. Div. 1977), *aff’d*, 380 N.E.2d 327 (1978); *Matter of City of New York (G&C Amusements, Inc.)*, 434 N.E.2d 1038 (N.Y. 1982); *Richards “Of Course” Inc. v. State of New York*, 317 N.Y.S. 2d 827 (N.Y. App. Div. 1971). Typical increments include shipping and installation, sales tax, general contractor overhead, profit, engineering, permits, and financing.

THE CASE STUDY: KAISER WOODCRAFT •

Finally, we can focus on an actual case, *Kaiser Woodcraft*. Mr. Kaiser operated a custom cabinet woodworking business which was located in the Melrose section of the Bronx. The plant had typical woodworking machines set up in an orderly fashion to process the product. Some machines were very heavy and fixed in place. Indeed, one machine required steel beams to be constructed in the basement to support it.

Others were not as heavy, but still affixed either by bolts or otherwise. All were connected by dedicated electric service. Still others were movable, such as smaller table saws. The last category of power tools included heavy duty pneumatic hand

tools that attached to a fixed pneumatic cooper air line fed by a compressor.

Some time in 2006, the City of New York condemned the block where Kaiser Woodcraft was located as part of an urban renewal proceeding for housing.

The trial court sitting in Bronx County Supreme Court heard the case without a jury. (New York does not allow jury trials in eminent domain matters. Forty-seven out of the 50 states provide for trial by jury.) The witnesses were the principal owner of the business and two trade fixture appraisers who offered their expert testimony, both as to affixation and value. The owner testified that he was not going to continue in business and had no use for anything. He left everything in place when he surrendered possession of the premises.

The testimony by the expert witnesses was widely different both in terms of whether a particular item was or was not a trade fixture and the value of the item. The City’s expert contended that most of the items were not trade fixtures and therefore non-compensable because the items could be removed and used elsewhere. The expert for the City maintained that there was a well-established market for used woodworking machines.

The claimant’s appraiser, on the other hand, maintained that the machinery once removed would lose substantial value and be worth a small fraction of its value in place. Among the reasons given for this low value was that the buyer would be a dealer in used machines and that the machine would have to be disconnected, disassembled, packed, and kept in storage until a buyer came along.

The trial court agreed with the claimant and made a substantial award. The City took an appeal to the Appellate Division, First Department, which modified the award slightly by not compensating for some items which were not machinery, but otherwise claimed as trade fixtures. A final appeal was taken to New York State’s highest court, the Court of Appeals in Albany.

In the Court of Appeals, the City argued that most of the machinery was non-compensable personal property because it was removable. After oral argument, the court held:

“When the State takes property by eminent domain, the Constitution requires that it compensate the owner ‘so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred.’ (citation omitted). Thus, ‘[a]n appropriation of land...is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures....The value of the fixtures ought, therefore, to [be] considered in estimating the total value of the property appropriated by the State.’” (citation omitted).

“These principles are easier stated than applied to the law of fixtures, which developed in the context of land sales, not eminent domain. The difficulty is apparent in the case of business machinery, which though large, heavy, and specific to a trade, is often removable and useful in another location. Removability, however, is not determinative in separating compensable fixtures from noncompensable personalty.”

“New York’s earliest cases on trade fixtures (as they are called) address the rights of buyers and sellers, or heirs and donees, of real property. The plaintiff, usually the seller, typically brought suit to retain title to machinery after a contract of sale for real property had been executed. The court’s task was to determine whether the machinery was so affixed that it became part of the realty and passed to the buyer by execution of the contract of sale. For an item to be deemed a fixture, it had to satisfy a three-pronged test: actual annexation to the realty; adaptability to the use or purpose of the realty; and the intention that the annexation be permanent.”

“In the century and a half this Court has grappled with fixtures issues, the three-pronged ‘annexation-adaptability-permanency’ test has remained central-in this and most other states-to de-

termining whether an item is a compensable trade fixture or noncompensable personalty. Under the first prong, annexation originally required that the chattel be physically attached to the realty, but that concept has been enlarged to include items that are ‘constructively annexed’ to the land. Adaptability, meanwhile, contemplates both fitting the chattel to the particular purpose of the freehold, and the necessity of the chattel for complete use of the freehold, as when machinery is placed in a factory to perform a special purpose and is fitted for that purpose. The final element is an intention that attachment be permanent, requiring an objective interpretation of the installer’s intention at the time of attachment. Even if the machinery could be removed, the critical factor was whether its installation was intended to be permanent. *See, McRea v. Central Nat’l. Bank of Troy*, 66 N.Y. 489, 494 (1876).”

“This court for the first time added a fourth element to the trade fixtures test: ‘those improvements which are used for business purposes and which would lose substantial value if removed.’ It is this ‘lose substantial value’ element that is the focus of the present appeal.”

“Kaiser argues that certain of its large machinery would lose substantial value both because it would sell for less on a secondhand market and because it was part of an integrated workplace physically ordered to maximize efficiency and mirror the flow of labor. [The court did not find that there was an integrated plant.] Both arguments were embraced by the courts below in articulating the applicable test. This, however, misconstrues what the Court in *Rose v. State*, 246 N.E.2d 735 (N.Y. 1969)] meant by ‘lose substantial value if removed.’

“Claimant’s remaining argument-unchallenged by the City-is that many of the listed items will lose value because they are worth less as secondhand goods than they are in his shop, and there are ad-

ditional costs incurred to have the machinery removed, shipped and stored. The existence of these costs, similarly, does not qualify as losing substantial value. Claimant mistakes diminution in use with loss in value merely because each piece of equipment may be worth less used. Under such analysis, virtually every machine used in a business would be a compensable fixture, obliterating the distinction between fixtures and personalty.”

“A fair reading of the decisions below shows that the courts correctly identified the ‘annexation-adaptability-permanence’ test along with the ‘lose substantial value’ factor articulated in *Rose*. As we have explained, however, reliance on the second-hand value of individual items in this nonintegrated woodshop was error, and we cannot say whether in this case the items otherwise meet the test for trade fixtures.”

“Accordingly, the order of the Appellate Division should be reversed, with costs, the case remitted to Supreme Court for further proceedings in accordance with this opinion, and the certified question answered in the negative.”

899 N.E.2d at 937-41.

The Lessons Of *Kaiser Woodcraft*

The claim then was returned to the Bronx Supreme Court where it was settled for the amount originally recommended by the judge on the day the trial began. What occurred was nothing more than an additional element being added to the formula when the fixture would “lose substantial value.” If this is the sole basis for the item being claimed as a trade fixture, then it is incumbent upon the claimant to also show a loss of functional utility if the fixture is moved. In other words, it is not enough to

show the machine would lose substantial value if moved — it also has to be shown that it would not work as well. But the Court of Appeal otherwise confirmed New York’s law of trade fixtures. The court made clear that when the State takes property by eminent domain, the Constitution requires that it compensate the owner “so that he may be put in the same relative position, insofar as this is possible, as if the taking had not occurred.”

It is also to be remembered that the court did not find the premises to be an integrated facility. But all the other rules for determining whether an item or machine is a compensable trade fixture, other than that it would “lose substantial value,” remained in place. The Court of Appeals concluded at the bottom of its decision:

“A fair reading of the decisions below shows that the courts correctly identified the “annexation-adaptability-permanence” test along with the “lose substantial value” factor articulated in *Rose*. As we have explained, however, reliance on the second-hand value of individual items in this nonintegrated woodshop was error, and we cannot say whether in this case the items otherwise meet the test for trade fixtures.”

899 N.E.2d at 940-41.

CONCLUSION • To conclude, machinery will be compensable, as it was in *Kaiser*, when it can be shown that the machine meets the three-prong test. The practitioner should also show that the machine would not only lose substantial value but also that it would lose functionality. But this test is not necessary if the machine is otherwise qualified as a trade fixture.

**To purchase the online version of this article,
go to www.ali-aba.org and click on “Publications.”**