INVERSE CONDEMNATION AND GOVERNMENT PANDEMIC RESPONSE

"*No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*"
~ United States Constitution, Amendment V.

"*No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.*"
~ Florida Constitution, Article X, Section 6(a).

"*The Fifth Amendment forbids the taking of private property for public use without just compensation. We have recognized that this constitutional guarantee is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'*"
~ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336, 122 S.Ct. 1465, 1486, 152 L.Ed.2d 517 (2002).

In recent days, the word "unprecedented" has been ever present in the lexicon of the news and any discussion of the impact of the COVID-19 pandemic on our lives and businesses. Certainly, the role and actions of Federal and local governments in responding to the pandemic have no comparison to anything in our living memory. As a consequence, many businesses have been forced to think about the direct impact of government action on not only how they do business but, in many cases, whether they can even conduct business and if there are any limitations on the government's power in that regard. In any consideration of that issue, the legal doctrine of inverse condemnation plays an important role.

Inverse condemnation is a subset of the broader government power known as "eminent domain" which allows the government to take private property for a public purpose. The distinction between eminent domain in general and the subset of inverse condemnation is that the exercise of the power of eminent domain typically occurs as part of a legal or administrative procedure where the government announces its intention to take private property and a process to determine "just compensation" takes place (either prior to or after the actual taking). Inverse condemnation, on the other hand, refers to a claim initiated by a property owner where the government has failed to commence a formal eminent domain proceeding or denies that a taking has even occurred. As a consequence, inverse condemnation proceedings are always subsequent to the government's action and frequently involve the government's exercise of its broad police powers.

Inverse condemnation claims can be broadly summarized into three categories: 1) actual or per se takings via regulation or actual seizure, 2) total regulatory takings and 3) partial regulatory takings.

The first category is the simplest and most straight forward and involves situations where the government actually seizes, uses, or requires a physical burden on private property. The seminal case on government regulations in this area is the United States Supreme Court case of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) which involved the State of New York requiring private property owners to allow cable television providers to install cable lines on their properties in exchange for a one time payment of $1. "In short, when the 'character of the government action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard

to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto*, 458 U.S. at 434-35, 102 S.Ct. at 3175.

In such an instance, the physical impact or burden imposed by the government is usually easily proven and the dispute is likely to center on what constitutes "just compensation" that the property owner is entitled to. In the current pandemic context, such claims would involve the government's seizure of private property (*i.e.*, medical equipment) or using property for the government's benefit (*i.e.*, commandeering hotels or other residential property to house patients or those at risk).

The second category involves the situation where the government does not actually occupy or use (or mandate that others may use another's) private property but, instead, utilizes its police powers to deprive a property owner of all economically viable use of the owner's property. The controlling case on this inverse condemnation claim category is *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). In that matter, the owner of two beachfront residential lots was prohibited from any improvement of the lots a couple of years after purchase as a consequence of subsequently enacted legislation. In reaching its ultimate decision, the Supreme Court observed "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of physical appropriation." *Lucas*, 505 U.S. at 1017, 102 S.Ct. at 2894. The Court ultimately concluded, "We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019, 102 S.Ct. at 2895. In reaching its ultimate decision, the Supreme Court made clear that government regulations to prohibit or abate activities that constitute a private or public nuisance are not entitled to compensation since they do "not proscribe a productive use that was previously permissible under relevant property and nuisance principles." *Lucas*, 505 U.S. at 1029-30, 102 S.Ct. at 2900-01.

In practice, claims of government regulation resulting in the complete deprivation of all economically viable uses are uncommon. Post-*Lucas*, federal and local government have sought to restrict only those uses critical to effectuate the purpose of their exercise of their police powers to avoid having to pay just compensation. Moreover, in a pandemic context, the government's exercise of its police powers are likely to be in place only for a discrete period of time necessary to address a particular exigency and, then relaxed or withdrawn. The Supreme Court subsequently clarified in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 336, 122 S.Ct. 1465, 1486, 152 L.Ed.2d 517 (2002) that a temporary deprivation of all economic viable uses does not constitute a *Lucas* claim and that the analysis of a temporary deprivation claim is performed utilizing the guidelines applicable to partial regulatory taking claims, our final category.

Given the prevalence of government restrictions on the use and development of real and personal property, it is unsurprising that the majority of potential inverse claims require analysis under the case law governing partial regulatory claims where the government restricts or prohibits certain uses of private property but not all. The decision that first articulated the principles governing such claims is *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). In that matter, the owner of the famous Grand Central Terminal was denied the ability to construct a 53/55 story office building over the Terminal originally constructed in 1913 that was designated a historic landmark in 1967. Interestingly, the Terminal was originally designed to support a 20-story office tower that was never constructed. As part of New York City's landmark preservation laws, owners of properties designated as landmarks were subject to much more stringent regulations than would be otherwise. The City's law did provide a benefit to owners of such property by allowing unused development rights belonging to a

landmark designated property to be transferred to contiguous parcels on the same city block. In denying the consents necessary to proceed with the development, the City found that the proposed alterations and additions would negatively impact the historic and aesthetic importance of the Terminal.

In its decision, the Supreme Court first noted that the "question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty." *Penn Central*, 438 U.S. at 123, 98 S.Ct. at 2659. "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than disproportionately concentrated on a few persons." *Id*. Having accepted that lower courts needed guidance in how to address such claims, the Court articulated a factually intensive three part analysis:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular importance. [1] The economic impact of the regulation on the claimant and, [2] particularly, the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. So, too, is [3] the character of the government action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, then when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Penn Central, 438 U.S. at 124, 98 S.Ct. at 2659 (citations omitted). In applying those principles to the matter, the Court rejected the proposition that a claimant "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development [as being] untenable" as well as "the proposition that diminution in property value, standing alone, can establish a 'taking' . . . ." *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. at 2662-63. In denying the inverse claim, the Court found that New York City's landmark preservation ordinances did not interfere with the present uses of the Terminal, did not prohibit all potential development of the airspace above the Terminal, and, to the extent development rights were impaired, the property owner's development rights still had value in that they could be transferred to contiguous parcels.

Because of the nature of the ad hoc factual inquiry set forth in *Penn Central*, it is difficult, if not impossible, to set forth numerical thresholds or hard rules (short of a *Lucas* taking) that will result in a finding of a government taking as a consequence of police power regulations or restrictions. This difficulty is only compounded in seeking to analyze potential claims resulting from COVID-19 related government action given its unprecedented nature. However, there have been a number of lower court decisions resulting from quarantines implemented for the purpose of protecting livestock that may provide some guidance.

Case v. United States Dep't of Agriculture, 642 F.Supp. 341 (M.D. Pa. 1986) – As a consequence of a quarantine imposed due to an outbreak of avian influenza, the owners of an avian hatchery lost 95% of its income from selling day old birds via mail throughout the US as a consequence of the quarantine regulations. In referencing the *Penn Central* criteria, the court made the observation that "[o]f paramount importance in the instant case is that the government action was the promulgation of regulations designed to promote the general welfare rather than specific conduct narrowly focused on certain property." *Id* at 344. The court also quoted an 1962 Supreme Court decision which held that "[a] prohibition simply upon the use of property for the purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of

the community, cannot in any just sense, be deemed a taking or an appropriation of property for the public good." *Id*. at 344 (*quoting Goldenblatt v. Town of Hempstead*, 369 U.S. 590, 593, 82 S.Ct. 987, 989 (1962)). In denying the claim, the court noted that there was no physical invasion of the claimants' property and held that they had no reasonable expectation to be able to use their breeding stock when there was a public interest in a quarantine and that they "should have anticipated that, in the event of an outbreak of avian influenza, the federal and state governments might impose limitations on the use of their property." *Id*.

Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990) – Claimants acquired a flock of turkey breeder hens and toms for purposes of selling the turkey hatched eggs out of state. As a consequence of an avian flu quarantine, claimants were unable to sell eggs and, after the cost of maintaining the flock indefinitely became prohibitive, sold the flock at a loss of 77% of their investment. Claimants' claim for compensation under the applicable statute was denied because there was no evidence that the flock was infected. After discussing the *Penn Central* criteria, the court focused on the impact to the claimants and concluded: "Even when pursuing the public good, as the USDA was doing when it imposed the poultry quarantine, the Government's action cannot be ignored. Why should the Yanceys be forced to bear their own losses when their turkeys were not diseased? The Yanceys' losses came about because of the Government's action. If the intent of the poultry quarantine was to benefit the public, the public should be responsible for the Yanceys' losses." *Id*. at 1542. As a consequence, claimants were entitled to be compensated for their loss.

Rose Acre Farms, Inc. v. United States, 559 F.3d 1260 (Fed. Cir. 2009) – Due to an outbreak of salmonella, the USDA restricted the sale of chicken eggs from flocks that indicated the presence of salmonella. As a consequence, such eggs could not be sold as "table eggs" but could only be sold for purposes that required pasteurization. Because of test findings from claimants flocks, 43% of its table eggs were diverted to the "breaker egg" market where the eggs had an approximately 10% lower market value. In applying the *Penn Central* factors and in distinguishing its previous decision in *Yancey*, the court discussed that, unlike salmonella, avian flu is of little danger to humans and that the Yanceys suffered a 77% loss in their investment. In ultimately denying the claim, the court concluded "the law of regulatory takings does not generally compensate property owners when a regulation's economic impact is slight and temporary but the potential for physical harm to the public is significant." *Id*. at 1283.

Cebe Farms, Inc. v. United States, 116 Fed.Cl. 179 (Fed. Cl. 2014) – Claimant raised "colored broiler" chickens, which was a niche portion of the otherwise homogenous white chicken market. Due to the outbreak of a poultry disease, the USDA imposed a quarantine and subsequently claimed that claimant's flock was infected (although it never provide any evidence or test results substantiating that finding). Despite claimant's efforts to address the possible health concerns in another manner, the USDA ultimately ordered the destruction of claimant's flocks and eggs. Ultimately, the court found that there was an issue of fact concerning whether the flocks and eggs were healthy or not. If not infected (and, thus, the government was not seeking to address a public nuisance in destroying the property), the court held that "just compensation pursuant to the Fifth Amendment would be required." *Id*. at 201.

In addition, while a full review of Florida inverse condemnation law is beyond the scope of the present discussion, there are several decisions of specific interest:

Department of Agriculture v. Mid-Florida Growers, Inc., 521 So.2d 101 (Fla. 1988), *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988) – Claimants had each purchased approximately 8,000-9,000 citrus seedlings from a citrus nursery where evidence of citrus canker

was discovered several months later. Despite negative test results, the Florida Department of Agriculture and Consumer Services advised claimants that their nursery stock must be destroyed and, subsequently, between 137,000 and 143,000 trees and seedlings belonging to each claimant were destroyed. In response to the inverse condemnation claims filed by the claimants, the Department argued that the destruction occurred pursuant to regulatory and police power and did not constitute a taking because they were destroyed to avoid a public harm. The Florida Supreme Court expressly rejected the argument that a valid exercise of police power does not entitle the property owner to compensation. *Id*. at 103. While the Court found that the destruction of diseased citrus plants would not entitle an owner to compensation because such plants are effectively valueless, the Court held "that full and just compensation is required when the state, pursuant to its police power, destroys healthy trees." *Id*. at 105.

Keshbro v. City of Miami, 801 So.2d 864 (Fla. 2001) – The City of Miami and the City of St. Petersburg had ordered the temporary closure of, respectively, a motel for six months and an apartment complex for one year due to reported instances of illegal activity involving the sale of illegal drugs. Since the lower courts had determined that the temporary closures resulted in a deprivation of all economic use, the Florida Supreme Court, applying the rationale of *Lucas*, held that "In sum, we are unable to discern any meaningful distinction justifying the preclusion of prospectively temporary regulations from categorical treatment under *Lucas*. Moreover, we believe this to be the only logical outgrowth of [*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 150 (1987).]" The application of the holding of *Kehbro* would be of significant utility in arguing that a temporary quarantine shutdown deprives a business owner of all economic use and, thus, should be regarded as a *Lucas* claim which would avoid the ad hoc factual analysis required by *Penn Central* under Florida inverse condemnation precedent. Given that the Florida Supreme Court did not have the benefit of the Supreme Court's subsequent decision in *Tahoe-Sierra*, great caution is urged in relying on *Keshbro*. Ultimately, the Florida Supreme Court found that the closure in St. Petersburg constituted a taking but that the Miami closure did not because there was sufficient evidence to find that the activities at the Miami property (but not the St. Petersburg property) constituted a public nuisance.

State v. Basford, 119 So.3d 478 (1st DCA 2013) – As a consequence of the "Pregnant Pig Amendment" to the Florida Constitution which banned the confinement of pigs during pregnancy and the legislation effectuating the amendment, claimant argued that his farm improvements could not be used for any other purpose or use. The state offered no evidence that to refute his contention and did not argue that claimant's improvements had another purpose or that the claimant could convert to a legal pig raising operation. Claimant continued to utilize other portions of his property for other farming related businesses that were not impacted by the amendment. After referencing the *Penn Central* factors, the First District noted the trial court finding that the amendment resulted in a taking of all of claimant's pig breeding improvements due to their functionally integrated nature and held that the "standard of proof for an as-applied taking is whether there has been a substantial deprivation of economic use or reasonable investment-backed expectations." *Id*. at 482. As a consequence of the findings by the trial court, the First District held that the lower court's finding of a taking would be affirmed but specifically stated that the decision should not be perceived as expansion of the takings clause of the Florida Constitution and was based solely on the record in the case before it. *Id*. at 483.

Ultimately, it must be concluded that potential inverse claims resulting from COVID-19 related executive orders and restrictions will face strong opposition from government counsel because of the large pool of possible claimants, the enormous potential exposure, the generalized nature of the harm visited on society as a whole, and the (presumably) temporary nature of the restrictions.

Based upon the ad hoc, factually intensive analysis specified by *Penn Central*, claims that can demonstrate particular harm to a claimant separate from negative impacts to the general public, a significant impact to a specific claimant's investment-based expectations, and involve an industry/business which is not heavily regulated are more likely to be considered compensable inverse condemnation taking claims.