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Constitutional Law—Eminent Domain—Just Compensation for a Lessee's Renewal Expectation—Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973)

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CONSTITUTIONAL LAW—EMINENT DOMAIN—JUST COMPENSATION FOR A LESSEE'S RENEWAL EXPECTATION—*Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

To clear the way for construction of a dam, the United States condemned petitioner Almota Farmers Elevator & Warehouse Company's (Almota) leasehold in three-quarters of an acre of land located near the Snake River in the State of Washington. Only the leasehold was condemned since the underlying fee had been previously purchased by the government. When condemned, 7½ years of Almota's 20-year leasehold remained. The condemned leasehold was the last in a series of renewals of the original lease executed in 1919. In reliance on this history of renewals, Almota had constructed substantial permanent improvements[1] on the leasehold in order to pursue more profitably its business of purchasing, storing and shipping grain produced locally.[2] The expected life of these improvements extended substantially beyond the duration of the lease term.

The lease contained neither a condemnation clause nor a right of renewal. The lease did provide that the petitioner must remove all improvements within 6 months after the expiration of the lease or such improvements would become the property of the fee holder.

At trial, Almota argued that the government should be required to compensate a lessee in the amount for which the leasehold could have been sold in the open real estate market—a sum that would have included a value representing Almota's expectation of renewal. The government maintained that compensation should be based only on the fair market value of Almota's *legal* rights in the leasehold—the 7½ years that remained of the lease term.

The district court accepted Almota's theory of valuation,[3] but was

1. The most significant improvements were a 522,500-bushel grain elevator and a large grain warehouse, which were erected immediately adjacent to the former fee holder's (Oregon-Washington Railroad and Navigation Company) railroad tracks. Although it is not clear from the Court's opinion, these improvements were probably constructed during the current lease that would have been up for renewal in 1974.

2. The former fee holder had a continuing business relationship with petitioner whereby the railroad shipped the grain that petitioner stored. The series of lease renewals was evidently based upon this mutually advantageous business arrangement.

3. 409 U.S. at 472.

reversed by the Court of Appeals for the Ninth Circuit.[4] The Supreme Court reinstated the district court's judgment. *Held:* Just compensation for a leasehold bearing improvements owned by the lessee is measured by what a willing buyer would pay to a willing seller for the leasehold, taking into account the possibility of renewal. *Almota Farmers Elevator & Warehouse Co. v. United States,* 409 U.S. 470 (1973).

I. BACKGROUND

Generally, when a leasehold is condemned, the lessee[5]

> is entitled to a sum which will adequately compensate him for his pecuniary loss as the result of the exercise of the power of eminent domain. The fair market value of the balance of the demised term has been ordinarily held to afford such compensation . . . .

The fair market value of an existing leasehold is generally measured by what a willing buyer will pay to a willing seller for the use and occupancy of the leasehold for the balance of the lessee's term.[6] Consideration must also be given to the lessee's right of renewal, if any, and a deduction made for the rent remaining over the term of the lease. The courts have consistently held that this formula requires the lessee to demonstrate a legal right to renew, such as a binding option in the lease, not merely an expectation of renewal.[7] The courts have adhered to this rule even in cases where the lessee could prove that the expectation of renewal was well justified and had market value.[8]

In the leading case, *United States v. Petty Motor Co.,* the Court affirmed this general rule:[9]

4. United States v. 22.95 Acres of Land, 450 F.2d 125 (9th Cir. 1971).

5. J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.42[3] (rev. 3d ed. 1974) [hereinafter cited as NICHOLS]; *see* cases cited therein.

6. S. SEARLES, A PRACTICAL GUIDE TO THE LEGAL AND APPRAISAL ASPECTS OF CONDEMNATION 21 (1969), defines fair market value generally as:

> The highest price estimated, in terms of money, which the property will bring, if exposed for sale in the open market by a seller who is willing, but not obliged to sell, allowing a reasonable time to find a buyer who is willing, but not obliged to buy, both parties having full knowledge of all uses to which it is adapted, and for which it is capable of being used.

7. *See, e.g.,* United States v. Petty Motor Co., 327 U.S. 372 (1946); Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901); Stroh v. Alaska State Housing Authority, 459 P.2d 480 (Alas. 1969). *See also* note 11 *infra.*

8. *See, e.g.,* United States v. Petty Motor Co., 327 U.S. 372 (1946); Scully v. United States, 409 F.2d 1061 (10th Cir. 1969).

9. 327 U.S. 372, 381 (1946).

> The measure of damages is the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew in the lease of Petty, less the agreed rent which the tenant would pay for such use and occupancy.

Although Petty Motor had an option to renew, also involved in the case was the condemnation of several leaseholds whose lessees, although lacking any right to renew, had proven a justifiable expectation that their leaseholds would be renewed. However, as the Court noted, "The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights."[10]

As was true of the lessees in *Petty Motor,* Almota's expectation that the lease would be continually renewed, coupled with the presence of valuable improvements, formed the basis of the valuation dispute between the government and Almota.[11] The government's theory of valuation would not have compensated Almota either for its expectancy of renewal or for the value of the improvements past the term of the lease. Almota argued that it should be compensated for the "real" market value of the leasehold, *i.e.,* the amount Almota could have received on the open real estate market. The difference between the government's valuation and Almota's higher valuation—$144,625—

10. *Id.* at 380 n.9.

11. As the Court put the issue:

> Whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed.

409 U.S. at 473. It is interesting to note that this phrasing of the issue was accepted by the Court exactly as stated by the government in opposing the grant of the petition for certiorari. *Id.* at 473 n.l. The issue as expressed by Almota is set out below for the sake of comparison:

> In awarding just compensation to a tenant in the condemnation of a leasehold interest in real property, including tenant owned building improvements and fixtures situated thereon, *may an element of great inherent value in the improvements be excluded* merely because it does not, by itself, rise to the status of a legal property right.

Id. (emphasis the Court's). In Almota's phrasing of the issue it is implicitly recognized that the real issue was whether an expectancy could be accorded, for compensation purposes, the status of a property right. The Ninth Circuit saw that question to be the crux of the issue:

> The question which we must answer in the instant case is "Does the word 'property' in the Fifth Amendment sense of the Constitution of the United States, ... include hopes and expectations, even those so well grounded that they have market value?"

450 F.2d at 127. This writer believes that the Ninth Circuit's inquiry—whether an expectancy is "property" under the fifth amendment—is the most incisive approach to the problem, and one which leads tho the correct resolution of the issue. *See* text accompanying note 25 *infra.*

reflected a willing buyer's expectation that the lease would be renewed and that he would be entitled to the full use of the improvements.[12]

The Court accepted Almota's theory of valuation and in so doing ignored the long line of precedent in which courts have held that the fair market value of a leasehold should not include the value of an expectancy.[13] The *Almota* Court has reversed this general rule, or at least modified it, where the life of valuable, permanent improvements constructed by the lessee extend beyond the term of the lease. This note will examine the reasoning underlying the Court's modification of the rule and explore the consequences that may result from that reasoning.

II. THE COURT'S REASONING

The *Almota* Court attempted to circumvent the reasoning of *Petty Motor* by distinguishing the latter as a case not involving valuable improvements[14] and by explicitly denying that it was compensating Almota for a mere expectancy.[15] However, as the dissent correctly points out:[16]

> [T]he Court permits the same practical result to be reached by saying that, at least in the case of improvements, the fair market value may

12. By the government's theory of valuation, Almota's leasehold was worth $130,000. In contrast, Almota's theory of valuation placed the value of the leasehold at $274,625. The dollar amount produced by each valuation was not litigated; it was stipulated that each was accurate according to its respective theory.

13. *See* United States v. Petty Motor Co., 327 U.S. 372 (1946); Scully v. United States, 409 F.2d 1061 (10th Cir. 1969); Stroh v. Alaska State Housing Authority, 459 P.2d 480 (Alas. 1969); United States v. 257.654 Acres of Land, 72 F. Supp. 903 (D. Hawaii 1947); Pause v. Atlanta, 98 Ga. 92, 26 S.E. 489 (1896); Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901); State v. Platte Valley Pub. Power & Irrig. Dist., 147 Neb. 289, 23 N.W.2d 300 (1946); Storms v. Manhattan Ry., 178 N.Y. 493, 71 N.E. 3 (1904). *Contra,* Mayor of Baltimore v. Rice, 73 Md. 307, 21 A. 181 (1891); *In re* Acquiring Certain Property on North river, 118 App. Div. 865, 103 N.Y.S. 908, *aff'd,* 189 N.Y. 508, 81 N.E. 1162 (1907). *See generally* Annot., 166 A.L.R. 1196 (1947); Annot., 3 A.L.R.2d 286 (1949). *See also* Osborne v. United States, 145 F.2d 892 (9th Cir. 1944), for a collection of cases where compensation was denied for disappointed expectations resulting from the revocation of various government permits which were legally revocable. On this latter point compare U.S. v. Fuller, 409 U.S. 488 (1973).

14. 409 U.S. at 476.

15. The Court asserted that "there is no question here of creating a legally cognizable value where none existed, or of compensating a mere incorporeal expectation." *Id.*

16. *Id.* at 481 (Rehnquist, J., dissenting).

> be computed in terms of a willing buyer's expectation that the lease would be renewed.

The validity of the dissent's criticism appears when one recognizes that the compensation Almota sought was based not only on what interest Almota had (the 7½ years remaining on the lease term), but also on what Almota might have had (a renewal) in the future.[17] Thus, to argue the Court is merely requiring compensation for "the fair value of the property taken by the Government,"[18] begs the question.

The *Almota* improvements distinction is illusory because it is founded upon the fallacious premise that only the improvements are compensated—not the renewal expectancy. This line of reasoning, while superficially appealing, ignores the fact that the lease agreement is the sole source of a lessee's legal right to the use and occupancy of improvements. Under the lease in *Almota* the lessee did not have a legal right to use its improvements after the expiration of the lease. The only legal right granted by the lease was removal of any or all improvements within 6 months of the expiration of the lease.[19] Therefore, in awarding the value of the improvements past the term of the lease, the Court granted Almota a legal right it simply did not possess. The net result of the Court's decision in *Almota* is that an incorporeal expectancy is treated as fifth amendment property (*i.e.*, a legal right), for which compensation is awarded when the leasehold happens to have lessee improvements erected thereon, but not when improvements are lacking.[20] Thus, the *Almota* Court's attempt to distinguish *Petty Motor* is faulty because the *Almota* decision has the direct effect of compensating for an expectancy—precisely the result rejected in *Petty Motor*.

In only one recent case, *United States v. Certain Property, Borough*

17. *See* note 12 and accompanying text *supra*.

18. 409 U.S. at 476 n.3. For a case which advanced an argument similar to that used by the *Almota* Court, see Mayor of Baltimore v. Rice, 73 Md. 307, 311, 21 A. 181, 182 (1891), where the court stated that it was merely requiring compensation for "saleable value of such interest as [the lessee] had."

19. Brief for Respondent at 3, *Almota*.

20. The Ninth Circuit considered this improvements distinction to be worthy of no more than a curt dismissal:

> We find no merit in Almota's argument that, because there were buildings, the issue before us is different from what it would have been if there had been no buildings.

450 F.2d at 129. *See also* note 11 *supra*.

of Manhattan,[21] has a court taken an approach similar to that in *Almota.*[22] In *Manhattan,* the Second Circuit noted a number of factors which indicated that condemnation would deprive the lessee of value which he would have otherwise retained.[23] The court reasoned

21. 388 F.2d 596 (2d Cir. 1968) (en banc). The panel opinion and the en banc opinion are reported together.

22. As recently as 1969 in Scully v. United States, 409 F.2d 1061 (10th Cir. 1969), the Tenth Circuit rejected a lessee's argument that the likelihood of renewal should be added to the value of the lease, citing *Petty Motor* as stating the correct rule. Decided the same year was Stroh v. Alaska State Housing Authority, 459 P.2d 480 (Alas. 1969), in which the Alaska Supreme Court, refusing to compensate for a renewal expectancy and relying on the general rule that a government need only compensate for a taking of a legal right, asserted that an expectancy of renewal amounted to no more than "a speculation on chance." *Id.* at 482.

An improvements distinction was not even discussed in the well-known Massachusetts case of Emery v. Boston Terminal Co., 178 Mass. 172, 59 N.E. 763 (1901), where valuable improvements owned by the lessee were involved. In *Emery,* the lessee owned a valuable wharf the life of which extended beyond the term of the condemned leasehold. The lessee brought suit seeking, *inter alia,* to have the value of the expectancy of renewal of the lease added to his damages. Justice Holmes, speaking for a unanimous court, explicitly rejected this item in assessing damages. Justice Holmes' words, though often cited in this area, bear repeating:

> It appeared that the owners had been in the habit of renewing petitioner's lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioner's holding, they could not be taken into account in determining what respondent should pay. They added nothing to the tenant's legal rights, and legal rights are all that must be paid for. Even if such intentions added to the salable value of the lease, the addition would represent a speculation on a chance, not a legal right.

59 N.E. at 765. *Emery* was relied upon by the Court in *Petty Motor* (*see* note 10 and accompanying text *supra*), yet was not considered by the majority in *Almota.*

23. Specifically, the en banc majority stated:

> We are unable to follow the panel majority in assuming that tenants under short term leases will generally not be able to derive any value from their fixtures beyond the expiration of their leases. The contrary is proved not only by common experience but by the record of frequent lease renewals in this very case. Lessors do desire, after all, to keep their properties leased, and an existing tenant usually has the inside track to a renewal for all kinds of reasons—avoidance of costly alterations, saving of brokerage commissions, perhaps even ordinary decency on the part of landlords. Thus, even when the lease has expired, the condemnor will often force the tenant to remove or abandon the fixtures long before he would otherwise have had to, as well as deprive him of the opportunity to deal with the landlord or new tenant—the only two people for whom the fixtures would have a value unaffected by heavy costs of disassembly and reassembly. The condemnor is not entitled to the benefit of assumptions, contrary to common experience, that the fixtures would be removed at the expiration of the stated term.

388 F.2d at 601–02, *quoted in part in Almota,* 409 U.S. at 474–75.

since the condemnor was taking this value compensation must be awarded.[24]

Both the Second Circuit in *Manhattan* and the Supreme Court in *Almota* failed to recognize that their holdings accord an expectancy the status of a binding option to renew. This failure caused both courts to overlook their implicit abandonment of the "legal right" definition of the term "property" as used in the fifth amendment, and enabled them to proceed directly to the tests used for measuring "just compensation." The error in this approach is that such tests assume, a priori, that "property" in the fifth amendment sense of the term, was in fact taken. Thus, the *Almota* Court's statement that "*Petty Motor* should not be read to allow the Government to escape paying what a willing buyer would pay for the same property"[25] begs the question. The precise issue which the Court should have addressed in *Almota* was whether an expectancy of renewal is fifth amendment "property," not how to measure the value of property already taken.[26] Instead, the Court ignored the issue altogether.

III. SOME PROBLEMS AND IMPLICATIONS OF *ALMOTA*

A. Landlord-Tenant Apportionment

The *Almota* Court's elevation of a renewal expectancy to the level of a fifth amendment property right is likely to have widespread re-

24. The en banc majority of the Second Circuit found unpersuasive the following reasoning of the panel:

> It is true that holdover tenants may in some instances continue to enjoy their occupancy of premises for long periods of time without the protection of a lease, but this does not mean that they have a legally protected interest in remaining and making use of the fixtures. In the absence of some legally enforceable assurance that they will be able to remain on their rented premises, we cannot assume that the tenants would be able to derive any value from their fixtures beyond the expiration of their leases and therefore there is no basis for giving compensation to any tenant beyond his lease expiration date.

388 F.2d at 598–99.

25. 409 U.S. at 476–77.

26. By this fusion of the meaning of "property" and the tests for the measure of compensation, the Court seems to suggest that whatever has market value is fifth amendment property. Such reasoning is difficult to reconcile, not only with *Petty Motor,* but also with Reichelderfer v. Quinn, 287 U.S. 315 (1932), which stands for the proposition that the "existence of value alone does not generate interests protected by the Constitution against diminution by the government . . . ." 287 U.S. at 319. *See also* U.S. v. Willow River Power Co., 324 U.S. 499, 510 (1945). In addition, the Court in *Almota* seemingly

percussions. In future condemnation proceedings, compensation must be awarded where the lessee can reasonably demonstrate that the life of his improvements may extend beyond the term of the lease and can also demonstrate a renewal expectancy. Hypothesizing the usual situation in which the government has condemned both the fee and the leasehold, the landlord, under the "unit rule" of valuation,[27] stands to receive less of the total award for condemnation of the fee simple. This result is dictated by *Almota* in that once a lessee is able to demonstrate that he owns improvements, the value of the renewal expectancy belongs to him.[28] Such a result is undesirable because it "would allow the tenant to diminish the share of the landowners on the strength of the latter having entertained an intention [to renew] they were free to change if they chose."[29]

Of course, this result is unnecessary if the Supreme Court subsequently limits *Almota* to cases where only the leasehold, and not the entire fee, is condemned, and does not extend it to cases where an

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abandons the clear distinction between property and value it had formulated in United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943). *See* note 31 *infra*.

Moreover, it is difficult to see how this mixture of "property" and the tests to measure its value could be other than deliberate, given the clear distinction between the two by the Ninth Circuit, *see* note 11 *supra*, and the reasoning of Judge Waterman in the panel opinion in *Manhattan*. *See* note 24 *supra*.

27. Basic appraisal principles require that where, as here, the fee simple is divided into separate interests, the fee is valued as an undivided unit (hence the term "unit rule") and the total award apportioned among the interest holders. 2 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 113, 120 (2d ed. 1953). For an explanation of that apportionment, see note 28 *infra*.

28. This is contrary to the general rule under which the lessee is entitled to the portion of the total award that equals the market value of his leasehold, less the agreed rental over the remainder of the lease term (reserved rental). *See* text accompanying note 10 *supra*. The landlord is entitled to the remainder of the total award. In the usual apportionment case, the agreed rental either is equal to or exceeds the market value of the leasehold; hence the lessee usually gets little or nothing for his leasehold. However, where the entire lease parcel is taken, the lessee is relieved of his covenant (implied or express) to pay the rent. *See generally* NICHOLS, note 5 *supra*, § 12.42[1]; 2 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN §§ 113, 120 (2d ed. 1953).

Occasionally, the market value of the leasehold exceeds the reserved rental. In such cases the lessee is entitled to the excess over the reserved rental—the so-called "bonus value" of the leasehold. In *Almota*, the excess value (or "bonus value") was due to the construction of the improvements and the use of those improvements in an ongoing grain storage and shipping business.

It should be kept in mind that *Almota* is not an apportionment case, for the government did not acquire the underlying fee by condemnation. The government condemned only Almota's leasehold estate and the case is concerned only with the compensation to be paid to Almota as lessee.

29. Stroh v. Alaska State Housing Authority, 459 P.2d 480, 482 (Alas. 1969).

apportionment is required between a landlord and his tenant. However, such a limitation would mean that a renewal expectancy would have value when the government condemns a leasehold interest, but not when the landlord would be compelled to shoulder the burden by accepting a diminished share. Such a result hardly seems fair to the government.

B. *Compensation for Loss of a Business or Lost Business Opportunities*

A major weakness of the Court's reasoning in *Almota* is the difficulty which will be encountered when the issue of compensation for loss of a business or lost business opportunities confronts the Court.[30] Certainly it is true that the owner of a business can suffer grievous loss due to condemnation. It is also true that while both loss of a business and lost business opportunities have been held to be not compensable in past Supreme Court decisions,[31] both may, at times, have market value. Logical consistency demands that the Court award compensation for these items where market value can be demonstrated since the government should not be allowed "to escape paying what a willing buyer would pay for the same property."[32]

30. The Court attempted to discourage any inference that its decision will allow for compensation of business losses or lost opportunities by noting simply that such compensation was not put in issue:

> The only dispute in this case is over how [lessee's] improvements are to be valued, not over whether Almota is to receive additional compensation for business losses. Almota may well be unable to operate a grain elevator business elsewhere; it may well lose the profits and other values of a going business, but it seeks compensation for none of that.

409 U.S. at 475–76 n.2.

31. Loss of a business was held to be noncompensable in Mitchell v. U.S., 267 U.S. 341 (1925). Loss of business opportunities was held to be noncompensable in United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943). In *Powelson,* the government had condemned land as part of the site of a dam. In doing so the government had ruined Powelson's plans to unite the tract taken with other tracts and construct four dams as part of a hydroelectric project. Powelson claimed that the destruction of his business opportunities ought to be compensated. The Court rejected his argument saying first that "[i]t is 'private property' which the Fifth Amendment declares shall not be taken for public use without just compensation" and that "the sovereign must pay only for what it takes, not for opportunities which the owner may lose." *Id.* at 280, 282. The Court went further and ruled: "That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States." *Id.* at 283.

32. 409 U.S. at 477.

The reasoning in *Almota* is especially inconsistent in this context with *Mitchell v. United States*.[33] In *Mitchell* the government condemned land that was specially adapted to the owner's business of producing a particular, high quality corn. Since it was acknowledged that the owner could not replace the specially adapted land and begin anew, the government taking of the land constituted the taking of an ongoing business as well. On appeal, the owner argued that he should be compensated for the loss of his business which had substantial market value apart from the value of the land. The Court held that since the taking of the owner's business was an "unintended incident"[34] of condemnation, the value of the business was not recoverable.[35] However, if, as the *Almota* Court ruled, the basic standard is that compensation must be based upon what a willing buyer would pay in the open market (*i.e.*, "real" fair market value), then *Mitchell* should be overruled since a willing buyer would certainly have paid for Mitchell's ongoing business.[36]

C. *Overcompensation*

The Court's reasoning in *Almota* also has the effect of overcompensating a lessee. As an implicit modification of the no-compensation-for-a-business rule, the government, since *Carlock v. United States*,[37] has compensated for the "business value" of lessee improvements, but only for the term of the lease.[38] The lessee's improvements have a

33. 267 U.S. 341 (1925).

34. *Id.* at 345. It should be clear that in *Almota* the taking of the lessee's improvements was also an "unintended incident" of condemnation. The purpose of the condemnation was *not* to acquire Almota's improvements, but rather to acquire the land for "the Little Goose Lock and Dam, a river improvement and navigational project on the Snake River below Lewiston, Idaho." 450 F.2d at 126.

35. In so holding, the Court was in accord with the general rule denying such recovery. *See* 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 74 (2d ed. 1953). *But see* Bowers v. Fulton County, 221 Ga. 731, 146 S.E.2d 884 (1966); State Road Dep't v. Bramlett, 179 So. 2d 137 (Fla. 1965) (loss of business allowed as separate item of recovery).

36. This point was noted by Justice Rehnquist, dissenting in *Almota*: "In either *Mitchell* or *Powelson*, the result would in all probability have been different had the Court applied the reasoning that it applies in this case." 409 U.S. at 484.

37. 53 F.2d 926 (D.C. Cir. 1931).

38. In *Carlock*, the court put forth what it called the "universal rule":

> The present money value of a leasehold interest is the present market value of the residue of the term yet to run with reference to the most valuable use or uses to which the same may be lawfully put; that is, what would be its present

"business value"[39] equal to the economic value that an ongoing business adds to the improvements.[40] Thus, in an indirect way, the *Mitchell* rule is tempered by compensating for this special kind of business loss when a lessee's improvement is taken in condemnation. However, awarding the business value of improvements over the term of the lease as in *Carlock* produces a different, more justifiable result than awarding the business value of the improvements after the expiration of the lease as *Almota* suggests. After the expiration of the lease, the business value of permanent improvements ought to be substantially reduced because the business is no longer supported by a legal property right (*i.e.*, a lease or an option to renew). By departing from the rule that only legal rights must be recompensed and awarding the full business value of improvements[41] without a supporting property right, the Court overcompensated Almota by ignoring this reduction in business value.[42]

D. Other Compensation Problems

Further problems emerge from the Pandora's box opened by *Almota*. First, under the Court's "willing buyer-willing seller" rule, it is not clear that the lessee would be compensated only in the amount

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money worth over and above the obligations of the lease, to an assignee or purchaser willing and able to assume and perform the obligation of the lease for the residue of the term. . . .

Id. at 927–28. The court explained:

> This does not mean that appellant is not entitled to compensation for the cost of the improvements, but only to the extent that they have enhanced the market value of the lease over and above the obligations of the lease . . . . In other words, in determining the market value of the lease, after the expiration of two years, the value of the improvements to the premises for leasing purposes for the remaining eight years would be a proper matter for consideration.

Id. at 927.

39. "Business value" is the author's term for the compensation rendered under the formula of *Carlock* and similar cases.

40. In short, in *Almota,* the 0.75 acre and the improvements erected thereon without the ongoing grain storage and shipping business would have been worth very little since the market value of the leasehold was largely dependent on the business made possible by the specialized improvements.

41. The full business value is necessarily awarded under the Court's analysis in *Almota*; in an arms-length transaction a "willing buyer" would have paid for the full business value of the improvements.

42. The Court, in effect, assumed that the business could continue even though there was no legal basis (in the form of a right to renew) for that assumption. Thus, the Court awarded an amount which far exceeded the limited "business value" compensation formulated in *Carlock*.

that a willing buyer would have paid for the life of the improvements extending beyond the term of the lease. The Court professed to require compensation for only the improvements,[43] but it seems quite clear that a "willing buyer" in the open market would have paid not only for the improvements but also for the expectancy that he would have the use and occupancy of the leasehold beyond the life of the improvements. Thus, the Court's reasoning requires compensation, not only for the improvements beyond the life of the leasehold, but also for the full value of the renewal expectancy—the result perceived by the Ninth Circuit and the dissent, but not by the majority.[44]

However, even if it can be assumed that compensation is limited to the life of the improvements, the Court fails to mention how the life of these improvements will be measured. As the Ninth Circuit and the dissent in *Almota* inquired, "[W]as the stipulation [of value] based upon some actuarial computation such as the prospective life of the buildings and machinery, or the life of the [fee holder], or upon free-ranging guesswork?"[45] To avoid the uncertainty involved in estimating the life of improvements and to arrive at a more concrete principle of valuation, the Court must depart from its "willing buyer-willing seller" language in *Almota* and specify factors to be considered in compensating for improvements; *e.g.*, the original cost of the improvement, whether it was erected in contemplation of renewal, the nature of the improvement and the business (if any) for which it was used, the extent to which the improvement can be salvaged, and what value the lessee has already derived from the original cost of construction. These factors all focus on the lessee and the injustice *he* may suffer from an unforeseen condemnation and are not concerned with the result under a hypothetical agreement involving a willing seller and willing buyer.

Unfortunately, if the Court chooses to adhere to its willing buyer-willing seller test, it cannot logically avoid compensating for the entire expectancy; a willing buyer's expectancy of renewal will seldom stop at the life of the presently situated improvements. Such a buyer will surely have the expectation that the improvements will be replaced as they wear out and that he will have the benefit of future re-

43. 409 U.S. at 475–76 n.2.
44. *Id.* at 481.
45. 450 F.2d 125, 129 (9th Cir. 1971), quoted at 409 U.S. at 485 (Rehnquist, J., dissenting).

newals as well. It seems evident that the Court was concerned with the apparent unfairness of depriving the lessee of the value of the improvements,[46] and hence inflicting unforeseen losses. If so, it would seem much simpler to formulate a rule that would compensate the lessee for the value of the use and occupancy of the improvements for the term of the lease, and then would add to that amount the remaining value of the buildings as measured by the original cost of the improvements, less straight-line depreciation over the term. While this formula would probably provide the lessee with less compensation than he might receive from a willing buyer under the Court's analysis, it would have the virtue of producing more readily ascertainable values.[47]

IV. CONCLUSION

Almota is constitutional law; consequently its future impact is likely to stretch beyond its strict, factual setting.[48] Certainly the stage is now set for a direct challenge to *Petty Motor* and the rule that was con-

46. It does seem unfair to take a lessee's improvements and pay him in return the use-value for only the balance of the term. Clearly, when the lessee erected his improvements he expected to get full use of them; *i.e.*, beyond the end of the term. The fact that Almota had the right to remove its improvements was of little value to it since in this case such removal meant destruction of the improvements. The salvage value of the buildings did not even approach the value of the buildings for that part of their useful life which extended beyond the end of the term. *See* 409 U.S. at 471.

47. This course would be more certain because it focuses on the lessee and the ascertainable costs he may suffer from condemnation. By so focusing this method avoids trying to attach value to what some unknown willing buyer would have paid for the leasehold in a hypothetical agreement containing unknown terms and conditions. This process should also present little or no unusual evaluation problems since it uses procedures established under *Petty Motor* for valuing the remainder of the lessee's term. Likewise, the lessee's original expenditure in constructing the improvements and the remaining worth of the improvements as measured by straight line depreciation should be easily ascertainable. The use of the straight line method in arriving at the remaining worth of the improvements is preferable since it is easily calculated and spreads the cost of the improvements out more evenly. In sum, this alternative course would compensate the lessee for the value (including business value) of the improvements over the term of the lease and would allow him to recover most, if not all, of the original construction cost of the improvements. In essence, the lessee would lose nothing except perhaps the opportunity to realize a profit (or a loss) by selling his leasehold on the open market.

48. *See, e.g.*, Bembinster v. State, 57 Wis. 2d 277, 203 N.W.2d 897, 900 (1973), where the Wisconsin Supreme Court cited *Almota* in support of this proposition:

> While possibilities of factors affecting value may be speculative, probabilities are not. Just compensation in condemnation proceedings is measured

sidered settled in *Mitchell*—that loss of a business is not a separately compensable item of recovery in a condemnation proceeding. If carried to its logical extreme, *Almota* may give credence to Justice Douglas's fear (in another context) that by departing from settled doctrine and introducing a large element of uncertainty into an area of law, the Court has given the Constitution "an interpretation which promises swollen verdicts which no Act of Congress can cure."[49]

Such uncertainty is sure to arise in the aftermath of *Almota,* for by abandoning the legal rights definition of fifth amendment property, the Court has launched the lower courts upon the now uncharted seas of hypothetical willing buyers and willing sellers, negotiating hypothetical agreements involving unknown terms and conditions. As demonstrated in this note, such a test leads to compensation for difficult-to-measure expectancies which could affect the "fair market value" of a leasehold. In short, under *Almota* anything which has a fair market value is fifth amendment property—at least for condemnation purposes. Uncertainty aside, such a rule will indeed lead to "swollen verdicts."

However, it may well be argued that such a rule does, in fact, represent "just compensation." Indeed, if the rule does not prove too unmanageable, it may result in the body public, for the first time, shouldering *all* economic costs of public acquisitions. Clearly, the public is better able than individual owners to bear those costs heretofore uncompensated under *Petty Motor* and *Mitchell.* If such is to become the rule, the Court should so state in a decision that carefully weighs the policy considerations which may support such a doctrine. Such a course is surely preferable to the strained reasoning and the dubious distinctions adopted by the Court in *Almota.*

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by what a willing buyer would pay for the land taking into account the probability of an access road or of a change in zoning or other factors affecting the value of property.

49. United States v. General Motors Corp., 323 U.S. 373, 385 (1945) (Douglas, J., concurring). *General Motors* involved government condemnation of an unexpired leasehold interest in a warehouse used in lessee's business. In ruling for the lessee (who had alleged that it had received insufficient compensation), the Court held, *inter alia,* that the reasonable cost of removing lessee's stored property to clear the space for the government should be included in the award. Justice Douglas objected that such costs are consequential losses which are not compensable under the fifth amendment as construed in Mitchell v. United States, 267 U.S. 341 (1925); United States *ex rel.* TVA v. Powelson, 319 U.S. 266 (1943). It was this departure from the rule that consequential damages are not compensable which Justice Douglas saw as promising "swollen verdicts."