

ALI-ABA Course of Study  
**Eminent Domain and Land Valuation Litigation**

January 26 - 28, 2012  
San Diego, California

**The Scope of the Project Rule-supplemental material**

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## **The Scope of the Project Rule**

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### **I. Introduction**

The “scope of the project” or “project influence” rule is a long accepted tool of eminent domain valuation and litigation in which any and all impacts on the value of the subject property, both positive and negative, caused by the project for which it is being taken must be ignored when determining just compensation. The origins of the scope of the project rule can be traced back to the 19<sup>th</sup> century and cases involving the acquisition of land for public parks in both Chicago and Washington, D.C.<sup>2</sup> From these first cases, and with the undertaking of large-scale projects such as railroads and interstate roadways, the Federal government along with many states have adopted and implemented the scope of the project rule.

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<sup>2</sup> See Kerr v. Southpark Commissioners, 117 U.S. 379 (1886); Shoemaker v. United States, 147 U.S. 282 (1893).

## II. Defining the Scope of the Project Rule

In the most comprehensive analysis of the scope of the project rule, the Fifth Circuit Court of Appeals stated:

The ‘scope of the project’ rule can be stated easily enough: If the condemned land was probably within the scope of the governmental project for which it is being condemned at the time the Government became committed to that project, then the owner is not entitled to any increment in value occasioned by the Government's undertaking the project. But... it is not so easily understood or applied.<sup>3</sup>

As explained in Nichols on Eminent Domain:

If the projected public work will be injurious to the neighborhood through which it will pass, the fact that it hanging like a sword of Damocles over the heads of land owners in the vicinity cannot but fail to have a depressing effect on values. On the other hand, if it is expected that the improvement will be of such character as to benefit the surrounding land, values usually rise in anticipation of construction of the improvement. When the taking is finally effectuated, the question arises whether this anticipatory modification of values should be considered in awarding damages.<sup>4</sup>

As early as Olson v. United States, the U. S. Supreme Court held that because just compensation includes all elements of value that inhere in the property, the land's most profitable use must be considered, even if that use is the same as the use for which it is being taken.

Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And to the extent that probable demand by prospective

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<sup>3</sup> United States v. 320 Acres of Land, 605 F.2d 762, 781-782 (5<sup>th</sup> Cir. 1979).

<sup>4</sup> Nichols on Eminent Domain, Ch. 12B, §17[1], (Matthew Bender, 3<sup>rd</sup> ed.).

purchasers or condemners affects market value, it is to be taken into account.<sup>5</sup>

The scope of the project rule was first articulated by the United States Supreme Court in the seminal case of United States v. Miller, where it was recognized that a property’s “fair market value” on the date of take may not always lead to the just compensation required by the Constitution. The Court reasoned that, “strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case.”<sup>6</sup> Concluding, it was held that “special value [of the condemned property] to the condemner *as distinguished from others who may or may not possess the power to condemn*, must be excluded, as an element of market value.”<sup>7</sup>

The scope of the project rule, sometimes referred to as project influence, has been a part of common law at both the federal and state levels for decades. In addition to its prevalence in case law, many states have codified variations of the scope of the project rule in an effort to receive federal funds for transportation projects.

## **A. Scope of the Project Rule on the State Level**

### **1. Virginia**

Virginia, like most states, has codified the scope of the project rule and eliminated any project influence in eminent domain proceedings. Setting forth the procedures for acquisition, the statute states:

Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which

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<sup>5</sup> Olson v. United States, 292 U.S. 246, 256 (1934) (citations omitted).

<sup>6</sup> United States v. Miller, 317 U.S. 369, 375 (1943).

<sup>7</sup> Id. (emphasis original).