



Settling Goodwill Loss Claims Before Trial: *Prevent Costly Litigation & Uncertain Outcomes*

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This article presents examples to illustrate how redevelopment agencies and business owners may avoid costly litigation by settling goodwill issues before trial. However, applicability and results may vary by situation.

In the previous issue of Valorem Principia, two examples were presented to demonstrate how a redevelopment agency ("Agency") may save time and money by hiring a qualified, experienced goodwill appraiser early in the process to advise on its potential risk and exposure to goodwill loss claims. The article illustrated attempts to reach efficient resolutions and settlements of goodwill loss issues before litigation arises. However, the condemnation process is not immune to Murphy's Law, so things don't always proceed as planned. Therefore, Agencies and business owners must be prepared to cope with potentially protracted litigation. But, don't despair - a settlement still may be reached before bringing the experts in for costly court testimony.

THE RIGHT EXPERTS

Since there are no guarantees, and any condemnation action bears the risk of protracted litigation, it is important to hire the right expert for the job - someone who can carry the ball from the beginning to the end, including court testimony, if necessary. Both Agencies and business owners should consider the following qualities when interviewing and retaining experts:

- ◆ An expert with the appropriate credentials and experience to qualify for court testimony.
- ◆ An expert with experience and knowledge of the eminent domain code and case law in California.
- ◆ A firm with the resources to handle multiple projects concurrently.



- ◆ A firm that can devote resources to your case subject to the gyrations of a litigation time schedule.

Agencies and business owners alike benefit from retaining experts whose professional experience gained from past cases, depositions, and trials equips them with the ability to help guide the case down the least acrimonious path. Ultimately, experts may be able to provide advice about strategies to reach settlement at any point in time.

EXAMPLE 1: CRITICAL ISSUES ANALYSIS

Even after litigation commences and experts for both the Agency and the business have been retained, settlement can be reached before the experts finalize their reports, which otherwise would be "exchanged" in a court setting. For example, consider a pest-extermination business that conducts almost all of its operations off-site at customer locations. The business' headquarters relocated as a result of an eminent domain project. According to the owner's deposition testimony, operations at the relocation site, which is of comparable size and layout, are essentially unchanged and the relocation site is not far from the original location. The principal issue at hand is that occupancy costs (especially rent) are much higher at the new location.

Recognizing that any disagreement of lost goodwill value is going to revolve primarily around the impact of the increased occupancy costs, the attorneys representing either party can request their respective experts to analyze the effects on goodwill of the higher occupancy costs. The results of this preliminary analysis can then be used in settlement negotiations. If a settlement can be reached, this pre-emptive analysis could save significant costs (including attorneys' and experts' fees) to both the business owner and the Agency.

EXAMPLE 2: REPORT REVIEW AND CRITIQUE

The business being relocated and the Agency taking the property each have hired their own goodwill appraisers. Each appraiser performs his or her analysis, and opinions of lost goodwill are exchanged:

- ◆ Agency's Appraiser \$75,000
- ◆ Business' Appraiser \$180,000



In this case, the Business Appraiser's opinion of loss is more than double that of the Agency Appraiser. However, the magnitude of loss being claimed by the business owner is not substantial compared to the costs of experts' and attorneys' fees that may be incurred in trial.

In this situation, either the Agency's or business owner's attorney can request their respective goodwill appraiser to review the opposing side's appraisal to identify strengths and weaknesses of the other side's case. Such an analysis may reveal:

- ◆ Mathematical errors;
- ◆ Fallacious reasoning;
- ◆ Non-compliance with California eminent domain law;
- ◆ Lack of independent research into industry, economic, or market conditions; and/or
- ◆ That material information was unknown to one side's appraiser, requiring that appraiser to amend his or her opinion.

Outlining these factors and assessing their respective impact on the opposing appraiser's opinion may result in a negotiated settlement before incurring further costs for deposition, trial preparation, etc. This avails an opportunity to devote limited funds to a settlement as opposed to inevitably expensive litigation costs with an uncertain outcome.

EXAMPLE 3: DEPOSITION TESTIMONY S

The business being relocated and the Agency taking the property each have hired their own goodwill appraisers. Each appraiser performs his/her analysis, and opinions of lost goodwill are exchanged:

- ◆ Agency's Appraiser \$250,000
- ◆ Business' Appraiser \$1,400,000

In this case, the difference in the conclusions and the amounts at stake are substantial. Hence, in all likelihood, depositions of each expert will go forward. Again, the Agency or business owner attorney can request his/her respective



goodwill appraiser or staff members to review the opposing appraisal to identify strengths and weaknesses of the other side's case. A qualified, experienced expert will be able to:

The Agency's expert also recognized the stagnant sales for two years and performed some additional research. Her analysis revealed two facts:

- ◆ Two new competitors moved into the business' trade area the year before sales leveled off; and
- ◆ The business owner testified in deposition that the business was reaching its capacity near the time its growth slowed, and had no plans to increase capacity.

During deposition, the business' expert revealed that he had not read the business owner's deposition, and he had not researched whether any new competitors had moved into the business' area. The business' expert previously had testified in deposition that increased competition generally could have a negative effect on a business' sales, and that capacity constraints would limit the ability of the subject business to grow over the long term.

As the above example illustrates, unearthing clear, indefensible variables in the opposing expert's testimony can weaken his/her opinion of total goodwill substantially, and therefore potential lost goodwill. This can both encourage settlement and promote flexibility in settlement negotiations.

CONCLUSION

As stated in the preceding article in the last issue of Valorem Principia, litigation involving business goodwill has at least two guarantees - it takes a significant amount of time and energy, and it always risks being very expensive. An experienced, qualified goodwill appraisal firm can offer practical recommendations and "war-story" knowledge to provide advice about the potential risks of and exposure to trial. As a result, both parties may benefit by reaching a reasonable settlement without protracted litigation.

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