"Preservation of your Fifth and Fourteenth Amendment Takings Claim for Non-Discretionary Federal Court Review"

presented by

Michael P. Marcin, Esq.
Gammage, Hampton, Marcin & Ray, L.L.P.
Austin

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1. INTRODUCTION

By employing traditional concepts of "*res judicata*" in conjunction with the ripeness test of *Williamson County*, Federal and State courts have largely closed the door to the federal court system for bringing an "as applied" claim for compensation under the Fifth Amendment to the US Constitution. This result has been achieved despite the expected legal consequences of the *Williamson County* analysis.

In *Williamson County* the court reasoned that under the literal wording of the Fifth Amendment, an element of a takings claim was the unsuccessful use of the state procedures for obtaining compensation. Arguably, it is the state's failure to pay compensation that is the unconstitutional act, and this denial doesn't occur until after the court in an inverse condemnation proceeding reaches its decision.

Subsequent Federal Circuit and State court decisions, however, have held that once the Fifth Amendment claim becomes ripe through the state court's denial of compensation in the inverse condemnation proceeding it is simultaneously barred by familiar principles of res judicata.[1]

How then can the Supreme Court as recently as May 1997 state that "a plaintiff must seek compensation through state inverse condemnation

* Special thanks to James Douglas Ray who provided many valuable insights into the issues presented, and was primarily responsible for the briefing in the *Guetersloh* appellate litigation.

[1] Inverse condemnation remedies are available in most states and, where available, they are a state procedure which must be exhausted under the ripeness rule of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

proceedings before initiating a taking suit in federal court , …" when the claim will be barred by *res judicata* after the inverse condemnation proceeding is concluded.[2] Apparently recognizing the inconsistency of this position, a number of federal circuit courts and the Austin Court of Appeals have fashioned a new mechanism or hurdle to preserve the entitlement to federal court review of the Fifth Amendment claim.

Using an analogy to the England Abstention Doctrine,[3] these courts rationalize that the Fifth Amendment claim may be reserved by declaration. While the analogy suffers under close scrutiny, from a practical perspective, the courts are inviting a second bite at the apple to the takings litigant. The England reservation assumes that the federal court has jurisdiction to hear the claim, however, for reasons of comity, the court will withhold its consideration until the states own courts have had an opportunity to rule on the issue. Under a ripeness analysis however, the federal court has no jurisdiction over the Fifth Amendment claim in the first instance since no claim exists unless and until there is a denial of just compensation. Consequently there is no claim to reserve in federal court for later litigation. A strict application of the ripeness analysis also leads to the conclusion that a Fifth Amendment claim would not be cognizable in state courts as well. Since the claim does not yet exist, the state courts would have nothing to consider.[4]

Nevertheless, while questioning the continued viability and underlying rational for the procedure, the courts who have addressed this issue assert that the proper course is to make a *Jennings* style reservation[5] in the state court and refrain from trying the Fifth Amendment cause of action while pursuing compensation under the applicable state constitutional provision.[6] Once the denial is given, the litigant is apparently free to file the Fifth Amendment claim in federal court. However, even after going through this procedure, it is unclear the extent to which any other preclusion principles would apply or whether the case can simply be tried anew without reference to the underlying facts decided in the state court proceeding.[7]

This paper is intended to treat three main points. First is a discussion of the underlying rational for the preclusion of a Fifth Amendment claim through its genesis in Texas courts in the Guetersloh case. As part of this discussion and as a second point, some mention will be made of the distorted concept of the "police power" justification for a taking. Without wading to deep into the "miltonian serbonian bog," I believe it is fair to criticize the Texas appellate courts understanding and application of the police power rational in the regulatory takings area.[8] Finally, this paper is intended to provide the

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2 *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1665, n.8 (1997); citing *Williamson County*, 473 U.S. at 194-96; *see also Mayhew v. Town of Sunnyvale*, 1998 LEXIS 35, *15 n.2 (March 13, 1998).

3 *England v. Louisiana State Bd. of Med. Examiners.,* 375 U.S. 411 (1964).

4 At least one federal district court has taken this position, noting that "[i]f the takings claim is not ripe for [the District] Court to decide, neither is it ripe for the state court to decide. *Standard Materials, Inc. v. City of Slidell*, 1994 U.S. Dist. LEXIS 8470, *24 (E.Dist. LA 1994); *See also, infra*. Section 2.4.

5 *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976); Jennings was not a Fifth Amendment claim, rather it dealt with a claim of racial discrimination brought under 42 U.S.C. § 1983.

6 Most states have a state constitutional provision providing for just compensation. Under the Constitutional floor theory, these provision can not provide less protection than he federal constitution. Although, as discussed *infra.*, Texas has apparently fashioned an interpretation that provides less protection.

7 At lease one federal circuit court has determined that while res judicata [claim preclusion] doesn't apply, collateral estoppel [issue preclusion] applies and the district court proceeding will be limited to the procedural and substantive distinctions between the state and federal constitutional remedies. *Dodd v. Hood River County* 59 F.3d 852, 863 (9th Cir. 1995), *on remand Dodd v. Hood River County,* 1998 U.S. App. LEXIS 2011 (9th Cir. Feb. 13, 1998).

8 The use of the police power as a means to analyze the compensability of a state action has been called "a sophistic Miltonian Serbonian Bog." *see City of Pharr v. Pena*, 853 S.W.2d 56, (Tex.App.-Corpus Christi 1993) citing *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex.1978).

practical benefit of familiarizing the takings practitioner in Texas with the option of making, for lack of a better term, a "Guetersloh reservation." My belief is that no takings practitioner should fail to make such a reservation, since this simple procedure will apparently provide an unsuccessful litigant in state court with a chance to argue the deficiencies of the state court proceedings and make his case, without being dependent on the vagaries of discretionary review.

2. THE CONSTITUTIONAL DIMENSION OF THE DENIAL OF ADEQUATE COMPENSATION

2.1 FACTUAL BACKGROUND FOR GUETERSLOH V. THE STATE OF TEXAS

In 1978, M.F. Guetersloh, Jr., sold a private water supply company, retaining a vendor's lien and deed of trust to secure payment for his facility. Several years after that sale, the new owner apparently had gotten behind with certain administrative filings required by the State to operate this small utility, and as a result, the State placed the utility in receivership. During the pendency of that receivership, Mr. Guetersloh was paid nothing on his underlying lien, and in 1985, Mr. Guetersloh foreclosed on the deed of trust and became the owner of the Carlisle Water Supply. Subsequent to his foreclosure, the State obtained a temporary restraining order prohibiting him from interfering with a state-appointed receiver's right to possession, and enjoining him from entering onto, or otherwise interfering with the State's use of his property. Petitioner filed his initial lawsuit three days later, asserting a taking under the Texas Constitution. That lawsuit was filed on December 9, 1985, and forms the basis for what will be referred to in this paper as Guetersloh I. All issues addressed in that lawsuit were disposed of by summary judgment, and those summary judgments were upheld on appeal.

It was undisputed that during the pendency of the five year receivership, the State used Mr. Guetersloh's utility to provide retail water service to the residents of Carlisle. Despite the availability of not less than four other utilities, Mr. Guetersloh's property was required to provide this public service because it was the "best" of the available alternatives. The utility's customers were charged for this service, but Mr. Guetersloh was paid nothing in return. Once there was no further need for his property, the State returned a worthless and worn out set of pumps, pipes, and a depleted water well that had absolutely no further value as a utility.

Guetersloh I was filed approximately twenty-seven (27) months into a receivership that lasted nearly five years. The initial cause of action first attacked the legitimacy of the State's action, and asserted that *imposition* of the receivership, together with the *intended* use of the facility by the State, constituted a compensable taking event. In the initial prayer for relief, Mr. Guetersloh requested an injunction against the State defendants from taking his property without first paying just compensation. On April 15, 1987, approximately sixteen months after Mr. Guetersloh filed his initial lawsuit, the City of Lubbock annexed the Carlisle service area and built a new water system, but Mr. Guetersloh's water supply was kept in receivership until the new water system was completed and began providing water service to Mr. Guetersloh's former customers. Once the City of Lubbock began providing water services to the residents of Carlisle, the receivership was dissolved, and Mr. Guetersloh was granted permission to reclaim possession of his utility. By that time, all of the customers were gone, the facility was worn out and badly in need of repair, and Mr. Guetersloh's water system was completely worthless, as a utility. Guetersloh I was then amended to include a complaint about the effect of extending the City of Lubbock's water service into the Carlisle service area.

Although initially asserting an entitlement to just or adequate compensation according to the dictates of the Fifth and Fourteenth Amendments, as well as Article 1, Section 17 of the Texas Constitution, Mr. Guetersloh subsequently deleted his federal constitutional claims, and pursued only his state compensation remedies once he became aware of the Supreme Court's holding in *Williamson County v. Hamilton Bank*.[9] The amended complaints were reviewed pursuant only to Article 1, Section 17 of the Texas Constitution. In *Williamson County*, the

[9] *Williamson County*, 473 U.S. 172 (1985).

Supreme Court held that due to their "special nature," claims for just compensation premised on the Fifth Amendment are premature or unripe until a property owner "has unsuccessfully attempted to obtain just compensation through the procedures provided by the State for obtaining such compensation."[10] .

In Guetersloh I, the Texas Court of Appeals upheld summary judgment in favor of the State and the City of Lubbock because the court determined that the alleged taking constituted a valid exercise of the state's police power, for which no compensation is required.[11] The Austin Court of Appeals held that "the Commission's authority to *seek* a receivership against this utility was a valid exercise of the state's police power rather than a "taking."[12] Without even so much as commenting upon the economic consequences of the regulation, as applied, the Court of Appeals found that such a valid exercise of police power does not constitute a compensable "taking" where:"(1) the regulation is adopted to accomplish a legitimate goal, ...; and (2) the regulation is reasonable, not arbitrary."[13] The Texas Supreme Court denied discretionary review, and Mr. Guetersloh brought suit in federal court, asserting an entitlement to just compensation for his now "ripened" Fifth and Fourteenth Amendment claims.

The federal courts, however, held that the Eleventh Amendment precluded that suit in federal court.[14] It should be noted that the City of Lubbock, for whom the eleventh amendment would not bar the suit, was not made a party to the federal claim.

In *Williamson County* the Supreme Court stated, if the state has provided an adequate process for obtaining compensation, and if resort to that process "yield[s] just compensation," then the property owner "has no claim against the Government" for a taking.[15] As a result, property owners, such as Mr. Guetersloh, "cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation."[16] According to the Eleventh Circuit, "absent the state's denial to a property owner of just compensation, there can be no cognizable harm to any federal constitutional right."[17]

Mr. Guetersloh then went back to state court and asserted his now ripe Fifth Amendment takings claim. The State, along with the City of Lubbock, again filed motions for summary judgment which the trial court granted on the sole basis of *res judicata.* The State argued that under the "transactional" approach to *res judicata* adopted by this state, Mr. Guetersloh should have brought his Fifth Amendment claim in the prior proceeding. That assertion, however, ignores the fact that at the time of Guetersloh I, such a claim did not exist. Nonetheless, the State successfully argued that once the State's inverse condemnation proceedings were concluded, Mr. Guetersloh's claim for just compensation under the Fifth Amendment was barred by ordinary principles of *res judicata*. The Austin Court of Appeals affirmed.[18] Under this approach, once a property owner's Fifth Amendment claim is perfected, it would also be precluded.

Perhaps in some concession to the obvious inconsistency of having a question of federal constitutional law that is simultaneously "ripe" for adjudication in state court, and "unripe" or "premature" in a federal court, the Austin Court of Appeals offered an alternative holding. In reaching its result, the Court stated that it had applied the holding of *Fields v. Sarasota Manatee Airport Auth.,*[19] to conclude that Mr. Guetersloh had somehow waived his federal constitutional claims by failing to make a "*Jennings*" style reservation of his federal claims for

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10 *Id.* at 195.

11 *Guetersloh v. Public Utility Comm'n*, No. 3-90-161-CV (Tex. App.—Austin, Aug. 14, 1991, *writ denied*)(not designated for publication).

12 Slip Op. at p.7 (Guetersloh I)(emphasis added).

13 *Id.*, Slip Op. at 6-7

14 *Guetersloh v. Texas*, No. 93-8729 (5th Cir. June 3, 1994)(not designated for publication), *cert. denied*, 513 U.S. 1076 (1995).

15 *Williamson County*, 473 U.S. at 194, n.13.

16 *Id.*, at 195.

17 *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d at 1368.

18 *Guetersloh v. Texas*, 930 S.W.2d 284 (Tex. App.–Austin 1996, *writ denied*) *cert. denied,* 118 S. Ct. 1040 (1998).

19 953 F.2d 1299 (11th Cir. 1992).

subsequent litigation in federal court.[20]

The Texas Supreme Court again denied Mr. Guetersloh's request for discretionary review, and on September 4, 1997, his Motion for Rehearing was rejected. Not one to give up without a fight, Mr. Guetersloh again appealed to the US Supreme Court and his certiori petition was denied on March 2, 1998.[21]

2.2 Federal Constitutional Principles Applied to Bar A Property Owner From Asserting His Fifth Amendment Right To Just Compensation .

An important conflict persists in the always troublesome field of regulatory takings law. Since the Supreme Court decided *Williamson County Regional Planning Comm'n v. Hamilton Bank*,[22] property owners have struggled in their attempt to balance the jurisdictional dilemma created by that holding, with the necessary interplay of 28 U.S.C.A. §1738 and traditional notions of *res judicata*.[23]

The question that remains to be answered is whether property owners who suffer takings under the guise of state regulation are entitled to litigate their Fifth Amendment right to just compensation once they have satisfied the jurisdictional "ripeness" requirements announced in that decision.

Today, virtually every court that has dealt with the matter recognizes that the Fifth Amendment does not proscribe the taking of property; it proscribes takings without just compensation.[24] For that reason, litigants who wish to assert a "takings" claim under the Fifth and Fourteenth Amendments must establish two elements or "ripeness" requirements; (1) that a "taking" occurred, and (2) that the owner has unsuccessfully sought compensation from the state.[25]

As is apparent upon review of the published decision in *Guetersloh*, property owners now find it increasingly difficult, if not impossible, to litigate their entitlement to just compensation under the Fifth Amendment once those ripeness requirements have actually been satisfied. The reason for this difficulty is that when litigants attempt to assert their takings claims under relevant state procedures, most state courts recognize *res judicata* doctrines that require state court litigants to assert their federal takings claims, under penalty of bar, *concurrently* as a contingent claim with their state compensation claims.[26] This is so despite the clearly acknowledged holding of the Supreme Court that the federal constitution is not violated until just compensation has been denied by the state.[27]

The *Guetersloh* case illustrates the dilemma faced by property owners in this context, and affords an opportunity to narrowly and directly examine the recurring question of when, and under what circumstances, litigants should properly assert their entitlement to just compensation under the Fifth and Fourteenth Amendments. That issue has generated considerable confusion among state and federal courts, alike.[28] Applying traditional notions of *res*

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20 *Guetersloh*, 930 S.W.2d at 289, (citing *Jennings v. Caddo Parish School Bd.,* 531 F.2d 1331 (5th Cir. 1976), *cert. denied*, 429 U.S. 897 (1976)).

21 *Guetersloh v. Texas*, 118 S. Ct. 1040 (1998).

22 473 U.S. 172 (1985).

23 28 U.S.C. Section 1738 provides that:

"[The Acts of the legislature of any State, Territory, or Possession of the United States or] ... records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court with in the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

24 *See, e.g., City of Grand Prairie v. Sisters of Holy Family of Nazareth*, 868 S.W.2d 835, 844 (Tex. App.–Dallas, writ denied), *cert. denied*, 513 U.S. 929 (1994); citing *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981).

25 *Williamson County,* 473 U.S. at 194; see also, *Samaad v. City of Dallas*, 940 F.2d 925, 933 (5th Cir. 1991).

26 *See, e.g., Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1303 (11th Cir. 1992).

27 *Williamson County*, 473 U.S. at 194, n.13; *see also, Lake Lucerne Civic Assn., Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1372 (11th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990).

28 *See, e.g.,* Thomas E. Roberts, *Fifth Amendment Taking Claims In Federal Court: The State Compensation Requirement and Principles of Res Judicata*, 24 URB. 479 (1992)(asserting that the federal courts have simply determined that there is no

judicata to federal "takings" challenges, the Eleventh Circuit has allowed property owners to advance their takings claims in federal court despite prior unsuccessful state court litigation.[29] However, in *Peduto v. City of North Wildwood*, the Third Circuit has reached the opposite result.[30]

Unfortunately, this important question has not been resolved, and property owners who are forced to litigate such "takings" claims against a state or its agencies will continue to find themselves on the horns of this dilemma. If they attempt to assert their Fifth Amendment rights in federal court along with available state remedies, their federal takings claims are routinely dismissed as "unripe." On the other hand, litigants such as Mr. Guetersloh, who adhere to the literal commands of the Supreme Court and wait to assert their federal constitutional rights until they have actually accrued, find that they are procedurally barred from litigating those claims by principles of *res judicata*. This "heads I win, tails you lose" approach to such an important constitutional entitlement effectively converts the Fifth Amendment promise of just compensation into a constitutional right without a remedy.[31]

In Guetersloh I, it was determined that a receivership imposed on the Carlisle Water Supply constituted a legitimate exercise of the State's police power. As authorized by the State, that receivership purported to allow government agents to come onto Mr. Guetersloh's land, seize his assets, run his utility as if it were their own, charge for its benefits, and pay nothing for the privilege. That those actions were taken for a beneficial purpose—from the public's point of view—adds nothing to the debate.

There is no question that the order of the Commission creating the receivership qualifies under the "public purpose" requirement of the Fifth Amendment, it does.[32] Nor is it questioned that the provision of water service to county residents qualifies as a "public purpose." Rather, what is significant here is that under these facts, it is the established policy of the state to do what it did, without consideration of the rights and property interests of the true owner.

Indeed Mr. Guetersloh's case assumed the legitimacy of that undertaking, but focused on the way and manner in which the State applied its receivership powers to Mr. Guetersloh. Regardless of when or how his claims arose, the State contended that a prior summary judgment which completely ignored the economic impact of this regulation was dispositive of Mr. Guetersloh's complaint. The case therefore asserted that that argument is premised upon a faulty application of res judicata, and misperceived the underlying Fifth and Fourteenth Amendment rights at issue.

2.3 THE FIFTH AMENDMENT CLAIM IS DIFFERENT THAN THE INVERSE CONDEMNATION CLAIM

Properly understood, a claim for an uncompensated Fifth Amendment taking constitutes a separate and distinct cause of action from that litigated previously.[33] The holding that Mr. Guetersloh forfeited his right to just compensation because he did not assert that claim before it existed, would subordinate this basic constitutional right to a wholly unwarranted concept of res judicata.

non-discretionary federal forum for a Fifth Amendment takings claim if resort to state inverse condemnation procedures is required).

29 *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d at 1372-73 (the courts finding that the claim was not precluded rested at least partially on the court's view that the state procedures were inadequate to provide compensation even were the litigants successful).

30 878 F.2d 725 (3rd Cir. 1989)

31 The 3rd Circuit, however, has stated in the context of an unreserved Fifth Amendment takings claim that the "denial of a federal forum, however, does not amount to denial of due process." *Peduto v. City of North Wildwood*, 878 F.2d 725 (3rd Cir. 1989)(citing *Allen v. McCurry*, 449 U.S. 90, 99 (1980), a criminal case brought under § 1983).

32 As discussed on Section 3.0 *infra.*, the public purpose requirement is simply another way of stating it is a valid police power action and is rationally related to a legitimate state interest. Indeed, if it is not a valid police power action it is not a taking since it would not satisfy the public purpose requirement of the Fifth Amendment.

33 *Lake Lucerne*, 878 F.2d at 1370.

As construed by state and federal appellate courts, the primary issue addressed by this ripeness doctrine is when a party may properly assert a cause of action.[34] Its purpose is to avoid premature adjudication and to prevent courts from becoming entangled in abstract disagreements over administrative policies, and protects administrative agencies from judicial interference until they have formalized their administrative decision and the challenging parties are able to feel the effects of that decision in a concrete way.[35] More importantly, however, ripeness involves the issue of subject matter jurisdiction, and the power of a court to render particular relief.[36] As the Texas courts have made clear, the same standards addressed by the Supreme Court in *Williamson County* apply in the state courts as well.[37]

The jurisdictional aspects of ripeness are based on Article III limitations on judicial power, as well as arising form prudential considerations for refusing to exercise jurisdiction.[38] Moreover, Texas also recognizes that the ripeness requirement is jurisdictional and "emanates, in part, from the separation of powers provision set out in article II, section 1 of the Texas Constitution."[39] To say that this is prudential, however, is not to minimize its jurisdictional character. If the denial of adequate compensation is an element of the claim under the Fifth Amendment, then that dependent consideration—the element of inadequate compensation in the state inverse condemnation proceeding—cannot be available to consider in that same proceeding. To say that the Fifth Amendment claim is a contingent claim would then put the court in the unusual position of deciding the constitutional adequacy of its own decision. During a subsequent federal court review of the state proceeding, the analysis should focus on both the procedural and substantive distinctions between the state court proceeding and those mandated under the federal constitutional standard.[40]

At the time of Guetersloh I, it was determined that under Texas law, regulatory takings focus solely on the reasonableness of the regulation at issue.[41] Under the relevant Fifth Amendment standard, once it is determined that the offending regulation substantially advances a legitimate state interest, the inquiry then focuses on whether that regulation denies an owner of economically viable use of that property, or unreasonably interferes with landowners rights to use and enjoy their property.[42] In this respect, the Fifth Amendment requires that:

> [A] regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, [and] compensation must be paid to sustain it.[43]

Thus, the applicable standards for compensating property owners under the Fifth Amendment and under the Texas Constitution appeared quite different at that time. However, with the Texas Supreme Court's opinion in Mayhew, Texas has now apparently adopted this same federal standard.[44]

At oral argument before the court of appeals, the City of Lubbock candidly admitted that the present claim would not be barred by res judicata if asserted against them in federal court. Yet traditional rules of preclusion are generally applicable in the cross-forum context, and it is likely that the claim against the City of Lubbock, while not barred under the

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[34] *See, e.g., Town of Sunnyvale v. Mayhew*, 905 S.W.2d 234, 244 (Tex. App.—Dallas 1994) *rev'd* No. 95-0771 (Tex. March 13, 1998)); *see also*, *Armstrong World Indus., Inc. v. Adams*, 961 F.2d 405, 411 (3d Cir.1992).

[35] *See*, *City of El Paso v. Madero Dev.*, 803 S.W.2d 396, 398-99 (Tex. App.—El Paso 1991, writ denied), *cert. denied*, 502 U.S. 1073 (1992).

[36] *Town of Sunnyvale*, 1998 Tex. LEXIS 35, *10; *Madero*, 803 S.W.2d at 399; *see also, Trail Enterprises, Inc. v. City of Houston*, 907 F. Supp. 250, 251 (S.Dist. Tex. 1995).

[37] *Town of Sunnyvale*, 1998 Tex. LEXIS 35 at *10-15.

[38] *Suitum v. Tahoe Regional Planning Agency*, 117 S.Ct. 1659, 1665 n.4 (1997).

[39] *Mayhew.* 1998 Tex. LEXIS 35 at *11.

[40] *Dodd v. Hood River County* 59 F.3d 852, 863 (9th Cir. 1995).

[41] *See*, Slip Op. at p. 7.

[42] *Nollan v. California Coastal Comm'n.*, 483 U.S. 825 (1987); *Lucas*, 505 U.S. at 1030-31.

[43] *Lucas*, 505 U.S. at 1030.

[44] *Mayhew*, 1998 Tex. LEXIS 35, *35-36.

Eleventh Amendment, would have been barred in federal court through application of the State's preclusion principles.[45] State judicial proceedings are due the same credit in a federal court that they are entitled to by law or usage in the courts of the rendering state.[46] Accordingly, a federal court must give a state-court judgment the same preclusive effect that it would have under the law of the state in which the judgment was rendered, even when, as here, the basis of the federal claim is the Civil Rights Act.[47] Alternatively, if res judicata does not bar the claim in federal court, the claim should be available in state court, as well.

2.4 UNRIPE FIFTH AMENDMENT CLAIM IS NOT A CONTINGENT CLAIM

The question of when a federal cause of action is complete so that it may be enforced by a lawsuit, and thus has accrued, is a federal question.[48] Under *Williamson County*, Fifth Amendment takings claims are supplemental to a state takings claim, and may not be brought until the property owner has unsuccessfully sought compensation under state remedies.[49] Consequently, the original state suit cannot be the same transaction for *res judicata* purposes because the exhaustion of the state court appeal is the second element of the federal cause of action. That element only arises at the conclusion of the state court proceeding.[50]

Nonetheless, the Texas courts have concluded that Fifth Amendment taking claims are the type of "alternative" or "contingent" claims that must be brought under TEXAS RULES OF CIVIL PROCEDURE 48 and 51(b) *before* the second required element has occurred, in order to avoid the preclusive effect of res judicata.[51] Under the "transactional" approach to res judicata adopted in Texas, a claim is precluded "if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit."[52] For purposes of this standard, the dispositive question becomes whether, given the "special nature" of the Fifth Amendment's Takings Clause, Petitioner's federal-law and state-law claims are truly separate and distinct, or are merely two alternative theories by which recovery is sought for the same alleged taking.

Although conceding that at least facially, Mr. Guetersloh's argument sounds appealing, the Austin Court found that the Texas Rules of Civil Procedure expressly provide for the simultaneous presentation of multiple claims, alternative theories, and contingent causes of action. According to these rules of procedure, the mere fact that a cause of action is contingent on the outcome of another suit does not prevent the two claims from being raised and litigated simultaneously in the same suit.

Relying on *Getty Oil Co. v. Insurance Co. of North America*,[53] which concerned a contract action for indemnity, the court found that under Rule 51(b) of the Texas Rules of Civil Procedure, claims for just compensation asserted under the Fifth Amendment represent the kind of contingent claims that must be asserted under Texas procedural law in order to escape the bar of *res judicata*.[54]

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[45] *See e.g., Palomar Mobilehome Park Ass'n v. City of San Marcos*, 989 F.2d 362, 365 (9th Cir. 1993); *Fields v. Sarasota Manatee Airport Authority*, 953 F.2d 1299, 1309 (11th Cir. 1992); *Peduto v. City of North Wildwood*, 878 F.2d 725 (3rd Cir. 1989); *Lavasek v. White*, 339 F.2d 861, 863 (10th Cir, 1965); *Santa Fe Village Venture v. City of Albuquerque*, 914 F. Supp. 478 (Dist. NM 1995).

[46] 28 U.S.C. §1738; *see also, Migra v. Warren City School Dist. Bd. Of Educ.*, 465 U.S. 75, 80-81 (1984).

[47] *Migra*, 465 U.S. at 81, 83-84.

[48] *Cope v. Anderson*, 331 U.S. 461, 464 (1947); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941).

[49] *Williamson County*, 473 U.S. at 194-95.

[50] *City of Grand Prairie v. Sisters of Holy Family of Nazareth*, 868 S.W.2d 835, 844 (Tex. App., - Dallas 1993, writ denied), *cert. denied*, 513 U.S. 909 (1994); *see also Southern Jam, Inc. v. Robinson*, 675 F.2d 94 (5th Cir. 1982).

[51] TEX. R. CIV. P. 48 and 51(b); *see also, Santa Fe Village,* 914 F.Supp. at 481 ("The Tenth Circuit has held repeatedly that a state court judgment is preclusive as to claims which were or could have been brought"). .

[52] *Barr v. Resolution Trust Corp.*, 837 S.W.2d 627, 631 (Tex.,1992).

[53] 845 S.W.2d 794 (Tex.,1992).

[54] *Guetersloh v. State*, 930 S.W.2d 284, 287-88 (Tex.

However, claims for just compensation under the Fifth Amendment are not at all "like" contract actions for indemnity brought against an insurance company. At the time of suit, facts which give rise to such contract actions have already occurred. In the context of these Fifth Amendment claims, however, an unsuccessful conclusion of state compensation remedies is a necessary element of the claim, itself. Carried to its logical conclusion, property owners who seek to avoid the bar of res judicata would be required under this rule to actually sue the state for money damages on the mere presumption that the state will somehow act unconstitutionally toward them at some future, but unknown date. Stated another way, the denial of compensation for the taking is the unconstitutional act, therefore the contingency relied on is that the taking occurred and the state acted unconstitutionally. This turns the normal presumptions about state action on their head. Setting aside the fact that states are not only presumed, but are actually compelled to act in a constitutional manner, it would be difficult to envision a scenario in which a property owner could ever actually prevail in such a proceeding.

It has long been the rule that "a claim is not barred until it comes into being and can be appropriately asserted."[55] Furthermore, a judgment in one cause of action does not bar a second cause of action which is based upon new facts created by the first judgment. The fact that both actions arise out of the same subject matter is immaterial.[56]

The Ninth Circuit recognizes it is not the states application of its own substantive law to the facts of the property deprivation that is the reason for the preclusion. Rather, they note that it is presenting to the state court the ultimate question of the states failure to pay adequate compensation which would extinguish the claim through application of res judicata principles.[57] However, to avoid the requirement to present the ultimate issue, the Ninth Circuit requires a reservation of the Fifth Amendment claim. How the states failure to pay adequate compensation or the constitutional principles applied to the facts can be tried in the initial inverse condemnation proceeding is hard to fathom. A typical contingent indemnity claim has all facts necessary to decide the issue available to the trial court, and merely await a pronouncement of liability. Under the ripeness analysis, the state procedures and the courts analysis and considerations in arriving at the compensation are part of the Fifth Amendment claim's second element and can not be litigated until after they occur. Clearly this puts the federal district court in the position of being, to some degree, an appellate court over the state proceedings. That much was tacitly acknowledged by the Ninth Circuit, but they dismiss this point by noting that "the Supreme Court has erected imposing barriers to guard against the federal courts becoming the Grand Mufti of local zoning boards."[58] More importantly, the Ninth Circuit found that they

> disagree … with the suggestion what Williamson County is a thinly-veiled attempt by the Court to eliminate the federal forum for Fifth Amendment taking plaintiffs and that any federal remedy is limited to actions based on inadequate taking procedures in the state.[59]

It is difficult to discern, then, how it could be that takings claims under the Fifth and Fourteenth Amendments must be brought as an alternative or contingent claim under state procedures, even though the claim is not "ripe" under federal law and no constitutional violation occurs until the property owner has unsuccessfully pursued State compensation procedures.[60]

The ripeness holding of *Williamson County,* which requires exhaustion of the state court suit first, is analogous to holdings on when a cause of action accrues for limitations purposes. In suits for

App.—Austin 1996, writ denied) *cert denied*.

55 *Empire Trust Co. v. United States*, 324 F.2d 507, 508 (5th Cir. 1963), *quoting Martin v. Brodrick*, 177 F.2d 886, 888 (10th Cir. 1949).

56 *Id.*

57 *Dodd*, 59 F.3d at 860.

58 *Dodd*, 59 F.3d at 861 (quoting *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989)).

59 *Dodd*, 59 F.3d at 861.

60 *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986).

wrongful deprivations of property under 42 U.S.C. §1983, the same considerations that render a claim premature prevent accrual of that claim for limitations purposes. Those claims do not accrue until the relevant governmental authorities have made a final decision on the fate of the property involved.[61] This is not the kind of contingent claim that is contemplated under Rules 51 and 48 of the Texas Rules of Civil Procedure.

Whether a property owner's Fifth Amendment rights were violated presents a different legal inquiry than that litigated in the inverse condemnation proceeding. A property owner is entitled, and indeed is required, to utilize available state compensation remedies before asserting a violation of the Just Compensation Clause. Substantially different questions are raised in these proceedings, making the application of the principals of res judicata unjustified.[62] In the event of such an uncompensated taking, the federal right to just compensation becomes not only a defense to the state law action, but also becomes an independent claim that is both necessary and proper.[63]

2.5 DUE PROCESS REQUIRES JUST COMPENSATION

2.5.1 Even If Compelled by State Procedural Law, the Inadequate Compensation Judgment Rendered In the State Proceeding Results In a Denial of Due Process, and Is Not Entitled to Preclusive Effect.

Even if a Fifth Amendment claim can be asserted as an alternative or contingent claim under Texas' and other states rules of procedure, the doctrine of res judicata should not be applied, under such circumstances, to preclude the litigant from asserting his right to "just compensation" under the Fifth and Fourteenth Amendments. A substantial body of state and federal jurisprudence would allow recovery under circumstances where, as here, a state has impermissibly interpreted its own laws to deny a minimum level of protection afforded by the federal constitution.

State constitutions cannot subtract from the rights guaranteed by the United States Constitution.[64] At least as interpreted by the Texas courts, "the only limit on the states is that, in relying on their constitutions, they may not deny individuals the minimum level of protection mandated by the Federal Constitution."[65] "This approach has been referred to as a 'federal safety net,' ensuring that individuals receive all available guarantees of their rights."[66] Such a "constitutional safety net" would be meaningless, however, if litigants have no right to actually pursue their federal remedies once it is determined that a judgment entered according to state law denies relief that is compelled by the federal constitution.

A recurring theme in this litigation is that Texas courts are open to both statutory and inverse condemnation claims brought against agencies of the state on the basis of the Fifth and Fourteenth Amendments, as well as on the basis of the Texas Constitution and laws. In fulfilling that obligation, however, states must satisfy all applicable requirements of the Due Process Clause.[67] Where they do not, it is well established that a "state may not grant preclusive effect in its own courts to a constitutionally infirm judgment...."[68]

2.5.2 Due Process Requires Just and Adequate Compensation

Under most circumstances, the unsuccessful

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61 *Norco Construction Co., Inc. v. King County*, 801 F.2d 1143, 1146 (9th Cir. 1986).

62 *See, e.g.*, *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp*., 878 F.2d at 1368; *Dodd v. Hood River County* 59 F.3d at 860.

63 *Cf. Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971); *Boilermakers v. Hardeman*, 401 U.S. 233, 241 (1971).

64 *See, e.g., Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

65 *Davenport v. Garcia*, 834 S.W.2d 4, 15 (Tex. 1992); *see also*, *Sax v. Votteler*, 648 S.W.2d 661, 664 (Tex. 1983).

66 *Davenport*, 834 S.W.2d at 15.

67 *Kremer v. Chemical Const.Corp.*, 456 U.S. 461, 482 (1982).

68 *Id.*

state inverse condemnation litigant who files a subsequent Fifth Amendment claim will have the case resolved on summary judgment. Under the well-established rules of summary judgment practice, evidence favorable to the non-movant should be taken as true, and every reasonable inference indulged in his favor.[69] Therefore, the litigant must establish a *prima facia* case for an uncompensated "taking" within the meaning of the Fifth and Fourteenth Amendments. Consequently, if a prima facia case is made, applying res judicata principles to the facts would deny the property owner compensation for what amounts to a taking, as a matter of law. Such a judgment is entitled to preclusive effect only if it comports with due process. If it does not, it is well-established that federal courts can refuse to accord preclusive effect to a state court judgment where application of that state's preclusion law would violate due process.[70]

The requirement of "just compensation" for the taking of private property is constitutionally required under the Fifth Amendment, and for almost a century, has been held to be applicable to the states because of its incorporation into the meaning of "due process" as found in the Fourteenth Amendment.[71] Questions going to "property," "taking," "just compensation," and "payment" are all facets of this central federal question of denial of due process.[72]

The ultimate question to be resolved then, is not merely whether the procedure by which the litigants property was "taken" complied with the requirements of procedural due process. Rather, the issue is whether the state, although complying with its own rules of procedure, has nevertheless violated the Fifth and Fourteenth Amendments by taking the property without just compensation. As Mr. Justice Harlan stated for the Court in the seminal case of *Chicago, Burlington & Quincy R.R. v. City of Chicago*:

> A state may not, by any of its agencies, disregard the prohibitions of the fourteenth amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law, regard must be had to substance, not to form.[73]

Under such circumstances, it has long been recognized that there is the possibility of a federal question in every taking under state authority, even if all conditions of state law have been complied with.[74] Zero compensation, under these circumstances, would sanction the taking of private property without due process.

> The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation... The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.[75]

By way of example, the summary judgment decision rendered in Guetersloh I did not provide compensation for a plead Fifth Amendment "taking."

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[69] *Nixon v. Mr. Property Management Co.,* 675 S.W.2d 585 (Tex. 1984)(applying Texas law); *see also, Hudson v. Palmer*, 468 U.S. 517, 540 (1984)(applying the federal rules).

[70] *Peduto v. City of North Wildwood*, 878 F.2d 725, 728 (3rd Cir. 1989); *citing Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 482 (1982).

[71] *Chicago, Burlington and Quincy R.R. v. City of Chicago*, 166 U.S. 226, 236 (1897); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 n.4 (1987).

[72] *Foster v. City of Detroit*, 254 F.Supp 655, n.14 (E.D. Mich. 1966), *aff'd*, 405 F.2d 138 (6th Cir. 1968).

[73] *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 234.

[74] *See McCoy v. Union Elevated Ry.*, 247 U.S. 354 (1918); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Chicago Burlington and Quincy R.R.*, 166 U.S. at 236 (1897); *Foster v. City of Detroit,* 254 F.Supp. 655, n.14; *Richmond Elks Hall Ass'n v. Richmond Dev.*, 561 F.2d 1327, 1330 (9th Cir. 1977); 18 AM. JUR. *Eminent Domain* §§ 144, 145 pp. 772-3 (1938).

[75] *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 236-37.

Therefore, because that judgment would offend due process, it is not entitled to preclusive effect.

The issue before the state court is whether a compensable event occurred under state law. Once the answer is "no," the issue in the subsequent Fifth Amendment case is whether the state can enforce a policy that is so inconsistent with the "just compensation" mandate of the Fifth and Fourteenth Amendments.

3. THE POLICE POWER

No one contended that the receivership that was the subject of Mr. Guetersloh's claim was initially unnecessary or improper. Rather, the complaint was that Mr. Guetersloh was singled out to bear a public burden that rightfully should not have been borne by him, alone. It is unquestionably a fundamental attribute of sovereignty that states may exercise their police power to "take" private property where it is deemed beneficial to the public interest. However, the obligation of government to pay just compensation for what it takes is a "condition placed on the otherwise rightful exercise of that power."[76]

As a result, federal takings law recognizes that under certain circumstances, a statute or regulation may meet the standards necessary for a valid exercise of the police powers, and nonetheless constitute a taking.[77] Even regulations that are rationally related to a legitimate state interest may nonetheless violate the "takings" provision of the Fifth Amendment.[78] Where, as in Mr. Guetersloh's situation, a taking is alleged from regulations which deprive property of all value, or that have deprived him of his reasonable investment-backed expectations, a taking is asserted even where the regulations is a valid police power exercise.[79]

In Guetersloh I, the Austin Court of Appeals held that "the Commission's authority to *seek* a receivership against this utility was a valid exercise of the state's police power, for which no compensation is required."[80] In *City of Pharr v. Pena,* the Corpus Christi Court of Appeals stated that "it was Pena's burden to show that the City's failure to rezone his property … was not a valid exercise of the City's police power," and after analyzing the legitimacy of the City's goals, the court concluded that "the City's actions were a valid exercise of its police power and did not constitute a taking."[81] The Houston Court of Appeals similarly stated that the City's failure to "prove it validly exercised its police power, i.e. that the house was a nuisance" established the claim as a taking.[82] Unfortunately, these attempts to analyze takings claims by invoking the "police power" fundamentally fail to understand the nature of the takings clause and add little the ultimate determination.

Under the federal standard;

> The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.[83]

Indeed, the power of government to take property is merely a subset of the police power. Justice Stevens noted that:

> our recent decisions [hold] that the "scope of the 'public use' requirement of the Takings Clause is 'coterminous with the scope of a sovereign's police powers.'" *See Ruckelshaus*

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[76] *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987)

[77] *Lake Lucerne*, at 1371; *see also, Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *First English v. County of Los Angeles*, 482 U.S. at 316-20.

[78] *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1013-15 (1992).

[79] *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

[80] Slip Op. at p. 7(Guetersloh I)(emphasis added).

[81] 853 S.W.2d 56, 60-61 (Tex.App.—Corpus Christi 1993 writ denied).

[82] *City of Houston v. Crabb*, 905 S.W.2d 669, 675 (Tex.App.-Hous. (14 Dist.) 1995).

[83] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034, (1992) (Kennedy, J., concurring).

> *v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984)). *See generally* R. Epstein, *Takings* 108-112 (1985).[84]

If the public use requirement of the Takings Clause is coterminous with a sovereigns police power, then all proper exercises of a governments power to regulate that result in a taking are valid exercises of the police power. Indeed, if property is taken for a purpose that does not fall within the ambit of the police power then it is simply not a Fifth Amendment taking. It may be an illegal fourth amendment seizure or what might be described as a fourteenth amendment taking, i.e., a taking without due process or an equal protection taking. It is not, however, a Fifth Amendment taking because there is no valid public purpose.

To be a proper exercise of the sovereign's police power, is merely to tackle the first part of a takings analysis. That is, can the government do what it did. Under most circumstances, this would be the rational basis test and is the analysis you would expect for a facial challenge to a regulation. However, to say that the act is rationally related to a legitimate government interest is merely to determine that the government can take the action. It does not help to determine if the event is compensable. Justice Abbott, in *Mayhew* noted as much when he concluded that a "property regulation must 'substantially advance' a legitimate governmental interest," which is not "equivalent to the 'rational basis' standard applied to due process and equal protection claims."[85] Indeed, the Supreme Court of Texas has long recognized the difficulty in applying a police power analysis to the taking of property. In *City of College Station v. Turtle Rock,* the Court recognized "the illusory nature of the problem," and noted that they have "previously refused to establish a bright line for distinguishing between an exercise of the police power which does constitute a taking and one which does not."[86] Implicit in this statement is that a taking is an exercise of the police power, however, not all police power actions are compensable. Given the Court's statements, it is surprising that a number of Texas Courts of Appeals seem to misquote this statement and, as noted above, claim that if it is a valid exercise of the police power it is not a taking. If this is the standard under the Article I Section 17 of the Texas Constitution, then it is clearly providing less protection than provided under the Fifth Amendment and affords a basis for argument on the inadequacy of state procedure when making your federal claim.

To the extent that the Texas law of regulatory takings focus solely on the reasonableness of the regulation at issue, it fails to provide the compensation to the same extent as the Fifth Amendment requires. Yet under the federal constitutional standard, once it is determined that the offending regulation substantially advances a legitimate state interest, the inquiry then focuses on whether that regulation denies an owner of economically viable use of his property.[87] Unlike the analysis of Texas law in Guetersloh I, the Fifth Amendment requires that:

> [A] regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, [and] compensation must be paid to sustain it.[88]

As such, to stop the analysis by looking solely to the purpose of the governmental action fails to adequately protect a property owners entitlement to just compensation. Under this Fifth Amendment standard, otherwise valid laws may constitutionally obligate state or local governments to compensate property owners. Stated another way, the standards necessary for the proper exercise of the police power may be met, but nevertheless result in a compensable taking under the Fifth Amendment.

Although outside the scope of this paper, it is worth noting that it is easier to analyze whether a

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[84] *Keystone Bituminous Coal Ass'n v. Benedictis*, 480 U.S. 470, 492 (1987).

[85] *Mayhew*, 1998 Tex. LEXIS 35 at *30, *33.

[86] 680 S.W.2d 802, 804 (Tex. 1984)(citing *City of Austin v. Teague*, 570 S.W.2d 389, 391 (Tex.1978); *DuPuy v. City of Waco*, 396 S.W.2d 103, 107 (Tex.1965).

[87] *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Lucas*, 505 U. S. at 1030.

[88] *Lucas*, 505 U.S. at 1030.

regulation is compensable if

> the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed. …[89]

For example, rather than looking at the governments power to regulate a nuisance, it would be better to argue that the property owner simply has no "right to use his property so as to create a nuisance or otherwise harm others," and the regulation "has not 'taken' anything when it asserts its power to enjoin nuisance-like activity.[90] The nuisance exception to the taking guarantee is a subset of the police power, and they are not coterminous.[91] If you look at the regulation from the perspective of the entitlements or property rights being infringed and determine the extent of the impact, then the analysis should prove more useful.

4. THE "JENNINGS" RESERVATION

As the Supreme Court has previously held, the Property Clause of the Fifth Amendment "constitutes more than a pleading requirement, and compliance with it [requires] more than an exercise in cleverness and imagination."[92] Nevertheless, a number of federal circuits and the Austin Court of Appeals have fashioned a new pleading requirement to preserve an entitlement to federal court review of a Fifth Amendment takings claim. Although the idea of making an *England*[93] type reservation to preserve the Fifth Amendment claim for federal court review was conceived soon after the *England* decision,[94] and certainly pre-dates the ripeness analysis put forward in *Williamson County*, it was not until 1992 that the a court first expressly applied the requirement for a reservation to a takings plaintiff.[95]

In determining that a Fifth Amendment claim for a taking was barred in federal district court, the Eleventh Circuit concluded that the critical question was whether the plaintiff had made a reservation pursuant to their earlier decision in *Jennings,*[96] informing the state court of their intention not to litigate the federal claim. The court found that Florida preclusion principles would and did bar the claim since it was not reserved pursuant to this previous decision.[97]

In *Jennings*, the old Fifth Circuit[98] found that the racial discrimination complaint under § 1983, was barred by the doctrine of res judicata. Notwithstanding the fact that the plaintiff was forced into state court to avoid losing her ability to appeal the administrative decision of the school board, she should have made a reservation on the state record of her intention not to try her federal claims if she

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89 *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1223, n.71 (6th Cir. 1992) (*citing Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68, (1981) (emphasis added) (citations omitted). *Accord Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1991); *Smithfield Concerned Citizens for Fair Zoning v. Town of Smithfield*, 907 F.2d 239, 244 (1st Cir. 1990); *Lake Lucerne Civic Ass'n v. Dolphin Stadium Corp.*, 878 F.2d 1360 (11th Cir. 1989), *cert. denied*, 493 U.S. 1079 (1990); *Lake-wood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 308-09 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983); *Higginbotham v. Barrett,* 473 F.2d 745, 747 (5th Cir. 1973)).

90 *Keystone Bituminous Coal*, 480 U.S. at 492 n.20 (1987).

91 *Id.*

92 *Nollan v. California Coastal Commission*, 483 U.S. 825, 841 (1986).

93 *England v. Louisiana State Bd. of Med. Examiners.,* 375 U.S. 411 (1964).

94 *Lavasek v. White* 339 F.2d 861, 863 (10th Cir. 1965) (rejecting *England's* application in an attack on a state condemnation proceeding, although it is not clear if a reservation was ever properly made).

95 *Fields v. Sarasota Manatee Airport Auth.,* 953 F.2d 1299 (11th Cir. 1992).

96 *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976).

97 *Fields,* 953 F.2d at 1307.

98 Reference to the old Fifth Circuit is merely to note that it was prior to the circuits split into the Eleventh and new Fifth Circuits and is therefore Circuit precedent for the Eleventh as well as the Fifth Circuits.

had wanted to proceed in federal court.[99]

Interestingly, in the Fifth Circuit's 1979 decision in *Henry v. First Nat'l Bank of Clarksdale*, decided soon after its *Jennings* decision, the court determined that the reservation requirement isn't necessary if the plaintiff is in a situation where they are effectively forced into litigating their claim in state court, since it would serve to prevent § 1983's use as a safeguard against federally protected rights by the states *judiciary* as well as by other branches of state government.[100] In other words, in situations like a taking claim. However, the court almost immediately backs away form this statement when in 1982, it interprets the Supreme Court's holding in *Allen v. McCurry*[101] that traditional res judicata principles apply if the state court litigant has had a full and fair opportunity to litigate his federal claims in the state proceeding.[102]

This analysis of *Allen* was adopted by the Third Circuit in *Peduto v. City of North Wildwood* to conclude that the takings plaintiff was barred by principles of res judicata from asserting a newly ripe Fifth Amendment claim in federal court.[103] Moreover, the Ninth Circuit cites *Peduto* in support of other circuits rejection of the argument that res judicata should not bar the federal taking claim.[104] As discussed in Section 2.5 *supra.,* this analysis fails to take into account the jurisdictional character of ripeness and the constitutional dimensions of inadequate compensation by the state. Indeed, the Eleventh Circuit acknowledges that a straightforward, basically superficial, reading of *Allen* and the Supreme Court's later opinion in *Migra v. Warren City School Dist. Bd of Educ*.[105] leads to the conclusion that there is no non-discretionary federal forum for a taking claim, but that on closer analysis the Supreme Court left open the door to the federal courts by way of reservation.[106] While the court does not reconsider the basic analysis of the application of preclusion principles generally, they are not prepared to close the door to a takings claimant.

To arrive at their position, the Eleventh Circuit notes that the Supreme Court in *Allen* left open the question of whether the federal claim would be barred if it was not raised in the state court proceeding.[107] Moreover, they go on to find support for the position that an involuntary state court litigant does not necessarily have to give up his right to federal court review by noting that the Supreme Court's decision in *Migra*[108] addressing the question they left open in *Allen* specifically distinguished a situation where the state court litigant was involuntarily forced into state court.[109] However, even when forced to litigate in state court *Fields* holds that an *England* style reservation must be made in order to preserve the right to return to federal court. For support of this position, they note that Justice Blackmun in *Migra* specifically identified an *England* reservation situation as one allowing for return to federal court.[110]

Oddly enough, the *Fields* decision itself admits that it has engaged in strained reasoning in order to avoid overruling *Jennings*, which it suggests is no longer good law if justified under *England*.[111] Indeed, the court admits that *Jennings* itself would come out differently today under the facts on which it was decided.[112] Applying the *Fields* opinion to a Guetersloh like situation raises the very dilemma that the Eleventh Circuit panel states as its basis for questioning the *Jennings* reservation:

> [I]t would be a very odd result if the federal courts were effectively barred from hearing claims arising under the takings clause, except through Supreme Court review via

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99 531 F.2d at 1332.

100 *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 298 n.14 (5th Cir. 1979).

101 449 U.S. 90 (1980)

102 *Southern Jam v. Robinson*, 675 F.2d 94, 96-97 (5th Cir. 1982).

103 878 F.2d 725, 729 (3rd Cir. 1989).

104 *Palomar Mobile Home Park Ass'n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir. 1993).

105 465 U.S. 75 (1984).

106 *Fields,* 953 F.2d at 1304.

107 *Fields,* 953 F.2d at 1306 n.8, 1303-04.

108 *Migra*, 465 U.S. 75 (1984).

109 *Fields,* 953 F.2d at 1306 n.8, 1304 (citing *Migra* 465 U.S. at 85 n.7).

110 *Fields,* 953 F.2d at 1304, 1306.

111 *Fields,* 953 F.2d at 1305.

112 *Fields,* 953 F.2d at 1306 n.7.

> the writ of certiorari, of state court decisions interpreting the clause. The real question is not whether the state courts are unable to enforce the takings clause—they most assuredly are—rather, the question is whether the citizens of this country are to be barred from ever vindicating a federal constitutional right through the federal court system. This premise seems to go beyond *Allen* and *Migra* and is at present foreclosed in this Circuit by operation of *Jennings*. Thus, our concern about the wisdom of *Jennings* relates to the *Jennings* Court's ostensible reliance on *England* to reach its result, not to the result itself. Although the result in *Jennings* seems to us to be a reasonable one, we are doubtful that *England* compels it.[113]

Finally, applying *Fields* to an unsuccessful inverse condemnation litigant results in circular reasoning. As explained by the Fifth and Eleventh Circuits, there is nothing to reserve in the federal district court because the Fifth Amendment cause of action does not exist and therefore does not accrue until the constitutional violation occurs (i.e., until all state compensation procedures prove ineffective).[114] If it is not accrued for purposes of reservation, why then is it subject to the preclusion principals of merger and bar. As the *Fields* court itself notes, in *Lewis v. East Feliciana Parish School Bd.*,[115] a panel of the Fifth Circuit has "severely questioned the continuing validity of *Jennings*."[116] Nevertheless, the *Fields* court goes on to cite *Jennings* for the abolition of the first requirement of *England*, i.e., the filing of the initial claim in federal court, paving the way for the notice reservation in the state court proceeding. Such a reservation is now apparently the procedure required to preserve the right to federal court review.

One further key to the reasoning supporting the applicability of a reservation might be found in the Eleventh Circuit's reinterpretation of their *Henry* decision. After earlier questioning the reasoning, the court now approves of the analysis to the extent that it distinguishes a situation where the litigant voluntarily chooses to try his federal claims from those situations where he is forced into state court.[117] Indeed the Eleventh Circuit decides that even if *Jennings* is not justifiable as originally decided, it is valid based on its reading of *Allen* and *Migra*.

The Austin Court of Appeals and the Eleventh Circuits reliance on *Fields*,[118] is misplaced in concluding that a "*Jennings* reservation"[119] should preserve the Fifth Amendment claim for federal court review. Preserving the availability of a federal forum for a federal question is just one factor in the federal res judicata analysis of whether to grant preclusive effect to a state court judgment. The purpose of a *Jennings* reservation is to place the trial court on notice of a party's intention to reserve his right to litigate federal questions in a federal forum.[120] In the case of a takings claim against a state entity protected by the Eleventh Amendment, however, a *Jennings* reservation fails of its intended purpose because of the Eleventh Amendment bar. The Austin Court of Appeals notes as much in its Opinion.[121] A *Jennings* reservation would therefore not be applicable under such facts.

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[113] *Fields*, 953 F.2d at 1307 n.8.

[114] *Samaad v. City of Dallas*, 940 F.2d 925, 935 (5th Cir.1991); *Fields*, 953 F.2d at 1305.

[115] 820 F.2d 143, 146 n.1 (5th Cir. 1987) ("We doubt the effectiveness of a reservation of federal claims absent a prior federal abstention. *See Haring v. Prosise*, 462 U.S. 306, 322 n. 11, 103 S. Ct. 2368, 2377 n. 11, 76 L. Ed. 2d 595 (1983); compare *Jennings v. Caddo Parish School Board*, 531 F.2d 1331, 1332 (5th Cir.1976) with *Howell v. State Bar of Texas*, 710 F.2d 1075, 1078 (5th Cir.1983), *cert. denied*, 466 U.S. 950, 104 S. Ct. 2152, 80 L. Ed. 2d 538 (1984). But we need not pursue this debate because, as we discuss later, Lewis's reservation was made only after the federal claims had been litigated in state court and is therefore ineffective").

[116] *Fields*, 953 F.2d at 1305 n.4. Indeed, one of the district courts within the 11th Circuit itself, has stated that irrespective of the Fields decision, "it does not appear that England should properly apply… ." *Treister v. City of Miami*, 893 F. Supp. 1057, 1070-71 (S. Dist., Fl. 1992).

[117] *Fields,* 953 F.2d at 1306 n.8, 1303-04.

[118] 953 F.2d 1299.

[119] *Jennings v. Caddo Parish School Bd.*, 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976).

[120] *Holmes v. Jones*, 738 F.2d 711, 714 (5th Cir. 1984).

[121] 930 S.W.2d at 287.

It is worth noting that the Austin Court of Appeals applied the *Fields* case retroactively to Mr. Guetersloh. *Jennings v. Caddo Parish School Bd.*,[122] was not a takings case, and the *Fields* decision applying a *Jennings* reservation requirement to a Fifth Amendment takings case was rendered *after* the Texas Supreme Court had denied writ on the appeal of Guetersloh I. Under such circumstances, Mr. Guetersloh could not have reasonably anticipated in 1985 what the *Fields* court itself admits is a strained analysis.[123] Nor could Mr. Guetersloh have reasonably anticipated that he was supposed to make such a *Jennings* reservation to preserve a federal claim which he could not present in federal court anyway.

5. PRACTICAL APPLICATION OF THE ENGLAND, JENNINGS, GUETERSLOH RESERVATION

In concluding that a notice reservation in the state court inverse condemnation proceeding is indeed possible and under current federal court analysis is mandatory, leads to the analysis of the consequences of this procedure. Only one circuit court has been faced with a plaintiff who has in fact made the necessary reservation and considered the impact of the reservation.[124] In *Dodd v. Hood River County*, the plaintiff's state court petition stated that they "*expressly reserved their right to have their federal claims adjudicated in federal court.*"[125] Indeed, the court first had to decide if it was serious about accepting the reservation as a valid means of preserving the Fifth Amendment claim. One argument put forward by the state questioning the effectiveness of the reservation was that the state remedies the plaintiff was required to pursue under *Williamson County* included the Fifth Amendment claim that had been reserved for later litigation.[126] The Court rejected this argument stating that

> [t]he Fifth Amendment action is not more "developed" or "ripened" through presentation of the ultimate issue—the failure of a state to provide compensation for a taking—to the state court. Indeed such a requirement would not ripen the claim, rather it would extinguish the claim.[127]

Moreover, the Supreme Court in *Williamson County* "made no reference to the pursuit of the Fifth Amendment claim in state court."[128]

Having rejected the continued application of the ripeness doctrine to the reserved claim, the court was then faced with whether or not the doctrines of res judicata and collateral estoppel still applied and if so to what degree. Unfortunately, the court refused to decide the case based on the *Jennings, England* reservation line of cases.[129] Instead, the court determined that the state of Oregon tacitly agreed to the reservation by failing to object, and the District Court had specifically and frequently noted that the federal constitutional claims were not before them.

Nevertheless, despite the genesis of the reservation, the Ninth Circuit concluded that there was an effective reservation and next addressed the question of collateral estoppel or issue preclusion. From the perspective of a takings practitioner in Texas, the fact that the Austin Court of Appeals has adopted the Fifth and Eleventh Circuits procedure for reserving federal claims makes the question of issue preclusion relevant, since you will hopefully be back before the federal court after having made an approved "*Guetersloh*" reservation before the state district court.

Without a doubt there is certain factual overlap between the state court determination of the existence of a taking and the compensation to be awarded with the analysis which would be required under the Fifth Amendment in federal district court. However, as previously discussed in Section 2.3 *supra*., they are not identical since the states denial of adequate compensation would be called into question. The state proceeding has both a

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[122] 531 F.2d 1331 (5th Cir.), *cert. denied*, 429 U.S. 897 (1976).

[123] *Fields*, 953 F.2d at 1307 n.8.

[124] *Dodd v. Hood River County*, 59 F.3d 852 (9th Cir. 1995).

[125] *Dodd*, 59 F.3rd at 857.

[126] *Dodd*, 59 F.3rd at 859.

[127] *Dodd*, 59 F.3rd at 860.

[128] *Dodd*, 59 F.3rd at 859.

[129] *Dodd*, 59 F.3rd at 862-63.

procedural and a substantive component that effect the outcome and decision. However, if the subsequent federal court action is to have any meaning it can not simply be a review of the states procedures. As the quote from Justice Harlan in Section 2.5.2., *supra.*, indicates, if the state were to provide every conceivable semblance of correct process yet were inevitably to provide no compensation, the result would be unconstitutional.

On remand the district court found no fundamental distinction between Oregon's taking law and the federal Fifth Amendment standards and therefore the plaintiffs were precluded from obtaining federal court relief.[130] Fortunately, the Ninth Circuit in *Dodd II* disagreed that their was no difference and then went on to find that the factual record was sufficiently developed so that they could decide the issue.[131] In particular, the court found that Oregon law did not fully account for the plaintiffs investment-backed expectations in a situation where less than all economically viable use was taken.[132] The court then proceeded to analyze these factors and concluded that there was no taking.[133]

The Ninth Circuits willingness to consider the distinction of the state and federal takings analysis is clearly a chance to argue the infirmities of the state court decision at least at some level. While apparently not providing an unfettered opportunity to revisit the underlying issues, the federal district court claim provides a forum for a reasoned analysis of the state substantive law and its application to the factual underpinnings of the claim.

More importantly, it should allow the litigant a chance to show that while the state espouses the right standards and quotes the correct passages on the meaning and value of a taking under a state standard that seemingly resembles the federal Fifth Amendment standard, it does not in practice make the correct application to the particular facts. Indeed, it provides a chance to argue that as applied the state analysis is substantively meaningless.

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[130] *Dodd v. Hood River County,* 1998 U.S. App. LEXIS 2011, *7 (9th Cir. Feb. 13, 1998).

[131] 1998 U.S. App. LEXIS 2011 at *24-*25.

[132] 1998 U.S. App. LEXIS 2011 at *20.

[133] 1998 U.S. App. LEXIS 2011 at *26-*28.