

**Florida Chapter of the International Association of Assessing Officers  
2009 Tangible Personal Property Conference  
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Crystal River, Florida**

**PROPERTY TAX LAWSUITS 101**

**I. Legal Update**

*MCI Worldcom Network Servs., Inc. v. Mastec, Inc.*, 33 Fla. L. Weekly S473 (Fla. July 10, 2008).

This case involved MCI's claim for loss-of-use damages to its underground fiber-optic cable caused by an excavation company. The cable – located in downtown Miami – was severed and not repaired until 97 hours later. However, MCI did not suffer a disruption of its service because it was able to redirect the telecommunications traffic from the damaged cable to other cables on its system. MCI sought loss-of-use damages based upon the amount that it claimed it could have paid, but did not, to rent the use of an equivalent substitute cable from another telecommunications company for the time reasonably necessary to make repairs.

The excavation company argued that MCI was not entitled to any loss-of-use damages because there was neither an interruption of service nor any actual lost profits. MCI argued that it was entitled to the damages because it “should not be punished for having the foresight to install this backup system at a considerable cost to itself.”

The Florida Supreme Court held that loss-of-use damages were not permitted because no such damages were incurred due to MCI's ability to re-route the telecommunications traffic carried by the damaged cable within its own network. The decision includes an extensive discussion of other court decisions in Florida and throughout the United States. In general, those other decisions observed that excess capacity enabled the fiber optic company to accommodate varying levels of telecommunications traffic and to reroute traffic in the event of emergencies to avoid disruptions in service. As a result, no loss-of-use damages were incurred.

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## II. Pre-lawsuit activities

- The vast majority of significant lawsuits will be filed by businesses with large tangible personal property accounts, either within the county or within the state.
- In reviewing a TPP return, it may be necessary to request additional information from the taxpayer. Such requests should be in writing and should be made every year, even if the taxpayer fails to respond.
- In some years, a substantially complete (CWIP) issue may arise. If your office becomes aware of the potential issue, staff should be on-site immediately prior, and subsequent, to January 1. Information relating to completion should be gathered, including photographs. Information should be requested from the taxpayer in writing. Do not wait until a TPP return is filed, or not filed, for the year and then investigate.
- A physical, on-site inspection of large manufacturing facilities also may be advisable. Take photographs, notes, inquire as to problems with the facility, new equipment, etc.
- Very few lawsuits involving tangible personal property are surprises. Typically, property appraisers will have the opportunity to resolve potential lawsuits before they are filed. If a resolution is reached, it is advisable to obtain written confirmation that a lawsuit will not be filed.

## III. The anatomy of a lawsuit.

(A) The Complaint – a short and plain statement of the cause of action and relief sought. Fla. R. Civ. P. 1.110(b). A summons along with the complaint is served upon the property appraiser.

- Property appraisers may file suit contesting an adverse Value Adjustment Board decision pursuant to section 194.036(1), Florida Statutes (2008).

(B) The Answer – all allegations must be admitted, denied, or, declared to be without knowledge. Fla. R. Civ. P. 1.110(c). Considerations involved in answering a complaint challenging a tangible personal property assessment include:

- Lawsuit must be timely filed within 60-day time period of section 194.171, Florida Statutes (2008), and otherwise comply with the conditions precedent set forth therein, i.e., payment of taxes or good faith payment prior to filing suit and attachment of a receipt indicating payment. In addition, taxes cannot become delinquent in subsequent years or the lawsuit must be dismissed.

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- Only the “taxpayer or other person contesting the assessment of any tax, the payment of which he or she is responsible for under a statute or a person who is responsible for the entire tax payment pursuant to a contract and has the written consent of the property owner” may file suit. § 194.181(1)(a), Fla. Stat. (2008).
- What parcels or account numbers are included in the lawsuit also must closely reviewed.

(C) The Discovery Process – discovery includes interrogatories, requests for production and inspection, requests for admissions, expert interrogatories, and depositions. Discovery seeks relevant and material information, or information which is reasonably calculated to lead to the discovery of admissible evidence.

- *Interrogatories* are written questions to be answered under oath. Fla. R. Civ. P. 1.340. They are admissible at trial if otherwise admissible under the evidence code. Interrogatories cannot exceed 30 in number, including subparts, without agreement of the parties or court order. Expert interrogatories also may be submitted to discover identity of testifying experts, and the qualifications, compensation, and reports thereof.
- *Requests to produce* involve providing documents responsive to the request. Parties may either provide copies of the documents or allow inspection of the documents and subsequent copying. Fla. R. Civ. P. 1.350. The producing party “shall either produce them as they are kept in the usual course of business or shall identify them to correspond with the categories in the request.” Parties only are required to produce documents that already exist (you are not required to create documents) and within your possession or control. The rule also allows entry upon land for inspection and other purposes
- All documents, correspondence, telephone messages, e-mail, etc., are public records and subject to inspection under Chapter 119, Florida Statutes (2005), unless confidential. A public record is “any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.” *Shevin v. Byron, Harless, Schaffer, Reid, & Assoc.*, 379 So.2d 633 (Fla. 1980). In contrast, “materials prepared as drafts or notes, which constitute mere precursors of governmental ‘records’ are not, in themselves, intended as final evidence of the knowledge to be recorded” and would not public records.” The only documents relating to tangible personal property that are confidential are the TPP returns. *See* § 193.074, Fla. Stat. (2005).
- Because all records in the property appraiser’s office are “public records,” such records must be retained in accordance with the General Records Schedule GS12 for Property Appraisers. An individual record schedule to establish retention requirements for records that are unique to particular agencies also may be established.

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- USPAP also has a recordkeeping requirement in the Ethics Section that taxpayers may argue should be followed in assessing properties. USPAP requires a workfile for each appraisal, appraisal review, or appraisal consulting assignment. The workfile must include: the name of the client and the identity, by name or type, of any other intended users; true copies of any written reports, documented on any type of media; summaries of any oral reports or testimony, or a transcript of testimony, including a signed and dated certification; and all other data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with this Rule and all other applicable Standards, or references to the location(s) of such other documentation.
- USPAP requirements, however, are not included in either the Florida Statutes or Administrative Code, and a property appraiser is not required to adhere to USPAP. *Florida Power & Light Co. v. Sherman*, case no. 99-CA-1025 (19th Jud. Cir. Ct., May 14, 2003).
- In any tangible personal property lawsuit, the cost approach will be a significant aspect of the case. The most reliable source of cost data is the financial records of the property owner. As a result, it will be necessary to conduct extensive discovery into the taxpayer's records of costs, overheads, freight and installation, sales tax, etc.
- The taxpayer's records also are the best source of data relating to depreciation, as well as functional and economic obsolescence. Sources of information include budgets, repair and maintenance records, economic decision-making models, internal equipment replacement studies, production records, income records, feasibility studies, and published financial reports and news reports. Do not forget the company's website.
- *Requests for Admissions* – Parties may serve upon other parties a request to admit or deny the truth of any matter that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Fla. R. Civ. P. 1.370. Requests cannot exceed 30 in number, including subparts, without agreement of the parties or court order. A party must admit or deny the admission and cannot answer by stating that he or she lacks information to respond unless a reasonable inquiry has been made and the information known or readily obtainable is insufficient to enable the party to admit or deny.
- *Depositions* are an oral examination of the party and any other person, including experts. Fla. R. Civ. P. 1.310. All answers are under oath and may be admissible as evidence or for impeachment at trial. No judge will attend the deposition; only the attorneys and a court reporter will be present. Depositions may be taken of a "corporate representative" and may be delineated as a deposition "duces tecum," which requires the deponent to bring certain documents to the deposition. Depositions are transcribed if requested by a party and upon appropriate payment to the court reporter.

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- Generally, the deposition of the property appraiser and/or staff, along with a corporate representative, is required to be conducted in the county where the suit is filed. Depositions of experts are required to be conducted in the county where they reside. The parties can agree to other locations.
- Depositions require preparation. While the primary purpose of a deposition is information gathering, foolish, inaccurate, misleading, or dismissive statements will come back to haunt you at trial and may influence the “settlement point” of a case.
- *Motions to Compel Discovery* – Typically, and perhaps unfortunately, disputes arise as to whether a party has properly complied with the discovery requests or whether objections to discovery are lawful. Fla. R. Civ. P. 1.380. Counsel for the parties are required to attempt to resolve the dispute without court order. If they are unsuccessful, a motion to compel is filed and set for a hearing. Although the rule allows recovery of attorney’s fees and costs for compelling responses to discovery, most often these remedies are limited to repeated, frivolous objections and “stonewalling” of the discovery process.

(D) Setting the Case for Trial – cases are not placed on the trial docket until a party files a “Notice for Trial” or “Notice at Issue.” Fla. R. Civ. P. 1.440. The notice declares that the case is ready to be placed on the non-jury trial docket and includes an estimate of the days required to try the case. Once the notice is filed, the court is required to enter an order within 30 days setting the trial date.

- In many judicial circuits, the order setting a trial date (Pretrial Order) will include standard provisions setting forth deadlines for discovery, mediation, witness and exhibit lists, dispositive motions, pretrial statements, continuances of trial, and exhibit review. Many circuits also set “docket calls,” which require counsel to appear – usually in person – to discuss the status of the case and set the trial for a “trial week” in the next several months. Because of the heavy workload of judges, limited court resources, and fact that many cases settle shortly before trial, several cases may be set for the same trial week. Thus, your case may not actually be tried in that trial week and may be “rolled over” to the next available week.
- The standard pretrial order varies among judicial circuits. Likewise, the required level of compliance with the order varies among the circuits and the judges. Parties also may agree to their own deadlines and submit a stipulated pretrial order.

(E) Mediation – All civil cases shall be ordered to mediation. Fla. R. Civ. P. 1.710. Mediation may be held at any time, and is typically set as part of the pretrial order. All statements at mediation are confidential.

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- The parties usually agree upon a mediator, who is an attorney, to conduct the mediation. All mediation agreements are voluntary, and the mediator has no authority to decide issues or require action by either party. While some mediators have prior ad valorem or eminent domain experience, subject matter knowledge is not required.
- The party or its representative having full authority to settle without further consultation is required to attend the mediation, along with counsel of record. Expert witnesses also may attend. Other, nonparties typically are excluded because of the confidential nature of the proceeding.
- Before mediation, parties should have a strategy regarding potential settlement of the case. Mediations do not settle upon the initial offer. It is advisable that settlement offers be logically related to some aspect of the appraisal or legal dispute.
- Mediations result in one of three outcomes: written settlement, impasse, or adjournment to continue discussions until a settlement or impasse is reached. The court only is advised as to the outcome.

(F) The trial – the vast majority of all cases, including property tax cases, do not proceed to trial. Instead, they are settled or otherwise resolved. Any discussion of the components of a trial is beyond the scope of this presentation. Suffice it to say that any trial requires extensive preparation of counsel, the parties, and the experts *before* the trial begins. The preparation continues during the trial as the parties plan their presentations for the upcoming day.

- Typically, the trial judge will have not presided over or litigated a property tax case in his or her legal career. No appraisal expertise should be expected.

(G) The post-trial proceedings – after the trial judge issues a decision, both parties may file motions for rehearing or a new trial and argue that a particular legal issue that arose during trial was incorrectly decided or the judge’s decision misunderstood the facts. Fla. R. Civ. P. 1.530.

(H) Appeals – the unsuccessful party may appeal the trial court’s final judgment. Fla. R. App. P. 9.110. The appeal is not an opportunity for a second trial. Instead, the appeal generally raises legal issues that are believed to have been incorrectly decided.

#### **IV. Working with your expert witness**

- Typically, larger accounts require greater resources and expertise to determine whether the amount identified on the TPP return is a fair market value. It may be advisable to retain the services of an outside consultant to assist in valuing these larger accounts. See § 193.074, Fla. Stat. (2005) (All TPP returns are “confidential in the hands of the

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property appraiser . . . and their employees and persons acting under their supervision and control . . . .”); *Walker v. Trump*, 549 So.2d 1098, 1102 (Fla. 4th DCA 1989) (There “is no prohibition on the use of outside appraisers to assist the property appraiser in fulfilling her function, since such appraisals produced by outside firms are not binding upon the property appraiser but may serve as a guide.”). Property appraisers and their staff should review the work product and, if it is acceptable, adopt it as their assessment.

- Oftentimes, the strength of your case depends upon the quality of your expert witness.
- Experts should be actively involved in the discovery process, including suggestions of relevant information and review of information obtained.

#### **(V) Evaluating litigation risk and settlement opportunities**

(A) Evaluating your team – You should review the quality of your team as part of the decision-making process involved in any potential settlement. That includes review of the following:

- Appraiser – the appraiser, staff, outside expert, and perhaps a non-testifying expert consultant.
- Attorney – the attorney may be in-house staff, county attorney staff, or an outside firm.
- Technical staff – industry expert, computer expertise, database management.

(B) Evaluating the discovery process – you should evaluate the efficacy of the discovery process, including pre-litigation information gathering, internal recordkeeping controls, and effective discovery of relevant documents and witnesses.

(C) Evaluating appraisal issues – you should attempt to determine the disputed appraisal issues and how resolution of those issues may impact the value. Is there a disagreement as to the data, i.e., original cost of the tangible personal property, or appraisal methodology? Does the case involve rate-regulated utilities or purchase price allocation issues?

- The appraisal issues also should be reviewed on how they impact the range of reasonable values.

(D) Evaluating legal issues – you should evaluate the impact of case law on the appraisal issues. Obtain copies of the relevant court decisions from your attorney, read those decisions, and discuss those decisions with him or her.

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(E) Evaluating settlement opportunities – Opportunities to resolve disputes arise during pre-litigation, including the value adjustment board process, “sue and settle,” informal settlement discussions, mediation, the courthouse steps, during trial, post-trial, and on appeal. Cases are settled when the range of reasonable values for each party intersect.

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