

ECONOMIC DEVELOPMENT PROJECTS THREATENED IN SUPREME COURT CASE

Alan Strasser and George Schlossberg of our Washington DC office write:

Can a city condemn property and take it away from one private party in order to transfer it to another private party to permit or support an economic development project?

This winter, the U.S. Supreme Court will hear a case that argues such a use of a city's powers of eminent domain violates the "takings" clause in the Fifth Amendment to the U.S. Constitution. Under the Fifth Amendment, a city cannot take property from a private party unless (i) there is a "public use" for the property and (ii) just



The U.S. Supreme Court

compensation is paid to the private party.

At issue is whether an economic development project being undertaken by a private party is the type of "public use" allowed under the Constitution. As noted by one court, projects such as building a highway or railway, or constructing government buildings or public utility facilities, have a traditional "public use" character. However, at least seven states prohibit the condemnation of property for economic development purposes.

In the case before the Supreme Court, the City of New London, Connecticut condemned a 90-acre parcel to support a private developer constructing a waterfront hotel and conference center, research labs, retail areas and homes. The development was intended to revitalize the community after its economic downturn following the closure of a nearby U.S. Navy base.

Owners of seven of those acres objected to the condemnation because they would be used by a

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drug company to provide parking and other amenities for its adjacent research facility. (*Kelo v. City of New London*)

Developers, bankers and underwriters, as well as municipalities, should consider whether this case should be disclosed in bond offerings for economic development projects that depend upon condemned land. Also, financing entities should consider whether their loans would remain adequately collateralized in the event of an adverse decision.■

[See our memo on this at www.kutakrock.com,

NEW IRS RULE WOULD REQUIRE CHANGE IN MAILING NOW

Under proposed IRS regulations, dropping your tax return into a mailbox would not be enough to prove you filed it on time if it gets lost on its way to, or even at, the IRS. And, these regulations would be retroactive to September 21, 2004 if they become effective.

Currently, a tax return is presumed to have been filed with the IRS on the date it is postmarked. This is referred to as the "mailbox rule," which dates back to the 18th

century and is currently a fixture in UCC commercial contract transactions.

However, the IRS has argued in several court cases that taxpayers cannot use the mailbox rule to prove a tax return was timely filed unless, pursuant to Section 7502 of the Internal Revenue Code, the IRS actually acknowledged it was received (e.g., before it was lost) or the taxpayer has a receipt showing it was sent via registered or certified mail. Federal courts have differed on whether this Code Section replaced the mailbox rule or merely provides a "safe harbor" procedure that is in addition to the mailbox rule.

Now, the IRS has proposed regulations to require that a taxpayer must show either an IRS

acknowledgement of receipt or a timely postmarked receipt for registered or certified mail to prove that a return was timely filed. (IRS Prop. Regs. Sec. 301.7502-1). The IRS has not yet included the approved private delivery services (FedEx, UPS, etc.) in this regulation, suggesting that a receipt from one of those companies would not be sufficient proof of timely filing if a return is lost.

While the IRS proposal is new, the advice from experienced tax practitioners is not: send every tax return to the IRS via certified or registered mail, with a return receipt requested, or file on-line. And, keep your mailing or filing receipts with a copy of your tax return, just in case.■

**DROPPING YOUR TAX RETURN
IN A MAILBOX WOULD
NO LONGER BE ENOUGH
UNDER A PROPOSED IRS RULE**

CAP ON TILA DAMAGES COULD NOW BE TWICE THE FINANCE CHARGES

Lenders subject to the Truth in Lending Act (TILA) – including retailers that finance purchases by their customers – could be subject to damages higher than the \$1,000 per violation cap under existing law. Two federal courts of appeal disagree on whether this is the case, and the U.S. Supreme Court has agreed to decide which one is right.

The latest case that created this disagreement involved an auto



The Supreme Court recently agreed to hear a case on TILA and a questionable car loan practice

dealership that was found to have violated TILA when it included a \$965 charge for a car alarm on the buyer's lending contract without the buyer's knowledge or approval. The buyer used a trade-in to acquire the vehicle from the dealership. Due to confusion and disagreements after the buyer discovered the unauthorized charge, no loan payments were made on the trade-in's remaining loan or on the new vehicle's loan. As a result, both vehicles were repossessed. A jury found for the buyer under TILA and awarded him \$24,192, equal to twice the finance charge, rather than capping damages at \$1,000. (*Nigh v. Koons Buick Pontiac GMC*).

TILA and its underlying Regulation Z require that persons who lend money give the borrower truthful loan disclosures before the transaction is completed. Prior to

1995, the penalty per violation under TILA was twice the finance charge, with a cap of \$1,000. In 1995, a new penalty limitation of \$2,000 was added for real estate loans.

In affirming the award, the federal court of appeals for the Fourth Circuit in Richmond, VA found that the wording of the 1995 amendment to TILA effectively removed the \$1,000 cap from the usual penalty of twice the finance charge. The \$1,000 cap still applied to consumer leases, however, and the \$2,000 cap applied to real estate loans. All other loans, including the car loan at issue, were subject to a penalty of twice the finance charge, with no cap.

Lenders should review both their procedures and documents for TILA compliance and may experience an increase in consumer complaints because of the potential for larger awards. ■

PENDING TAX BILL COULD HINDER DEFERRED COMPENSATION PLANS

The comprehensive corporate tax bill passed over the holiday weekend and now on the President's desk for signature includes provisions that could significantly reduce benefits currently available to your key employees. (American Jobs Creation Act of 2004, Sec. 885.) Among the changes in the tax bill:

- a 20% penalty on withdrawals other than under specified circumstances, such as (a) an "unforeseeable emergency," (b) a specified date or event in the plan or (c) severance (in which case payments cannot be made until at least 6 months after severance).
- no deferral of payouts would be allowed any more unless (i) the change is made at least a year ahead of the payout date and (ii) the payout is extended for at least five years.
- a decision to defer compensation

– such as a bonus – would have to be made at least six months before the end of the period to which the compensation applies. For example, a decision to defer a bonus earned for the 2005 year would have to be made by June 30, 2005.

When this tax bill is signed, companies should review and amend their deferred compensation plans as soon as possible as the new rules are effective January 1, 2005.

However, amendments should be made carefully as they may affect the "grandfathering" provisions of the bill. This review should include SERPs, deferred compensation arrangements, restricted stock plans, SARs and discounted or other non-qualified stock options. ■

[See our website, www.kutakrock.com, under "Publications" once the bill is signed for further information]

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