

# Electromagnetic Radiation Field Property Devaluation

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**The *Criscuola v. Power Authority of the State of New York* decision by the New York State Court of Appeals seems to provide the means to obtain damages due to diminution of property values as a result of proximity to an electromagnetic radiation field (EMF). This article explores ramifications of the decision and its application to valuation problems.**

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**W**hen New York State's highest court, the Court of Appeals, handed down *Criscuola v. Power Authority of the State of New York*<sup>1</sup> last year, many hailed the decision as the missing piece of the puzzle that would provide the means to obtain monetary damages because of diminution of property values caused by proximity to an electromagnetic radiation field (EMF).

One year later, the aggressive use of the holding can be observed in many different types of lawsuits. The *Criscuola* doctrine is also being used in inverse condemnation cases and in a host of other situations as diverse as the fertile imagination of learned counsel would allow.

Much has been written in legal periodicals about *Criscuola* and its potential application to any litigation involving the use of

land. It is therefore necessary to carefully explore the decision to consider its application to valuation problems.

## EMINENT DOMAIN CONTEXT

*Criscuola* arose in the context of a pure eminent domain taking; that is, there was a condemnation of a strip of property through the Criscuola brothers' farm in rural New York. The appropriation was by the Power Authority of the State of New York for a 345-KV power transmission line, involving a 160-foot corridor crossing the property diagonally in an east-west direction approximately midway of its depth.

The claimants filed a claim for damages seeking just compensation, not only for the six acres directly taken for the pow-

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1. *Criscuola v. Power Authority of the State of New York*, 81 NY2d 649, 602 NYS2d 588, 621 NE2d 1199 (1993). Also reported, *ATLA Law Reporter* 23, no. 33, 37; *Toxic Law Reporter* 8, no. 20; *Indoor Pollution Law Report* 7, no. 5; *Medley's Litigation Reports, Toxics Torts* 2, no. 14; *EMF Litigation News* (November 1993); and *Microwave News* (Sept./Oct. 1993, Nov./Dec. 1993, Jan./Feb. 1994).

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erline, but for the loss in value sustained by the remaining 94 acres because of the remainder's loss of market value. Condemnation lawyers refer to these two types of damages in partial takings as direct and consequential.

Claimants alleged that the consequential damages arose as a result of the public's perception of health risks associated with high-voltage powerlines, a fear known as "cancerphobia." One of the owners testified that he never would have bought the property if it had had a high-voltage powerline across it. Claimants' expert valuation witness, an MAI-designated appraiser, testified that because of the public's cancerphobia, the market value of the remainder was worth half of its prevesting value.

The trial court, the New York State Court of Claims, held that the Criscuolas were only entitled to recover for the direct takings, and awarded \$5,400, plus \$543 for hardwood trees taken down, a total of \$5,943. The court ruled that to recover for consequential damages, the claimant must first prove that powerlines cause health problems by a preponderance of the credible scientific evidence. If scientific proof supported the cancerphobia of the public, the claimant must then also establish that this reasonable apprehension has affected the purchaser's willingness to pay the fair market value of the property.

On appeal, the trial court's decision was affirmed by the Appellate Division.<sup>2</sup> The Appellate Court, in affirming *Criscuola*, relied on a companion case involving another parcel located in a different county that was also taken by the Power Authority for the same Marcy-South powerline that was decided by another appellate court of equal jurisdiction.<sup>3</sup>

Criscuola moved for, and received permission to appeal to New York State's highest court, the Court of Appeals. The Power Authority argued, once again, that existing law required that the claimants must first prove by a preponderance of the evidence that health fears were scientifically reasonable, and that the claimants (who were joined with all other Marcy-South claimants) could not con-

vince the trial judge, who heard a levy of impressive and certainly expensive expert witnesses, that there was a basis in scientific evidence for a fear of exposure to the fields emitted by powerlines.

## NEW YORK STATE COURT OF APPEALS DECISION

The Court of Appeals held otherwise, and reversed in a decision by Judge Bellacosa, who stated:

We are satisfied that there should be no requirement that the claimant, as a separate and higher component of its market value proofs, must establish the reasonableness of a fear or perception of danger or of health risks from exposure to high-voltage powerlines. The issue is a just compensation proceeding (citations omitted). This consequence may be present even if the public's fear is unreasonable. Whether the danger is a scientifically genuine or verifiable fact should be irrelevant to the central issue of its market value impact. Genuineness and proportionate dollar effects are relevant factors, to be sure, but in the usual evidentiary framework. Such factors should be left to the contest between the parties' market value experts, not magnified and escalated by a whole new battery of electromagnetic power engineers, scientists or medical experts. "Adverse health effects *vel non* is not the issue in eminent domain proceedings: full compensation to the landowner for property taken is" (citations omitted). As the Court of Appeals of Kansas has noted, "Logic and fairness . . . dictate that any loss of market value proven with a reasonable degree of probability should be compensable, regardless of its source. If no one will buy a residential lot because it has a high-voltage line across it, the lot is a total loss even though the owner has the legal right to build a house on it. If buyers can be found, but only at half the value it had before the line was installed, the owner has suffered a 50% loss."<sup>4</sup> Thus, relying on *Willsey*, the Supreme Court of Kansas concluded, and we agree, that evidence of fear in the marketplace is admissible with respect to the value of property taken without proof of the reasonableness of the fear."<sup>5</sup>

## KEY HOLDING

In the key holding, once again, the New York Court of Appeals ruled:

- There should be no requirement that the claimant must establish the reason-

2. *Criscuola v. Power Authority of the State of New York*, 188 AD2d 951, 592 NYS2d 79 (3d Dept., 1992).

3. *Zappavigna v. State of New York*, 186 AD2d 557, 588 NYS2d 585 (2d Dept., 1992).

4. *Willsey v. Kansas City Power*, 631 P2d 268, 277-278.

5. *Ryan v. Kansas Power & Light Co.*, 815 P2d 528, 533.

ableness of a fear or perception of danger or of health risks from exposure to high-voltage power lines, and

- Whether the danger is a scientifically genuine or verifiable fact should be irrelevant to the central issue of its market value impact.

### APPLICATION TO NONCONDEMNATION CASES

It is this marketplace evidence rule that has sparked the plaintiff's bar to apply *Criscuola* to noncondemnation situations. Indeed, *Criscuola* is being applied against the City of New York by homeowners who live in Staten Island and are unable to sell their homes because of the largest landfill in the country. The noxious smell and unsightliness of this mountain of garbage has created a well-publicized fear of cancer to would-be home buyers.

Fear in the real estate marketplace is also argued as a reason for not allowing construction for a CellularOne Tower in Glen Cove, Long Island. Community Board Two in Greenwich Village, New York, uses this reason to oppose the construction of a power substation the Transit Authority plans to build. The State of Connecticut General Assembly's Committee on Transportation is considering the potential EMF property devaluation that may be caused by Amtrak's electrification of railroad lines within the state.

The argument being advanced in these situations is that even though the best-informed experts cannot say for sure that EMF causes cancer, everyone agrees that if a powerline is constructed next door, local real estate values may suffer substantial devaluation.

Litigation is currently proceeding in New York against Consolidated Edison and against the Long Island Lighting Company, seeking damages for inverse condemnation, trespass, and injunctive relief. Similar inverse condemnation claims are being filed across the country. The number of property devaluation claims continues to grow geometrically.

### CRISCUOLA FORMULA

Judge Bellacosa wrote in *Criscuola* that "evidence of fear in the marketplace is admis-

sible with respect to the value of property taken without proof of the reasonableness of the fear."<sup>6</sup>

A claimant, however, is not relieved from giving any proof to establish claims and just compensation damages. *Criscuola v. Power Authority of the State of New York* mandates that a claimant must still establish some prevalent perception of a danger emanating from the objectionable condition.

Quoting the *Ryan* decision once again, the Court of Appeals stated that "no witness, whether expert or nonexpert, may use his or her personal fear as a basis for testifying about fear in the marketplace. However, any other evidence that fear exists in the public about the dangers of high-voltage lines is admissible" (emphasis added). Judge Bellacosa further stated:

Claimants should have to connect the market value diminution of the property to the particular fear in much the same manner that any other adverse market effects are shown; e.g., by proffering evidence that the market value of property across which powerlines have been built has been negatively affected in relation to comparable properties across which no powerlines have been built (citations omitted).

### EMF INVERSE CONDEMNATION

In an inverse condemnation (i.e., an EMF property devaluation claim), the damage calculation should be the same as if the property were condemned because the public perceives that there is a health risk when one lives in close proximity to a high-voltage power transmission line. This perception among the prospective purchasers of the property results in a substantial loss of value.

This cancerphobia affects the minds of any prospective purchaser, causing a loss of demand, a loss of market value, and thus damage to an EMF-affected property. Indeed, even if a prospective purchaser were certain that there was no risk to health, he or she still would not be disposed to acquire a property with such a limited resale potential.

One thing is certain: whether the danger is a scientifically genuine or verifiable fact is irrelevant to the central issue of its market value impact. Appraisers should be cognizant of not only the change in law, but of the market effect as well.

6. *Ryan v. Kansas Power & Light Co.*

It should not be difficult to establish that the market value of real property in close proximity to a high-voltage powerline is substantially lower than a comparable property unaffected by a powerline.

#### THE PUBLIC'S PERCEPTION— CANCERPHOBIA

According to an article by Ron Marx,<sup>7</sup> a public poll taken in 1993 by Cambridge Reports/Research showed that 63% of all adult Americans were aware of the EMF issue, up from 31% in 1989. Half responded that they were "extremely worried" about it. The public's perception of a problem is well established.

The reason for the growing awareness has been the increased reporting of residential and school cancer cluster investigations near powerlines, along with numerous studies of occupational exposure showing an increased frequency of cancer in workers who have had higher exposure levels to EMF.

Recently, an article in *The New York Times*, "Power Lines Raise Fears in Home Buyers,"<sup>8</sup> began, "When Marie Trizano takes people to see houses near powerlines, she says sometimes they won't even get out of the car." There have been hundreds of other similar articles in magazines and newspapers across the country.<sup>9</sup>

Homeowners who adjoin high-voltage powerlines have reported that their EMF-affected homes are unsellable at any price. An appraiser should be easily able to connect the market value diminution of the property to the public's fear of an EMF.

#### APPROACH TO VALUATION

The proper approach for an appraiser to take in valuing a parcel of land damaged by the visible presence of a high-voltage powerline will be a before-and-after valuation of similar properties. In other words, comparable unaffected properties will be selected and adjusted, with an appraiser considering location, market conditions, physical characteristics, conditions of sale, time, financing terms, and use. This sales comparison approach will provide or indicate a market value for the unaffected (before) property.

The appraiser will then attempt to find comparable sales of parcels similarly situated next to a powerline, if possible. It may be extremely unlikely that any recent sales of EMF-affected properties exist. Assuming that the appraiser's research does indicate some nonforeclosure or other distress sales of property in proximity to a powerline, these sales must be analyzed and compared with the subject property. The after (affected) property value is then subtracted from the before (unaffected) property value, and the difference will be the damages.

#### CONCLUSION

It is entirely possible to conclude after an EMF market study that most parcels of EMF-affected property will have a restricted resale value, and thus there will be damages in the full indicated value found by adjusted comparable properties not affected by high-voltage powerlines.

7. Ron D. Marx, "This ELF Could Be the Next Giant in Environmental Hazards," *Econ the Environmental Magazine for Real Property Hazards* (November 1993): 22.

8. *The New York Times*, "Power Lines Raise Fears in Home Buyers," *The New York Times*, Section 10 (July 11, 1993): 5.

9. See, for example, "Power Lines Short-Circuit Sales, Homeowners Claim," *The Wall Street Journal* (December 8, 1993): B1; *New York Newsday*, "Power Struggle—High-Tension Lines Creating Tension Among Some Buyers," *New York Newsday* (August 14, 1994): Real Estate, 1.