Inverse Condemnation: Subsumption and Ripeness of Related Constitutional Claims

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A Practice Note discussing strategies and procedure for obtaining dismissal of constitutional claims that are ancillary to an inverse condemnation, or regulatory takings, claim. This Note describes the application of the *Williamson County* ripeness requirements to related constitutional claims, including procedural due process, substantive due process, and equal protection claims. This Note also discusses a takings claim's potentially preclusive effect on related claims that are coextensive with, and subsumed by, the takings remedy.

The Takings Clause of the Fifth Amendment allows landowners to seek compensation for the government's deprivation of their vested property rights. However, due to the difficulty in maintaining a takings claim, plaintiffs often allege various ancillary constitutional violations. A plaintiff typically has an incentive to file these companion claims as a fallback to the takings claim because they provide an opportunity to obtain similar relief for the injury to property, as well as attorneys' fees and costs (see 42 U.S.C. §§ 1983 and 1988).

While it is possible to include distinct constitutional claims and a takings claim in the same lawsuit, federal courts disapprove of litigating unripe takings claims under the guise of other constitutional rights. To prevent this scenario, district courts routinely apply the takings claim's ripeness requirements to related constitutional claims when all claims are based on the same nucleus of facts or property loss.

A minority of circuits apply this principle more broadly and dismiss the ancillary claims because the court deems them concurrent with, or subsumed by, the takings remedy.

This Note discusses substantive and procedural considerations for seeking dismissal of constitutional claims that are ancillary to a takings claim. For more information on the ripeness requirements of an inverse condemnation claim, see Practice Note, Inverse Condemnation: Asserting the Ripeness Defense in Federal Courts (w-007-4853).

SUBSUMPTION AND THE WILLIAMSON COUNTY RIPENESS REQUIREMENTS

When asserting that a Fifth Amendment takings claim is not ripe, government counsel should also consider seeking dismissal of any ancillary constitutional claims by arguing that:

- The takings claim's ripeness requirements also apply to the related constitutional claims, especially if all claims arise from the land use context (see Application of Williamson County Ripeness Requirements to Related Claims).
- The takings remedy itself precludes and subsumes the related constitutional claims (see Subsumption of Related Claims). However, the subsumption argument is only recognized in a minority of jurisdictions.

Although the ripeness and subsumption defenses have different origins, they apply in similar ways. Practically, both defenses preclude ancillary constitutional claims that are largely duplicative of an unripe takings claim.

APPLICATION OF WILLIAMSON COUNTY RIPENESS REQUIREMENTS TO RELATED CLAIMS

Plaintiffs must overcome strict ripeness hurdles when filing inverse condemnation claims in federal court by satisfying:

- **The exhaustion requirement.** The plaintiff must show that it first sought the state remedy for obtaining compensation for the taken property and was denied relief. This typically means the plaintiff was required to first file an inverse condemnation claim in state court.
- **The finality requirement.** The plaintiff must show that the government has reached a final decision regarding how the local regulations apply to its property.

(*Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).)

Most federal courts (and some state courts) also apply both *Williamson County* ripeness requirements to companion constitutional claims that are based on the same facts (or the same loss of property) as the takings claim. Therefore, if a court dismisses the takings claim as unripe, it may also quickly dispose of the related constitutional claims as similarly unripe. (See *Kurtz v. Verizon N.Y., Inc.*, 758 F.3d 506, 514-16 (2d Cir. 2014).) Even in the absence of a takings claim, some circuits independently apply *Williamson County's* finality requirement to all constitutional land use claims (see, for example, *Insomnia Inc. v. City of Memphis*, 278 Fed.Appx. 609, 613 (6th Cir. 2008); *Murphy v. New Milford Zoning Com'n*, 402 F.3d 342 (2d Cir. 2005); *Signature Properties Intern. Ltd. Partnership v. City of Edmond*, 310 F.3d 1258, 1265 (10th Cir. 2002)).

Dismissing the related constitutional claims prevents plaintiffs from circumventing the *Williamson County* ripeness requirements by alleging a more generalized constitutional violation, most commonly the Fourteenth Amendment rights to procedural and substantive due process and equal protection (see, for example, *Simons v. Town of Sherman*, 2017 WL 1025169, at *4 (D. Conn. Mar. 16, 2017)). This rule applies even though generally:

- A court may find an interference with individual property rights to breach more than one provision of the Constitution (*United States v. James Daniel*, 510 U.S. 43, 49-50 (1993)).
- Different standards may otherwise govern the ripeness of stand-alone due process and equal protection claims (*Rocky Mountain Materials & Asphalt, Inc. v. Bd. of Cty. Comm'rs*, 972 F.2d 309, 310-11 (10th Cir. 1992)).

SUBSUMPTION OF RELATED CLAIMS

A minority of federal and state courts sometimes apply this anti-circumvention principle more broadly in favor of the government defendant. In addition to applying the *Williamson County* ripeness requirements to related claims, these courts may hold that the ancillary claims are entirely precluded because they are coextensive with, or subsumed by, the takings remedy. (See *Rocky Mountain Materials & Asphalt, Inc.*, 972 F.2d at 311; *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 960 (9th Cir. 2011); see also Considerations for Procedural Due Process Claims, Considerations for Substantive Due Process Claims, and Considerations for Equal Protection Claims.)

PROCEDURE FOR RAISING DEFENSE

The ripeness and subsumption arguments are both premised on the interconnected nature of the ancillary constitutional claims and the takings claim. The government asserts these arguments at the pleadings stage on a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure (FRCP) (see Motion to Dismiss Stage). The government cannot raise them for the first time in a reply brief (see, for example, *FlightCar, Inc. v. City of Millbrae*, 2014 WL 2753879, at *4 (N.D. Cal. June 16, 2004)).

If the motion is unsuccessful, government counsel should:

- Include the argument as an affirmative defense in the answer.
- Raise the issue later in either:
  - a motion for summary judgment under FRCP 56; or
  - a suggestion of lack of subject matter jurisdiction under FRCP 12(h)(3) (see Summary Judgment Stage).

CONSIDERATIONS FOR PROCEDURAL DUE PROCESS CLAIMS

If a procedural due process claim focuses mostly on the property deprivation and lack of compensation rather than a lack of process that causes a separate and distinct injury, it is likely an improperly pleaded takings claim in disguise (see, for example, *DiLuzio v. Village of Yorkville*, 2014 WL 11515878, at *2-3 (S.D. Ohio Sept. 8, 2014)).

Plaintiffs commonly assert that the taking itself occurred without sufficient process, making the takings claim and any procedural due process claim essentially interrelated. Unlike the Due Process Clause, however, the Takings Clause of the Fifth Amendment does not require pre-taking notice, an opportunity to be heard, or pre-taking compensation (*Martini v. City of Pittsfield*, 2015 WL 1476768 (D. Mass. Mar. 31, 2015)) (for more information on Section 1983 procedural due process claims, see Practice Note, Section 1983 Procedural Due Process Land Use Claims (w-004-1682)). The only procedure required by the Takings Clause is that a state action for inverse condemnation be available to the plaintiff (see *Pande Cameron & Co. of Seattle, Inc. v. Cent. Puget Sound Reg'l Transit Auth.*, 610 F. Supp. 2d 1288, 1309 (W.D. Wash. 2009); *Williamson Cty.*, 473 U.S. at 195 n.14).

Therefore, if the plaintiff fails to plead insufficient process separate from the taking itself, some courts will dismiss the procedural due process claim as ancillary to, and subsumed by, the plaintiff's takings claim (see *Presley v. City of Charlottesville*, 464 F.3d 480, 490 (4th Cir. 2006); *Rocky Mountain Materials & Asphalt, Inc.*, 972 F.2d at 311).

CONSIDERATIONS FOR SUBSTANTIVE DUE PROCESS CLAIMS

Substantive due process generally does not apply where a more specific constitutional provision protects against the challenged governmental action (see *Graham v. Connor*, 490 U.S. 386, 395 (1989)). While there is no blanket rule that a takings claim precludes all substantive due process claims, some district courts, particularly within the US Courts of Appeals for the Fifth and Ninth Circuits, will dismiss substantive due process claims as subsumed by the takings remedy if the claims are both premised on the lack of compensation for the property deprivation (see *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1093-94 (9th Cir. 2015); *White Oak Realty, LLC v. US Army Corp of Eng'rs*, 2016 WL 355485, at *6-7 (E.D. La. Jan. 28, 2016)).

The Fifth Circuit has held that substantive due process is not the appropriate avenue of relief for most landowner complaints and that, with rare exceptions, Takings Clause jurisprudence cannot be circumvented by artful pleading of substantive due process claims (see *Severance v. Patterson*, 566 F.3d 490, 501 (5th Cir. 2009)). However, the Supreme Court has left open the possibility of an independent substantive due process claim where a property regulation that fails to serve any legitimate governmental objective is so arbitrary or irrational that it violates the Due Process Clause (*Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005); see, for example, *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, 2005 WL 1541860, at *25-30 (Tenn. Ct. App. June 30, 2005)). For more information on defending substantive due process claims, see Practice Note, Section 1983: Substantive Due Process Land Use Claims (W-002-4377).

Substantive due process and regulatory takings claims have had a complicated and confused relationship. Courts at all levels have

intertwined aspects of the two claims, and counsel should push back against allegations in a complaint that assert:

- Substantive due process considerations as being relevant to, or dispositive of, the takings claim, such as whether the underlying government action was arbitrary or otherwise invalid (see *Lingle*, 544 U.S. at 542).
- A federal "due process takings" cause of action separate from a Fifth Amendment takings claim or a substantive due process claim (see, for example, *Villas of Lake Jackson, Ltd. v. Leon County*, 121 F.3d 610, 614 (11th Cir. 1997) (holding that the court has abandoned the distinction between takings claims and claims under a due process takings theory)).

CONSIDERATIONS FOR EQUAL PROTECTION CLAIMS

A property owner may be able to raise a successful equal protection challenge to a local land use decision in some situations (see, for example, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985)). However, plaintiffs cannot avoid the *Williamson County* requirements by recasting a takings claim as an equal protection claim (*Donohoo v. Hanson*, 2015 WL 5177968, at *6 (W.D. Wis. Sept. 2, 2015); *Muscarello v. Ogle Cty. Bd. of Comm'rs*, 610 F.3d 416, 423 (7th Cir. 2010) ("Any equal protection claim based on a taking would be unripe and subject to [the *Williamson County* requirements] in connection with the takings claim.")).

A minority of courts may also dismiss an equal protection claim if it finds that the claim is coextensive with, and subsumed by, another constitutional claim (see, for example, *Flanagan v. Harris*, 2017 WL 729788, at *5 (C.D. Cal. Feb. 23, 2017)).

For more information on defending equal protection claims, see Practice Note, Section 1983: Equal Protection Claims (W-002-6708).

MOTION TO DISMISS STAGE

The government commonly argues in a motion to dismiss that the court should dismiss the ancillary constitutional claims:

- Under FRCP 12(b)(1) for lack of subject matter jurisdiction, because the claims are unripe under *Williamson County* (see Lack of Subject Matter Jurisdiction for Unripe Claims Under FRCP 12(b)(1)).
- Under FRCP 12(b)(6) for failure to state a claim, because the claims are either prudentially unripe under *Williamson County* or more broadly precluded and subsumed by the takings remedy (see Failure to State a Claim Under FRCP 12(b)(6)).

LACK OF SUBJECT MATTER JURISDICTION FOR UNRIPE CLAIMS UNDER FRCP 12(B)(1)

Federal courts do not have subject matter jurisdiction over unripe claims. Therefore, the government typically asserts that the court should dismiss the related constitutional claims because they are unripe under *Williamson County* in a motion to dismiss under FRCP 12(b)(1) for lack of subject matter jurisdiction. The motion must be filed before filing a responsive pleading to the complaint, although a court may dismiss an action for lack of subject matter jurisdiction at any time. For more information on filing a motion to dismiss under FRCP 12(b)(1), see Practice Note, Motion to Dismiss: Overview: Lack of Subject Matter Jurisdiction (8-523-9648).

Benefits of 12(b)(1) Motions for Government Defendants

The primary benefits to the government defendant of making a factual challenge to the court's subject matter jurisdiction in a 12(b)(1) motion include:

- The ability to attach additional supporting evidence outside of the complaint to the motion. Attaching affidavits or other documents to the motion can rebut generic statements in the complaint that the plaintiff has met all pre-suit requirements by demonstrating that:
  - the plaintiff has not first sought and been denied compensation in state courts; or
  - the government provided information on the specific permitting or administrative appeal processes that would resolve the plaintiff's issue, but the plaintiff did not avail itself of those remedies and chose to file suit prematurely.

  For more information, see Practice Note, Motion to Dismiss: Drafting and Filing a Motion to Dismiss, Opposition, and Reply: Supporting Evidence (1-524-1621).
- The burden of proof is on the plaintiff to present further evidence in support of its position that the requirements for subject matter jurisdiction are met (see, for example, *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1335 (11th Cir. 2013); *Ernst & Young v. Depositors Econ. Prot. Corp.*, 862 F. Supp. 709, 713 (D.R.I. 1994)).
- A district court being free to weigh the facts without being constrained to view them in the light most favorable to the plaintiff (see *Sentry Ins. A Mut. Co. v. Provide Commerce, Inc.*, 2016 WL 1241553, at *2 (S.D. Cal. Mar. 30, 2016)).
- The possibility in some courts of limited discovery and hearings on the jurisdictional question. No statute or rule specifies a format for evidentiary hearings on jurisdiction, so the court can use any rational mode of inquiry (*Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)).

Unlike typical ripeness defenses, the Supreme Court has stated that the *Williamson County* requirements are prudential requirements, not jurisdictional ones (see *Horne v. Dep't of Agric.*, 133 S. Ct. 2053, 2062 (2013)). This means that a federal court could retain subject matter jurisdiction over a takings claim that is unripe under *Williamson County* (see, for example, *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010)).

What prudential ripeness means for a motion to dismiss is unclear, and government counsel may want to file a motion to dismiss under both FRCP 12(b)(1) and 12(b)(6).

FAILURE TO STATE A CLAIM UNDER FRCP 12(B)(6)

A motion to dismiss asserting that the related constitutional claims are more broadly precluded because they are coextensive with, and subsumed by, the takings remedy is often considered an attack on the merits of the plaintiff's claim under FRCP 12(b)(6).

Outside of the Fifth and Ninth Circuits, most courts are reluctant to broadly dismiss the related constitutional claims as subsumed by the takings claim. However, even if the court will not consider the subsumption argument, pointing out that the related claims are essentially takings claims disguised as other constitutional claims,

much like a trojan horse, can support more direct arguments that the due process and equal protection claims fail to state a claim under FRCP 12(b)(6).

Unlike a motion to dismiss for lack of subject matter jurisdiction under FRCP 12(b)(1), a court determining the sufficiency of a claim must accept all non-conclusory allegations as true, and its inquiry is limited to the pleadings. For more information on filing a motion to dismiss under FRCP 12(b)(6), see Practice Note, Motion to Dismiss: Overview: Failure to State a Claim on Which Relief Can Be Granted (8-523-9648).

CONTENTS OF THE MOTION TO DISMISS

The motion to dismiss under either FRCP 12(b)(1) or 12(b)(6) should focus on minimizing the related claims as largely duplicative of the inverse condemnation claim, while highlighting the similar facts that support all of the claims.

If asserting that all of the claims are unripe, government counsel need only prove that the takings claim is unripe. Counsel need not separately apply the *Williamson County* requirements to each ancillary constitutional claim for these claims to be dismissed as unripe.

Since the ripeness argument is the most effective, motions to dismiss typically lead with it, and are followed by arguments that connect the remaining claims back to the takings remedy to convince the court that allowing the claims to move forward would circumvent the *Williamson County* requirements.

Similarity of Facts

There is no strict nationwide test for determining whether the related constitutional claims are precluded by the takings claim's lack of ripeness or the takings remedy itself. Courts generally consider whether the claims are based on the same nucleus of facts or seek identical damages for the same injury to property. Therefore, an effective motion to dismiss should compare the factual allegations supporting each claim and highlight the similarities. For example, counsel should question whether all of the claims generally involve the same:

- Government action that led to the alleged property loss, such as the same:
  - permit denial;
  - code enforcement action; or
  - quasi-judicial decision.
- Property interests of the plaintiff, such as a particular:
  - vested right; or
  - nonconforming use.
- Relief sought, specifically whether each claim seeks similar damages for the same property deprivation or independently alleges unique injuries and damages separate from the value of the property, such as:
  - commercial expectations;
  - costs incurred in seeking to obtain the permits; and
  - punitive damages.

(See, for example, *B. Willis, C.P.A., Inc. v. BNSF Ry. Corp.*, 531 F.3d 1282, 1298 n.19 (10th Cir. 2008); *R Bend Estates II, LLC v. St. John the Baptist Parish*, 2016 WL 4087490, at *5 (E.D. La. Aug. 2, 2016); *White Oak Realty*, 2016 WL 355485, at *6-7.)

The facts supporting the related claims do not need to be identical to the takings claim for the court to dismiss the related claims. Courts often address this inquiry in a general way, and will dismiss the related claims, even those that could arguably stand as separate claims under different theories of liability, if the claims rest on the same foundation, or nucleus of facts, as the takings claim. (See, for example, *Deem v. Village of Pomeroy*, 2014 WL 2767608, at *4-5 (S.D. Ohio June 18, 2014); *Alto Eldorado Partners v. City of Santa Fe*, 644 F. Supp. 2d 1313, 1349-50 (D.N.M. 2009).)

REMOVAL AS A WAIVER OF THE DEFENSE

Federal courts are increasingly disapproving of the practice of government defendants removing takings and related constitutional claims to federal court, only to assert in a motion to dismiss that the federal court does not have jurisdiction because the claims are unripe under the *Williamson County* exhaustion requirement (see, for example, *Race v. Bd. of Cty. Commr's*, 2016 WL 1182791, at *3 (D. Colo. Mar. 28, 2016); *River N. Props., LLC v. City & County of Denver*, 2014 WL 1247813 (D. Colo. Mar. 26, 2014); *Sansotta v. Town of Nags Head*, 724 F.3d 533 (4th Cir. 2013)).

This strategy is typically counterproductive and transparent because the removing defendant ultimately bears the burden of proving that removal was proper. Removing a takings claim to federal court and then asserting that the federal court lacks subject matter jurisdiction will likely result in either:

- The federal court ruling that the government has waived the ripeness defense.
- The plaintiff seeking to remand the case to state court. If granted, the district court might also award attorneys' fees and costs to the plaintiff for having to litigate the government defendant's improper removal.

Subject matter jurisdiction cannot normally be conferred on a federal court by the agreement or waiver of the parties. However, many courts now hold that due to the prudential nature of the *Williamson County* inquiry, an otherwise unripe claim can be deemed ripe for subject matter jurisdiction purposes if the government waived the ripeness defense by removing the claims to federal court.

For more information on removal, see Practice Note, Removal: Overview (3-532-4248).

Federal Court May Be the Better Venue for Litigating the Related Claims

Federal courts are often the preferred venue for litigating the related Fourteenth Amendment claims, particularly those that arise from land use disputes. Aside from their familiarity with Section 1983 litigation, federal courts are generally more hostile to sitting as master zoning boards of appeal and suspicious of run-of-the-mill local disputes being categorized as violations of constitutional law. For example, the First Circuit has stated that most local planning disputes are not actionable under substantive due process, yet the court will leave "the door slightly ajar for federal relief in truly horrendous situations" (*Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir. 1992)).

Government counsel should keep in mind that if the federal court rules in the government's favor on ripeness or other jurisdictional grounds, the plaintiff will likely refile all of the same claims in state court. The government should therefore aggressively pursue alternative bases for the federal court to dismiss the related constitutional claims for failure to state a claim. A state court is typically unlikely to disturb a federal court's previous ruling that the plaintiff cannot state a basic element of the claim, such as the lack of a cognizable property interest that could support a Fourteenth Amendment due process or equal protection claim.

For more information on seeking the independent dismissal of due process and equal protection claims, see Practice Notes:

- Section 1983: Substantive Due Process Land Use Claims (W-002-4377).
- Section 1983: Procedural Due Process Land Use Claims (W-004-1682).
- Section 1983: Equal Protection Claims (W-002-6708).

SUMMARY JUDGMENT STAGE

If government counsel is unsuccessful on the motion to dismiss, counsel should list the ripeness and subsumption arguments as affirmative defenses in the answer. For more information on responsive pleadings and asserting affirmative defenses, see Practice Note, Responsive Pleadings: Answering the Complaint (2-521-6409).

Government defendants often target early discovery requests specifically to the question of the takings claim's ripeness, such as requesting that the plaintiff admit that it:

- Has not yet filed the inverse condemnation claim in state court and been denied just compensation.
- Never sought available permits, administrative appeals, or variances that could allow the desired use of the property.

For more information on sending requests for admission, see Requests for Admission in Federal Court Toolkit (8-571-2585).

Limited discovery on the alleged injuries to plaintiff's property interests and the related damages can sometimes help to convince a court that all of the claims are essentially the same as the takings claim; particularly if the facts show that the plaintiff is ultimately asserting that all of the constitutional claims injured the same property right to a similar degree.

The ripeness and subsumption arguments are typically reasserted in a motion for summary judgment under FRCP 56 (see, for example, *Ackermann Enters., Inc. v. City of Bellevue*, 2016 WL 4499659, at *5 (E.D. Ky. Aug. 24, 2016)). The court may consider the *Williamson County* ripeness arguments in the motion as a suggestion of lack of subject matter jurisdiction under FRCP 12(h)(3). Regardless, the legal arguments to the court are the same as those made at the motion to dismiss stage (see Motion to Dismiss Stage).

For more information on filing a motion for summary judgment, see Practice Note, Summary Judgment: Overview (8-520-5163).

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