

THE POWER LINE DILEMMA: COMPENSATION FOR DIMINISHED PROPERTY VALUE CAUSED BY FEAR OF ELECTROMAGNETIC FIELDS*

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I. INTRODUCTION

Electromagnetic field (EMF)¹ litigation is fast becoming the “asbestos of the 90s”² as concern over the potential adverse health

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** Associate, Arnall Golden & Gregory, Atlanta, Georgia. B.S., University of Florida, 1990; J.D., Florida State University, 1996. The author thanks Professor Larry Garvin, Florida State University College of Law, for his insight and contributions.

1. Electricity produces an electric field and a magnetic field, which together are called an electromagnetic field. NATIONAL INST. OF ENVTL. HEALTH SCIENCES & U.S. DEP’T OF ENERGY, QUESTIONS AND ANSWERS ABOUT EMF, ELECTRIC AND MAGNETIC FIELDS ASSOCIATED WITH THE USE OF ELECTRIC POWER 5 (1995) [hereinafter QUESTIONS ABOUT EMF]. EMFs are generated by power lines, electrical wiring, and such common household items as radios, televisions, microwaves, and hair dryers. *Id.*; EDWIN F. FROELICH ET AL., EMF, ELECTROMAGNETIC FIELDS, SCIENTIFIC AND LEGAL ASPECTS 2 (1993). The strength of

effects from EMF has spawned extensive litigation.³ With claims arising in many forms, especially in the areas of property damage and personal injury, a potential plaintiff has an array of legal theories from which to choose.⁴ In fact, EMF litigation could become more common than asbestos litigation because the prevalence of EMF could lead to a higher number of potential plaintiffs.⁵

EMFs are generated not only from power lines, with which most people associate EMF, but also from such devices as microwave ovens, hair dryers, and cellular telephones.⁶ Whether EMF causes cancer continues to be a hotly debated question.⁷ Indeed, in 1992, Congress authorized the expenditure of sixty-five million

electric and magnetic fields decreases as one moves away from the source. *QUESTIONS ABOUT EMF*, supra, at 5. However, only the electric field can be eliminated by shielding in dense objects such as walls or houses. *Id.* This is important because the present health concerns about EMF revolve around the magnetic field. *Id.* at 6.

Most of the electricity generated by common household appliances is alternating current (AC), meaning the flow of the current reverses periodically—in the U.S., at a frequency of 60 Hz. *Id.* at 5, 7. The higher the frequency, the more energy there is in the field. *Id.* at 7. For example, an X-ray has a very high frequency and can cause ionization, which damages genetic material. *Id.* The EMFs generated by power lines do not cause ionization, but do create weak currents in people and animals. *Id.* at 9.

2. George Brandon, *Defending Against EMF Property Devaluation Cases*, *PUB. UTIL. REP.*, Feb. 1, 1995, at 43. In the 1970s and 1980s, the United States saw a large amount of litigation involving asbestos, with asbestos manufacturers and their insurers incurring costs in the billions of dollars. See generally BARRY L. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 666-676 (3d ed. 1990) (summarizing costs of asbestos litigation to manufacturers and insurance industry).

3. FROELICH ET AL, supra note 1, at 2.

4. See FROELICH ET AL, supra note 1, at 24-25 (summarizing EMF litigation theories and noting that both property damage and personal injury claims take many forms, including "trespass, conversion, nuisance, and undue burden upon the easements granted for the routing of lines" among the former and "negligence, product liability, and ultrahazardous activity" among the latter).

5. See Tom Watson & Curtis S. Renner, *The Scientific and Legal Bases for Litigating EMF Property Cases*, in *CURRENT CONDEMNATION LAW* 126 (Alan T. Ackerman ed., 1994) ("[T]he potential impact from EMF property damage claims could 'dwarf' the impact seen from asbestos litigation."); Roy W. Krieger, *On the Line*, *A.B.A. J.*, Jan. 1994, at 40 ("We live surrounded by electromagnetic fields. Some say they are deadly. With these fields all around us, the litigation potential could dwarf the asbestos claims of the past decade.").

6. FROELICH ET AL, supra note 1, at 2.

7. Compare William J. Broad, *Cancer Fear is Unfounded*, *Physicists Say*, *N.Y. TIMES*, May 14, 1995, at 19 (discussing study by the American Physical Society which stated that "it [could] find no evidence that the electromagnetic fields that radiate from power lines cause cancer") and *Amicus Brief* at 4, *San Diego Gas & Elec. Co. v. Orange Co. Superior Court*, 895 P.2d 56 (Cal. 1995) (No. S045854) (stating that studies do not "demonstrate a causal association between electromagnetic fields and cancer") with Nancy Wertheimer & Ed Leeper, *Electrical Wiring Configurations and Childhood Cancer*, 109 *AM. J. EPIDEMIOLOGY* 2273-84 (1979) (arguing that there is an increase in the rate of childhood leukemia in homes located near power lines). See also *QUESTIONS ABOUT EMF*, supra note 1, at 57-63 (listing studies of the potential health effects caused by EMF); Mhammad Harunuzzaman & Govindarajan Iyyuni, *Electromagnetic Fields and Human Health: Revisiting the Issue*, 16 *NAT'L REG. Q. BULL.* 181, 182-88 (1995) (same).

dollars over a five-year period for an EMF research and public information program.⁸ However, many in the scientific community only agree that “there may be a connection between EMF exposure and some forms of cancer.”⁹

An issue of significant litigation, especially in recent years, is whether property owners may be compensated for the diminution in value of their land caused by the public’s fear of EMF emanating from power lines.¹⁰ This issue arises most often in condemnation proceedings brought by power companies seeking to install new power lines over a portion of property owners’ land.¹¹ The property owners claim that the land has been partially “taken”¹²

8. See Energy Policy Act of 1992, Pub. L. 102-486, 102 Stat. 2776 (codified at 42 U.S.C.A. § 13478 (1994)). This Act created the Electric and Magnetic Fields Research and Public Information Dissemination (EMF RAPID) program. QUESTIONS ABOUT EMF, *supra* note 1, at 64. The EMF RAPID program’s central purpose is determining whether EMF causes cancer and providing the public with information about EMF. *Id.* at 1, 65. QUESTIONS ABOUT EMF was prepared for the EMF RAPID program and provides answers to questions about EMF. *Id.* at 1. A copy can be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington DC 20402. The EMF RAPID program also provides a toll-free number to answer EMF-related questions: 1-800-363-2383.

9. Robert D. Chesler & Peter E. Nahmias, *The Next Wave? EMF Regulation and Litigation*, MEALEY’S LIT. REP. (TOXIC TORTS), Oct. 21, 1994, at 23 (emphasis added).

10. This Comment focuses on the EMF issue in terms of the fear of power lines and subsequent land value diminution caused by that fear. This is the context in which fear-based land value diminution arises most often and presumably will continue to arise, especially in light of increased public awareness and fear of EMF. Pipeline cases are the second most common scenario under which public fear may create a land value diminution. See James W. Springer & David G. Mawn, *Condemnation Law: Can a Landowner Recover for Damages Due to the Improvement?*, 22 REAL EST. L.J. 281, 287-88 (1994); see, e.g., *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 273-75 (Kan. Ct. App. 1981) (power line condemnation suit; summary of case law); *All Am. Pipeline Co. v. Ammerman*, 814 S.W.2d 249 (Tex. Ct. App. 1991) (pipeline condemnation suit). Public fear causing value diminution arises in other situations, however. For example, in *City of Santa Fe v. Komis*, 845 P.2d 753 (N.M. 1992), the New Mexico Supreme Court analyzed the issue in reference to a condemnation proceeding brought for the construction of a highway to transport nuclear waste. The landowner in *Komis* attempted to recover for diminution of the property’s value caused by the public’s fear of potential dangers from the nuclear waste. *Id.* at 755; see also *infra* note 96 (discussing *Komis*); *Department of Agric. & Consumer Serv. v. Polk*, 568 So. 2d 35, 41 (Fla. 1990) (noting that evidence of diminution in market value caused by public’s fear of orange trees from infected nursery was relevant in determining damages in inverse condemnation suit); *Horsch v. Terminix Int’l Co., Ltd. Partnership*, 865 P.2d 1044, 1049 (Kan. Ct. App. 1993) (involving civil action by private homeowner against termite company; homeowner was entitled to damages for reduction in market value caused by public’s fear of houses with prior termite damage). Thus, while this Comment focuses on power lines, its analysis and conclusions are meant to apply to most factual scenarios in which public fear creates a diminution in value.

11. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 896 (Fla. 1987) (involving utility company condemnation of portion of property owner’s land, of which owner retained some use); *Selective Resources v. Superior Court*, 700 P.2d 849, 850 (Ariz. Ct. App. 1984) (noting that pertinent valuation determination in easement condemnation proceeding was value of land taken for power line and power line’s effect on market value of remaining land).

12. Eminent domain provides that if the government takes private property for a public use, the landowner must be justly compensated. U.S. CONST. amend. V (“[N]or shall

and assert that the public's fear that power lines cause cancer has decreased the remaining property's market value.¹³ It is also conceivable that adjacent property owners could have a claim, albeit a less direct one.¹⁴ While the former owner can seek compensation in a condemnation proceeding for the value lost,¹⁵ the latter owner could file claims of inverse condemnation, nuisance, trespass, strict liability, or ultrahazardous activities.¹⁶ In either situation, a court must decide whether a diminution in the property's value caused by the public's fear is compensable.

The jurisdictions that have addressed the issue of compensability for damages caused by the public's fear have followed three approaches.¹⁷ The first, labeled the minority view,¹⁸ holds that damages caused by the public's fear are never compensable.¹⁹ The second, labeled the intermediate view,²⁰ holds that damages caused by the public's reasonable fear may be compensable.²¹ Fi-

private property be taken for public use, without just compensation."). State legislatures allow power companies to utilize the power of eminent domain for the erection of power lines. See, e.g., FLA. STAT. § 361.01 (1995); IND. CODE § 8-1-8-1 (1995). If a power company or other governmental agency wants to implement eminent domain proceedings, the entity must seek to have the property condemned. See WILLIAM B. STOEBCUK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN* 4 (1977). Every state except North Carolina has a similar provision in its constitution. *Id.* at 5-6. However, North Carolina provides for eminent domain proceedings through its supreme court. *Id.* at 6. In condemnation proceedings, landowners are usually awarded damages for the property taken and consequential damages for the diminished value of the remaining property. *Id.* at 18-19.

13. See, e.g., Gary A. Thorton, *Litigation Involving High-Power Electrical Transmission Line Cases*, in *CURRENT CONDEMNATION LAW* 118-19 (Alan T. Ackerman ed., 1994) ("In the past, people viewed electricity and the high-power lines that supplied it as a blessing. The opposite viewpoint is more common today. High-power lines are now more often seen as an eyesore at best and, at worst, as potentially dangerous, cancer-causing, or posing latent health risks."). This fear has developed in part because of the publicity surrounding studies that purport to show a correlation between EMF and cancer. See Chesler & Nahmias, *supra* note 9, at 20-21; Margo R. Stoffel, *Comment, Electromagnetic Fields and Cancer: A Legitimate Cause of Action or a Result of Media-Influenced Fear?*, 21 OHIO N.U. L. REV. 551, 587-90 (1994) (summarizing media's role in shaping public perception by encouraging fear of power lines).

14. See, e.g., *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992) (involving nuisance claim for property value depreciation caused by public concern about contamination emanating from defendant's property); see also *infra* note 74 (discussing *Adkins*).

15. See *Jennings*, 518 So. 2d at 895; see also *Selective Resources*, 700 P.2d at 850.

16. See, e.g., *Adkins*, 487 N.W.2d at 717. See also Chesler & Nahmias, *supra* note 9, at 24 ("The nature of EMF lends itself to recovery under theories of nuisance, trespass and inverse condemnation."); Todd D. Brown, *The Power Line Plaintiff & the Inverse Condemnation Alternative*, 19 B.C. ENVTL. AFF. L. REV. 655, 681-90 (1992) (discussing possible claims for EMF exposure and suggesting that inverse condemnation suit on various theories, such as nuisance or airspace easement, might result in compensation for lost market value caused by public's fear).

17. See Chesler & Nahmias, *supra* note 9, at 24.

18. *Willsey v. Kansas City Power*, 631 P.2d 268, 273 (Kan. Ct. App. 1981).

19. See *infra* notes 32-56 and accompanying text.

20. *Willsey*, 631 P.2d at 273.

21. See *infra* notes 57-83 and accompanying text.

nally, the third approach, labeled the majority view,²² holds that damages caused by the public's fear are always compensable.²³

This area of law is confusing and unsettled.²⁴ There is no uniform approach to the issue, and there are variations of the three main approaches.²⁵ Moreover, in recent years, several courts have either reversed precedent and switched views, or cast doubt upon the state of law in their respective jurisdictions. The Florida Supreme Court reversed years of precedent by switching from the minority view to the majority view.²⁶ New York and Kansas switched from the intermediate view to the majority view.²⁷ Virginia's highest court recently decided a case that casts doubt upon that state's position.²⁸ This lack of consistency, coupled with the array of views on this issue, is a legal quagmire, with no end to the confusion in sight.²⁹ Courts³⁰ and commentators³¹ offer many different justifications for why a particular view is superior.

Part II of this Comment attempts to summarize the current state of the law on the issue of fear-based land value diminution by examining relevant case law. Part III argues that the majority view is superior to the minority and intermediate views. This part demonstrates that the majority view is essentially a strict li-

22. Willsey, 631 P.2d at 273.

23. See *infra* notes 84-136 and accompanying text.

24. See *infra* note 61 (discussing further the confusion in this area).

25. For example, Arizona follows the intermediate view, but has modified the analysis. See *Selective Resources v. Superior Court*, 700 P.2d 849 (Ariz. Ct. App. 1984); see also *infra* note 75 (discussing *Selective Resources*).

26. See *infra* notes 102-09 and accompanying text.

27. See *infra* notes 110-28 and accompanying text.

28. It is now unclear whether Virginia has moved from the majority view to the intermediate view. See *infra* notes 129-36 and accompanying text.

29. See, e.g., *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla. 1987) (reversing *Casey v. Florida Power Corp.*, 157 So. 2d 168 (Fla. 2d DCA 1963)); *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195 (N.Y. 1993) (reversing *Zappavigna v. New York*, 588 N.Y.S.2d 585 (N.Y. App. Div. 1992)); *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528 (Kan. 1991) (explicitly adopting majority view, yet citing earlier court of appeals decision for proposition that Kansas followed intermediate view); *Chappell v. Virginia Elec. & Power Co.*, 458 S.E.2d 282 (Va. 1995) (casting doubt upon whether Virginia courts should follow majority or intermediate view). See also *infra* note 61 (discussing further the confusion in this area).

30. See *Jennings*, 518 So. 2d at 895 (discussing majority view arguments); *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886 (Tex. 1975) (discussing intermediate view arguments); *Pappas v. Alabama Power Co.*, 119 So. 2d 899 (Ala. 1960) (discussing minority view arguments).

31. See Linda J. Orel, *Perceived Risks of EMFs and Landowner Compensation*, 6 RISK: HEALTH SAFETY & ENV'T 79 (1995); Stoffel, *supra* note 13, at 582; Philip S. McCune, Note, *The Power Line Health Controversy: Legal Problems and Proposals for Reform*, 24 U. MICH. J.L. REF. 429 (1991); David Z. Kaufman, Comment, *Efficient Compensation for Lost Market Value Due to Fear of Electric Transmission Lines*, 12 GEO. MASON U. L. REV. 711 (1990).

ability approach, and suggests that the justifications for imposing strict liability upon an actor also support imposing upon power companies the cost of compensating property owners for losses caused by the public's fear of EMF health hazards. Part IV notes that in situations where the majority view may be inappropriate, courts or legislatures can create exceptions. Finally, Part V concludes that the majority view is the superior approach to determining damages caused by fear of EMF.

II. THE THREE APPROACHES

A. The Minority View: Fear Can Never Be an Element of Damages

1. In General

The minority view holds that because fear is inherently subjective, damages are inappropriate even if the public's fear causes a reduction in the property's market value.³² Only three jurisdictions follow this view: Alabama,³³ Illinois,³⁴ and West Virginia.³⁵

2. The Minority View Applied: *Alabama Power Co. v. Keystone Lime Co.*

In 1914, the Alabama Supreme Court first addressed the issue of compensation for damages caused by fear in *Alabama Power Co. v. Keystone Lime Co.*³⁶ The court held that compensation for diminution of property value in a condemnation proceeding is not permissible when the public's fear causes the diminution.³⁷ The property owner in *Keystone Lime* argued that people would be afraid to farm or work the land adjacent to the power line,³⁸ and thus this fear devalued the land because it would be difficult to find a willing buyer.³⁹ The court noted that many people were unaccustomed to power lines and afraid of them, and therefore would not purchase the property.⁴⁰ The court did not allow an award of damages for the diminution, however, noting that it was

32. See, e.g., *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

33. See *id.* at 833; see also Pappas, 119 So. 2d at 899.

34. See *Central Ill. Light Co. v. Nierstheimer*, 185 N.E.2d 841 (Ill. 1962).

35. See *Chesapeake & Potomac Tel. Co. v. Red Jacket Consol. Coal & Coke Co.*, 121 S.E. 278 (W. Va. Ct. App. 1924).

36. 67 So. 833 (Ala. 1914) (concerning condemnation proceeding for erection of power line).

37. *Id.* at 835.

38. See *id.* at 833-34.

39. *Id.* at 834-35, 837.

40. *Id.* at 837.

caused by “the mere fears of some of the people, which are founded in reality upon their lack of knowledge of the real effect of the line, and which human experience shows is not justified by the facts.”⁴¹ The court’s reason for denying the property owner compensation for this loss centered around the irrationality of the public’s fear.⁴² The court found that electricity was of great social value and possessed a risk no greater than that of other technologies:

Having no actual knowledge of the practical operation and effect of such lines, [the public] may, as some of the testimony tends to show, be afraid of the property on which the lines are situated. A large percentage of the agencies which now conserve human effort are, when negligently controlled, dangerous to human life, and many things now daily used upon our streets and upon our public highways were, when they were first introduced, objects of terror to those who knew nothing about them. When the automobile was first introduced, especially in our towns, villages, and country neighborhoods, the driver . . . was known to be in possession of a dangerous instrument.⁴³

The court concluded that it could not regard land value diminution created by fear as resting upon any substantial basis.⁴⁴

The Alabama Supreme Court revisited the issue forty-six years later in *Pappas v. Alabama Power Co.*⁴⁵ In determining the damages award, the *Pappas* court similarly held that the property owner could not recover damages caused by the public’s fear of the power lines.⁴⁶ The court stated: “The reasoning of [*Keystone Lime*] is sound and probably even more necessary in this modern age of scientific and industrial expansion.”⁴⁷

The Alabama Supreme Court has consistently reaffirmed *Keystone Lime*.⁴⁸ For example, in *Alabama Electric Cooperative, Inc. v. Faust*,⁴⁹ the Alabama Supreme Court responded to a property

41. *Id.* The court placed great emphasis on testimony offered to show that power lines are safe to humans and the environment. *Id.* at 833-34.

42. *Id.* at 837.

43. *Id.*

44. *Id.* at 835, 837.

45. 119 So. 2d 899 (Ala. 1960). *Pappas* was another condemnation proceeding brought by the Alabama Power Co. to erect power lines upon a property owner’s land. See *id.* at 902.

46. *Id.* at 905.

47. *Id.*

48. See *Alabama Elec. Coop., Inc. v. Faust*, 574 So. 2d 734, 735 (Ala. 1990); *Deramus v. Alabama Power Co.*, 265 So. 2d 609, 614 (Ala. 1972); *Southern Elec. Generating Co. v. Howard*, 156 So. 2d 359, 362 (Ala. 1963).

49. 574 So. 2d 734 (Ala. 1990).

owner's request to expand the *Keystone Lime* rule by stating: "We decline so to do, for such a modification would materially change the established rule of damages relating to eminent domain cases. Although this Court is receptive to change where compelling reasons are advanced for making a change, we find no rational basis for changing the rule here challenged."⁵⁰ Other jurisdictions have not been as inclined to follow precedent, and have not hesitated to change years (or even decades) of established case law.⁵¹

Both Illinois and West Virginia follow the minority view.⁵² Illinois applies a different rationale than that of Alabama, relying upon its supreme court's state constitutional analysis limiting the just compensation rule to property taken.⁵³ The Illinois court reasoned that there must be direct physical disturbance of a right, and thus "depreciation in market value will not, alone, sustain a claim for damages. The depreciation must be from a cause which the law regards as a basis for damages."⁵⁴

Illinois appears to be moving away from the minority view, however. Illinois courts used to cite the above reasoning in refusing to allow landowners to recover for lost market value caused

50. *Id.* at 736.

51. See, e.g., *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla. 1987) (changing rule in Florida from minority view, established in 1963, to majority view).

52. See *Central Ill. Light Co. v. Nierstheimer*, 185 N.E.2d 841, 843 (Ill. 1962) (summarizing Illinois law on issue of proper elements of damages and noting that "imagined sources of danger . . . [are] so remote and speculative and uncertain as to afford no basis for the allowance of damages"); *Chesapeake & Potomac Tel. Co. v. Red Jacket Consol. Coal & Coke Co.*, 121 S.E. 278, 280 (W. Va. Ct. App. 1924) ("[D]angers which lessen the value of [property] may be considered in the ascertainment of damages; but . . . such dangers must be real, imminent and reasonably to be apprehended,—not remote or merely possible.").

Florida also followed the minority view until its supreme court reversed precedent and decided to follow the majority view. See *infra* notes 102-09 and accompanying text. Before the Florida Supreme Court's adoption of the majority view, Florida courts cited *Casey v. Florida Power Corp.*, 157 So. 2d 168, 170 (Fla. 2d DCA 1963), as the seminal case in Florida. The Casey court, in deciding to follow what it misstated as the majority view but what was actually the minority view, reasoned:

That a prospective purchaser of the land . . . will be so timid or so ignorant that he either will not buy at all or will offer less than the true value because of the transmission lines and towers is too highly speculative . . . to be taken into consideration. This court, like the majority of other courts, recognizes the owners' right to full and just compensation; but when a jury must base its award upon ignorance and fear, we must draw the line; such a basis cannot possibly result in fair and just compensation.

Id. at 170-71. The Florida Supreme Court subsequently reversed the Casey decision in *Jennings*, 518 So. 2d at 897. The Jennings court stated that the minority view ignored the key issue in eminent domain and condemnation proceedings, i.e., compensation to the landowner for the lost market value caused by the taking.*Id.*

53. *Illinois Power & Light Co. v. Talbott*, 152 N.E. 486, 489 (Ill. 1926).

54. *Id.* at 490.

by the unsightliness of power lines.⁵⁵ The Illinois Supreme Court has since receded from this view and now allows landowners to recover for this loss.⁵⁶ Whether the Illinois court will expand its approach and allow landowners to recover for the lost market value caused by the public's fear of power lines is still unclear.

B. The Intermediate View: Award Permissible Where Fear Depresses Value, As Long as Fear is Reasonable

1. In General

Jurisdictions following the intermediate view hold that as long as the public's fear is reasonable, or at least not completely unreasonable, a damages award is permissible when the fear depresses market value.⁵⁷ These jurisdictions usually require expert testimony from a real estate appraiser or similar expert; the landowner cannot personally testify as to his or her own fears.⁵⁸ For example, a landowner cannot testify that he or she is afraid of power lines and thinks that a purchaser of his or her land would feel the same way.⁵⁹

The U.S. Court of Appeals for the Ninth Circuit⁶⁰ and twelve states follow the intermediate view.⁶¹ Those states are: Arkan-

55. *Iowa-Illinois Gas & Elec. Co. v. Hoffman*, 468 N.E.2d 977, 980 (Ill. App. Ct. 1984).

56. *Central Ill. Pub. Serv. Co. v. Westervelt*, 367 N.E.2d 661, 663 (Ill. 1977). See also *Hoffman*, 468 N.E.2d at 980 (agreeing with Illinois Supreme Court's move away from policy of not allowing compensation for unsightliness and noting that earlier policy was probably "based upon a conclusion that such damage was speculative and largely unquantifiable.")

57. *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 888 (Tex. 1975). The reasoning of the intermediate view was enunciated in *Olson v. United States*, 292 U.S. 246 (1934). In *Olson*, the U.S. Supreme Court held that elements in a condemnation proceeding "that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value . . ." *Id.* at 257.

58. See, e.g., *Gulledge v. Texas Gas Transmission Corp.*, 256 S.W.2d 349, 353 (Ky. Ct. App. 1952).

59. *Id.*

60. *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir. 1984) (applying federal common law). The argument could be made that the Ninth Circuit follows the majority view. Specifically, the 760.807 Acres court stated: "[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation." *Id.* at 1447. The court went on to note, however, that damages for fears based wholly upon speculation are impermissible: "[F]ears must be 'reasonable' or 'founded on practical experience' in order to be compensable." *Id.*

61. In addition to the diverse number of approaches to the issue of whether property owners may be compensated for diminution due to fear, courts and commentators also disagree as to which states follow the majority or intermediate views. Compare *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 273-75 (Kan. Ct. App. 1981) (asserting that

sas,⁶² Connecticut,⁶³ Indiana,⁶⁴ Kentucky,⁶⁵ Nebraska,⁶⁶ New Jersey,⁶⁷ North Carolina,⁶⁸ Oklahoma,⁶⁹ Tennessee,⁷⁰ Texas,⁷¹ Utah,⁷² and Wyoming.⁷³ The Michigan Supreme Court appears willing to

Arkansas, Indiana, North Carolina, Oklahoma, and Virginia adopted majority view)with McCune, *supra* note 31, at 434-35 nn.25-26 (asserting that those states adopted intermediate view). The Willsey court asserted that those states adopted the majority view because the courts in those states assumed the reasonableness of the fear of power lines. McCune, *supra* note 31, at 434 n.25. Those courts still required a showing of reasonableness, however. See *id.* Therefore, this Comment includes all but Virginia among states taking the intermediate view. Virginia is listed as a majority-view state because language in the case cited by Willsey, see *Appalachian Power Co. v. Johnson*, 119 S.E. 253 (Va. 1923), was read for the proposition that property owners could recover for diminution caused by the public's fear in a subsequent Virginia Supreme Court decision, see *Chappell v. Virginia Elec. & Power Co.*, 458 S.E.2d 282 (Va. 1995). In that same decision, however, Virginia called that language dictum and appeared to be willing to adopt the intermediate view. See *infra* notes 129-36 and accompanying text.

The confusion in this area of law is heightened by courts mislabeling views. E.g., *Casey v. Florida Power Corp.*, 157 So. 2d 168, 170-71 (Fla. 2d DCA 1963) (incorrectly labeling approach that damages caused by public fear are never compensable as "majority view"); *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528, 533-34 (Kan. 1991) (same).

62. See *Arkansas Power & Light Co. v. Haskins*, 528 S.W.2d 407, 409 (Ark. 1975) ("Apprehension of danger [from power lines] is very reasonable.").

63. See *Northeastern Gas Transmission Co. v. Tersana Acres, Inc.*, 134 A.2d 253 (Conn. 1957).

64. See *Southern Ind. Gas and Elec. Co. v. Gerhardt*, 172 N.E.2d 204, 206 (Ind. 1961) (holding that jury may consider effect upon market value of fears caused by possibility that power lines may break or fall during storms, "[i]f such possibilities exist").

65. See *Gulledge v. Texas Gas Transmission Corp.*, 256 S.W.2d 349 (Ky. 1959).

66. See *Dunlap v. Loup River Pub. Power Dist.*, 284 N.W. 742 (Neb. 1939).

67. See *Tennessee Gas Transmission Co. v. Maze*, 133 A.2d 28 (N.J. Super. Ct. App. Div. 1957).

68. See *Colvard v. Natahala Power & Light Co.*, 167 S.E. 472, 475 (N.C. 1933) (property owner may recover for lost market value caused by fear of power lines where such fear "sensibly impairs its value") (quoting *Carolina & Yadkin River R.R. v. Armfield*, 83 S.E. 809, 811 (N.C. 1914)) (emphasis added).

69. See *Oklahoma Gas & Elec. Co. v. Kelly*, 58 P.2d 328, 329 (Okla. 1936) (holding that it is proper to consider things that "sensibly" impair value in determining condemnation proceeding damages). There is room in *Kelly* to allow a future Oklahoma court to adopt the majority view. The *Kelly* court noted that while it would not allow recovery solely on speculative matters such as potential danger from power lines, it would "allow such hazards to be taken into consideration as affecting the market value of the land." *Id.*

70. See *Hodge v. Southern Cities Power Co.*, 8 Tenn. App. 636 (1928); see also *Alloway v. Nashville*, 13 S.W. 123 (Tenn. 1890).

71. See *Delhi Gas Pipeline Co. v. Reid*, 488 S.W.2d 612 (Tex. Ct. App. 1972); see also *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886 (Tex. 1975).

72. See *Telluride Power Co. v. Bruneau*, 125 P. 399 (Utah 1912).

73. See *Canyon View Ranch v. Basin Elec. Power Corp.*, 628 P.2d 530 (Wyo. 1981). *Canyon View Ranch* involved an appeal by several property owners from damages awards made to them in a condemnation proceeding brought for the erection of a power line. *Id.* at 531. The Wyoming Supreme Court endorsed the trial court's instruction to the jury that in determining damages to the property, "any factors which you consider must be direct and certain and may not be remote, imaginary, or speculative." *Id.* at 534, 541. The supreme court went on to hold that there was no error in refusing to allow the property owners to introduce into evidence magazine articles about the hazards of power lines. *Id.* at 536-37. The property owners had offered the articles to show that the property was further devalued because prospective purchasers, aware of the information within the articles, would find the property less desirable. *Id.* at 535-36. The court reasoned that because the prop-

follow the intermediate view,⁷⁴ and Arizona follows a modified version of this rule.⁷⁵ Moreover, after a recent decision by its supreme court, Virginia appears to be leaning toward the intermediate view.⁷⁶

2. The Intermediate View Applied: *Dunlap v. Loup River Public Power District*

*Dunlap v. Loup River Public Power District*⁷⁷ illustrates the intermediate view. In *Dunlap*, the plaintiff's expert witness testified to the dangers inherent in power lines, including the dangers to individuals coming within the general vicinity of the power lines.⁷⁸ The Loup River Public Power District objected to the trial judge's jury instructions, which allowed consideration of the possible dangers of power lines.⁷⁹

The Nebraska Supreme Court affirmed the lower court's award of damages to the landowner.⁸⁰ The court reasoned that while general fears should not be compensable, if there is a basis in experience for the fears, and the fears are reasonable and affect the price a purchaser of land is willing to pay, the loss should be compensable.⁸¹ The court, however, reduced the damages

erty owner made no effort to prove the credibility of the information in the articles, the evidence was speculative. *Id.* at 537.

74. See *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 721 (Mich. 1992). In *Adkins*, the Michigan Supreme Court held that landowners could not recover in nuisance for property value diminution that was caused by the public's fear that contamination on the defendant's land might reach the landowners' property. *Id.* The majority specifically disagreed with the dissent. *Id.* at 726. The dissent would have held that the landowners could have recovered solely because their property had been devalued. *Id.* at 744-45. The majority held that "unfounded fears" could not be a basis for recovery. *Id.* at 726. The majority also noted that the case came to the court "singularly on the issue whether plaintiffs may proceed with their nuisance in fact claims solely on the basis of property depreciation due to public concern about contaminants in the general area." *Id.* n.34. The majority then held that the plaintiffs could not proceed. *Id.*

75. See *Selective Resources v. Superior Court*, 700 P.2d 849 (Ariz. Ct. App. 1984). *Selective Resources* held that proof of actual knowledge of the effect of power lines on the part of the buying public is not needed. *Id.* at 852. Instead, a landowner can recover based upon the theory of a hypothetical buyer, who is assumed to know all facts relevant to the purchase. *Id.*

76. See *infra* notes 129-36 and accompanying text.

77. 284 N.W. 742 (Neb. 1939). *Dunlap* involved the Loup River Public Power District's application for an easement to construct a power line over the landowner's dairy farm. *Id.* at 743.

78. *Id.* at 744-45. The plaintiff's expert testified that "a man on a load of hay would be partially grounded, and if he had a pitchfork in his hand he could receive a shock that might endanger his life." *Id.* at 744.

79. *Id.* at 745. "It is insisted by the power district that it is not an insurer against the dangers arising from [power lines]." *Id.* at 746.

80. *Id.* at 746.

81. *Id.* at 745.

award,⁸² reasoning that it was necessary to curb over-imaginative speculation about dangers from power lines in condemnation proceedings.⁸³

C. The Majority View: Reasonableness of Fear is Irrelevant—Award Permissible Where Fear Depresses Value

1. In General

Jurisdictions following the majority view hold that the reasonableness of the public's fear is irrelevant: if the public's fear depresses market value, the loss is compensable.⁸⁴ This view is premised upon the argument that the issue in eminent domain proceedings is full compensation.⁸⁵ Thus, if fear of power lines causes a loss of market value, that loss should be compensated.⁸⁶

The U. S. Courts of Appeals for the Fifth⁸⁷ and Sixth⁸⁸ Circuits follow the majority view, as do thirteen states: California,⁸⁹ Florida,⁹⁰ Georgia,⁹¹ Iowa,⁹² Kansas,⁹³ Louisiana,⁹⁴ Mis-

82. *Id.* at 746.

83. *Id.*

84. *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987).

85. *Id.* Of course, not all takings result in full compensation or any compensation at all. For example, with regulatory takings, value is taken away from property by some action of the government, but the landowner is not necessarily awarded compensation. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The standard is whether the regulation has eliminated either all economically viable use of the property or the property owner's investment-backed expectations. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

86. *Jennings*, 518 So. 2d at 899.

87. See *United States ex rel. TVA v. Robertson*, 354 F.2d 877 (5th Cir. 1966) (applying 16 U.S.C. § 831).

88. See *United States ex rel. TVA v. Easement and Right of Way*, 405 F.2d 305 (6th Cir. 1968) (applying 16 U.S.C. § 831).

89. See *Pacific Gas & Elec. Co. v. W.H. Hunt Estate Co.*, 319 P.2d 1044 (Cal. 1957); see also *San Diego Gas & Elec. Co. v. Daley*, 253 Cal. Rptr. 144 (Cal. Ct. App. 1988).

90. See *Jennings*, 518 So. 2d at 895.

91. See *Georgia Power Co. v. Sinclair*, 176 S.E.2d 639, 642 (Ga. Ct. App. 1970) (holding that "[p]otential danger of an electric power line . . . necessarily has a material connection with the market value of the adjacent land and is an item to be considered by the jury . . .").

92. See *Evans v. Iowa S. Utils. Co.*, 218 N.W. 66, 69 (Iowa 1928) (holding that it was proper for expert to consider as one of the damage elements in a condemnation proceeding "the fear prospective purchasers might have by reason of the high voltage line being on the premises."). But see *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326 (Iowa App. 1983) (holding that trial court improperly allowed expert testimony offered to illustrate effects fear of health hazards from power lines might have upon market value of property "because insufficient data existed for [the expert] to reach a conclusion that a reasonable probability of hazards to human health is created by the [power line].").

93. See *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528 (Kan. 1991).

94. See *Claiborne Elec. Coop., Inc. v. Garrett*, 357 So. 2d 1251 (La. Ct. App. 1978), writ denied, 359 So. 2d 1306 (La. 1978).

souri,⁹⁵ New Mexico,⁹⁶ New York,⁹⁷ Ohio,⁹⁸ South Dakota,⁹⁹ Virginia,¹⁰⁰ and Washington.¹⁰¹

2. Florida's Reversal: Florida Power & Light Co. v. Jennings

The Florida Supreme Court reversed twenty-four years of precedent in *Florida Power & Light Co. v. Jennings*¹⁰² by overruling *Casey v. Florida Power Corp.*¹⁰³ In *Casey*, the Florida Second District Court of Appeal announced that it would follow the majority view; however, it actually meant the minority view.¹⁰⁴ In *Jennings*, the Florida Supreme Court declined to follow *Casey*, noting that the issue in eminent domain proceedings should be to determine the true market value of the land taken.¹⁰⁵ Evidence "extremely relevant to the central issue of what is full compensation to the landowner," such as the impact of a potential buyer's fears on the land's value, should not be excluded.¹⁰⁶ The court also

95. For a number of years, Missouri was thought to adhere to the intermediate view. See *Willsey v. Kansas City Power*, 631 P.2d 268, 275 (Kan. Ct. App. 1981) (citing *Phillips Pipe Line Co. v. Ashley*, 605 S.W.2d 514, 517-18 (Mo. Ct. App. 1980)). However, the Missouri Supreme Court subsequently adopted the majority view, even though it did not explicitly overrule *Phillips Pipe Line*. See *Missouri Pub. Serv. Co. v. Juergens*, 760 S.W.2d 105, 106-07 (Mo. 1988) (en banc). In *Juergens*, the court held that "depreciation in market value due to a risk of harm is recoverable in a condemnation hearing. . . . '[I]t is the fear caused by the risk which actually depreciates the value of the remaining tract, rather than the risk itself.'" *Id.* (quoting *Phillips Pipe Line*, 605 S.W.2d at 518). Interestingly, the *Juergens* court relied upon *Phillips Pipe Line*, but only cited language from that opinion that supported the majority view. *Id.*; see also *Missouri Highway & Transp. Comm'n v. Horine*, 776 S.W.2d 6, 12 (Mo. 1989) (en banc) (adhering to same reasoning and holding as *Juergens* court).

96. See *City of Santa Fe v. Komis*, 845 P.2d 753 (N.M. 1992) (action to recover for diminution of property value caused by construction of highway to transport nuclear waste). After reviewing this case of first impression, the New Mexico Supreme Court considered the three primary viewpoints and adopted the majority view, reasoning that "[the] objective in a condemnation case is to compensate the landowner for damages actually suffered. . . . [I]f loss of value can be proven, it should be compensable regardless of its source." *Id.* at 756.

97. See *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195 (N.Y. 1993); see also *infra* notes 110-14 and accompanying text (discussing *Criscuola*).

98. See *Ohio Pub. Serv. Co. v. Dehring*, 172 N.E. 448 (Ohio Ct. App. 1929).

99. See *Basin Elec. Power Coop., Inc. v. Cutler*, 217 N.W.2d 798, 800 (S.D. 1974) (holding that qualified witnesses in eminent domain proceeding can opine "as to [the property's] value and to also state the factors they considered in arriving at a depreciation in value even though some of those factors were in the nature of conjecture").

100. See *Appalachian Power Co. v. Johnson*, 119 S.E. 253 (Va. 1923). But see *infra* notes 129-36 and accompanying text.

101. See *State v. Evans*, 612 P.2d 442 (Wash. Ct. App. 1980), *rev'd* on other grounds, 634 P.2d 845 (Wash. 1981), *modified*, 649 P.2d 633 (Wash. 1982).

102. 518 So. 2d 895 (Fla. 1987).

103. 157 So. 2d 168 (Fla. 2d DCA 1963).

104. *Id.* at 170-71; see also *supra* note 52 (discussing *Casey* court's rationale for following minority view).

105. *Jennings*, 518 So. 2d at 897. But see *supra* note 85.

106. *Jennings*, 518 So. 2d at 897.

rejected the intermediate view, which the lower court had adopted.¹⁰⁷

The Jennings court thus adopted the majority view: "We join the majority of jurisdictions who have considered this issue and hold that the impact of public fear on the market value of the property is admissible without independent proof of the reasonableness of the fear."¹⁰⁸ The court stated that the reasonableness of the public's fear either should be assumed or considered irrelevant.¹⁰⁹

3. New York's Reversal: *Criscuola v. Power Authority of New York*

New York adopted the majority view in 1993, when its highest court overruled a lower court decision that had endorsed the intermediate view. In *Criscuola v. Power Authority of New York*,¹¹⁰ the New York Court of Appeals decided whether landowners in a condemnation suit have to prove the reasonableness of the public's fear of power lines "as a separate, additional component of diminished market value."¹¹¹ The lower courts had ruled against the claimants, holding that they "had not met their burden of proving that the 'cancerphobia' was reasonable."¹¹²

The *Criscuola* court held that the landowners need not prove the reasonableness of the public's fear. The court noted:

The issue in a just compensation proceeding is whether or not the market value has been adversely affected. 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.

107. *Id.*

108. *Id.* at 898.

109. *Id.* at 899. The court made reasonableness a matter of fact instead of a matter of law. See *id.* The court stated that the jury is capable of determining the reasonableness of an expert's testimony and noted: "[W]e believe that a jury could also determine the reasonableness of a valuation opinion which explains the devaluation of such adjacent property on the grounds that, e.g., the buying public is fearful that transmission lines attract alien being[s] in flying saucers." *Id.* The court opined that whether an expert's opinion is reasonable can be determined by the jury without additional experts testifying as to the reasonableness of a particular fear. *Id.*; see also *Missouri Pub. Serv. Co. v. Juergens*, 760 S.W.2d 105, 106 (Mo. 1988) (en banc) (holding that "[t]he weight to be given evidence which is remote or speculative is a task for the jury with proper instructions.").

110. 621 N.E.2d 1195 (N.Y. 1993) (reversing *Zappavigna v. New York*, 588 N.Y.S.2d 585 (App. Div. 1992)).

111. *Id.*

112. *Id.* at 1196.

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.¹¹³

The court did state, however, that the plaintiffs must offer evidence of "some prevalent perception of a danger emanating from the objectionable condition" and establish that this perception diminishes market value.¹¹⁴

4. Kansas's Move to the Majority View: *Willsey v. Kansas City Power & Light Co.* and *Ryan v. Kansas Power & Light Co.*

In 1991, the Kansas Supreme Court, applying the reasoning of the Kansas Court of Appeals in *Willsey v. Kansas City Power & Light Co.*,¹¹⁵ adopted the majority view.¹¹⁶ In *Willsey*, Kansas City Power appealed from a judgment in favor of the landowners in an easement condemnation proceeding.¹¹⁷ Kansas City Power argued that the trial court had erred in allowing the jury to consider expert testimony regarding the impact that public fear of power lines had on the market value of the Willseys' home.¹¹⁸ In considering compensation, the court examined the reasonableness of the

113. *Criscuola*, 621 N.E.2d at 1196 (citations omitted).

114. *Id.* at 1197; see also Richard A. Reed, *Fear and Lowering Property Values in New York: Proof of Consequential Damages from "Cancerphobia" in the Wake of Criscuola v. Power Authority of the State of New York*, 66 N.Y. ST. B.J. 30, 34 (1994) (discussing *Criscuola* and its impact upon condemnation actions in New York).

115. 631 P.2d 268 (Kan. Ct. App. 1981).

116. *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528, 533 (Kan. 1991).

117. *Willsey*, 631 P.2d at 270.

118. *Id.* Kansas City Power specifically objected to the Willseys' expert witness—a market analyst, realtor, and appraiser—regarding his answers to questions about the potential for loss to the home's market value caused by buyer aversion to power lines. *Id.* at 270-71. The witness testified that:

[P]eople don't like the unsightliness of it, and then, of course, there is a latent fear.

....

... There is a latent fear on the part of buyers due to this high voltage power line. This is due in part to some people, it may be imagined, and it may be due to what they see in the papers, on T.V. and hear on the radio.

....

Q. Mr. Vickers, have you personally seen advertisements in the news media concerning danger of power lines, and proximity to power lines?

A. Well, the Kansas City Power and Light Company itself is probably the one who propagates or who informs the public of the danger of getting in contact or close proximity to power lines.

....

Q. Mr. Vickers, have you in your experience as a real estate broker in talking to actual buyers in the pit, have those buyers expressed concerns to what you are relating to right now, to you as a realtor?

A. Absolutely.

Id. at 271.

public's fear of power lines and noted that "[a] certain amount of fear and a healthy wariness in the presence of high voltage lines strikes us as eminently reasonable."¹¹⁹ The court concluded that as long as fear is not unreasonable as a matter of law, reasonableness is a question of fact for the jury to decide.¹²⁰ The court ultimately held that the property owner's evidence was "persuasive" and affirmed the damages award.¹²¹

The Willsey court left itself the option to move from the intermediate view to the majority view. While the court in one sentence used the rationale applied by courts that follow the intermediate view,¹²² in the next sentence the court used the rationale applied by courts that follow the majority view.¹²³ The court explained that it preferred the majority view,¹²⁴ but because the facts of the case satisfied the intermediate view, the court chose to remain with that approach.¹²⁵ The court stated that "the evidence in this case makes it unnecessary for us to choose [between the intermediate view and the majority view]."¹²⁶ In fact, several years later, the Kansas Supreme Court officially chose the majority view in *Ryan v. Kansas Power & Light Co.*¹²⁷ The *Ryan* court stated:

We submit that in effect the Court of Appeals adopted the [majority rule] in Kansas in Willsey and we agree with its rationale therein. Accordingly, in a condemnation action to acquire an easement for installation of a high voltage electrical line we find evidence of fear in the marketplace is admissible with respect to the value of property taken without proof of the

119. *Id.* at 279.

120. *Id.*

121. *Id.* at 279-80.

122. *Id.* at 277. The court noted that "[r]emote, speculative and conjectural damages are not to be considered; the owner cannot recover today for an injury to his child which he fears will happen tomorrow." *Id.*

123. *Id.* at 277-78. The court stated that:

Logic and fairness, however, 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.

124. *Id.*

125. *Id.*

126. *Id.* at 279.

127. 815 P.2d 528, 533 (Kan. 1991). The Kansas Supreme Court perpetuated the mislabeling of the majority view as the minority view, a trend initiated by the Florida Second District Court of Appeal in *Casey v. Florida Power Corp.*, 157 So. 2d 168, 170-71 (Fla. 2d DCA 1963). The Kansas Supreme Court, while referring to the minority view throughout the opinion, intended to state the majority view. *Ryan*, 815 P.2d at 533-34.

reasonableness of the fear. . . . [F]ear of a high voltage line is reasonable.¹²⁸

5. Confusion in Virginia: Chappell v. Virginia Electric & Power Co.

Virginia's highest court recently issued a decision with ominous overtones for property owners attempting to recover for diminution in property value caused by public fear. In *Chappell v. Virginia Electric & Power Co.*,¹²⁹ the Virginia Supreme Court cast doubt upon the validity of *Appalachian Power Co. v. Johnson*,¹³⁰ the case cited for Virginia's adoption of the majority view since 1923.¹³¹ In affirming the lower court's denial of damages, the court stated:

We do not agree that *Johnson* is controlling precedent. . . . [T]he language *Chappell* invokes is obiter dicta. Nevertheless, we need not decide whether a landowner in a proceeding to condemn an easement for an electric transmission line may be entitled to compensation for diminution in the market value of the remaining land attributable to the fears of prospective purchasers. . . . And, as [the landowner] acknowledged on brief, "[s]peculative matters should not be considered by commissioners in determining just compensation."¹³²

This language should disturb property owners in Virginia who face the possibility of litigating a condemnation action. The court did not need to question *Johnson*. The landowner merely offered insubstantial proof that the public's fear had diminished the value of the property.¹³³ Proof that the public's fear causes a diminution in property value is necessary in jurisdictions adopting the majority view.¹³⁴ Therefore, the *Chappell* court need only have stated that the plaintiff offered insufficient proof.¹³⁵ The court characterized as mere dictum the language from *Johnson* cited by the landowner, however, and left open the question of the

128. Ryan, 815 P.2d at 533. The court went on to conclude that "evidence of fear in the marketplace is admissible but no witness, whether expert or non-expert, may use his or her personal fear as a basis for testifying about fear in the marketplace." *Id.* at 533-34.

129. 458 S.E.2d 282 (Va. 1995).

130. 119 S.E. 253 (Va. 1923).

131. *Id.* at 258 ("[T]he commissioners could have properly taken into consideration the effect of the fear of the [power] line breaking down and injuring persons and property . . . if the liability [for] such injury in fact depreciated the market value of the property.").

132. *Chappell*, 458 S.E.2d at 284 (citations omitted).

133. *Id.* The plaintiff "failed to quantify any damage to the fair market value of the residue attributable to the alleged public fear of high voltage transmission lines." *Id.*

134. *E.g.*, *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195, 1197 (N.Y. 1993).

135. *Id.*

proper view regarding compensability for damages caused by fear of power lines.¹³⁶ Thus, property owners in a condemnation action in Virginia should consider offering evidence of the reasonableness of the public's fear of power lines—as is required of property owners in jurisdictions following the intermediate view—or face the possibility of a Virginia appellate court reversing an award for damages.

III. STRICT LIABILITY RATIONALES AS JUSTIFICATION FOR THE MAJORITY VIEW

The majority view is hard to ignore or reason away. Why should a purely innocent landowner, whose property has depreciated because of the erection of a power line over a portion of his or her property, have to suffer this loss? Courts following the majority view rationalize holding power companies liable for diminished value caused by fear by stating that the issue in a condemnation proceeding is full compensation.¹³⁷ Additionally, many courts find it easy to hold against power companies because power companies often advertise the dangers of power lines, and thus are at least partially responsible for causing the public's fear.¹³⁸ However, putting aside temporarily the power companies' part in causing the fear, the argument that power companies should always pay for a loss caused by fear begs the question: why should an equally innocent power company, which cannot necessarily control the general public's fear, be held responsible for this loss?¹³⁹ Strict liability rationales offer the answer to this question.

136. Chappell, 458 S.E.2d at 284. The court actually stated that the issue was "whether a landowner in a proceeding to condemn an easement for an electric transmission line may be entitled to compensation for diminution in the market value of the remaining land attributable to the fears of prospective purchasers." *Id.*

137. Florida Power & Light Co. v. Jennings, 518 So. 2d 895, 897 (Fla. 1987). But see *supra* note 85 and accompanying text.

138. E.g., Willsey v. Kansas City Power & Light Co., 631 P.2d 268, 279 (Kan. Ct. App. 1981). For example, the Willsey court noted that:

The landowner's expert testified to the perceived basis for popular fear, and that was the warning campaigns conducted by electric utilities themselves. . . . Although not a factor in our decision, it seems highly inconsistent for a company to warn the public repeatedly of the danger with which an instrumentality is fraught, and then say that public fear of that instrumentality is groundless.

Id.

139. Some liken the current EMF scare to medieval witchcraft trials. See Bruce W. Radford, Lawyers, Witchcraft, and EMF, PUB. UTIL. REP., Sept. 15, 1994, at 6. For example, one attorney noted that "[i]n olden days, . . . judges were prone to admit 'spectral evidence'—testimony about visions, demons, or mysterious events known only to the witness, and therefore immune to cross-examination." *Id.* The attorney continued, observing that

A. Strict Liability

The majority view holds that landowners should always be compensated for loss of market value caused by fears of the general public.¹⁴⁰ This view holds that power companies, even though they have arguably done nothing to cause the fear, still must pay for this loss.¹⁴¹ Courts following the majority view essentially impose liability upon innocent power companies in a manner similar to how the doctrine of strict liability imposes liability upon innocent actors.¹⁴²

Strict liability is defined as "liability without fault,"¹⁴³ with the analysis focusing on who should bear the loss.¹⁴⁴ Strict liability allows one party to be compensated for a loss caused by another party, even though the party paying for the loss has done nothing wrong, morally or otherwise.¹⁴⁵ There are several defenses to strict liability, including assumption of the risk,¹⁴⁶ contributory

EMF litigation involves claims such as "cancerphobia" and inverse condemnation, which "rely more on a 'community-based fear standard' than scientific analysis: If everyone shares the belief that EMF is dangerous, it doesn't matter whether that belief is correct." *Id.* To support this view, the attorney cited *Criscuola*, 621 N.E.2d at 1195, "in which the New York Court of Appeals found scientific fact 'irrelevant' to the EMF debate, as long as public perception actually drives down housing prices." *Id.*

140. See *supra* notes 84-86 and accompanying text.

141. *Id.* In contrast, the minority view asks, albeit indirectly, why an actor (here a power company), through absolutely no fault of its own, should be responsible for a loss caused by an ignorant public. Minority view courts answer by holding that such a party should not be liable for that loss. See *supra* note 32 and accompanying text.

142. The majority view is "liability without negligence," in that an inference of negligence may be refuted by a showing of proper care. See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). Even if power companies offer evidence showing that EMF does not cause cancer—thus proving that there is no lack of proper care on their part and no reasonable basis for the public's fear—the majority view still places the loss caused by that fear upon power companies. See *supra* text accompanying notes 84-86.

143. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 75, at 534 (5th ed. 1984); see also *Spano v. Perini Corp.*, 250 N.E.2d 31, 33 (N.Y. 1969). Strict liability "means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence." KEETON ET AL., *supra*, § 75, at 534. The case commonly cited as the seminal decision responsible for advancing notions of strict liability is *Rylands v. Fletcher*, 3 H.L. 330 (1868). See Francis H. Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298 (1911). The Restatement (Second) of Torts later incorporated the *Rylands* holding. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1964).

144. See KEETON ET AL., *supra* note 143, § 75, at 536; see also FRANK J. VANDALL, *STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS* 46 (1989); *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring); *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (Cal. 1963).

145. KEETON ET AL., *supra* note 143, § 75, at 536; VANDALL, *supra* note 144, at 46.

146. See RESTATEMENT (SECOND) OF TORTS § 523 (1964) ("The plaintiff's assumption of the risk of harm from an abnormally dangerous activity bars his recovery for the harm.")

In one suit against a power company, the property owner claimed that he had not been able to sell his house because nearby power lines scared off potential purchasers. *Conn.*

negligence,¹⁴⁷ and proximate cause.¹⁴⁸ Strict liability is used most often in tort claims relating to products liability and dangerous activities.¹⁴⁹ The scope of strict liability is expanding, however.¹⁵⁰ For example, strict liability has been applied in asbestos litigation.¹⁵¹ Changing societal values, such as the desire to protect individuals from personal disaster, are one reason for this expansion.¹⁵²

Applying strict liability rationales to the majority view does not require expanding the strict liability doctrine because the majority view essentially is a strict liability approach. This application is useful merely to illustrate the superiority of the majority view over the intermediate and minority views.

In applying strict liability rationales to the issue of compensability for fear-based market value diminution, one must illustrate why a negligence approach would not be preferable.¹⁵³ It is important to note that the majority view is not a negligence-based theory.¹⁵⁴

Homeowner Sues CL&P Saying EMF Concerns Have Lowered Property Value, UTIL. ENVTL. REP., Sept. 15, 1995, at 5. However, the power lines were installed years before the property owner purchased the house. *Id.* As a possible defense to this claim, the defendant power company might argue that the plaintiff "assumed the risk" of lost property value when he moved into the house.

147. "The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability." RESTATEMENT (SECOND) OF TORTS § 524(2) (1964).

148. VANDALL, *supra* note 144, at 56.

149. See generally *id.* (summarizing law of strict liability).

150. See generally *id.* at 95-105 (discussing scope of strict liability); see also Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 288 (1987) ("[S]trict liability has expanded beyond manufacturers to include retailers, wholesalers, and even lessors of products. Since the adoption of strict products liability . . . various proposals for new areas of strict liability have appeared, and courts have rendered decisions that suggest such new applications."). Some argue that strict liability should be extended to professionals such as doctors and lawyers. VANDALL, *supra* note 144, at 107.

151. See *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973); see also VANDALL, *supra* note 144, at 98 (noting that "[a]sbestos has been a fertile ground for the application of strict liability").

152. Nolan & Ursin, *supra* note 150, at 289-93 (discussing reasons for expansion of strict liability).

153. Cf. Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 657 (1987) ("One of the most debated topics in the law of tort is surely the choice of either a negligence or a strict liability rule for accidental harms.").

154. Starting with the traditional definition of negligence, stated by Prosser and Keeton: "Negligence is a matter of risk . . . of recognizable danger of injury. It has been defined as 'conduct which involves an unreasonably great risk of causing damage,' or, more fully, conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.'" KEETON ET AL., *supra* note 143, § 31, at 169 (citations omitted); see also RESTATEMENT (SECOND) OF TORTS §§ 282, 291-93 (1964). Negligence occurs when there is a violation of the duty of care. See KEETON ET AL., *supra* note 143, § 30, at 164. Strict liability requires no proof of the defendant's negligence. See 1 STUART M.

The majority view imposes liability upon power companies once the landowner shows that the public's fear of power lines has caused a diminution in property value; there is no determination of a duty of care as there is with a negligence approach.¹⁵⁵ Additionally, unlike a negligence approach, the majority view does not require balancing the parties' interests.¹⁵⁶ The property owner simply must demonstrate that the public's fear has caused a diminution in property value.¹⁵⁷ The majority view court then strictly imposes liability upon the power company, which must compensate the landowner for the diminution.¹⁵⁸ Therefore, because the majority requires no proof of care or balancing of interests, the majority view cannot properly be called a negligence approach.

The principal rationales for strict liability are discussed in the following sections and illustrate why the majority view is superior to the minority and intermediate views.¹⁵⁹

B. Corrective Justice

Several commentators support strict liability with notions of corrective justice.¹⁶⁰ Corrective justice focuses on determining what is fair between the victim and defendant, rather than broader concerns about society as a whole.¹⁶¹

1. Causation

One corrective justice model centers upon fairness and suggests that the primary issue should be causation: whether A caused harm to B.¹⁶² Under this model, the objective should be to

SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 18:30 (1983). Indeed, the doctrine of strict liability applies even if the defendant "has exercised all possible care." *RESTATEMENT (SECOND) OF TORTS* § 402A(2) (1964).

155. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla. 1987) (failing to make duty of care determination).

156. Negligence requires that a balancing test be applied, usually through the use of a risk-benefit form of analysis. See *KEETON ET AL.*, *supra* note 143, at 173 (citations omitted); see also *RESTATEMENT (SECOND) OF TORTS* §§ 282, 291-93 (1964).

157. E.g., *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195, 1197 (N.Y. 1993).

158. *Id.*

159. Law and economics (economic analysis) and corrective justice are the two most powerful legal theories today, and both offer support for strict liability. Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 439 (1990). This Comment justifies the majority view by concentrating analysis on these theories. See discussion *infra* part III.B-C.

160. See generally 1 *SPEISER ET AL.*, *supra* note 154, § 1:37.

161. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 224 (1980). For a summary of corrective justice theories, see Susan Randall, *Corrective Justice and the Torts Process*, 27 *IND. L. REV.* 1, 2-3 (1993).

162. Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151, 152, 166 (1973).

take "into account common sense notions of individual responsibility."¹⁶³ Individuals should be free from harm to either their personal bodily integrity or their property.¹⁶⁴ If a victim can show that a defendant's actions caused harm to the victim's bodily integrity or property, the victim should be able to recover, and any defenses the defendant might have should be narrowly applied.¹⁶⁵ After causation is established, a defendant can assert justifications or defenses, such as lack of causation or assumption of the risk.¹⁶⁶ The philosophy behind this theory and the reason causation is its focus is that allowing courts to decide cases involving individuals while considering society's needs at the same time delegates too much power to the judiciary to impose restrictions upon individual liberty.¹⁶⁷ Moreover, because individuals have a right not to be harmed, conduct causing harm cannot be justified by focusing on society's needs.¹⁶⁸ Therefore, the fairest standard is strict liability.¹⁶⁹

When a power company erects a power line adjacent to an individual's property, and the public's fear of that power line causes an additional diminution in value to the land, the erection of the power line has harmed the landowner.¹⁷⁰ Before there will be liability, however, there must be damage, either to person or to property.¹⁷¹ Under the corrective justice model, a prima facie case of liability is established if the landowner can show a causal link between the erection of the power line and the diminution in property value caused by the public's fear of the power line.¹⁷²

The minority view does not permit recovery even in the face of evidence that the fear caused a diminution in market value.¹⁷³ The minority view appears to consider society's needs,¹⁷⁴ which is

163. *Id.* at 151.

164. *Id.* at 164; see also Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 441 (1975).

165. Epstein, *supra* note 162, at 166, 204.

166. *Id.* at 204; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 169, 170, 207-11 (1974).

167. WHITE, *supra* note 161, at 228.

168. 1 SPEISER ET AL., *supra* note 154, § 1:37, at 135.

169. *Id.*

170. See Epstein, *supra* note 162, at 166.

171. *Id.* The intermediate and majority views require a showing that the fear caused actual diminution in value to the property. See *supra* text accompanying notes 57, 84. As noted by Professor Richard Epstein, "the minimum condition of . . . liability is damage to the person or property of the plaintiff." Epstein, *supra* note 162, at 166.

172. See Epstein, *supra* note 162, at 168.

173. See *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

174. Cf. *Pappas v. Alabama Power Co.*, 119 So. 2d 899, 905 (Ala. 1960) (holding that the minority view "is sound and probably even more necessary in this modern age of scientific and industrial expansion.").

inappropriate in a corrective justice regime.¹⁷⁵ Thus, the minority view is inadequate because it imposes liability upon the harmed landowner.¹⁷⁶ The intermediate view also is flawed because it requires a showing of reasonableness,¹⁷⁷ when the main inquiry under the corrective justice model requires a showing of causation.¹⁷⁸ Because the requisite causation is present, liability should be imposed regardless of the reasonableness of the public's fear.¹⁷⁹

The most forceful approach under a corrective justice regime is the majority view. The requisite causation is present: the erection of power lines caused a diminution in property value by creating a fear of contracting cancer in the buying public.¹⁸⁰ Thus, it is fair to impose this loss upon power companies rather than property owners.¹⁸¹ The corrective justice model concludes that "the principles of strict liability say that the liberty of one person ends when he causes harm to another."¹⁸²

2. Reciprocity and Reasonableness

Another theory advances notions of corrective justice and fairness, but notes that there are two paradigms, or models, of liability: the paradigm of reciprocity and the paradigm of reasonableness.¹⁸³ The basic premise of the paradigm of reciprocity is that, in determining liability, a court should examine the conduct of both the defendant and victim.¹⁸⁴ If the defendant and victim expose each other to an equal amount of risk, strict liability should not apply.¹⁸⁵ For example, "two airplanes flying in the same vicinity subject each other to reciprocal risks of a mid-air collision," and therefore strict liability should be precluded.¹⁸⁶ On the other hand, if the defendant's actions expose the victim to a unilateral, nonreciprocal risk, strict liability should apply.¹⁸⁷ For example, "a pilot or an airplane owner subjects those beneath the path of

175. 1 SPEISER ET AL., *supra* note 154, § 1:37, at 135.

176. See Epstein, *supra* note 162, at 168.

177. See *supra* note 57 and accompanying text.

178. Epstein, *supra* note 162, at 165-66, 204.

179. See *id.*

180. See *id.* at 166.

181. See *id.* at 151. "The task is to develop a normative theory of torts that takes into account common sense notions of individual responsibility." *Id.*

182. *Id.* at 203-04.

183. George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 540 (1972).

184. 1 SPEISER ET AL., *supra* note 154, § 1:37, at 131.

185. Fletcher, *supra* note 183, at 542.

186. *Id.*

187. *Id.*

flight to nonreciprocal risks of harm,” and strict liability should apply.¹⁸⁸ If the victim’s injury results from a nonreciprocal risk of harm, the defendant is not always under a duty to pay.¹⁸⁹ Nonreciprocal risk-creation may be excused when it is unfair to require the defendant to pay.¹⁹⁰

Power lines fall into “the set of cases in which a socially useful activity imposes nonreciprocal risks on those around it.”¹⁹¹ When the presence of power lines causes a diminution in property value, however, a nonreciprocal risk is imposed upon an innocent landowner. Through no fault of the landowner, the property’s value decreases. Thus, the paradigm of reciprocity permits recovery for the landowner and supports the majority view.

One must point out, however, the second model of liability—the paradigm of reasonableness. The paradigm of reasonableness suggests that instead of focusing solely on the defendant and the victim, the issue of liability must be decided by considering the impact the decision will have upon society at large.¹⁹² This paradigm determines who will bear the loss by focusing on the reasonableness of the risk:

Reasonableness is determined by a straightforward balancing of costs and benefits. If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover. The premises of this paradigm are that reasonableness provides a test of activities that ought to be encouraged and that tort judgments are an appropriate medium for encouraging them.¹⁹³

One can argue that society suffers by allowing property owners to recover the loss in market value caused by the public’s fear.

188. *Id.*

189. *Id.* at 551.

190. *Id.* at 541, 551-556. For example, conduct may be excused in the case of unavoidable ignorance. *Id.* at 551-56. Professor Fletcher notes that the “issue of fairness is expressed by asking whether the defendant’s creating the relevant risk was excused on the ground . . . that the defendant could not have known of the risk latent in his conduct.” *Id.* at 541. Power companies must recognize that the erection of power lines will result in an additional diminution in property value because of the public’s fear of adverse health effects. Cf. *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983) (power company conceded that testimony offered to show effect fear of adverse health consequences from power lines might have upon property value could be relevant in that regard). Thus, this excuse should not be available to power companies.

191. Fletcher, *supra* note 183, at 569.

192. *Id.* at 556.

193. *Id.* at 542-43. The paradigm of reasonableness represents economic efficiency analysis, see discussion *infra* part III.C, as opposed to the paradigm of reciprocity, which represents corrective justice. Joseph M. Steiner, *Economics, Morality, and the Law of Torts*, 26 U. TORONTO L.J. 227, 247 (1976).

Appealing to the paradigm of reasonableness, one could assert that the activity is socially advantageous and warrants encouragement. The dilemma is whether to focus on the parties and their relationship or on society and its needs.¹⁹⁴ Courts following the minority view employ the latter dynamic, which favors the power company, perhaps because they fear that finding in favor of property owners will ultimately impede progress and, therefore, hurt society.¹⁹⁵

At least as the issue relates to power companies, however, corrective justice requires that courts protect individual interests. Indeed, corrective justice advocates the paradigm of reciprocity and rejects the paradigm of reasonableness as a model for liability.¹⁹⁶ And under the paradigm of reciprocity, " 'justice' . . . should be equated with justice between the parties, not with broader conceptions of the welfare of the community."¹⁹⁷ Individual interests should be insulated against "community demands."¹⁹⁸ Thus, according to the paradigm of reciprocity, the majority view is superior.¹⁹⁹

194. Fletcher, *supra* note 183, at 569.

195. See *supra* text accompanying note 43; cf. *Pappas v. Alabama Power Co.*, 119 So. 2d 899, 905 (Ala. 1960). For example, the *Pappas* decision, in reaffirming *Keystone Lime*, implied that if the court permitted recovery of damages, the public would eventually suffer because it would be too costly to support projects for the public good. *Id.*

196. WHITE, *supra* note 161, at 224; Fletcher, *supra* note 183, at 550-51.

197. WHITE, *supra* note 161, at 224; see also Fletcher, *supra* note 183, at 550.

198. Fletcher, *supra* note 183, at 569. "The burden should fall on the wealth-shifting mechanism of the tort system to insulate individual interests against community demands. By providing compensation for injuries exacted in the public interest, the tort system can protect individual autonomy by taxing, but not prohibiting, socially useful activities." *Id.*

199. But see discussion *infra* part IV (discussing situations in which societal interests may take precedence over interests of the individual). For criticisms of the causation and reciprocity corrective justice models, see Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 215-221 (1973); Steiner, *supra* note 193, at 243-50; WHITE, *supra* note 161, at 224-30.

Jules Coleman advances another model centering on notions of corrective justice. See JULES COLEMAN, *RISKS AND WRONGS* 329 (1992). This model is quite different from his earlier writing on the subject. Interestingly, Coleman explicitly rejects his earlier views on corrective justice. See Jules L. Coleman, *Risks and Wrongs*, 15 HARV. J.L. & PUB. POL'Y 637, 644-45 (1992). The model has two components: wrongfulness and responsibility. See COLEMAN, *RISKS AND WRONGS*, *supra*, at 329. Corrective justice requires that an actor repair the wrongful losses for which he or she is responsible. *Id.* at 345. Indeed, corrective justice governs a loss only if the loss is wrongful. *Id.* at 361. An actor must repair wrongful losses that result from either wrongdoing (unjustified actions) or a wrong (an invasion of rights). *Id.* at 332, 361. The second category covers cases of strict liability.

In applying this model to strict liability, Coleman notes that:

Sometimes innocent or justifiable conduct can be contrary to the constraints imposed by the rights of others. If it is, justifiable or innocent conduct can constitute a wrong, and when it does, the losses that result are wrongful in the sense necessary to impose on the injurer a duty to repair.

C. Economic Efficiency

Economic efficiency is the notion that rules of law should promote efficient resource allocation.²⁰⁰ Strict liability is one means of attaining efficient resource allocation.²⁰¹ Theories of economic efficiency that support strict liability also support the majority view; most notable among these theories are the reduction of transaction costs, the cheapest cost avoider rationale, and the enterprise model.²⁰²

1. Reduction of Transaction Costs

A liability rule is economically efficient if it reduces transaction costs.²⁰³ Transaction costs include the cost of litigation.²⁰⁴ Indeed, a liability rule that simplifies the proof necessary to establish liability is preferable to a rule that imposes more of a burden upon litigants.²⁰⁵

Under this view, strict liability is efficient because it reduces the costs of litigation, and by analogy, the majority view is efficient.²⁰⁶ Unlike the intermediate view, the majority view does not require litigation of the reasonableness of the public's fear; this

Id. at 371. Thus, by installing power lines, power companies have invaded the rights of property owners. Id. at 361. The installation of power lines has resulted in a loss to the property owner because of the additional diminution in property value caused by the public's fear. Id. Even though power companies are "innocent," in that they arguably have no control over the public's fear, they must still repair, or compensate, landowners for diminution caused by fear. Id. at 371.

200. Steiner, *supra* note 193, at 227-28.

201. E.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1060-64, 1084 (1972). But see Posner, *supra* note 199, at 221 (arguing that strict liability is not as efficient as negligence).

202. Cf. *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 203-04 (E.D. La. 1983) (finding that "economic efficiency" requires strict liability), modified, 762 F.2d 1250 (5th Cir. 1985).

203. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1096-97 (1972).

204. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 225-26 (1970). As noted by one commentator:

[An] efficiency objective traditionally considered relevant in determining liability standards is the reduction of transaction costs, which include the costs of operating the accident reparation system. Holding other factors constant, liability standards that reduce these costs, by simplifying the proof necessary to establish liability, for example, are preferable to standards that are more costly to administer.

James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 *GEO. WASH. L. REV.* 1570, 1579 (1991).

205. See Henderson, *supra* note 204, at 1579.

206. See CALABRESI, *supra* note 204, at 225-26; Henderson, *supra* note 204, at 1579. See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 6.5, 21.6 (1992) (debating whether strict liability is more efficient than negligence). The minority view achieves the same result, but, for other reasons, the majority view on balance is superior. See discussion *infra* part V (summarizing majority view's superiority).

simplifies "the proof necessary to establish liability."²⁰⁷ The majority view also leads to certainty because litigators know the diminution caused by the public's fear is compensable.²⁰⁸ Thus, the court's time and the client's money need not be wasted on a barrage of expert testimony about possible adverse health effects.²⁰⁹

In contrast, the intermediate view leads to economic inefficiency because courts must litigate the reasonableness of the public's fear.²¹⁰ Courts therefore end up hearing additional expert testimony as to whether, for example, power lines cause cancer.²¹¹ Moreover, in many cases (but not all), the intermediate view leads to the same result as the majority view, with the majority view avoiding needless costs.²¹² Indeed, many courts have held that the public's fear is reasonable and have therefore permitted a damages award.²¹³ Thus, from an efficiency standpoint, the intermediate view needlessly wastes resources by forcing parties to litigate the reasonableness of the public's fear.

2. Cost Avoidance

The "cheapest cost avoider" rationale suggests that if actors are held strictly liable, they will attempt to avoid suits by exercising a higher degree of care.²¹⁴ Under this rationale, losses should

207. See Henderson, *supra* note 204, at 1579.

208. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987) ("[Under the majority rule,] the reasonableness of fear is either assumed or is considered irrelevant."). Conversely, if a jurisdiction follows the minority view, litigators know that the diminution is not compensable. See *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

209. See Henderson, *supra* note 204, at 1579.

210. See *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 888-89 (Tex. 1975) ("To establish that there is a basis in reason or experience for the fear, it is incumbent upon the landowners to show either an [a]ctual danger forming the basis of such fear or that the fear is reasonable . . ."); see also *supra* note 204 and accompanying text.

211. *Jennings*, 518 So. 2d at 899 ("The experts' scientific testimony introduced below was irrelevant to any fact at issue. . . . Instead, the scientific testimony altered the focus of the trial and confused the issue to be determined."); see also *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195, 1196 (N.Y. 1993) ("[Valuation] 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.").

212. See, e.g., John Weiss, Note, *The Power Line Controversy: Legal Responses to Potential Electromagnetic Field Health Hazards*, 15 COLUM. J. ENVTL. L. 359, 373 (1990) ("This review of case law standards regarding power line electromagnetic fields has shown that most jurisdictions (courts following both the majority and intermediate standards) allow the public's fear of power line electromagnetic fields to be considered in awarding compensation.").

213. See, e.g., *Arkansas Power & Light Co. v. Haskins*, 528 S.W.2d 407 (Ark. 1975); *Northeastern Gas Transmission Co. v. Tersana Acres, Inc.*, 134 A.2d 253, 256 (Conn. 1957); *Colvard v. Natchala Power & Light Co.*, 167 S.E. 472 (N.C. 1933); *Delhi Gas Pipeline Co. v. Reid*, 488 S.W.2d 612, 614 (Tex. Ct. App. 1972).

214. See CALABRESI, *supra* note 204, at 26; *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118 (La. 1986).

be allocated to those who can most inexpensively reduce the risk of “accidents,” or, for our purposes, reduce the risk of diminution of property value.²¹⁵

Under the cheapest cost avoider rationale, the minority view imposes the cost of avoiding diminution in market value upon the landowner,²¹⁶ a party not suited to manage the risks and perceptions associated with EMF.²¹⁷ Therefore, the minority view is inappropriate. The intermediate view is less objectionable because the landowner may recover once fear is established as reasonable.²¹⁸ If, however, the fear is unreasonable, the loss is again imposed upon the ill-suited landowner.²¹⁹ Therefore, the intermediate view is similarly inappropriate.

The majority view is superior because power companies are the cheapest cost avoiders. Power companies have more capital to invest in eliminating the risks associated with EMF, including continued scientific exploration of the relationship, if any, between EMF and cancer.²²⁰ Research indicating EMF does not cause cancer can alleviate the general public’s fear of power lines, and thus could eliminate the diminution in property value caused by that fear. Moreover, power companies can practice “prudent avoidance,” the practice of minimizing the effects of EMF by taking reasonable steps to reduce the public’s exposure to EMF.²²¹ Indeed, several jurisdictions already have adopted the policy of prudent avoidance.²²² Therefore, because power companies are the cheapest cost avoiders, the majority view is superior.

215. See Escola, 150 P.2d at 441 (Traynor, J., concurring).

216. See *supra* note 32 and accompanying text.

217. See CALABRESI, *supra* note 204, at 26.

218. See *supra* notes 57 and accompanying text.

219. See CALABRESI, *supra* note 204, at 26.

220. *Id.*; see also Lisa Bogardus, Recovery and Allocation of Electromagnetic Field Mitigation Costs in Electric Utility Rates, 62 *FORDHAM L. REV.* 1705, 1705-06 (1994) (“[E]lectric utilities are spending significant sums of money on research, education programs, design changes, and litigation fees.”).

221. See *QUESTIONS ABOUT EMF*, *supra* note 1, at 51-52; Bogardus, *supra* note 220, at 1711-17; Harunuzzaman & Iyyuni, *supra* note 7, at 188-94 (summarizing state legislative action to EMF health effects issues). But see Edward Gerjuoy, Electromagnetic Fields: Physics, Biology and Law, 35 *JURIMETRICS J.* 55, 73-75 (1994) (arguing against policy of prudent avoidance).

222. Bogardus, *supra* note 220, at 1711-17; Harunuzzaman & Iyyuni, *supra* note 7, at 188-94.

3. The Enterprise Model

a. Loss Shifting

Under the so-called "enterprise model,"²²³ strict liability is an appropriate response because the actor who caused the loss should bear the loss.²²⁴ The rationale is that the seller is in a better position to absorb the damages than the consumer.²²⁵ Thus, the loss is shifted to the manufacturer, who can then spread the loss among all consumers of the product by raising the price.²²⁶ A commonly cited example of a judge applying this justification is Justice Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co. of Fresno*.²²⁷ Justice Traynor noted that loss shifting focuses on public policy: "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by

223. See generally 1 SPEISER ET AL., *supra* note 154, § 1:30 (summarizing enterprise model).

224. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring); see also FOWLER V. HARPER ET AL., *THE LAW OF TORTS* 195, 195-96 (2d ed. 1986); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 500-01 (1961).

225. *Wright v. Newman*, 735 F.2d 1073, 1077 (8th Cir. 1984); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986); Calabresi, *supra* note 224, at 500-01; see also KEETON ET AL., *supra* note 143, § 75, at 537:

The courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is seeking a benefit or a profit from such activities, and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim. The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it.

226. *Wright*, 735 F.2d at 1077; *Becker v. IRM Corp.*, 698 P.2d 116, 123 (Cal. 1985); *Halphen*, 484 So. 2d at 118-19; Calabresi, *supra* note 224, at 500-01. But see RICHARD A. POSNER, *TORT LAW (CASES AND ECONOMIC ANALYSIS)* 517-18 (1982) (challenging loss shifting as an adequate rationale for strict liability). A similar concept is the "deep pockets" rationale, which holds that "losses can be reduced most by placing them on the categories of people least likely to suffer substantial social or economic dislocations as a result of bearing them, usually thought to be the wealthy." CALABRESI, *supra* note 204, at 40. Power companies would be likely candidates for liability under a deep pockets rationale as well because power companies are generally wealthier than individual property owners.

227. 150 P.2d 436, 440-46 (Cal. 1944) (Traynor, J. concurring). In *Escola*, a waitress in a restaurant was injured when a Coca Cola bottle exploded in her hand. *Id.* at 437-38. The majority upheld an award of damages based upon *res ipsa loquitur*, holding that "the thing speaks for itself": only a defective Coca Cola bottle will explode. *Id.* at 440. Concurring, Justice Traynor agreed with the result, but opined that a theory of strict liability was more appropriate:

I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.

Id. (Traynor, J., concurring); see also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 431-33 (1988) (discussing Justice Traynor's concurrence in *Escola*).

the manufacturer and distributed among the public as a cost of doing business.”²²⁸ In adopting Justice Traynor’s loss shifting rationale in *Greenman v. Yuba Power Prod., Inc.*,²²⁹ the California Supreme Court noted that “[t]he purpose [of strict liability] is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”²³⁰

b. Internalization of Costs

Loss shifting essentially requires that profit-motivated actors pay for all losses their activities generate.²³¹ Losses that the actor should bear include “externalities.”²³² An externality is a “spillover effect” from an activity that is not considered by the actor at the time the actor decides the manner in which the activity will be accomplished.²³³ The most common example of an externality is pollution.²³⁴ Suppose a factory emits smoke that damages a neighboring farm’s crops. This damage is an externality in that it is external to the factory’s operation.²³⁵ Stated another way, the damage caused by the smoke falls upon someone other than the factory.

Regardless of the social value of an actor’s activity, the actor should internalize the loss if the activity exposes others to the loss.²³⁶ The actor can internalize losses by raising the cost of the service or product, thus spreading the loss among consumers.²³⁷ Externalities are inefficient; therefore, by requiring actors to internalize losses, society benefits.²³⁸

228. *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

229. 377 P.2d 897 (Cal. 1963).

230. *Id.* at 901; see also HARPER ET AL., *supra* note 224, at 195.

231. See A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 98-99 (1983); see also Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); *Wright v. Newman*, 735 F.2d 1073, 1077 (8th Cir. 1984); *Langan v. Valicopters, Inc.*, 567 P.2d 218, 222 (Wash. 1977); *Atlas Chemical Indus., Inc. v. Anderson*, 514 S.W.2d 309, 315-16 (Tex. Civ. App. 1974), *aff’d in part and rev’d in part*, 524 S.W.2d 681 (Tex. 1975).

232. COOTER & ULEN, *supra* note 227, at 169.

233. Steiner, *supra* note 193, at 229; see also COOTER & ULEN, *supra* note 227, at 169 (defining externalities as “a cost or benefit that the voluntary actions of one or more people impose or confer on a third party or parties without their consent”). The concept of externalities is discussed at length in Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

234. See, e.g., COOTER & ULEN, *supra* note 227, at 170.

235. See *id.*

236. See Calabresi, *supra* note 224, at 500-01.

237. See *id.*

238. “Efficiency can be restored by getting the externality-generator to internalize these external effects.” COOTER & ULEN, *supra* note 227, at 170.

c. Application of the Enterprise Model

Applying the principles of the enterprise model (loss shifting and internalization of costs) to the three principal views addressing compensability for diminution in market value caused by the public's fear, the majority view emerges as superior. First, the minority view is contrary to the rationales behind the enterprise model. The minority view imposes the loss in all cases upon the injured person,²³⁹ who is unable to spread the risk.²⁴⁰ Moreover, the minority view perpetuates an externality: it allows power companies to expose landowners to a loss (the diminution in market value caused by the public's fear) yet does not require power companies to compensate landowners for the loss.²⁴¹ The minority view denies compensation to landowners even if the public's fear causes a reduction in market value.²⁴² Allowing power companies to escape liability for this loss allows them to externalize the loss.²⁴³

The intermediate view fails to incorporate fully the enterprise model because the view does not always impose the loss upon the responsible actor.²⁴⁴ The intermediate view, however, is a move toward the enterprise model. Once a landowner establishes the reasonableness of the fear, the court imposes liability upon the power company, not the individual.²⁴⁵ The intermediate view merely imposes an additional burden upon the landowner, the burden of proving the reasonableness of the fear.²⁴⁶

Of the three views, the majority view most adequately advances the goals of the enterprise model. The majority view holds that if the landowner establishes that the public's fear has depressed the market value of the land, then the loss is imposed upon the power company in all cases.²⁴⁷ This is the best and most fair result because power companies are better equipped to bear the loss than innocent property owners.²⁴⁸ Also, because most

239. *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

240. *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (Cal. 1963); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986).

241. See, e.g., *Keystone Lime*, 67 So. at 837.

242. *Id.* at 835.

243. See COOTER & ULEN, *supra* note 227, at 170.

244. See Calabresi, *supra* note 224, at 500-01.

245. *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 279 (Kan. Ct. App. 1981).

246. *Id.* at 279.

247. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987).

248. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986).

power companies are motivated by profit,²⁴⁹ they should pay for all losses their activities generate.²⁵⁰ The majority view incorporates this philosophy and rightly imposes the risk of market devaluation upon power companies, who, like manufacturers, can distribute the loss among the public as a business cost.²⁵¹

Indeed, courts following the intermediate and majority views have used loss shifting rationales in holding for landowners. For example, the Willsey court opined that “[i]f [loss caused by the public’s fear] is proven to the satisfaction of the jury we see no reason why the landowner should bear the loss rather than the customers for whose benefit the loss is inflicted.”²⁵² Courts following the majority view also have used loss shifting rationales.²⁵³

Importantly, society experiences a net gain when power companies are required to internalize the problems associated with EMF because power companies will continue to research the effects of EMF, educate the public about EMF, and practice prudent avoidance.²⁵⁴ If power companies are not held responsible for this loss, it is less likely that they will continue to engage in such beneficial activities.

IV. BALANCING INTERESTS

One must distinguish, however, power companies from actors who are either unable to avoid costs, spread the loss, or who provide significant societal benefits when measured against the landowner’s interests, and who thus should not be required to compensate a private landowner. For example, it may be inappropriate to require compensation where homeless shelters, homes for maladjusted teens, or AIDS hospices have caused a

249. Power companies are regulated by the government, but profit does play a part in the decisionmaking process. Bogardus, *supra* note 220, at 1738-39.

250. See VANDALL, *supra* note 144, at 21; Bogardus, *supra* note 220, at 1721-24 (discussing processes involving ratemaking and assurances of reasonable profit).

251. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986). In fact, power companies frequently reflect the costs of litigating EMF claims, including tort damage awards, in utility rates, thus illustrating loss shifting in action. See Bogardus, *supra* note 220, at 1725; see also *In re Public Serv. Co. of Ind., Inc.*, 112 Pub. Util. Rep. (PUR) 4th 94, 124 (Ind. Util. Regulatory Comm’n 1990); *In re South Carolina Elec. & Gas Co.*, 37 Pub. Util. Rep. (PUR) 4th 441, 463 (S.C. Pub. Serv. Comm’n 1980).

252. *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 278 (Kan. Ct. App. 1981). For a discussion of Kansas’s move to the majority view, see *supra* part II.C.4.

253. E.g., *San Diego Gas & Elec. Co. v. Daley*, 253 Cal. Rptr. 144, 151 (Ct. App. 1988) (citing *Willsey*, 631 P.2d at 278).

254. Cf. Bogardus, *supra* note 220, at 1705-06 (noting the significant amount of money power companies are spending on research and education).

diminution in an individual's property value. The intermediate view would probably hold that fear of these activities is unreasonable, and thus noncompensable.²⁵⁵ The minority view would not allow recovery even if the fear were reasonable.²⁵⁶

There is the possibility, however, that even in majority view jurisdictions, courts could make a policy judgment and hold against the landowner. As an analogy, in *Davis v. Dinkins*,²⁵⁷ homeowners near a privately owned hotel sought to enjoin the hotel from being used as a shelter for homeless families.²⁵⁸ The homeowners claimed that the presence of the shelter had caused a diminution in their property values.²⁵⁹ The court declined to issue the injunction on public policy grounds, noting that "the granting of such relief is inappropriate under the circumstances now existing in New York City. The indisputable compelling need to provide temporary housing for homeless families clearly makes it an abuse of discretion to preclude the use of a hotel which is already housing these families."²⁶⁰ It is apparent that even if the homeowners could have demonstrated that the shelter had caused a diminution in property value, the court still would have denied the injunction because of the important societal interest in providing shelter for the homeless.²⁶¹ Another court, facing the same issue, reached a similar conclusion, noting that "a balancing of the equities lies decidedly in favor of defendants' continued operation of this homeless shelter."²⁶²

If court-made policy is objectionable, the legislature could make a policy judgment that the doctrine of strict liability is inappropriate in a specific instance. The legislature might decide that a particular societal need outweighs the interests of an individual. For example, there may come a time when a property owner attempts to recover for a diminution in property value

255. See discussion *supra* part II.B.

256. See discussion *supra* part II.A.

257. 585 N.Y.S.2d 978 (Sup. Ct. 1992), *aff'd* in part and *rev'd* in part, 613 N.Y.S.2d 933 (App. Div. 1994).

258. *Id.* at 981.

259. *Id.* at 982.

260. *Id.*

261. *Id.*; see also *Sunderland Family Treatment Serv. v. City of Pasco*, 903 P.2d 986, 993 (Wash. 1995) (*en banc*) (holding that denial of special use permit for group home crisis center on grounds that fear of home's clientele reduced area property values "would be based on unsubstantiated fears" and "is not competent nor substantial evidence").

262. *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 989 (N.Y. Sup. Ct. 1989). But see *Steadham v. Board of Zoning Adjustment*, 629 So. 2d 647 (Ala. 1993) (finding a challenge to a zoning variance permitting the facility for juvenile offenders permissible because there was evidence that the proposed use could result in diminished property value).

when an entity attempts to establish a home for AIDS victims in a residential neighborhood. A property owner might argue that his or her land has been devalued because some potential purchasers might be afraid of contracting this deadly disease.²⁶³ Legislatures may decide that in such situations a property owner will not be permitted to recover for this loss, even if a governmental agency is in charge of the home.²⁶⁴ The legislature might reason that allowing a damages award in this situation would have the adverse effect of eliminating a great social value, especially if the service did not have either the resources to litigate the claim or the ability to spread the loss. Thus, in this situation, the balance may tip in favor of the AIDS hospice.²⁶⁵

Indeed, legislatures have acted to prevent imposition of strict liability when the balance has favored protection of a certain activity. For example, in an effort to promote the health and welfare of the community by protecting the societal value hospitals and blood banks provide, legislatures in most states have decided to shield those institutions from strict liability claims by plaintiffs who contract AIDS from blood transfusions.²⁶⁶ The legisla-

263. Cf. *Association of Relatives & Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Admin. or Administracion de Reglamentos y Permisos (A.R.P.E.)*, 740 F. Supp. 95, 99 (D.P.R. 1990) (defendant opposed group's efforts to establish AIDS hospice in part because of fear the hospice might devalue surrounding property); *Poff v. Caro*, 549 A.2d 900, 902 (N.J. Super. Ct. Law Div. 1987) (landlord violated anti-discrimination laws by refusing to rent to homosexuals; landlord "feared that they might later acquire AIDS and thereby endanger his family").

264. A court could make this judgment as well. For example, in *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992), the Michigan Supreme Court stated:

In short, we do not agree with the dissent's suggestion that wholly unfounded fears of third parties regarding the conduct of a lawful business satisfy the requirement for a legally cognizable injury as long as property values decline. Indeed, we would think it not only "odd," but anachronistic that a claim of nuisance in fact could be based on unfounded fears regarding persons with AIDS moving into a neighborhood, the establishment of otherwise lawful group homes for the disabled, or unrelated persons living together, merely because the fears experienced by third parties would cause a decline in property values.

Id. at 726 (citations omitted).

265. If there is no legislative action, a court also might hold that, on balance, it would not be appropriate to require the hospice to pay for this loss. See *Good Shepherd Episcopal Church*, 550 N.Y.S.2d at 989.

266. See *Roberts v. Suburban Hosp. Ass'n, Inc.*, 532 A.2d 1081, 1086 n.3 (Md. Ct. Spec. App. 1987) (listing 48 jurisdictions with statutes excluding strict liability as basis for holding blood banks and hospitals liable in suits by plaintiffs who contract AIDS from blood transfusions). At the time of the Roberts opinion, only New Jersey, the District of Columbia, and Vermont did not have a blood shield statute. *Id.* New Jersey and District of Columbia courts previously had concluded that blood banks were immune from strict liability. See *Brody v. Overlook Hosp.*, 317 A.2d 392, 398 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 332 A.2d 596 (N.J. 1975); *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048, 1060-1061 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988). Moreover, Vermont has since adopted a blood shield statute. VT. STAT. tit. 9A, § 2-108 (1995). See also Michael J. Miller, *Strict Liability, Negligence and the Standard of Care for Transfu-*

tures apparently fear requiring "providers to serve as insurers of the safety of these materials [because such a requirement] might impose such an overwhelming burden as to discourage the gathering and distribution of blood."²⁶⁷

Therefore, while the majority view, supported by strict liability rationales, encourages imposition of losses caused by the public's fear upon the actor most responsible for the fear, it does not preclude courts or legislatures from recognizing that the balance may tip against the landowner where overriding societal interests are at stake.²⁶⁸

V. CONCLUSION

EMF litigation involving market devaluation of property caused by the public's fear is an area of the law fraught with uncertainty. It is unlikely that a single approach will be adopted by every jurisdiction. However, the recent defection of New York and Kansas to the majority view, New Mexico's adoption of the majority view in 1992, and the propensity of jurisdictions to reverse years of precedent by switching to the majority view (as did Florida) may indicate that significant change is on the horizon.²⁶⁹

A strict liability approach to compensability for diminished property value caused by the public's fear is preferable to other approaches, such as a negligence-based approach. At its core, the majority view is essentially strict liability. The rationales for strict liability support movement to the majority view and rejection of the intermediate and minority views. Corrective justice requires that the interests of the landowner take precedent. Moreover, not only does the majority view reduce transaction costs, power companies also are the cheapest cost avoider because they have more resources to reduce the risks of EMF. Finally, power companies are better able to internalize costs, including the recovery of EMF litigation costs, by spreading the loss among

sion-Transmitted Disease, 36 ARIZ. L. REV. 473, 490 (1994) ("These states did not want to inhibit the exercise of sound medical judgment and restrict the availability of knowledge, skill and material by allowing recovery based on liability without fault.").

267. *Zichichi v. Middlesex Memorial Hosp.*, 528 A.2d 805, 810 (Conn. 1987); see also *Kozup*, 663 F. Supp. at 1059; *Garvey v. St. Elizabeth Hosp.*, 697 P.2d 248, 249 (Wash. 1985) ("The public policy represented by these statutes is not difficult to discern: blood transfusions are essential in the medical area . . .").

268. See, e.g., *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528, 537 (Kan. 1991) ("A condemnation proceeding is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner.").

269. See *Brandon*, supra note 2, at 43 (noting that defection of Florida and New York to majority view "is likely to influence the remaining courts across the country").

consumers.²⁷⁰ Therefore, courts should adhere to the majority view and hold that as long as it is established that the public's fear diminishes property value, the loss is compensable. If situations arise where the balance tips against the property owner and in favor of great societal interests, courts or legislatures can create exceptions to the general rule. Thus, strict liability analysis demonstrates that between the innocent property owner and the better-equipped power company, courts should hold the latter responsible for market devaluation of property caused by the public's fear of power lines.

270. The majority view is the correct result for another reason. It imposes the loss upon the general public, which not only receives the benefit of electricity from power lines, but also whose fear (unfounded or not) ultimately results in the devaluation of the landowner's property. Cf. *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 277-78 (Kan. Ct. App. 1981) (“[W]e see no reason why the landowner should bear the loss rather than the customers for whose benefit the loss is inflicted.”).