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The Unable to Agree Requirement and Texas Condemnation Law: A Critical Analysis of Hubenak v. San Jacinto Gas Transmission Co..

B. Tyler Milton

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**THE “UNABLE TO AGREE” REQUIREMENT AND TEXAS
CONDEMNATION LAW: A CRITICAL ANALYSIS OF
*HUBENAK v. SAN JACINTO GAS TRANSMISSION CO.***

B. TYLER MILTON

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I. INTRODUCTION

Beginning with King Ahab's seizure of Naboth's vineyard¹ and the Roman expropriation of land for aqueducts,² to the acquisition of easements for natural gas pipelines by power companies³ endowed with eminent domain power by a sovereign state,⁴ the capacity to acquire a person's land without his consent has been present in one form or another for centuries.⁵ In order to reconcile the glaring inequity of unconsented takings with the state's imperative need to have eminent domain power, commentators dating back to the seventeenth century have advocated for the remedial caveat of just compensation—an equitable concept that now provides the principle source of condemnation litigation.⁶

1. See William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 553 (1972) (recognizing that some authorities claim King Ahab's seizure of Naboth's vineyard was the first recorded exercise of eminent domain power).

2. *Id.* at 553-54 (emphasizing that the Romans likely expropriated land and materials for construction of roads and aqueducts, even though no explicit evidence exists of this action).

3. See TEX. UTIL. CODE ANN. § 181.004 (Vernon 2004) (defining the term "power companies" as gas or electric corporation[s]).

4. See *id.* §§ 181.004, 181.008 (Vernon 2004) (conferring eminent domain power on certain nonstate entities, including natural gas companies). See generally *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004) (adjudicating a dispute between respective landowners and nine separate utility companies seeking to acquire an easement for the purpose of constructing a pipeline).

5. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 507 (7th ed. 2004) (noting that despite the absence of a constitutional provision enumerating an eminent domain power, the Supreme Court has generally held that the power of eminent domain is an incident of federal sovereignty as well as political necessity (citing *Bauman v. Ross*, 167 U.S. 548, 574 (1897); *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 681 (1896))).

6. See *id.* (citing WILLIAM BLACKSTONE, 1 COMMENTARIES at 139; GROTIUS, DE GROTIUS, DE JURE BELLI ET PACIS LIB. III. C. 20 VII 1 (1625)) (pointing out that both Blackstone and Grotius argued that the state could only take private property when reasonable compensation was provided); see also MADISON RAYBURN, TEXAS LAW OF CONDEMNATION: A PRACTICAL APPLICATION OF THE LEGAL PRINCIPLES OF EMINENT DOMAIN AND LAND DAMAGES § 1, at 3 (1960) (asserting that the source for the incorporation of "just compensation" into Texas law is found in the case of *Texas Highway Department v. Weber*, 147 Tex. 628, 219 S.W.2d 70 (1949), which first recognized limitations on the right of the sovereign to take private property). Specifically, the Texas Supreme Court held in *Weber*:

[T]he state in the exercise of its sovereign authority has the right to take, damage, or destroy private property for a public use, subject, of course, to the right of the owner thereof to adequate compensation. These principles of law are so well established and uniformly recognized that it is trite to repeat them.

Tex. Highway Dep't v. Weber, 147 Tex. 628, 631, 219 S.W.2d 70, 71 (1949); 1 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 1.14[2], at 1-23 (3d ed. 2004) (recognizing that under the natural law theory, the state has a superior right to private property, yet the individual similarly has a right to compensation).

In Texas, like a majority of other states,⁷ the state constitution follows the lead of the United States Constitution and requires adequate compensation as a predicate to a taking of private property for a public use.⁸ Though an eminent domain cause of action has both a constitutional and statutory basis, the requirement of adequate or just compensation is premised on principles of natural equity and justice.⁹ In order to foster this requirement of adequate compensation and to preclude costly litigation and unnecessary appeals,¹⁰ Texas statutorily mandates that a condemnor of land must, prior to the institution of a condemnation proceeding, plead and prove that the two parties were “unable to agree” on the corresponding compensation due to the landowner.¹¹ Texas courts interpreted the unable to agree requirement in the condemnation statute to compel “good faith negotiations” or a “bona fide” effort or attempt at agreement between the condemnor and the landowner.¹² Nevertheless, in *Hubenak*

7. Compare JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 508 (7th ed. 2004) (identifying the near universal inclusion of eminent domain statutes in state constitutions, yet pointing out that North Carolina is the only state without an eminent domain provision in its constitution), with *Weber*, 219 S.W.2d at 72 (recognizing that there is at least some form of a just compensation provision appearing in the constitutions of all the states of this nation).

8. Compare TEX. CONST. art. I, § 17 (“No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . .”), with U.S. CONST. amend. V (stating “nor shall private property be taken for public use, without just compensation”), U.S. CONST. amend. XIV (reiterating “nor shall any State deprive any person of life, liberty, or property without due process of law”), and *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 235-36 (1897) (concluding that due process mandates that the property be condemned for a public use and the landowner be compensated).

9. 3 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 4.8, at 4-41 (3d ed. 2004) (highlighting that a failure to observe the right of just compensation “has been held to be a violation of the ‘unwritten law,’ . . . against ‘natural equity,’ and a travesty of ‘natural justice’” (citing *Va. & Truckee R.R. v. Henry*, 8 Nev. 165 (1873); *Johnston v. Rankin*, 70 N.C. 550 (1874); *Ex parte Martin*, 13 Ark. 198 (1853)) (footnotes omitted)).

10. See *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ) (recognizing that the purpose of the condemnation statute is to “forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties”).

11. See TEX. PROP. CODE ANN. § 21.012 (Vernon 2004) (enumerating that a condemning entity may commence a condemnation action by filing a petition which must, among other things, “state that the entity and the property owner are unable to agree on the damages”).

12. See *McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 83 S.W.3d 205, 208 (Tex. App.—Dallas 2002, no pet.) (recognizing that a condemning entity must make a bona fide attempt to agree with the landowner as to the damages resulting from the taking in order to satisfy the unable to agree requirement of the condemnation statute), *disapproved of by Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 183 (Tex. 2004); *Texas v. Schmidt*, 894 S.W.2d 543, 544-45 (Tex. App.—Austin 1995, no writ) (indicating that the

v. San Jacinto Gas Transmission Co.,¹³ the Texas Supreme Court failed to find this directive within the statute, and concluded that the terms good faith negotiations and unable to agree were dissimilar.¹⁴ Further, the court concluded that the evidentiary standard corresponding to the unable to agree requirement was minimal and therefore unworkable within the more complex good faith framework.¹⁵

This Comment analyzes the current state of condemnation law in Texas in light of the recent Texas Supreme Court decision in *Hubenak*. Initially, this Comment provides a brief background on the law of eminent domain and the condemnation process in Texas, including an abbreviated overview of condemnation law precedent in Texas prior to the *Hubenak* decision. Part III carves the *Hubenak* decision into two sections: (1) the case

statutory requirement requiring the condemner to establish an inability to agree with the landowner as to the damages resulting from the condemnation refers to a “bona fide attempt to agree on damages, which includes a bona fide offer by the condemner to pay the estimated true value of the land”), *disapproved of by Hubenak*, 141 S.W.3d at 183. The Third Court of Appeals in Austin noted that the purpose of this requirement is to encourage the condemner to offer the true value of the land. *Id.*; *State v. Hipp*, 832 S.W.2d 71, 78 (Tex. App.—Austin 1992) (holding that the statutory prerequisite requiring the condemning entity to both plead and prove an inability to agree “may be satisfied if the condemner makes a single bona fide offer to a landowner that the condemner in good faith feels is the amount of compensation due, and the landowner rejects that offer”), *rev'd on other grounds sub nom. State v. Dowd*, 867 S.W.2d 781 (Tex. 1993). Specifically, the Austin Third Court of Appeals further emphasized that to be considered an offer in good faith “the offer must be made in or with good faith; honestly, openly, and sincerely; without deceit or fraud.” *Id.* at 78 (quoting BLACK’S LAW DICTIONARY 160 (5th ed. 1979)). Furthermore, the court noted that a good faith offer must be based on a reasonably thorough investigation combined with an “honest assessment of the amount of compensation due the landowner as a result of the condemnation.” *Id.* at 78-79; *see also Precast Structures, Inc. v. Houston*, 942 S.W.2d 632, 635-36 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that the City of Houston made a bona fide purchase offer as to the damages to the property owner and that this offer under *Dowd* was sufficient to meet the unable to agree requirement of the condemnation statute); *disapproved of by Hubenak*, 141 S.W.3d at 183; *Lapsley v. Texas*, 405 S.W.2d 406, 411 (Tex. Civ. App.—Texarkana 1966, writ ref’d n.r.e.) (advancing that a good faith negotiation requires an effort by the condemner to investigate all aspects of value in furtherance of the statutory objective of settlement rather than litigation); *Rankin*, 303 S.W.2d at 457 (emphasizing that the key issue was whether the county, prior to the condemnation proceedings, made a good faith effort to agree with the landowners on the amount of compensation to be paid for the property involved); *Schlottman v. Wharton County*, 259 S.W.2d 325, 331 (Tex. Civ. App.—Fort Worth 1953, writ dismissed) (suggesting that the purchase offer made by the condemning entity needs to be “for the interest sought in the land in question” in order to be considered an offer of good faith), *disapproved of by Hubenak*, 141 S.W.3d at 183.

13. 141 S.W.3d 172 (Tex. 2004).

14. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 185-86 (Tex. 2004).

15. *See id.* (alluding to case law which “has required minimal evidence to satisfy the ‘unable to agree’ requirement” and contending that a subjective inquiry would be “anti-thetical” to the statutory purpose).

history of the nine cases that were eventually consolidated by the Texas Supreme Court and (2) the majority opinion of the court which Justice Owen authored. Part IV anticipates the potential problems and effects that are likely to emanate from the court's majority opinion, while Part V takes those same problems and effects, seeking to find a solution in other states' precedents as well as other areas of Texas law. Lastly, while Part VI proposes that Texas courts require condemning entities to make a single, pre-suit good faith offer which encompasses only those property rights that will be condemned, Part VII highlights that such a requirement would not only further the statutory purpose of encouraging negotiation, but also effectuate a more fair and stable condemnation process.

II. BACKGROUND

A. *Eminent Domain and Condemnation Defined*

Although the terms eminent domain and condemnation are often used interchangeably, in fact, they take on slightly different denotations. Eminent domain is the "inherent power of a governmental entity to take privately owned property . . . and convert it to public use, subject to reasonable compensation."¹⁶ In contrast, condemnation is "the exercise of eminent domain."¹⁷ Corollary to the power of eminent domain is the requisite need for just compensation.¹⁸ Despite the constitutional mandate of just compensation for public takings,¹⁹ only two of the original state constitutions adopted between 1776 and 1780 compelled the state to pay compensation when private property was taken for a public use.²⁰ Nonetheless, state courts, in recognition of natural justice principles combined with the need to protect private property interests, required state entities condemning property to offer compensation payments in return for the public taking.²¹

16. BLACK'S LAW DICTIONARY 562 (8th ed. 2004).

17. *Id.* at 310.

18. *See* TEX. CONST. art. I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; . . .").

19. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

20. *See* J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 (1931) (noting that only the Vermont and Massachusetts Constitutions required compensation upon the taking of private property for a public use).

21. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.11, at 508 (7th ed. 2004) (contending that state courts, in following doctrines of natural justice, generally issued two requirements with respect to takings: (1) that they be for a public use, and (2) that they be made only "upon the payment of just compensation"); *see also* Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 COLUM. L. REV. 596, 600-01

B. *The Condemnation Procedure in Texas*

Land condemnation in Texas is a two-part in rem procedure that involves: (1) an administrative hearing conducted by special commissioners, and (2) a judicial proceeding, if needed.²² While eminent domain power was reserved exclusively in the state,²³ currently in Texas a private entity may condemn land if it has an express grant of eminent domain power; otherwise, it is blocked from taking private property.²⁴ Once an entity decides to condemn a piece of land or other property interest for public use, it usually attempts to reach an agreement with the landowner regarding any damages that result from the taking.²⁵ If the two parties are unable to agree on the amount of just compensation, the condemning party's first step is to file a petition seeking condemnation in either a district court or a county court at law in the county in which the land is located.²⁶ In order for the condemning party to satisfy the prerequisites of the condemnation statute, the petition must: (1) describe the property to be condemned; (2) state the purpose for which the entity intends to use the property; (3) state the name of the owner of the property if the owner is known; and (4) state that the entity and the property owner are unable to agree on the damages.²⁷ That said, if a condemnor alleges an "inability to

(1942) (espousing that courts eventually discovered that the principles of natural justice sustain and ensure the idea of compensation for takings).

22. See *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 241 (Tex. 1984) (pointing out that the Texas land condemnation process involves two stages: first, an administrative proceeding and second, if necessary, a judicial proceeding).

23. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.10, at 505 (7th ed. 2004) (recognizing that the federal and state governments, as sovereign bodies, have the power of eminent domain).

24. See generally MADISON RAYBURN, TEXAS LAW OF CONDEMNATION: A PRACTICAL APPLICATION OF THE LEGAL PRINCIPLES OF EMINENT DOMAIN AND LAND DAMAGES § 13(2), at 31-32 (1960) ("It is generally held that unless the state legislature gives an express power to some other governmental agency, or to some private corporation to exercise the power of eminent domain, such power does not exist." (citing *Ryan v. State*, 21 S.W.2d 597 (Tex. Civ. App.—Waco 1929, no writ); *Isaac v. City of Houston*, 60 S.W.2d 543 (Tex. Civ. App.—Galveston 1933, writ dismissed))).

25. Cf. *Amason*, 682 S.W.2d at 241 (stressing that "[w]hen a party desires to condemn land for public use but cannot agree on settlement terms with the landowner, that party must [first] file a statement seeking condemnation in the proper court, either district court or county court at law, of the county in which the land is located"); *State v. Schmidt*, 894 S.W.2d 543, 544 (Tex. App.—Austin 1995, no writ) (noting that the condemnor must establish that it was unable to agree with the landowner as to the damages resulting from the condemnation), *disapproved of by Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 183 (Tex. 2004).

26. TEX. PROP. CODE ANN. §§ 21.001, 21.012, 21.013 (Vernon 2004); see also *Amason*, 682 S.W.2d at 241 (detailing the condemnation process in Texas).

27. TEX. PROP. CODE ANN. § 21.012(b).

agree” without ever having made an offer, the condemnor and its attorney could face sanctions under the Texas Rules of Civil Procedure.²⁸

The administrative aspect of the proceeding occurs upon the filing of the condemnation petition, when the trial court judge appoints “three disinterested freeholders” who reside in the same county to serve as special commissioners to assess the damages to the landowner.²⁹ In a likely attempt to preclude corruption, the special commissioners “swear to assess damages fairly, impartially, and according to the law,”³⁰ and their power is limited to deciding and filing in the appropriate court the corresponding amount of damages, which is normally the fair market value of the subject property.³¹ If the landowner appears at the special commissioners’ hearing or alternatively, withdraws the commissioners’ award from the registry of the court, it becomes conceded that the parties are unable to agree for purposes of the condemnation statute’s requirements,³² and

28. TEX. R. CIV. P. 13 (dictating that a party who signs a pleading, motion or other paper that is not truthful can be subject to sanctions by the presiding court); *see also* Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172, 181, 184 (Tex. 2004) (Jefferson, J., concurring) (emphasizing that an offer is a requisite to claiming an “inability to agree”).

29. *See* TEX. PROP. CODE ANN. § 21.014(a) (Vernon 2004) (“The judge . . . shall appoint three disinterested freeholders who reside in the county as special commissioners to assess the damages of the owner of the property being condemned.”).

30. *Id.* § 21.014(b).

31. *See id.* § 21.014(a) (stating that the judge to whom the “case is assigned shall appoint three disinterested freeholders who reside in the county as special commissioners . . . the judge appointing the special commissioners, shall give preference to persons agree on by the parties”); *see also* Amason, 682 S.W.2d at 242 (noting that a special commissioner’s role is limited to filing in the proper court the corresponding compensation due for the condemnation).

32. *Compare* Hubenak, 141 S.W.3d at 181 (stating that if the landowner “makes his appearance before the special commissioners and resists the condemnation proceedings upon the merits, he thereby waives whatever lack of efforts to reach a settlement there might have been” (quoting Jones v. City of Mineola, 203 S.W.2d 1020, 1023 (Tex. Civ. App.—Texarkana 1947, writ ref’d))), Brown v. Lower Colo. River Auth., 485 S.W.2d 369, 371 (Tex. Civ. App.—Austin 1972, no writ) (indicating that by appearing before the special commissioners and resisting the condemnation action on the merits, the landowners waived their objection that the preliminary negotiations did not conform to the statute), Lohmann v. Natural Gas Pipeline Co. of Am., 434 S.W.2d 879, 882 (Tex. Civ. App.—Beaumont 1968, writ ref’d n.r.e.) (citing Jones, 203 S.W.2d at 1023) (recognizing that an appearance and subsequent resistance at the commissioners’ hearing results in a waiver of the landowner’s objection to the sufficiency of negotiations), and Aronoff v. City of Dallas, 316 S.W.2d 302, 306 (Tex. Civ. App.—Texarkana 1958, writ ref’d n.r.e.) (concluding that the landowner’s contention as to the absence of good faith offer was without merit because the landowner “challenged and resisted the right and power of the authorities to condemn the subject property both in the hearing before the Special Commissioners in Condemnation and in the trial in the County Court at Law”), with Amason, 682 S.W.2d at 242 (citing State v. Jackson, 388 S.W.2d 924, 925 (Tex. 1965) (pointing out that if a property owner with-

as a result, the only issue to be adjudicated is the fair market value of the land.³³ Alternatively, the landowner may choose to not participate at the hearing—when this happens, the commissioners continue with the hearing and enter findings accordingly.³⁴

At this point, if either party is dissatisfied with the special commissioners' decision, the dissatisfied party may object to the findings by timely filing a written statement of its objections in the court of jurisdiction.³⁵ If this filing occurs, the court of jurisdiction will hold a trial *de novo* in order to ascertain the fair market value of the property and hence, the compensation owed to the landowner.³⁶ Importantly, subsequent to the commissioners' findings, the condemnor may take possession of the property pending the results of the litigation.³⁷ This is allowed as long as the condemnor follows section 21.021 of the Texas Property Code, which requires that the condemning entity either pay the landowner directly or deposit the amount of damages awarded by the commissioners into the registry of the court and execute a bond securing the payment of additional costs, unless it is the state.³⁸

draws the commissioners' award from the court's registry, he effectively waives his right to contest the condemnor's eminent domain power), *and* *McConnico v. Tex. Power & Light Co.*, 335 S.W.2d 397, 399-400 (Tex. Civ. App.—Beaumont 1960, writ ref'd n.r.e.) (finding that even though the landowners had a good argument as to the insufficiency of negotiations, they waived their objections by both appearing at the commissioners' hearing and withdrawing the amount of damages awarded by the commissioners from the court's registry), *disapproved of by* *Callejo v. Brazos Elec. Power Coop., Inc.*, 755 S.W.2d 73, 75 (Tex. 1988).

33. *See Amason*, 682 S.W.2d at 242 (indicating that if the property owner waives the right to challenge the condemning entity's eminent domain power, all that is left to determine is the value of the land).

34. *Cf. Hubenak*, 141 S.W.3d at 180 (providing that none of the landowners in any of the nine consolidated trials participated at the commissioners' hearing, and instead, they first raised their objections as to the absence of good faith negotiations at the trial court proceeding).

35. TEX. PROP. CODE ANN. § 21.018(a) (Vernon 2004); *see also* *Amason*, 682 S.W.2d at 242 (stating that if the landowner is not satisfied with the commissioners' award, the landowner must timely file an objection in the court of jurisdiction).

36. *See* TEX. PROP. CODE ANN. § 21.018(b) (stating that the "court shall cite the adverse party and try the case in the same manner as other civil causes"); *see also* *Austin Home Ctr. Assoc. v. State*, 794 S.W.2d 593, 594 (Tex. App.—Austin 1990, no writ) (indicating that the trial following the commissioners' hearing is held *de novo*).

37. TEX. PROP. CODE ANN. § 21.021 (Vernon 2004).

38. TEX. PROP. CODE ANN. § 21.021(a)(1)-(a)(3) (Vernon 2004). The Texas Property Code details the procedure as follows:

(a) After the special commissioners have made an award in a condemnation proceeding . . . the condemnor may take possession of the condemned property pending the results of further litigation if the condemnor:

C. *Condemnation in Texas Prior to Hubenak*

1. The Requirements of the Condemnation Statute Were Jurisdictional

As noted earlier, a condemnation petition must comply with section 21.012(b) of the Texas Property Code.³⁹ In 1943, the former Galveston Court of Civil Appeals concluded that these four requirements in the condemnation statutes were “special and summary in character,” and as such, the condemning party must strictly adhere to them or else the proceedings would be voided as a penalty for nonadherence.⁴⁰

Five years later, in a decision for which the writ of error was refused, giving it the same force and effect as a Texas Supreme Court opinion, the Galveston Court of Civil Appeals reinforced its prior holding by concluding that the vesting of jurisdiction in the trial court was contingent upon the condemnor’s ability to plead and prove that it was unable to agree with the landowner on the value of the land to be condemned.⁴¹ Since

(1) pays to the property owner the amount of damages and costs awarded by the special commissioners or deposits that amount of money with the court subject to the order of the property owner;

(2) deposits with the court either the amount of money awarded by the special commissioners as damages or a surety bond in the same amount issued by a surety company qualified to do business in this state, conditioned to secure the payment of an award of damages by the court in excess of the award of the special commissioners; and

(3) executes a bond that has two or more good and solvent sureties approved by the judge of the court in which the proceeding is pending and conditioned to secure the payment of additional costs that may be awarded to the property owner by the trial court or on appeal.

Id.

39. *Id.* § 21.012(b). According to the Texas Property Code, a condemnation petition must: (1) describe the property to be condemned; (2) state the purpose for which the entity intends to use the property; (3) state the name of the owner of the property if the owner is known; and (4) state that the entity and the property owner are unable to agree on damages. *Id.*

40. See *Brinton v. Houston Lighting Power Co.*, 175 S.W.2d 707, 709-10 (Tex. Civ. App.—Galveston 1943, writ ref’d w.o.m.) (emphasizing that other state courts have construed the condemnation statutes to be “special and summary in character[;]” therefore, in the case of incomplete compliance, the proceedings are rendered void), *disapproved of by Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 183 (Tex. 2004); see also *State v. Davis*, 139 S.W.2d 638, 640 (Tex. Civ. App.—Eastland 1940, writ dism’d) (urging that the condemnation statutes are special in character and must be strictly adhered to, otherwise, the respective proceedings are subject to becoming void). The Eastland court continued to state that regarding a condemnation proceeding that ignores the correct statute, “the court will hold them to be void of its own motion.” *Id.*

41. See *City of Houston v. Derby*, 215 S.W.2d 690, 692 (Tex. Civ. App.—Galveston 1948, writ ref’d) (“In order for the City to vest the county court with jurisdiction to condemn appellees’ land, it had to first allege, and then during the proceedings prove, that it

these two decisions, the general precedent as dictated by the Texas courts indicates that the requirements within the condemnation statute are jurisdictional; as such, a failure to strictly comply resulted in a dismissal of the condemnation action based upon lack of jurisdiction.⁴²

2. The Condemnation Statute Contemplated Good Faith

The primary purpose of the condemnation statute is to “forestall litigation and to prevent needless appeals to the courts when the matter may

had failed to agree with the appellees on the value of their land to be taken.” (citing *Isaac v. City of Houston*, 60 S.W.2d 543 (Tex. Civ. App.—Galveston 1933, writ dismissed)), *disapproved of by Hubenak*, 141 S.W.3d at 183 (Tex. 2004); *see also* *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 180-81 (Tex. 2004) (recognizing that the Galveston Court of Appeals’s conclusion in *Derby* that the unable to agree requirement represented a jurisdictional issue was given the same force and effect as an opinion of the Texas Supreme Court because the application for writ of error was refused).

42. *See, e.g.*, *ExxonMobil Pipeline Co. v. Harrison Interests, Ltd.*, 93 S.W.3d 188, 192 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding that the condemnor’s obligation of engaging the landowner in good faith negotiations is a jurisdictional requirement that must be satisfied in accordance with section 21.012 of the Texas Property Code), *disapproved of by Hubenak*, 141 S.W.3d at 183; *McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 83 S.W.3d 205, 209-11 (Tex. App.—Dallas 2002, no pet.) (reversing the trial court’s dismissal of the condemnation proceedings on the basis of lack of jurisdiction because there was insufficient evidence supporting the trial court’s holding that the unable to agree requirement was not satisfied), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 720 (Tex. App.—Corpus Christi 2000, pet. denied) (concluding that the court had jurisdiction to hear the condemnation proceeding because the condemning party satisfied the unable to agree requirement by engaging the landowner in good faith negotiations), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 89 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (“Although the condemning authority must engage in good faith negotiations to acquire the property prior to the filing of [the] suit . . . this requirement has been held to be one of jurisdiction only.”), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Precast Structures, Inc. v. City of Houston*, 942 S.W.2d 632, 635-36 (Tex. App.—Houston [14th Dist.] 1996, no writ) (finding that the trial court had jurisdiction to try the condemnation suit because the condemning entity made a valid and good faith offer, which consequently satisfied the unable to agree requirement), *disapproved of by Hubenak*, 141 S.W.3d at 183; *State v. Schmidt*, 894 S.W.2d 543, 545 n.1 (Tex. App.—Austin 1995, no writ) (“[T]he attempt to agree is a jurisdictional prerequisite to the statutory proceedings.” (citing *Brinton*, 175 S.W.2d at 709-10)), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Tex.-N.M. Power Co. v. Hogan*, 824 S.W.2d 252, 254 (Tex. App.—Waco 1992, writ denied) (noting that the negotiations with one of the joint owners satisfied the jurisdictional requirement of a bona fide effort to agree upon damages), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Schlottman v. Wharton County*, 259 S.W.2d 325, 331 (Tex. Civ. App.—Fort Worth 1953, writ dismissed) (maintaining that an offer, which received no response, was sufficient to satisfy the requisite unable to agree requirement, thereby establishing the court’s jurisdiction), *disapproved of by Hubenak*, 141 S.W.3d at 183.

have been settled by negotiations.”⁴³ As noted earlier, in order to advance this purpose, courts have imposed a good faith requirement on condemning entities.⁴⁴ While some courts have held that good faith means “a bona fide effort on the part of the condemnor to agree” with the landowner concerning the measure of damages and that a mere offer will not discharge such a requirement,⁴⁵ others have concluded that the condemnation statute contemplates good faith negotiations—meaning “an effort by the condemnor to investigate all aspects of value.”⁴⁶ Alter-

43. *Hubenak*, 141 S.W.3d at 184 (quoting *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ)); see also *Schlottman*, 259 S.W.2d at 330 (asserting that the purpose of requiring an effort to agree is to spare time and save expenses when an agreement is feasible).

44. See generally *State v. Hipp*, 832 S.W.2d 71, 77-79 (Tex. App.—Austin 1992) (holding that the statutory prerequisite requiring the condemning entity to both plead and prove an inability to agree “may be satisfied if the condemnor makes a single bona fide offer to a landowner that the condemnor in good faith feels is the amount of compensation due, and the landowner rejects that offer”), *rev’d on other grounds sub nom.* *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993); *Lapsley v. Texas*, 405 S.W.2d 406, 411 (Tex. Civ. App.—Texarkana 1966, writ ref’d n.r.e.) (advancing that a good faith negotiation requires an effort by the condemnor to investigate all aspects of value in furtherance of the statutory objective of settlement rather than litigation); *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ) (emphasizing that the key issue was whether the county, prior to the condemnation proceedings, made a good faith effort to agree with the landowners on the amount of compensation to be paid for the property involved); *Schlottman*, 259 S.W.2d at 331 (suggesting that the purchase offer made by the condemning entity needs to be for the interest sought in the land in question in order to be considered an offer of good faith).

45. See *Brinton*, 175 S.W.2d at 710 (emphasizing that the Texas condemnation statute explicitly requires a preliminary bona fide effort by the condemning entity to agree with the landowner as to the value of the land, if and when it is taken). Significantly, the former Galveston Court of Civil Appeals dismissed the notion that a single offer would suffice in concluding that the unable to agree requirement is not satisfied by a “mere attempt in advance to buy an easement from the owner for a specified price per rod.” *Id.*; see also *Mercier*, 28 S.W.3d at 720 (highlighting that the unable to agree condition refers to a “bona fide attempt to agree on damages”); *Hipp*, 832 S.W.2d at 78 (requiring the evidence to show that prior to the initiation of the condemnation action the condemning entity made a bona fide attempt to agree with the landowner as to the resulting damages); *Curfman v. State*, 240 S.W.2d 482, 484 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e.) (refusing to negate jurisdiction after finding that the statutory requisite of an inability to agree was satisfied because a bona fide effort to agree on the damages was made by the condemnor).

46. *Lapsley*, 405 S.W.2d at 411; see also *Coastal Marine Serv. of Tex., Inc. v. City of Port Neches*, 11 S.W.3d 509, 512 (Tex. App.—Beaumont 2000, no pet.) (expressing that in order to meet the statutory requirement of negotiation, a condemning party needs to fully investigate the value of the property to be condemned to qualify as negotiating in good faith); *City of Houston v. Plantation Land Co.*, 440 S.W.2d 691, 692 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref’d n.r.e.) (representing that a “good faith negotiation” is a preliminary requirement to the condemning entity’s implementation of its eminent domain power).

natively, the Austin Court of Appeals adopted the Black's Law Dictionary definition of a bona fide offer, which defines such an offer as one "made in good faith; without fraud or deceit."⁴⁷

These varied interpretations clearly suggest a lack of uniformity in the courts' construction of the condemnation statute's unable to agree requirement. For the most part, Texas courts have made it clear that in order to satisfy the unable to agree requirement, a condemning party must in some way prove that it made, at a minimum, a good faith effort to agree with the landowner on the amount of damages due for the taking.⁴⁸ Thus, rather than the condemnor entertaining prolonged negotiations or a sequence of offers, the statutory requirement would be satisfied so long as there was a single bona fide offer that was an "honest assessment" (hence, in good faith) of the amount of damages due the landowner.⁴⁹

III. *HUBENAK V. SAN JACINTO GAS TRANSMISSION CO.*

A. *The Case History*

The *Hubenak* decision developed out of a tangled web of nine consolidated condemnation cases,⁵⁰ whose facts were sufficiently analogous to

47. BLACK'S LAW DICTIONARY 186 (8th ed. 2004); see also *Hipp*, 832 S.W.2d at 78 (holding that "the statutory prerequisite [of section 21.012] may be satisfied if the condemnor makes a single bona fide offer to a landowner that the condemnor in good faith feels is the amount of compensation due, and the landowner rejects that offer"). The Third Court of Appeals additionally urged that the offer "must not be arbitrary and capricious; rather, it must be based on a reasonably thorough assessment of the amount of just compensation due the landowner as a result of the taking." *Id.* at 78-79 (citing *Lapsley*, 405 S.W.2d at 411).

48. *Hipp*, 832 S.W.2d at 78 (holding that all a condemnor must do to fulfill the unable to agree requirement is make "a single bona fide offer to a landowner that the condemnor in good faith feels is the amount of compensation due"); see also *Jenkins v. Jefferson County*, 507 S.W.2d 296, 298 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.) (recognizing that both a bona fide attempt to agree and good faith negotiations suggest a more general requirement of good faith with respect to the condemnor's satisfaction of the unable to agree requirement), *disapproved of by Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 183 (Tex. 2004).

49. See *Hipp*, 832 S.W.2d at 78-79 (clarifying that the statutory unable to agree requirement may be satisfied by a single offer, based on a comprehensive investigation, that is in good faith reflective of the damages resulting from the taking).

50. See *Hubenak*, 141 S.W.3d at 180 (stating that this appeal stems from nine separate condemnation actions); see also *MidTexas Pipeline Co. v. Cusack ex rel. Cusack*, 141 S.W.3d 215, 216 (Tex. App.—Corpus Christi 2002) (mem. op.) (declaring that the pipeline company sufficiently established they negotiated in good faith and thus satisfied the unable to agree requirement), *aff'd and remanded*, 141 S.W.3d 172 (Tex. 2004); *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852, 857 (Tex. App.—Texarkana 2002) (finding that the trial court was without jurisdiction to try the condemnation action because there was no evidence that the condemnor "ever made an offer which comprehended only the rights" it

merit a joinder of the actions on appeal to the Texas Supreme Court.⁵¹ In each case, a gas utility company possessing eminent domain power under the Texas Utility Code⁵² sought to condemn land for easements for the construction of a natural gas pipeline.⁵³ The problem in all of the cases stemmed from inconsistencies between the purchase offers for the land and the condemnation petitions which were filed subsequent to the offers.⁵⁴ In all of the cases, the landowners argued that because the

sought by the condemnation), *rev'd*, 141 S.W.3d 172 (Tex. 2004); *MidTexas Pipeline Co. v. Wright, III*, 141 S.W.3d 211, 213 (Tex. App.—Texarkana 2002) (upholding the dismissal of the condemnation action based on the fact that the offer made prior to the proceeding was for greater rights than were sought in the condemnation and lacked good faith negotiations undertaken by the condemner; consequently, the unable to agree requirement was not fulfilled), *rev'd*, 141 S.W.3d 172 (Tex. 2004); *MidTexas Pipeline Co. v. Wright, Jr.*, 141 S.W.3d 208, 210 (Tex. App.—Texarkana 2002) (not designated for publication) (finding that the facts are analogous to *Dernehl* and therefore, affirming the trial court's decision granting the landowner's plea for dismissal of the condemnation action), *rev'd*, 141 S.W.3d 172 (Tex. 2004); *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2001) (finding that the gas company participated in good faith negotiations in the four separate condemnation actions that were joined for appeal as required by the condemnation statute and thus, the trial court had jurisdiction over the condemnation action), *aff'd*, 141 S.W.3d 172 (Tex. 2004); *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 71 S.W.3d 395, 400 (Tex. App.—Corpus Christi 2001) (concluding that the pipeline company, prior to instituting the condemnation action “engaged in good faith negotiations sufficient to satisfy” the unable to agree requirement of the condemnation statute; therefore, the trial court was vested with jurisdiction), *aff'd*, 141 S.W.3d 172 (Tex. 2004); *Hubenak v. San Jacinto Gas Transmission Co.*, Nos. 00-99-00691, -00959, -01359, -01360, 2000 WL 1056416 (Tex. App.—Houston [1st Dist.] July 27, 2000) (not designated for publication) (holding the trial court lacked jurisdiction to try the condemnation proceeding because the condemner-pipeline company did not sufficiently comply with the unable to agree requirement), *withdrawn, superseded by*, *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2001), *aff'd*, 141 S.W.3d 172 (Tex. 2004).

51. *See generally* Brief of Petitioner on Petition for Review from Case No. 13-00-734-CV in the Thirteenth Court of Appeals, Corpus Christi at *1, *Cusack v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0359), 2002 WL 32349493. While the court asserts that MidTexas Pipeline Company and San Jacinto Gas Transmission Company are unrelated, they were closely related. *Id.* MidTexas is a partnership whose partners include Houston Pipe Line Company and Teco Pipeline Company, while San Jacinto is a partnership comprised of Teco Industrial Gas Company and Centana Intrastate Pipeline Company. *Id.* Both companies' condemnation efforts were spearheaded by another party. *Id.* at *2.

52. *See* TEX. UTIL. CODE ANN. § 181.004 (Vernon 2004) (conferring upon gas companies the power to utilize the eminent domain power to “enter on, condemn, and appropriate” private property); *id.* § 181.008 (allowing a gas company to construct and maintain any apparatus necessary to operate its pipelines within the state).

53. *Hubenak*, 141 S.W.3d at 174-75.

54. *See id.* at 176 (recognizing that the condemnation petitions did not seek to condemn three property rights which were sought in the purchase offer). Specifically, the pipeline companies attempted to obtain via their purchase offers: (1) warranty of title, (2) the right to transport “oil, petroleum products, or any other liquids, gases or substances

purchase offers included greater rights than those which the condemnors could legally condemn, they could not be classified as good faith, and therefore, the condemnors had not satisfied the statutory prerequisites necessary to confer subject matter jurisdiction upon the trial court.⁵⁵ Alternatively, while contending that the statutory requirements had been met, the condemnors supplied affidavits evincing that the purchase offers were either rejected or ignored, sufficient to satisfy the unable to agree requirement, and vesting the respective trial courts with jurisdiction.⁵⁶ The key issues ultimately settled by the court were: (1) whether provisions in the condemnation statute regarding the inability to agree were jurisdictional; and (2) whether the condemnors satisfied those provisions.⁵⁷

which can be transported through a pipeline,” and (3) the unrestricted right to assign the easement to any person or entity. *Id.* at 175–76; Brief of Petitioner on Petition for Review from Case No. 13-00-734-CV in the Thirteenth Court of Appeals, Corpus Christi at *5, *Cusack v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0359), 2002 WL 32349493.

55. *See Hubenak*, 141 S.W.3d at 177 (noting that in all of the joined cases, the landowner argued that the condemnors failed to comply with the statutory unable to agree requirement due to the inconsistencies between the purchase offers and the condemnation petitions); *see also* Brief of Petitioner on Petition for Review from Case No. 13-00-734-CV in the Thirteenth Court of Appeals, Corpus Christi at *5, *Cusack v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0359), 2002 WL 32349493 (arguing that because the purchase offers encompassed more rights than were sought by the condemnation, they were arbitrary and capricious, and therefore, not in good faith—as such, the unable to agree requirement was not satisfied, and jurisdiction could not have vested); Petitioner’s Brief on Petition for Review from Case No. 13-00-247-CV in the Thirteenth Court of Appeals, Corpus Christi at *11–12, *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0217), 2002 WL 32349553 (asserting that an offer of money is insufficient to satisfy the statutory unable to agree requirement); Petitioner’s Reply Brief on the Merits at *4, *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0214), 2002 WL 32132182 (arguing generally that an offer for rights which are sought in the condemnation proceeding fails to fulfill the statutory requirement of a good faith offer).

56. *See Hubenak*, 141 S.W.3d at 177 (recognizing the gas company’s argument that the only remaining issue was the amount of damages because all of the statutory requirements for condemnation had been satisfied); *see also* Respondent’s Brief on Petition for Review from the Court of Appeals for the Sixth Supreme Judicial District Court at Texarkana, at *10–11, *MidTexas Pipeline Co. v. Wright, III*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0326), 2002 WL 32349580 (urging that a condemnor may negotiate for more than it seeks to condemn and still be considered in good faith because an offer for the greater estate encompasses the lesser estate). The Respondent argued that MidTexas was exempt from additionally making a good faith offer prior to the institution of the condemnation action because such efforts would have been futile as the previously refused offers. *Id.* at *8–9.

57. *Hubenak*, 141 S.W.3d at 174-75.

B. *The Majority Opinion*

1. The Unable to Agree Requirement Is Not Jurisdictional

Justice Owen, reasoning that the condemnation statute was without language indicating that the pre-suit requirements were jurisdictional, concluded for the majority that the unable to agree requirement, though mandatory, is incapable of depriving a court of subject matter jurisdiction.⁵⁸ Though this interpretation was certainly in harmony with the court's earlier construction of another mandatory statutory provision,⁵⁹ it was clearly in contravention of the precedent corresponding with the condemnation statute.⁶⁰

58. *Id.* at 180 (“[W]e conclude that this statutory requirement is mandatory, but failure to satisfy it does not deprive courts of subject matter jurisdiction.”).

59. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76–77 (Tex. 2000) (holding that the statutory requirement of proving that another country has “equal treaty rights” with the United States, though compulsory prior to proceeding with the trial, was not requisite to achieving subject matter jurisdiction with the court).

60. *See, e.g., ExxonMobil Pipeline Co. v. Harrison Interests, Ltd.*, 93 S.W.3d 188, 192 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (holding that good faith negotiations are a jurisdictional requirement that must be satisfied in accordance with TEX. PROP. CODE ANN. § 21.012 (Vernon 2004)), *disapproved of by Hubenak*, 141 S.W.3d at 183; *McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 83 S.W.3d 205, 209–10 (Tex. App.—Dallas 2002, no pet.) (indicating that because there was insufficient evidence supporting the trial court's holding that the unable to agree requirement was unsatisfied, the trial court's dismissal of the condemnation proceedings on the basis of lack of jurisdiction was reversed), *disapproved of by Hubenak*, 141 S.W.3d at 183 (Tex. 2004), *followed in part by Hubenak.*, 141 S.W.3d at 181; *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 720 (Tex. App.—Corpus Christi, 2000, pet. denied), *disapproved of by Hubenak*, 141 S.W.3d at 183 (concluding that jurisdiction was established because unable to agree requirement was satisfied); *Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 89 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (stating that “the condemning authority must engage in good faith negotiations . . . this requirement has been held to be one of jurisdiction only”), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Precast Structures, Inc. v. Houston*, 942 S.W.2d 632, 635–36 (Tex. App.—Houston [14th Dist.] 1996, no writ) (finding that the trial court had jurisdiction because there was a valid and good faith offer), *disapproved of by Hubenak*, 141 S.W.3d at 183; *State v. Schmidt*, 894 S.W.2d 543, 545 n.1 (Tex. App.—Austin 1995, no writ) (citing *Brinton v. Houston Lighting & Power Co.*, 175 S.W.2d 707, 709–10 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.)) (recognizing that the unable to agree requirement is a jurisdictional requirement prior to the initiation of condemnation proceedings), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Tex.-N.M. Power Co. v. Hogan*, 824 S.W.2d 252, 254 (Tex. App.—Waco 1992, writ denied) (noting that there was jurisdiction because there was a bona fide effort to agree upon damages), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Schlottman v. Wharton County*, 259 S.W.2d 325, 331 (Tex. Civ. App.—Fort Worth 1953, writ dism'd) (stating that one must establish that they were unable to agree to a damage award, which was sufficient to establish jurisdiction), *disapproved of by Hubenak*, 141 S.W.3d at 183; *City of Houston v. Derby*, 215 S.W.2d 690, 692–93 (Tex. Civ. App.—Galveston 1948, writ ref'd) (holding that a failure to adequately plead and prove an inability to agree renders the proceedings void for lack of jurisdiction), *disapproved of by*

The chief case the court relied upon to substantiate this aspect of its holding was *Dubai Petroleum Co. v. Kazi*,⁶¹ a case based on the predicate requirements to a foreign plaintiff's initiation of a personal injury or wrongful death cause of action in a Texas court.⁶² The case centered on section 71.03 of the Texas Civil Practice and Remedies Code,⁶³ which permits foreign plaintiffs to bring causes of action in Texas courts for personal injury or wrongful death incidents that occurred in a foreign country, so long as the decedent or injured party's country of citizenship has "equal treaty rights" with the United States.⁶⁴ In recognizing the policy benefits to be had from reducing the vulnerability of final judgments,⁶⁵ the court went against precedent⁶⁶ and held that the equal treaty rights requirement, though compulsory before proceeding with the trial, was not requisite to achieving subject matter jurisdiction.⁶⁷ In drawing this comparison, Justice Owen correctly recognized that the respective statutory requirements in *Dubai* and *Hubenak* were sufficiently analogous to support the conclusion that the unable to agree requirement in the condemnation statute is not jurisdictional; therefore, an abatement of the proceedings rather than a dismissal would be necessary.⁶⁸

Hubenak, 141 S.W.3d at 183; *Brinton v. Houston Lighting Power Co.*, 175 S.W.2d 707, 709 (Tex. Civ. App.—Galveston 1943, writ ref'd w.o.m.) (citing *Houston N. Shore Ry. Co. v. Tyrell*, 128 Tex. 248, 98 S.W.2d 786 (1936)) (emphasizing that other state courts have construed the condemnation statutes to be "special and summary in character" and therefore in the case of incomplete compliance, the proceedings are rendered void), *disapproved of by Hubenak*, 141 S.W.3d at 183.

61. 12 S.W.3d 71 (Tex. 2000).

62. *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 73-77 (Tex. 2000).

63. See TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 2004) (requiring that a foreign country have equal treaty rights with the United States before an action can be maintained for a death in that country).

64. *Id.*; see also *Dubai*, 12 S.W.3d at 73 ("Section 71.031 of the Texas Civil Practice and Remedies Code permits suit for the personal injury or wrongful death of a citizen of a foreign country, if the decedent or injured party's country of citizenship has 'equal treaty rights' with the United States.").

65. See RESTATEMENT (SECOND) OF JUDGMENTS § 11(e) (1982) ("[T]he modern direction of policy is to reduce the vulnerability of final judgments to attack on the ground that the tribunal lacked subject matter jurisdiction."); see also *Dubai*, 12 S.W.3d at 76 (recognizing that *Mingus v. Wadley*, 115 Tex. 551, 285 S.W. 1084 (1926), the precedent at the time, was an antiquated approach that overlooked the recent trend of reducing susceptibility of judgments to attack based on subject matter grounds).

66. See *Dubai*, 12 S.W.3d at 76 (overruling "*Mingus* to the extent that it characterized the plaintiff's failure to establish a statutory prerequisite as jurisdictional").

67. See *id.* at 77 (concluding that the requirement of equal treaty rights is not jurisdictional and as such cannot deprive a court of the power to adjudicate).

68. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 183 (Tex. 2004).

2. Abatement Is the Remedy for Noncompliance with the Unable to Agree Requirement

After finding the unable to agree requirement to be nonjurisdictional,⁶⁹ the court addressed the remedial avenues to be followed by a presiding court when a landowner timely objected to the condemnor's failure to satisfy the requirement.⁷⁰ Section 21.012 of the Texas Property Code is silent as to the consequences for noncompliance. The majority, in order to ascertain the appropriate remedy, examined the statutory purpose of section 21.012 of the Texas Property Code,⁷¹ which was "to forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties."⁷² Rejecting dismissal as an unnecessary remedy,⁷³ the court considered other statutes with similar ends and accordingly decided that the statute's purpose could be achieved by compelling abatement until the requirement that the parties are unable to agree has been fulfilled.⁷⁴ The majority further suggested that while the condemnation proceedings are abated, the parties can negotiate for the land to be condemned, as they should have done

69. *See id.* at 180 (concluding that the trial courts in the nine separate actions were properly vested with jurisdiction, regardless of the condemnors' respective satisfaction of the statutory unable to agree requirement).

70. *See id.* at 184 ("Having determined that section 21.012's requirements are not jurisdictional, we must determine the appropriate remedy when a condemnor fails to meet those requirements and a landowner has timely objected.").

71. *See id.* (promulgating that when a statute is silent as to the remedy, the alternative is to look to the statutory purpose).

72. *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Fort Worth 1936, no writ) (highlighting that the purpose of the condemnation statute "is to forestall litigation and to prevent needless appeals" when negotiation could have resolved the conflict (citing *Fort Worth Indep. Sch. Dist. v. Hodge*, 96 S.W.2d 1113 (Tex. Civ. App.—Fort Worth 1936, no writ))); *see Schlottman v. Wharton County*, 259 S.W.2d 325, 330 (Tex. Civ. App.—Fort Worth 1953, writ dismissed) (asserting that the purpose of the requiring an effort to agree is to spare time and save expenses where an agreement is feasible), *disapproved of by Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 183 (Tex. 2004).

73. *See Hubenak*, 141 S.W.3d at 184 (noting that the Texas Supreme Court has consistently found dismissal to be an inadequate remedy for noncompliance).

74. *See id.* (looking to both the Deceptive Trade Practices Act and the Medical Liability and Insurance Improvement Act to find abatement a more appropriate remedy). With respect to the Deceptive Trade Practices Act, abatement is the applicable remedy when notice is not properly provided. *Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992). Similarly, under the Medical Liability and Insurance Improvement Act, failure to adhere to the act's pre-suit notice requirement results in an abatement of the proceedings. *Schepps v. Presbyterian Hosp. of Dallas*, 652 S.W.2d 934, 938 (Tex. 1983). Abatement essentially means that the case is temporarily suspended for a "reasonable period of time" for a reason unrelated to the merits of the action, such that the parties can attempt to cure the existing defects. *Hubenak*, 141 S.W.3d at 184; BLACK'S LAW DICTIONARY 3 (8th ed. 2004).

prior to the institution of the action.⁷⁵ Thus, so long as the landowner pleads that no offer has been made and the respective court finds that the unable to agree requirement was not satisfied, the proceedings should be abated for a reasonable period of time consequently giving the condemnor an opportunity to cure the deficiency, i.e., satisfy the unable to agree requirement.⁷⁶ If after the reasonable time period has expired, the condemnor has yet to fulfill the unable to agree requirement, then the condemnation action should be dismissed.⁷⁷

3. The Unable to Agree Requirement Does *Not* Contemplate a Good Faith Inquiry

The landowners primarily contended that the condemnors failed to negotiate in good faith when their purchase offers included three property rights that were excluded from the condemnation petitions,⁷⁸ and as a result, the unable to agree requirement remained unsatisfied.⁷⁹ The majority interpreted the above contention by the petitioners as two different arguments: (1) the offers were not a result of good faith negotiations, and (2) the offers were not comprehensive of the rights sought by the condemnors.⁸⁰

75. *Hubenak*, 141 S.W.3d at 184.

76. *Id.*

77. *Id.*

78. *See id.* at 187 (pointing out that the right of assignability, the right of unrestricted substance transportation, and the warranty of title were not included in the condemnation petition, even though they were sought in the negotiations prior to the proceedings).

79. *See id.* (reducing the landowner's argument to the contention that "the condemnors never made offers for what they actually sought to condemn or could legally condemn, and therefore, have not met" the unable to agree requirement of the condemnation statute); *see also* Brief of Petitioner on Petition for Review from Case No. 13-00-734-CV in the Thirteenth Court of Appeals, Corpus Christi at *5, *Cusack v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0359), 2002 WL 32349493 (arguing that the purchase offers were arbitrary and capricious and encompassed more rights than were sought by the condemnation, thus jurisdiction could not have vested); Petitioner's Reply Brief on the Merits at *6, *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0214), 2002 WL 32132182 (arguing generally that an offer for rights which are sought in the condemnation proceeding fails to fulfill the statutory requirement of a good faith offer); Petitioner's Brief on Petition for Review from Case No. 13-00-247-CV in the Thirteenth Court of Appeals, Corpus Christi at *11-12, *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0217), 2002 WL (asserting that a mere offer of money, irrespective of good faith, is insufficient to satisfy the statutory unable to agree requirement).

80. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 185, 187 (Tex. 2004) (addressing the good faith argument in Section IV of the opinion, while the symmetry argument is addressed in Section V).

Addressing the good faith argument, the court reasoned that the condemnation statute did not contemplate a good faith inquiry and therefore, a single offer would be sufficient to meet the unable to agree requirement.⁸¹ The majority further recognized that a number of Texas cases applied the terms good faith negotiation and bona fide effort in conjunction with an analysis of the unable to agree requirement.⁸² However, the majority did not see the nexus between these equitable concepts and the statutory requirement, and it concluded that case law required only a minimal showing to constitute an inability to agree.⁸³

81. *Id.* at 185-86.

82. *See id.* at 185 (recognizing that some Texas courts have employed the terms good faith negotiations and bona fide effort in conjunction with the inability to agree requirement in the condemnation statute). *See generally* McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd., 83 S.W.3d 205, 208 (Tex. App.—Dallas 2002, no pet.) (recognizing that a condemning entity must make a bona fide attempt to agree with the landowner as to the damages resulting from the taking in order to satisfy the unable to agree requirement of the condemnation statute), *disapproved of by* Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172, 183 (Tex. 2004); Precast Structures, Inc. v. Houston, 942 S.W.2d 632, 635-36 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that the City of Houston made a bona fide purchase offer as to the damages to the property owner and that this offer under *Dowd* was sufficient to meet the unable to agree requirement of the condemnation statute), *disapproved of by* Hubenak, 141 S.W.3d at 183; State v. Schmidt, 894 S.W.2d 543, 544-45 (Tex. App.—Austin 1995, no writ) (indicating that the statutory unable to agree requirement refers to a “bona fide attempt to agree on damages, which includes a bona fide offer by the condemnor to pay the estimated true value of the land” and is intended to “encourage the condemnor to offer the true value of the land”), *disapproved of by* Hubenak, 141 S.W.3d at 183; State v. Hipp, 832 S.W.2d 71, 77-79 (Tex. App.—Austin 1992) (holding that the statutory prerequisite requiring the condemning entity to both plead and prove an inability to agree “may be satisfied if the condemnor makes a single bona fide offer to a landowner that the condemnor in good faith feels is the amount of compensation due, and the landowner rejects that offer”), *rev’d on other grounds sub nom.* State v. Dowd, 867 S.W.2d 781 (Tex. 1993); Lapsley v. Texas, 405 S.W.2d 406, 411 (Tex. Civ. App.—Texarkana 1966, writ ref’d n.r.e.) (advancing that a good faith negotiation requires an effort by the condemnor to investigate all aspects of value in furtherance of the statutory objective of settlement rather than litigation); County of Nueces v. Rankin, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ) (emphasizing that the key issue was whether the county, prior to the condemnation proceedings, made a good faith effort to agree with the landowners on the amount of compensation to be paid for the property involved); Schlottman v. Wharton County, 259 S.W.2d 325, 331 (Tex. Civ. App.—Fort Worth 1953, writ dism’d) (suggesting that the purchase offer made by the condemning entity needs to be for the interest sought in the land in question in order to be considered an offer of good faith), *disapproved of by* Hubenak, 141 S.W.3d at 183.

83. *See* Hubenak, 141 S.W.3d at 185 (arguing that case law has generally required only minimal evidence in order to fulfill the unable to agree requirement).

In support of this holding, the court cited cases which respectively held that: (1) the making of an offer by a county is sufficient;⁸⁴ (2) the ignoring or rejection of an offer qualifies as being unable to agree for purposes of the statute;⁸⁵ (3) reciprocal efforts by the parties are not required for compliance;⁸⁶ and (4) counteroffers are unnecessary.⁸⁷ Additionally, the majority equated an inquiry into the good faith of a condemning entity to an inquiry into the reasonable market value of property,⁸⁸ as such, the court's opinion contended that holding inquiries into both good faith and the market value of property would be largely duplicative and hence judicially inefficient.⁸⁹ The court found that the "landowner will receive no more and no less than the amount awarded as a result of the condemnation proceedings, even if the condemnor's pre-suit offer was not made in 'good faith.'"⁹⁰ Because the condemnors made offers, and those offers were either rejected or ignored by the landowners, the court eventually concluded that the efforts made by the condemnors were sufficient to satisfy the unable to agree requirement of the condemnation statute.⁹¹

4. Exact Symmetry Between the Purchase Offer and the Condemnation Petition Is Not Required

Responding to the remainder of the landowners' argument—that the purchase offers failed to mirror those rights sought by the condemnors—

84. See *Schlottman*, 259 S.W.2d at 330-31 (holding that all a county must do to comply with the unable to agree requirement of the condemnation statute is to make an offer for the interest in the land).

85. See *id.* (declaring that a landowner's silence in the face of a purchase offer will be construed as a rejection of the offer for the purposes of satisfying the unable to agree requirement).

86. See *Malone v. City of Madisonville*, 24 S.W.2d 483, 485 (Tex. Civ. App.—Waco 1929, no writ) (concluding that if the law required both parties to a condemnation action to make an effort to agree on the value of the land before the condemnation action could commence then the landowner would only need to avoid the condemnor to avoid the condemnation).

87. See *McKinney Indep. Sch. Dist.*, 83 S.W.3d at 209 (holding that a counteroffer did not have any bearing on satisfaction of the unable to agree requirement).

88. See *Hubenak*, 141 S.W.3d at 186 ("Whether an offer by a condemning authority was made in 'good faith' would, in most cases, be determined . . . by the reasonable market value of the property sought to be condemned . . .").

89. See *id.* (urging that if the trial court judge inquired as to the good faith of the condemning entity, the judge would be duplicating the court's role of determining the reasonable market value of the property to be condemned).

90. *Id.* at 187.

91. See *id.* (articulating that because the condemnors sufficiently proved that they made offers to the landowners prior to the institution of the condemnation proceedings and that those offers were effectively rejected, they satisfied the unable to agree requirement under section 21.012 of the Texas Property Code).

the majority concluded that to require exact symmetry would do nothing more than impede the condemnation process.⁹² Additionally, the court found that it will generally suffice that the “same physical property and same general use” is the subject of the negotiation, even if there are intangible rights sought by the purchase offer *not* sought in the subsequent condemnation petition.⁹³ The majority attempted to bolster this conclusion by looking to other states which had addressed this same issue⁹⁴ and decided that defining a bright-line rule for the inclusion of intangible property rights in a condemnation petition is not easily accomplished.⁹⁵ Further, the court’s opinion stated that it would be futile to require the terms of the purchase offer to mirror the condemnation petition.⁹⁶ Thus, the majority of the court concluded that condemnors had satisfied the unable to agree requirement even though they uniformly sought greater rights through negotiations than they condemned.⁹⁷

IV. A TROUBLING DECISION: RECONCILING THE PROBLEMS AND EFFECTS STEMMING FROM *HUBENAK*

A. *Mistaken Interpretation of Good Faith*

Perhaps the most glaring problem with the *Hubenak* decision is the court’s mistaken approach to the good faith requirement within the condemnation statute. In concluding that good faith negotiations were unnecessary, the majority equated an inquiry into subjective good faith to a determination of whether the respective purchase offer represented the

92. *See id.* at 191 (arguing that the requirement of “exact symmetry between the purchase offer and the property rights to be condemned could create an impediment to the condemnation process not contemplated” by the statute).

93. *Hubenak*, 141 S.W.3d at 191.

94. *See Peoples Gas Light & Coke Co. v. Buckles*, 182 N.E.2d 169, 174 (Ill. 1962) (holding that the condemnor negotiated in good faith even though greater rights were sought in the negotiations than were eventually condemned); *Camden Forge Co. v. County Park Comm’n of Camden County*, 186 A. 519, 520-21 (N.J. 1936) (barring a challenge to the good faith of negotiations, despite the condemnor seeking a fee simple when fee simple interests could not be condemned under state law); *Moore Mill & Lumber Co. v. Foster*, 336 P.2d 39, 60 (Or. 1959) (representing that a condemnor satisfied the unable to agree requirement even though the purchase offer only permitted ingress and egress, yet the easement that was eventually condemned permitted the owner to use the road through a reservation).

95. *See Hubenak*, 141 S.W.3d at 191 (contending that while it is simple to accurately describe physical property in a condemnation petition, the additional inclusion of intangible property rights “does not easily lend itself to a bright-line rule”).

96. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 191 (Tex. 2004).

97. *See id.* (holding that even though the purchase negotiations “did not exactly mirror” the rights sought by condemnation, the condemnors nevertheless satisfied the unable to agree requirement).

reasonable market value of the property to be condemned.⁹⁸ Though reasonable market value is certainly part of the good faith equation, it is not an independently sufficient indicator of the presence of good faith. Alternatively, lower courts have turned to a more fitting, two-part inquiry requiring that the purchase offer must: (1) be for the reasonable market value of the property (as noted by the majority) and, (2) accurately reflect *only* the rights to be condemned (dismissed by the majority).⁹⁹ Al-

98. *See id.* at 186 (arguing that a determination of the good faith of an offer would unnecessarily duplicate the court's role of ascertaining the reasonable market value of the subject property).

99. *See, e.g., McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 83 S.W.3d 205, 208 (Tex. App.—Dallas 2002, no pet.) (recognizing that a condemning entity must make a bona fide attempt to agree with the landowner as to the damages resulting from the taking in order to satisfy the unable to agree requirement of the condemnation statute), *disapproved of by Hubenak*, 141 S.W.3d at 172; *State v. Schmidt*, 894 S.W.2d 543, 544-45 (Tex. App.—Austin 1995, no writ) (indicating that the statutory requirement of establishing an inability to agree with the landowner as to the damages is aimed at encouraging the condemnor to offer damages equating to the true value of the land), *disapproved of by Hubenak*, 141 S.W.3d at 172; *State v. Hipp*, 832 S.W.2d 71, 78 (Tex. App.—Austin 1992) (holding that the statutory prerequisite requiring the condemning entity to both plead and prove an inability to agree “may be satisfied if the condemnor makes a single bona fide offer to a landowner that the condemnor in good faith feels is the amount of compensation due, and the landowner rejects that offer”), *rev'd on other grounds sub nom. State v. Dowd*, 867 S.W.2d 781 (Tex. 1993). The Third Court of Appeals further emphasized that to be considered an offer in good faith the offer must be made “in or with good faith; honestly, openly, and sincerely; without deceit or fraud.” *See Hipp*, 832 S.W.2d at 78 (quoting BLACK'S LAW DICTIONARY 160 (5th ed. 1979)). The Third Court of Appeals also highlighted that a good faith offer “must be based on a reasonably thorough investigation” combined with “an honest assessment of the amount of compensation due the landowner as a result of the [condemnation].” *Id.* at 78-79. *See generally Ind. Serv. Corp. v. Town of Flora*, 31 N.E.2d 1015, 1017 (Ind. 1941) (holding that negotiations for different rights than are sought in the condemnation will not suffice as an effort to purchase the property; as such, the purchase offer should mirror the rights sought to be condemned); *Precast Structures, Inc. v. Houston*, 942 S.W.2d 632, 635-36 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that the City of Houston made a bona fide purchase offer as to the damages to the property owner resulting from the condemnation and that this offer was sufficient to meet the unable to agree requirement of the condemnation statute), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Lapsley v. Texas*, 405 S.W.2d 406, 411 (Tex. Civ. App.—Texarkana 1966, writ ref'd n.r.e.) (advancing that a good faith negotiation requires an effort by the condemnor to investigate all aspects of value in furtherance of the statutory objective of settlement rather than litigation); *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ) (emphasizing that the key issue was whether the county, prior to the condemnation proceedings, made a good faith effort to agree with the landowners on the amount of compensation to be paid for the property involved); *Schlottman v. Wharton County*, 259 S.W.2d 325, 331 (Tex. Civ. App.—Fort Worth 1953, writ dismissed) (suggesting that the purchase offer made by the condemning entity needs to be for the interest sought in the land in question in order to be considered an offer of good faith), *disapproved of by Hubenak*, 141 S.W.3d at 172.

though the majority's conclusion that an inquiry into good faith would be duplicative of the court's role in determining reasonable market value is correct,¹⁰⁰ the court's corollary conclusion that the condemnation statute does not "contemplate a subjective inquiry [by the court] into 'good faith'"¹⁰¹ merely on the basis of this duplication is mistaken in so far as an offer of fair market value does not equate to good faith.¹⁰² Thus, the majority's analysis overlooks the second element of good faith: that the purchase offer includes only those rights which the condemnor is seeking to condemn.¹⁰³ As a result, the court erroneously concluded that a good faith inquiry is inappropriate in the context of a condemnation proceeding.¹⁰⁴

Continuing on its flawed line of logic, the majority held that a requirement of exact symmetry between the purchase offer and the condemnation petition would be cumbersome to the condemnation process in that it would create an "impediment [that was] not contemplated by the purpose" of the statute.¹⁰⁵ Alluding to this rationale, Justice Jefferson observed in his concurring opinion that such a requirement of a single, pre-

100. See, e.g., *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 241 (Tex. 1984) (finding that damages should equate to the value of the potentially condemned land). The court, upon the finding that the award of value was not withdrawn, can still consider the market value of the condemned property. *Id.*; *White v. Natural Gas Pipeline Co. of Am.*, 444 S.W.2d 298, 301 (Tex. 1969) ("The landowner is entitled to compensation in money at the time of taking for the difference in market value of the easement strip and remainder before and after taking.").

101. *Hubenak*, 141 S.W.3d at 186.

102. Cf. *McKinney Indep. Sch. Dist.*, 83 S.W.3d at 208 (urging the condemning party to make a bona fide attempt to agree with the landowner); *Schmidt*, 894 S.W.2d at 544-45 (requiring a "bona fide attempt to agree on damages, which includes a bona fide offer by the condemnor to pay the estimated true value of the land"); *Hipp*, 832 S.W.2d at 78 (pleading and proving an inability to agree "may be satisfied if the condemnor makes a single bona fide offer to a landowner that the condemnor in good faith feels is the amount of compensation due, and the landowner rejects that offer"); *Lapsley*, 405 S.W.2d at 411 (stating that there must be an effort by the condemnor to investigate all aspects of value in furtherance of the statutory objective of settlement rather than litigation); *Schlottman*, 259 S.W.2d at 331 (suggesting that the purchase offer needs to be for the interest sought in the land in question in order to be considered an offer of good faith). These cited cases clearly suggest that reasonable market value is not an independently sufficient indicator of good faith; rather, the purchase offer must additionally be reflective of the subsequent condemnation petition.

103. See *Hubenak*, 141 S.W.3d at 191 (holding that the unable to agree requirement is satisfied even though the negotiated rights differ from the condemned rights).

104. See *id.* at 195 (Jefferson, J., concurring) (emphasizing that the majority, by likening the rejection of an offer that comprehends greater rights than those in the condemnation petition with the refusal to sell those same property rights, "pays little heed" to the directive of the condemnation statute that the parties be unable to agree on the amount of damages resulting from the taking).

105. *Id.* at 191.

suit good faith offer “is neither burdensome nor complex.”¹⁰⁶ In fact, Justice Jefferson argued that such a requirement is “the simplest and cheapest solution.”¹⁰⁷ This reasoning parallels the landowners’ argument that the overbroad offers were ineffectual to allow them to accurately assess their damages¹⁰⁸ and highlights a central problem with the majority’s holding, namely, its underestimation of the importance of an accurate purchase offer.¹⁰⁹

The majority pays little attention to the statutory directive that the condemnor “state that the entity and the property owner are unable to agree on the damages”¹¹⁰ in the condemnation petition. Rather, the court held that an offer which is either rejected or ignored by a landowner is adequate to satisfy the unable to agree requirement.¹¹¹ Such an argument ignores the importance of making an offer that encompasses only those rights to be condemned.¹¹² Without a good faith offer for the rights to be condemned, landowners cannot accurately assess the resulting damage, which frustrates the goal of encouraging negotiations.¹¹³

106. *Id.* at 196 (Jefferson, J., concurring).

107. *Id.* at 197 (Jefferson, J., concurring).

108. See Brief of Petitioner on Petition for Review from Case No. 13-00-734-CV in the Thirteenth Court of Appeals, Corpus Christi at *5, *Cusack v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0359), 2002 WL 32349493 (arguing that because the purchase offers encompassed more rights than were sought by the condemnation, they were arbitrary and capricious and therefore not in good faith); Petitioner’s Brief on Petition for Review from Case No. 13-00-247-CV in the Thirteenth Court of Appeals, Corpus Christi at *11–12, *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0217), 2002 WL 32349553 (asserting that a mere offer of money, irrespective of good faith, is insufficient to satisfy the statutory unable to agree requirement); Petitioner’s Reply Brief on the Merits at *6, *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0214), 2002 WL 32132182 (arguing generally that an offer for rights which are sought in the condemnation proceeding fails to fulfill the statutory requirement of a good faith offer).

109. See *Hubenak*, 141 S.W.3d at 196 (Jefferson, J., concurring).

110. TEX. PROP. CODE ANN. § 21.012 (Vernon 2004).

111. *Hubenak*, 141 S.W.3d at 187.

112. See *State v. Hipp*, 832 S.W.2d 71, 78 (Tex. App.—Austin 1992) (highlighting the making of a single offer of compensation to the landowners prior to the institution of proceedings does not, by itself, provide any evidence to support a negative finding on the unable to agree requirement), *rev’d on other grounds sub nom. State v. Dowd*, 867 S.W.2d 781 (Tex. 1993). The Third Court of Appeals continued that the pertinent question with respect to the satisfaction of the unable to agree requirement is whether the purchase offer was one made in good faith. *Id.*

113. See *Hubenak*, 141 S.W.3d at 196 (Jefferson, J., concurring) (emphasizing that a requirement of a single, bona fide offer would provide a bright-line rule that would give landowners a chance to accurately assess the value of the rights to be condemned); *cf. Texas v. Nelson*, 160 Tex. 515, 334 S.W.2d 788, 790 (1960) (emphasizing that unless the land to be condemned is adequately described, neither the commissioners nor the court can accurately pass on the necessary damages). *Nelson* is important because the converse of

B. *Miscalculation As to the Proper Damages*

As noted earlier, prior to the institution of the condemnation proceedings the condemnor's purchase offers included a final offer "Right-of-Way Agreement" for a natural gas pipeline that included intangible property rights which were not sought in the condemnation petition.¹¹⁴ Additionally, the landowners were told that if they did not agree to these offers, the condemnors would petition to condemn the rights those agreements described. Although this implied threat initially frustrated the negotiations between the parties, because the warranty of title, assignability rights and unregulated liquid transportation rights were never sought in the condemnation petition, the concerns remained baseless.¹¹⁵ Addressing both the discrepancy between the purchase offers and the condemnation petition as well as the landowners argument that the purchase offers should have mirrored the condemnation petition,¹¹⁶ Justice Owen's opinion countered that "exact symmetry between the purchase offer and the property rights to be condemned could create an impediment to the condemnation process that is not contemplated by the purpose of the 'unable to agree' requirement."¹¹⁷

The problem with the majority's contention is that the statute requires the condemnor of property to state in the condemnation petition that

the court's proposition is similarly true: if the land in the purchase offer does not mirror the land to be condemned in the petition, then the landowner will be thwarted from accurately determining the damages he is due (as opposed to the commissioners' or judge's assessment of damages). *See id.* at 790 (holding that "unless the land to be taken is adequately identified, the owner cannot know what portion of his property is required" and the owner will be unable to accurately assess damages).

114. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 175-76 (Tex. 2004).

115. *See id.* at 192 (Jefferson, J., concurring) (noting that the property owners were told that if they did not execute the right-of-way agreements, those very same rights would be sought in a condemnation action).

116. *See* Brief of Petitioner on Petition for Review from Case No. 13-00-734-CV in the Thirteenth Court of Appeals, Corpus Christi at *10, *Cusack v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0359), 2002 WL 32349493 (arguing that because the purchase offers encompassed more rights than were sought in by the condemnation, they were arbitrary and capricious and therefore, not in good faith); Petitioner's Brief on Petition for Review from Case No. 13-00-247-CV in the Thirteenth Court of Appeals, Corpus Christi at *11-12, *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0217), 2002 WL 32349553 (asserting that a mere offer of money, irrespective of good faith, is insufficient to satisfy the statutory unable to agree requirement); Petitioner's Reply Brief on the Merits at *6, *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172 (Tex. 2004) (No. 02-0214), 2002 WL 32132182 (arguing generally that an offer for rights which are not sought in the condemnation proceeding fails to fulfill the statutory requirement of a good faith offer).

117. *Hubenak*, 141 S.W.3d at 191.

“the [condemning] entity and the property owner [were] unable to agree on damages.”¹¹⁸ Courts have generally interpreted this statutory language to mean that the condemnor has the burden of both pleading and proving that prior to the initiation of the condemnation action it was unable to agree with the landowner as to the total amount of damages *resulting from the condemnation*.¹¹⁹ In holding that “exact symmetry” is *not* required between the purchase offer and the condemnation petition, the majority either overlooked or just blatantly ignored this precedent.¹²⁰ Clearly, the property rights negotiated for by the condemnors in the *Hubenak* line of cases—warranty of title, assignability and unregulated liquid/gas transportation—were not sought in the condemnation action, and therefore were not part of taking.¹²¹ It follows that the negotiations did not involve the damages that resulted from the taking, but rather hypothetical damages that would have resulted had the landowners agreed to the condemnors’ final offers.¹²² This distinction not only suggests a deviation from the condemnation statute’s requirement concerning purchase offers and damages,¹²³ but also begs for a condemning entity’s use of unfair and deceptive negotiating tactics.¹²⁴

118. TEX. PROP. CODE ANN. § 21.012 (Vernon 2004).

119. See *ExxonMobil Pipeline Co. v. Bell*, 84 S.W.3d 800, 804 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (noting that good faith requires a bona fide offer to compensate the owner for damages to the land), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791, 796 (Tex. App.—Houston [1st Dist.] 2001) (holding that the condemnor must demonstrate that they were ‘unable to agree’ with the landowner), *aff’d*, 141 S.W.3d 172 (Tex. 2004); *State v. Hipp*, 832 S.W.2d 71, 77 (Tex. App.—Austin 1992) (arguing that the state must make a bona fide effort to agree on compensation), *rev’d on other grounds sub nom.* *State v. Dowd*, 867 S.W.2d 781 (Tex. 1993); *Brinton v. Houston Lighting & Power Co.*, 175 S.W.2d 707, 710 (Tex. Civ. App.—Galveston 1943, writ ref’d w.o.m.) (urging the condemnor to agree with the landowner about damages). See generally *White v. Natural Gas Pipeline Co. of Am.*, 444 S.W.2d 298, 301 (Tex. 1969) (citing NEB. CONST. art. I, § 21; *Pierce v. Platte Valley Pub. Power & Irrigation Dist.*, 143 N.W.2d 813 (Neb. 1943)) (approving of a Nebraska Supreme Court case which held that the Nebraska Constitution assures landowners a recovery for the entire amount of damages sustained as a result of the condemnation).

120. *Hubenak*, 141 S.W.3d at 191.

121. *Id.* at 176.

122. *Cf. id.* at 195 (Jefferson, J., concurring) (pointing out that the purchase offer sought more rights than were included in the condemnation petition).

123. TEX. PROP. CODE ANN. § 21.012(b) (“A condemnation petition must . . . state that the entity and the property owner are unable to agree on damages.”).

124. See *Hubenak*, 141 S.W.3d at 195 (Jefferson, J., concurring) (stressing that by not requiring the purchase offers and condemnation petitions to mirror each other, the majority adopts a “greater includes the lesser theory,” which is potentially quite detrimental to the landowner). Justice Jefferson further illustrates his opinion by quoting the Texarkana Court of Appeals position on the “greater includes the lesser” theory:

C. *Conflict with Precedent*

1. Ignoring the Traditional Statutory Construction

Before the *Hubenak* decision was issued, courts had followed the Texas Supreme Court precedent, which held that statutes conferring eminent domain power were to be “accorded a full meaning so as to carry out the manifest purpose and intention of the statute” and therefore should be “strictly construed in favor of the landowner and against those corporations and subdivisions of the State.”¹²⁵ The majority’s opinion appears antithetical to this dictate¹²⁶ because it will almost certainly provide a considerable boon to a condemning entity’s condemnation power.¹²⁷ As one commentator put it, “[the] new system allows the [condemnor] to

[I]f this were the law, it would allow the condemnor to make an offer on a 500-acre tract of land that had been in the landowner’s family for five generations, that contained the home of the landowner, numerous improvements made by the landowner, and other properties unconnected with the condemnation when the area sought to be condemned involved only a small strip in the corner of the property. The condemnor could then, under that theory, say that the negotiated offer required under the statute had been made. Such an offer would in no way have any connection with the property to be condemned, and certainly the Legislature could not have intended for such an offer, even though the greater included the lesser, to be considered a good faith negotiation in an attempt to purchase the property to be condemned.

Id. (citing *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852, 861 (Tex. App.—Texarkana 2002) (Cornelius, J., dissenting), *rev’d*, 141 S.W.3d 172 (Tex. 2004)).

125. *Burch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. 1975); *see also* *Coastal States Gas Producing Co. v. Pate*, 158 Tex. 171, 309 S.W.2d 828, 831 (1958) (explaining that statutes conferring eminent domain power should be “strictly construed in favor of the landowner” and against the condemning entities); *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 716 (Tex. App.—Corpus Christi 2000, *pet. denied*) (highlighting the precedent that eminent domain statutes are construed strictly in favor of the landowner), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Atkins v. Davis*, 291 S.W. 968, 969 (Tex. Civ. App.—Amarillo 1927, *writ dismissed w.o.j.*) (expressing that statutes relating to the establishment of highways are to be strictly construed in favor of the landowner).

126. *Cf. Hubenak*, 141 S.W.3d at 196 (Jefferson, J., concurring) (stressing that the requirement of a single, pre-suit good faith offer, as opposed to the majority’s offer for the same general property and uses, would comport with the court’s obligation to construe condemnation cases in favor of the property owner).

127. *Cf. Brent Shellhorse, State Wants Your Land, and Doesn’t Have to Be Nice*, FORT WORTH BUS. PRESS, Sept. 3, 2004, at 27, available at <http://www.fwbusinesspress.com/display.php?id=2339> (arguing that good faith negotiation prior to the institution of a condemnation proceeding are a thing of the past and now a condemning entity can prove that it was unable to agree by making a single offer, thus leaving no incentive for the condemnor to deal fairly with the landowner) (on file with the *St. Mary’s Law Journal*). More importantly, by the time the landowner reaches the point in the litigation to demand negotiations, the party will have already incurred a number of legal pitfalls, including the costs of legal representation. *Id.*

speed the condemnation process along and reduce any legal challenges to its actions along the way.”¹²⁸

While the previous burden of good faith or bona fide negotiations was substantially high, now all a condemning party must do is make a single offer for the same general property rights and uses as those potentially subject to condemnation.¹²⁹ As a result, the condemnor's burden lightens substantially because it is now legally irrelevant if the condemning party fails to negotiate in good faith or alternatively refuses to negotiate.¹³⁰ In short, the current condemnation process will now dramatically tilt in the condemning party's favor.¹³¹ If the condemnor is benefited to such a great degree, then by extension, the converse will be true and the landowner's position will be equally weakened.

Both of these effects, the boon to condemnors and increased burden on landowners, indicate the court's failure to adhere to its prior mandate that the court construe the condemnation statute strictly in favor of landowners and against the condemning authorities. This rule of construction, which is in place to level the condemnation battlefield, plainly suggests a judicial preference in adjudicating condemnation cases.¹³² This preference is critical because the historical construction of the condemnation statute was premised on the fact that the landowner only gets one opportunity to recover damages for the taking, thus creating a de facto imbalance of power between the landowner and the condemnor.¹³³ By

128. *Id.*

129. *See Hubenak*, 141 S.W.3d at 187-91 (holding that because the condemnors respectively made offers for the same general physical property and uses, they satisfied the unable to agree requirement).

130. *See Brent Shellhorse, State Wants Your Land, and Doesn't Have to Be Nice*, FORT WORTH BUS. PRESS, Sept. 3, 2004, at 27, available at <http://www.fwbusinesspress.com/display.php?id=2339> (arguing that since the state can make a single offer “there is no incentive for the state to deal fairly with a landowner during litigation”) (on file with the *St. Mary's Law Journal*).

131. *Id.*

132. *See Laura Hanley, Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, But by How Much*, 37 HOUS. L. REV. 125, 140 (2000) (observing that strict construction of the condemnation statute “appears to be the court's way of leveling the battlefield based upon the belief that landowners have a right not to have their interests in their property taken without a fair fight”).

133. *See Coastal Indus. Water Auth. v. Celanese Corp.*, 592 S.W.2d 597, 599 (Tex. 1979) (highlighting that the property owner is given only “a single opportunity to recover [the] damages” resulting from the condemnation of his property). *See generally* Laura Hanley, *Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, But by How Much*, 37 HOUS. L. REV. 125, 139-40 (2000) (noting that the condemnor has the strength of eminent domain on its side and therefore the procedures within the condemnation statute have the effect of balancing the fight between the condemning entity and the landowner).

construing the statute in favor of the landowner, courts sought to not only remedy this imbalance, but also to moderate the derogation of citizen rights that results from eminent domain.¹³⁴ Now, in light of the majority's decision, neglecting this judicial construction, the imbalance of power between the landowner and the condemner will ripen, and consequently undermine the landowner's position and restore the power imbalance.

2. A Reversal of the Statutory Purpose

The purpose of the condemnation statute and its statutory requirements is to "forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties."¹³⁵ As noted earlier, eminent domain statutes should be accorded their complete meaning to carry out the purpose and intention of the statute.¹³⁶ Correspondingly, courts should adjudicate condemnation proceedings in such a manner that would foster negotiations between the condemning entity and the landowner. However, as stated throughout the *Hubenak* opinion, the majority does not always follow the logical dictates of past precedent. Now, based on the majority's holding that any offer, so long as it is for the same general property and same general use, will satisfy the statutory unable to agree requirement,¹³⁷ it is not implausible that negotiations will no longer be viewed as a viable route in the condemnation process; instead, whoever can likely afford the expenses of litigation will take an all or nothing approach with the mindset that litigation rests in their favor—a mindset that is certain to stimulate condemnation litigation.¹³⁸

134. *Burch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. 1975).

135. *See Hubenak*, 141 S.W.3d at 195 (Jefferson, J., concurring) (recognizing that the purpose of the condemnation statute is to "forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties" (quoting *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ))); *see also Schlottman v. Wharton County*, 259 S.W.2d 325, 331 (Tex. Civ. App.—Fort Worth 1953, writ dismissed) (asserting that the purpose of requiring an effort to agree is to spare time and save expenses where an agreement is feasible), *disapproved of by Hubenak*, 141 S.W.3d at 183.

136. *Burch*, 518 S.W.2d at 545.

137. *See Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 191 (Tex. 2004) (holding that because the condemners respectively made offers for the same general physical property and uses, they satisfied the unable to agree requirement).

138. *See id.* at 195 (Jefferson, J., concurring) (highlighting the majority's standard for the unable to agree requirement of a single offer for the same general property, which will likely increase litigation, rather than reduce it); *see also Brent Shellhorse, State Wants Your Land, and Doesn't Have to Be Nice*, FORT WORTH BUS. PRESS, Sept. 3, 2004, at 27, available at <http://www.fwbusinesspress.com/display.php?id=2339> (asserting that under the new system as dictated by the *Hubenak* majority, condemners will not only be able to acceler-

V. SEARCHING FOR A SOLUTION: LOOKING ELSEWHERE
FOR GUIDANCE

A. *Other States*

A number of other states, contrary to the *Hubenak* decision, have held that before a condemning entity can claim that parties are unable to agree, there must be a purchase offer made for the subject property.¹³⁹ Logically, the more reflective an offer of the property to be condemned, the more accurately the landowner will be able to assess his position, and hence better suited to decide whether to accept the reward.¹⁴⁰ For example, in a case in which a town negotiated for more extensive property rights than it eventually condemned, the Indiana Supreme Court highlighted that “[i]t is conceivable that if the offer to purchase had related to the property which is the subject of the condemnation proceeding, the offer might have been accepted, in which event this litigation would not have been necessary.”¹⁴¹ Comparatively, Colorado, in order to alleviate confusion as to the necessary content of the purchase offer,¹⁴² has statutorily mandated that once a condemning entity determines its intention to

ate the condemnation process, but they can also choose to refuse to negotiate or alternatively fail to negotiate in good faith) (on file with the *St. Mary's Law Journal*).

139. See, e.g., *Dzur v. N. Ind. Pub. Serv. Co.*, 278 N.E.2d 563, 566 (Ind. 1972) (emphasizing that any preliminary offers to a condemnation action must coincide with the subsequent condemnation complaint in order to satisfy the condition precedent of making an effort to agree with the landowner as to the damages); *Ind. Serv. Corp. v. Town of Flora*, 31 N.E.2d 1015, 1017 (Ind. 1941) (holding that an effort to purchase the property sought to be acquired is required prior to the institution of a condemnation action and that in order for this effort to be sufficient there must be a meeting of the minds as to the subject property rights); *Prairie View Tel. Co. v. County of Cherry*, 138 N.W.2d 468, 470 (Neb. 1965) (equating a good faith attempt to agree to “an offer made in good faith” that makes a reasonable effort to induce the owner to accept it); see also 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 24.14[1], at 24-234 (3d ed. 2004) (“If the condemnor, after making an offer to acquire a particular property or a specific part thereof, undertook to condemn other and different property or a quantum thereof than it offered to purchase, there was no effort to purchase for the land taken to satisfy the negotiation requirement.”); Michael A. DiSabatino, Annotation, *Sufficiency of Condemnor's Negotiations Required As Preliminary to Taking in Eminent Domain*, 21 A.L.R.4TH 765, 815-19 (1983) (detailing cases in various states which have sought to ascertain the sufficiency of negotiations between landowners and condemnors prior to the institution of the condemnation proceeding).

140. See *Dzur*, 278 N.E.2d at 566 (recognizing the benefits to be had from a purchase offer which coincides with the subsequent description of the property in the condemnation petition); *Ind. Serv. Corp.*, 31 N.E.2d at 1017 (promulgating the likelihood that an owner will accept an offer by the condemnor if that offer accurately reflects the subject property).

141. *Ind. Serv. Corp.*, 31 N.E.2d at 1017.

142. See David L. Kelble, Jr., *Representing the Landowner in Condemnation Cases*, 23 COLO. LAW. 1103, 1104 (1994) (highlighting that in order to achieve more substantial negotiations between the landowner and the condemnor the legislature enacted Colorado Revised Statute section 38-1-121).

condemn a certain property interest, it must give both notice of this intent and a description of the exact property interest that will be sought in the condemnation.¹⁴³

Similarly, both New Jersey and Nebraska have held that in order to reduce litigation, a condemning entity must make a good faith offer to the landowner regarding the damages resulting from the taking.¹⁴⁴ Additionally, the Supreme Court of New Jersey, adjudicating a condemnation case in which the condemning entity sought more land than was statutorily permissible, concluded that the landowner is entitled to at least an offer for the land to be acquired; subsequently, the proceeding was rendered illegal.¹⁴⁵ These courts and others around the country¹⁴⁶ agree with Justice Jefferson, who emphasized in his concurring opinion in *Hubenak* that “it is improper to equate rejection of an offer that comprehends rights greater than those sought to be condemned with refusal to sell only those property rights that could be or were sought to be condemned.”¹⁴⁷

143. See COLO. REV. STAT. ANN. § 38-1-121 (West 2004) (“As soon as a condemning authority determines it intends to acquire an interest in property, it shall give notice of such intent, together with a description of the property interest to be acquired, to anyone having an interest . . . in the property involved.”). Additionally, the Supreme Court of Colorado has interpreted Colorado’s failure to agree requirement as meaning that a condemnor must make a reasonable good faith offer to the landowner for the subject property in order to satisfy the prerequisite of failing to agree on the damages. *City of Thornton v. Farmers Reservoir & Irrigation Co.*, 575 P.2d 382, 392 (Colo. 1978) (en banc).

144. Compare *In re* SID No. 384 of Douglas County, 609 N.W.2d 679, 688 (Neb. 2000) (“The burden is upon the condemnor to allege and prove that before commencing condemnation proceedings a good faith attempt was made to agree with the owner of the land as to the damages the owner was entitled to receive.” (quoting *Moody’s Inc. v. State*, 267 N.W.2d 192, 193 (Neb. 1978))), with *Borough of Rockaway v. Donofrio*, 452 A.2d 694, 697 (N.J. Sup. Ct. App. Div. 1982) (quoting the Eminent Domain Act of 1971’s Commission’s April 15, 1965 report: “To foster amicable adjustments and thereby reduce litigation, the statute shall require that before proceedings are instituted, the condemning body shall conduct bona fide negotiations with the owners, through fair offers of compensation” (citing *Monmouth County v. Wissell*, 342 A.2d 199 (N.J. 1975))).

145. *State v. Hudson Terminal Ry. Co.*, 46 N.J.L. 289, 1884 WL 7658, at *3 (N.J. Sup. 1884).

146. See, e.g., *City of Cape Girardeau v. Robertson*, 615 S.W.2d 526, 530 (Mo. Ct. App. 1981) (detailing that in Missouri a condemnor must both plead and prove an inability to agree with the property owner as to the damages for the condemned interest before a condemnation order can be entered); *N.Y. State Elec. & Gas Corp. v. Morrison*, 252 N.Y.S.2d 979, 982 (Sup. Ct. 1964) (recognizing that offers which seek to obtain gratuitous rights do not comply with the requirement of good faith negotiations); *Erie County v. Lancaster Dev. Co.*, 250 N.Y.S. 108, 110-11 (App. Div. 1931) (finding that actions by the county to condemn more land than the board of supervisors authorized did not adhere to the spirit of the New York condemnation laws and that the owner of the property was prevented from having a fair opportunity to negotiate for the sale of his land).

147. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 195 (Tex. 2004) (Jefferson, J., concurring).

Therefore, the more comprehensive the offer, the more apt a landowner will be to accept, thus adhering to the statutory purpose of obviating litigation.

Alternatively, Justice Owen's opinion for the majority questions the applicability of some of the above mentioned cases by maintaining that these cases held in the landowner's favor because the condemnors sought more land, as opposed to intangible rights, than they eventually condemned.¹⁴⁸ However, in drawing that distinction the court fails to distinguish the effectual differences between land and intangible rights with respect to the negotiation process. Whether the condemnor negotiates for more land or more intangible rights than it eventually condemns, or both, the impact on the landowner persists, i.e., he is unable to evaluate as clearly the purchase offer as if it had mirrored the rights in the condemnation petition.¹⁴⁹

B. *Texas's Deceptive Trade Practices Act*

The *Hubenak* majority found it helpful to analogize the condemnation statute to other mandatory statutory provisions in holding that abatement was the proper course when a statutory requirement is not met.¹⁵⁰ Likewise, a worthwhile comparison exists in the requirements of the purchase offer in the context of condemnation with the written notice requirement of the Deceptive Trade Practices Act (DTPA), because both derive from a statutory purpose that discourages litigation.¹⁵¹ Section 17.505 of the Texas Business and Commerce Code¹⁵² requires that before filing suit the plaintiff must give written notice of the "specific complaint and the

148. *See id.* at 188 ("Those cases, however, are distinguishable because the condemnors sought to purchase more land than they were legally entitled to condemn.").

149. *Cf. id.* at 196 (disagreeing with the majority's position that the inclusion of intangible property rights in a purchase offer is impracticable and highlighting that the landowner could not be forced to warrant the valuable commodity of title by a condemning entity).

150. *See id.* (examining the majority's disposition of utilizing the Deceptive Trade Practices Act and the Medical Liability and Insurance Improvement Act in order to ascertain a remedy for noncompliance with the condemnation statute's prelitigation requirements).

151. *Compare Hines v. Hash*, 843 S.W.2d 464, 469 (Tex. 1992) (emphasizing that the purpose of the DTPA's notice requirement is to foment negotiations and discourage unnecessary litigation), *and Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985) (stressing that the purpose of the DTPA notice requirement is to promote settlements of consumer complaints), *with Hubenak*, 141 S.W.3d at 195 (Jefferson, J., concurring) (recognizing that the purpose of the condemnation statute is to "forestall litigation and to prevent needless appeals to the courts when the matter may have been settled by negotiations between the parties" (quoting *County of Nueces v. Rankin*, 303 S.W.2d 455, 457 (Tex. Civ. App.—Eastland 1957, no writ))).

152. TEX. BUS. & COM. CODE ANN. § 17.505 (Vernon 2004).

amount of economic damages, damages for mental anguish, and expenses, including attorney's fee."¹⁵³ The Code also notes that abatement should be ordered if the court finds that notice "was not provided as required by this section."¹⁵⁴ Texas courts have interpreted this statute to mean that written notice, in order to fulfill the statutory purpose of deterring litigation and comply with the statute, must conform in *all respects* to section 17.505¹⁵⁵ and must be sent to the defendant.¹⁵⁶ Relying on the damages asserted in the notice, the recipient and potential defendant has the opportunity to make an educated decision whether to negotiate and settle or incur further expenses and risks associated with litigation.¹⁵⁷

No substantive distinction appears between the written notice requirement in the DTPA and the unable to agree requirement in the condemnation statute at least with respect to its purpose and remedy.¹⁵⁸ Both requirements intend to deter litigation and stimulate negotiation or settlement and both are mandatory requirements needed to initiate litigation and avoid abatement.¹⁵⁹ That said, the majority's opinion in *Hubenak* deviates from its precedent concerning written notice under the DTPA.¹⁶⁰ The majority instead opens the door for condemnors to avoid exact compliance with the statutory requirement that the parties be "una-

153. *Id.* § 17.505(a).

154. *Id.* § 17.505(d).

155. *Id.* § 17.505.

156. *See* *Cielo Dorado Dev., Inc., v. Certainteed Corp.*, 744 S.W.2d 10, 11 (Tex. 1988) (Gonzales, J., dissenting) (citing *Silva v. Porowski*, 695 S.W.2d 766, 768 (Tex. App.—El Paso 1985, writ ref'd n.r.e.); *Barnard v. Mecon*, 650 S.W.2d 123, 127 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)) (arguing that in order to fulfill the statutory purpose, the plaintiff must prove that notice "complied in all respects with Section 17.505(a)" and "was sent to the defendant").

157. *See Cielo Dorado Dev., Inc.*, 744 S.W.2d at 11 (Gonzales, J., dissenting) (asserting that as a result of adequate notice, a consumer is "given an opportunity to negotiate the claim and settle the dispute rather than expose itself to the additional damages and attorney's fees which will result if the lawsuit is successfully prosecuted" (citing *Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985))).

158. *Compare Hines v. Hash*, 843 S.W.2d 464, 468-69 (Tex. 1992) (emphasizing that the purpose of the DTPA's notice requirement is to foment negotiations and discourage unnecessary litigation and therefore abatement, not dismissal, is the appropriate remedy for noncompliance with the notice requirement), *with Hubenak*, 141 S.W.3d at 192 (Jefferson, J., concurring) (recognizing that the purpose of the condemnation statute is to prevent needless litigation by encouraging negotiation and thus abatement is the proper remedy).

159. *Compare Hines*, 843 S.W.2d at 468-69 (citing the DTPA's notice requirement, which is used to prevent unnecessary litigation); *with Hubenak*, 141 S.W.3d at 192 (noting that the condemnation statute attempts to limit litigation as well).

160. *Compare Jim Walter Homes, Inc. v. Valencia*, 690 S.W.2d 239, 242 (Tex. 1985) (conveying that the notice requirement was met when there was written notification of violation of the DTPA), *with Hubenak*, 141 S.W.3d at 191 (asserting that it will generally satisfy the unable to agree requirement if the "same physical property and same general

ble to agree on the damages” by holding that purchase offers which do not reflect the condemnation petition are nevertheless sufficient to satisfy the unable to agree requirement.¹⁶¹ This holding does not allow landowners to accurately assess the value of their land. Hence, they are unable to make an informed decision on whether to proceed with the litigation, a result that unquestionably frustrates potential negotiations.¹⁶² Consequently, exact, rather than approximate compliance, would be the most effective mandate in terms of fulfilling the statutory purpose of discouraging litigation.

VI. PROPOSAL

Prior to the majority's holding, the unable to agree requirement was diluted in confusion and mired in questions over the application and meaning of respective statutory standards and terms. While the majority's position in *Hubenak* simplifies the interpretation of the unable to agree requirement by demanding only a single offer for the same general property, it does so at the expense of equity. The majority's standard not only frustrates the statutory purpose of stimulating negotiations for the sake of needless litigation, but more importantly leaves the landowner at the apparent mercy of the condemning authority—a scenario that clearly opposes the court's directive of construing the eminent domain statutes in favor of the landowner and most harshly against the condemnor.

The condemnation process could be simplified, while honoring past precedent by requiring a single pre-suit, good faith offer involving only those property rights which the condemnor intends to condemn.¹⁶³ As Justice Jefferson has emphasized, “[t]his requirement is neither burdensome nor complex.”¹⁶⁴ In fact, it is the “simplest and cheapest solution.”¹⁶⁵ A pre-suit, good faith offer would offer landowners a clear and accurate picture of the damages resulting from the taking and accordingly

use” is the subject of the negotiations, even if there are intangible rights negotiated for that are not in the subsequent condemnation petition).

161. *Hubenak*, 141 S.W.3d at 187, 191.

162. *See id.* at 193 (Jefferson, J., concurring) (emphasizing that a requirement of a single bona fide offer would provide a bright-line rule that would give landowners a chance to accurately assess the value of the rights to be condemned.); *cf.* *Texas v. Nelson*, 160 Tex. 515, 521, 334 S.W.2d 788, 790 (1960) (emphasizing that unless that land to be condemned is adequately described, neither the commissioners nor the court can accurately pass on the necessary damages).

163. *See Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 196 (Tex. 2004) (Jefferson, J., concurring) (showing that the pre-suit offer for condemning property should include all of the rights the condemnor seeks to condemn).

164. *Id.*

165. *Id.* at 197.

allow them to properly determine whether the option of settlement outweighs the alternative of litigation.¹⁶⁶ Such a standard, were it adopted by the courts, would adhere with the judicial directive of strictly construing condemnation statutes in favor of the landowner.¹⁶⁷ Additionally, by having an offer which accurately reflects the rights to be condemned, the landowner will be better equipped to competently assess the value of his property and decide whether to negotiate with a condemning entity. This effect will certainly advance the statutory purpose of encouraging negotiation and decreasing litigation.

Prior to *Hubenak*, a myriad number of court decisions sought to ascertain the sufficiency of negotiations between the landowner and the condemnor.¹⁶⁸ By adopting the requirement of a single pre-suit offer, courts would preclude needless inquiries into the adequacy of negotiations.¹⁶⁹ A single pre-suit offer would relegate a court's inquiry to whether a single pre-suit, good faith offer was made that reflected the rights sought in the condemnation petition. If the court finds that the purchase offer and the condemnation petition were in fact symmetrical, then the unable to agree requirement would be satisfied and the proceeding would continue accordingly. However, if the offer sought greater or lesser rights than were

166. *Id.* at 196.

167. *Id.*

168. See *Houston N. Shore Ry. Co. v. Tyrrell*, 128 Tex. 248, 98 S.W.2d 786, 795 (1936) (attempting to discern whether negotiations would have been futile); *State v. Hipp*, 832 S.W.2d 71, 77 (Tex. App.—Austin 1992) (holding that the Texas condemnation statute does not contemplate prolonged negotiations), *rev'd on other grounds sub nom. State v. Dowd*, 867 S.W.2d 781 (Tex. 1993); *Tex.-N.M. Power Co. v. Hogan*, 824 S.W.2d 252, 254 (Tex. App.—Waco 1992, writ denied) (addressing the issue of negotiations with joint landowners and recognizing that if the good faith efforts to agree with one landowner failed, then it is likely that further efforts would not be required), *disapproved of by Hubenak*, 141 S.W.3d at 183; *Aronoff v. City of Dallas*, 316 S.W.2d 302, 306 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.) (recognizing that negotiations are unnecessary where an attempt to agree would be futile); *Fort Worth Indep. Sch. Dist. v. Hodge*, 96 S.W.2d 1113, 1114 (Tex. Civ. App.—Fort Worth 1936, no writ) (recognizing the futility in ascertaining of the sufficiency negotiations, the court looked to the wholesome doctrine, which establishes that “where it appears from the entire record and proceedings that the parties could not have agreed upon the amount to be paid, it is not necessary to make a formal effort to agree upon the amount”); see also Michael A. DiSabatino, Annotation, *Sufficiency of Condemnor's Negotiations Required As Preliminary to Taking in Eminent Domain*, 21 A.L.R.4TH 765, 815-19 (1983) (detailing ways various courts handle the question of the sufficiency of negotiations).

169. Cf. *Hubenak*, 141 S.W.3d at 196 (Jefferson, J., concurring) (asserting that a single pre-suit, good faith offer would be the “simplest and cheapest” solution to the problem of ascertaining the sufficiency of negotiations between a condemning authority and the landowner).

being condemned, the matter would be abated in accordance with the majority decision in *Hubenak*.¹⁷⁰

Perhaps the most important point is that condemning entities would not be barred from negotiating for additional rights.¹⁷¹ During the course of negotiations, the offers for the additional rights should be separate and distinct from those rights that will be condemned, alleviating any confusion about the amount of compensation offered for the subject property.¹⁷² The majority suggests that this requirement “does not easily lend itself” to a bright-line rule and would create an “impediment to the condemnation process.”¹⁷³ This suggestion, however, flies in the face of logic because no other party is better suited to know what rights will be sought through condemnation than the condemning entity itself.¹⁷⁴ Therefore, it should be a rather simple feat to craft a purchase offer that mirrors the rights that will be sought through condemnation.

VII. CONCLUSION

Subsequent to the completion of the first draft of this Comment, the United States Supreme Court in *Kelo v. City of New London*¹⁷⁵ concluded that a condemnation action executed for the purpose of “economic development” conformed to the requirements of the Public Use Clause of the Fifth Amendment to the United States Constitution and was therefore constitutionally permissible.¹⁷⁶ While this decision addressed issues not necessarily germane to the argument of this Comment, that is, the constitutionality of a specific type of taking, it nevertheless is

170. *See id.* (illustrating that even if the pre-suit offer for condemning property does not include all of the rights the condemnor seeks to condemn, the unable to agree requirement may be met).

171. *See id.* (noting that condemnors may negotiate with landowners for additional rights the condemnor seeks to acquire).

172. *Id.*

173. *Id.* at 191.

174. *Hubenak*, 141 S.W.3d at 196 (Jefferson, J., concurring) (noting that because condemnors control their pleading, they are in the best position to conform the rights sought during the condemnation proceedings with the rights sought during the pre-suit proceedings).

175. 125 S. Ct. 2655 (2005).

176. *See Kelo v. City of New London*, 125 S. Ct. 2655, 2665-66 (2005) (concluding that economic development can qualify as a “public use” in the context of eminent domain); *see also* John Dean, *The U.S. Supreme Court's Holding in Kelo v. City of New London: An Interview That Reveals an Insider's Perspective*, July 1, 2005, at 1, <http://writ.corporate.findlaw.com/dean/20050701.html> (“The U.S. Supreme Court, in a closely-watched 5-4 decision, found it constitutional, under the Takings Clause, for the State of Connecticut, and the city of New London, to condemn fifteen homes, owned by seven families, for ‘economic development.’”) (on file with the *St. Mary's Law Journal*).

significant because it enhances the gravity of the *Hubenak* holding. By expanding or, at a minimum, solidifying the permissible scope of eminent domain powers, the court has likely prompted a potential rise in the number of condemnation proceedings in the future.¹⁷⁷ Due to this probable increase, the need to preserve equity throughout the condemnation process by ensuring a fair and forthright negotiations process between the landowner and the condemning entity, has been rendered even more imperative.

Regardless, the *Hubenak* decision inexplicably restores an imbalance of power in the Texas condemnation process by removing the good faith element from the condemnation equation in favor of a more general, condemnor-friendly standard, which requires only a single offer for the same general property and same general uses. This standard, though seemingly simple, is rife with problems. First, the statutory purpose of encouraging negotiations and preventing gratuitous litigation will be noticeably frustrated. Second, there will be an amplified imbalance of power, leaving property owners at the mercy of condemning entities—a position that clearly conflicts with the judicial precedent compelling courts to strictly construe eminent domain statutes in favor of the landowner and against the condemnor.

In order to remedy these inequities, the playing field must once again be leveled. By requiring a single pre-suit good faith offer, this option would reduce needless and confusing inquiries by the courts into the adequacy of negotiations between two parties, while concurrently allowing the landowner to accurately assess his strategic options in light of the pending litigation. Most importantly, a single pre-suit offer would fulfill the statutory purpose of reducing litigation and needless appeals, while encouraging negotiation and settlement between the condemning entity and the landowner. A single pre-suit offer that is reflective of the rights to be condemned is clearly the most effective and just remedy for Texas landowners. For this reason, Texas courts should adopt this approach in their future adjudication of condemnation actions.

177. See S.G. Johndroe, III & Brian McCabe, *Future of Eminent Domain after Kelo v. City of New London*, FORT WORTH BUS. PRESS, July 11, 2005, at 23 (asserting that the *Kelo* decision merely confirmed “what cities have known all along: Economic development can be as much a ‘public use’ as a road, bridge or water tower”).

