



BY CHARLES R. WATKINS

# A CLASS ACTION SOLUTION TO A RIGHT OF WAY PROBLEM

**T**he conflict between old easements and modern information technology sometimes gives rise to interesting and unsuspected legal issues, which may be of substantial importance to right-of-way professionals. A unique class-action lawsuit in which the author represented a class of several hundred affected Midwestern landowners is a case in point.

During the 1930s, oil pipelines were laid throughout the Midwest. The pipelines run in the form of a cross from Minnesota in the north, to Kansas City, Missouri in the south and from a “tank farm” located in Franklin Park, Illinois in the east, to a point west of Des Moines, Iowa, in the west. These pipelines are commonly known as the “Midwestern Cross.” When the pipelines were initially installed, they ran mostly through farmland, but over the years some of the land was developed for subdivisions, shopping centers, a county fairground and other uses.

By the 1980s, the pipelines and the attendant easements had come under the common ownership of a large pipeline company in Oklahoma. Changing economic conditions meant the pipelines were gradually taken out of service.



Concurrently, the pipeline company entered the telecommunications field. Astute managers within the pipeline company decided that the old pipeline business could complement the new telecommunications business. They decided to use the decommissioned pipelines to house fiberoptic cables. This was accomplished by means of a “pig”, or small-wheeled robot that can run inside an 8-inch pipeline pulling the cable behind it. The pipeline company in its annual reports to shareholders touted the benefits of using pipelines for fiberoptic cable.

Realizing that the 1930s vintage easements did not refer to cables or wires, an initial attempt was made by the pipeline company to obtain amended easements from hundreds of affected landowners. Glossy brochures were printed up for use in this endeavor. Ultimately, however, the effort proved too troublesome and was abandoned. The laying of the fiberoptic cable, however, was not abandoned. It proceeded without notification or permission from hundreds of affected landowners.

A few years later, due in part to new signs placed along the easement announcing that fiberoptic cable lay below, a landowner retained the author’s law firm to investigate the situation. Based on the investigation, the firm decided to prosecute a class-action lawsuit against the pipeline company.

A class action is a legal device that allows many “similarly situated” individuals to join forces and prosecute claims on a group basis, which would be too small individually to warrant legal attention. The suit sought either removal of the cable—which, legally speaking, would be trespassing—or compensation for the use of the plaintiffs’ land for fiberoptic cable purposes.

Given the unique nature of the situa-

tion, the pipeline company was somewhat surprised when the complaint in the lawsuit was served. After an unsuccessful claim that the wrong corporate entity had been sued, the pipeline company mounted a three-pronged defense.

First, the pipeline company argued that the easement language in question was broad enough to encompass their fiber optic cable installation. Nevertheless, the court agreed

with the landowners, finding that even though the language of the easement did leave some room to maneuver, it was not broad enough to permit the fiberoptic cable.

Second, the pipeline company argued that the landowners had no legally compensable damages because the use of the pipeline for fiberoptic cable purposes was less burdensome and intrusive than the permitted oil pipeline usage. In other words, the landowners should be glad that the pipeline was being used for cable instead of oil because the cable was less likely to leak, cause groundwater pollution or otherwise damage the land at issue. The court rejected that argument, reasoning that the issue was not whether the landowners had been damaged, but whether the defendant pipeline company had legal

permission to lay fiberoptic cable beneath the properties.

In reaching its conclusion, the court took into account the amount of money the pipeline company was making from the fiberoptic cable. The court considered that by laying the cable through the pipeline, the defendant company had saved a substantial amount over the cost of digging a new trench and laying the fiberoptic cable using traditional methods. The court also gave weight to the fact that a property owner enjoys certain basic rights, including the right to control who or what comes onto



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his or her land.

In response to the pipeline company's argument that it could simply condemn an easement, the court acknowledged that if the defendant wanted to initiate hundreds of individual condemnation proceedings, it was free to do so. Of course, each landowner would have a separate opportunity to oppose the condemnation and litigate the valuation of the easement condemned. However, unless and until condemnation proceedings were initiated and successfully concluded, the cable was not lawfully present under the landowners' properties.

Having unsuccessfully contested the landowners' claims on the merits, the pipeline company argued that the case could not properly proceed as a class action because each property was "different" and because there were three slightly different versions of the easement governing the subject pipeline. In support, the pipeline company cited a case from Tennessee that had adopted this reasoning. The defendant pipeline company also argued that the pipeline crossed several Midwestern states and that Illinois was not the proper forum for claims by landowners in other states.

That effort by the pipeline company was also largely unsuccessful, with the court ruling that although there were some variations in the easements at issue, they were all essentially the same insofar as the legality of the cable was concerned. The court did rule, however, that it only had jurisdiction over the claims of Illinois landowners, thus requiring that separate proceedings be brought in Iowa and Missouri.

After the pipeline company's efforts to oppose the plaintiff's claims proved unsuccessful, it decided to enter into settlement negotiations. As a result, the parties reached a settlement with terms essentially as follows:

An experienced right-of-way professional was retained to appraise the value of the easement. An extensive survey of land values in the vicinity of the easements was undertaken. Also, an analysis was done to determine approximately what percentage of the

value of affected land was properly attributable to the easement in question. The results—which bear upon Iowa and Missouri as well as Illinois—were contained in a series of reports.

Using the valuation analysis, the next step was to negotiate an appropriate settlement figure. It was agreed that affected landowners would receive a certain amount of money based on the number of running feet of easement that crossed each affected property. In negotiating this amount it was necessary to arrive at an average valuation figure for the entire length of the pipeline. Thus, class members who owned

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affected farmland, or even vacant land, received the same per-foot amount as landowners that owned property located in suburban and urban areas. That compromise was necessary in order to avoid the difficulty of separately valuing each piece of property. Separate valuation would have been expensive and the administrative costs would likely have consumed much of the value to be obtained under the settlement.

The final element of the negotiations involved developing a mechanism for a new easement to the pipeline company, thus avoiding similar problems in the future. Each class member that agreed

to let the pipeline company record an amended easement would receive an additional, one-time net payment of \$250. The amount was equivalent to that paid landowners who had agreed to permit an amended easement when the pipeline company was engaged in its earlier efforts to obtain amended easements from all of the affected landowners.

Having agreed upon the basic terms of the settlement and having executed that agreement in writing, the parties then presented it to the courts in Illinois, Iowa and Missouri for preliminary approval. In a class-action case, all settlements are subject to scrutiny by the court for fairness, to make sure that the case has been handled in a manner which does not benefit any one individual at the expense of others.

After the courts concluded that the settlement appeared to be fair on its face, each landowner was mailed a detailed package of information. The package outlined the nature of the lawsuit with the claims and defenses asserted. It provided each landowner with a copy of the amended easement that was to be recorded at the conclusion of the litigation and explained that each landowner had the choice of participating or not participating. The information also stated that each landowner would have the opportunity to advise the court if he or she felt that the settlement was unfair for any reason. As is customary in class-action litigation, the courts reviewed and approved the content of the notice packets sent to class members.

In each of the three jurisdictions at issue—Illinois, Iowa and Missouri—the respective courts held "fairness" hearings at which they considered the terms of the settlements and the manner in which the settlements had been negotiated. At the conclusion of each of these hearings, and based in large measure upon the analytical work done by the right-of-way professional, each of the three courts concluded that the settlements were fair and appropriate and entered orders finally approving

the settlements. While each of the settlement hearings generated a fair amount of interest from affected landowners, no landowner objected to the settlements and only a handful decided to “opt out” and negotiate separately with the pipeline company.

Ultimately, the settlements involved the transfer of approximately \$4 million from the pipeline company to the landowners. Landowners received, at the low end, slightly over \$250, for those with city-sized lots, ranging upward to several thousand dollars for landowners that held large tracts of rural property.

In the end, all parties benefited from the outcome of the class-action litigation. The pipeline company was able to clear up a significant title problem regarding its easement without the necessity of hundreds of individual negotiations. The pipeline company did not have to remove or re-route any cable and was able to retain the savings resulting from running the cable through the pipe. The landowners, for their part, were appreciative of the financial payments, which were obtained without the necessity of any action or out-of-pocket expenditure on their part. The lawyers representing the landowners were paid by the court, which required a deduction from each landowner’s payment.

Several lessons may be learned from this case, which as far as we know is the only trespass case ever to be successfully concluded as a class action. First, whenever an easement granted many years ago is to be used for a new purpose, careful attention needs to be given to the exact language of the easement to avoid problems of trespassing and unpermitted use.

Second, given the widespread use of easements of all sorts and the growing communications field, it is possible that in the future similar situations will arise. That is, with more and more communications cables being laid over existing easements, and as landowners become more attuned to their rights, we expect to see more litigation of this

sort, if the formalities with respect to amended easements are not observed.

Finally, the class-action device is a relatively efficient and inexpensive method of resolving such problems. Virtually every state has a class-action procedure in place and although class-action rules were principally designed for securities fraud and similar situations, they are flexible enough to

encompass disputes involving land ownership and use. ■

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