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WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Supreme Court Upholds "Taking" for Economic Development

Decision Sparks National Controversy

***Kelo v. City of New London*, 125 S.Ct. 2655 (2005)**

Josh Clemons

On June 23 the U.S. Supreme Court issued an opinion that should be of great interest to the governments of coastal communities that are pursuing economic development, and to the individual citizens who make their homes in those communities. It could affect attempts to revitalize depressed areas and, potentially, efforts to direct smart growth. The case, *Kelo v. City of New London*, concerns the government's power of eminent domain - the power to take private property for public use provided just compensation is paid to the private owner. In *Kelo* the Court was faced with two questions: what is a "public use," and who decides when a use is public?

The Facts of the Case

In 1990 a Connecticut state agency declared that years of economic decline had rendered the Thames River city of New London a "distressed municipality."[1] In 1996 conditions worsened when one of the city's major employers, the U.S. Naval Undersea Warfare Center in New London's Fort Trumbull area, shut its doors. In the following years unemployment in New London surged while the city's population withered to pre-War levels.

The state and local governments sought to turn the tide by taking steps to foster economic development in the struggling town. In January 1998 the state authorized funding for economic development planning and a Fort Trumbull State Park. The planning would be performed by the New London Development Corporation (NLDC), a private nonprofit entity under the leadership of privately appointed directors, the purpose of which is to assist the city in this type of planning.

The following month, pharmaceutical giant Pfizer, Inc. announced that it would be building a $300 million "global research facility" near Fort Trumbull. Local planners saw the Pfizer facility as having the potential to spur an economic renaissance of the Fort Trumbull area, and the NLDC considered it during the planning process.

In 2000, after holding neighborhood meetings and receiving approval from the city and state, the NLDC completed an integrated development plan for ninety acres in the Fort Trumbull area. The plan was intended to "complement the facility that Pfizer was going to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually build momentum for the revitaliza-

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Americans with Disabilities Act Applies to Foreign-Flag Vessels

Does Not Regulate "Internal Affairs," However

***Spector v. Norwegian Cruise Line Ltd.,* 125 S.Ct. 2169 (2005)**

Sabena Singh, 3L, South Texas College of Law

On June 6 the U.S. Supreme Court reversed a lower court's decision that the Americans with Disabilities Act of 1990 (ADA) is altogether inapplicable to foreign vessels. A plurality of the Court decided that Title III of the ADA applies to foreign-flag cruise ships in U.S. waters, provided the statute does not regulate a vessel's internal affairs.

Background

Norwegian Cruise Line Ltd. (NCL) is a cruise line operating foreign-flag ships departing from, and returning to, U.S. ports. A lawsuit under Title III of the ADA arose on account of discrimination allegations by disabled individuals and their companions who purchased tickets for round-trip NCL cruises. Title III of the ADA prohibits discrimination based on disability in places of "public accommodation" and in "specified public transportation services," and requires covered entities to make "reasonable modifications in policies, practices, or procedures" to accommodate disabled persons, and to remove "architectural barriers, and communication barriers that are structural in nature" where such removal is readily achievable."[1]

The allegations against NCL maintained that the cruise line charged disabled passengers higher fares and required disabled passengers to pay special surcharges; maintained evacuation programs and equipment in locations not accessible to disabled individuals; required disabled individuals, but not other passengers, to waive any potential medical liability and to travel with a companion; and reserved the right to remove from the ship any disabled individual whose presence endangered the "comfort" of the other passengers.[2] More generally, the petitioners alleged that respondent NCL "failed to make reasonable modifications in policies, practices, and procedures" necessary to ensure the petitioners' full enjoyment of the services respondent offered.[3] The Fifth Circuit Court of Appeals held that Title III does not apply to foreign-flag cruise ships in U.S. waters because of the presumption that absent a clear indication of congressional intent, general statutes do not apply to foreign-flag ships. The Supreme Court's plurality opinion reversed the Circuit Court's judgment, with Justice Scalia dissenting.

Court's Analysis

The Supreme Court determined that as long as Title III does not attempt to regulate a vessel's internal affairs, the statute is applicable to foreign-flag cruise ships in U.S. waters. Several of the petitioners' claims involved requirements that could have been viewed as relating to internal ship affairs, so the Court speculated on the necessity of applying the "clear statement" rule which holds that a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a foreign-flag vessel's internal affairs and operations. The Court determined that "[w]hile the clear statement rule could limit Title III's application to foreign-flag cruise ships in some instances, when it requires removal of physical barriers, it would appear the rule is inapplicable to many other duties Title III might impose."[4]

Sea Grant

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Editor: Josh Clemons, M.S., J.D.

Publication Design: Waurene Roberson

Contributors:
Jonathan P. Lew, 2L • Emily Plett-Miyake, 3L
Sabena Singh, 3L

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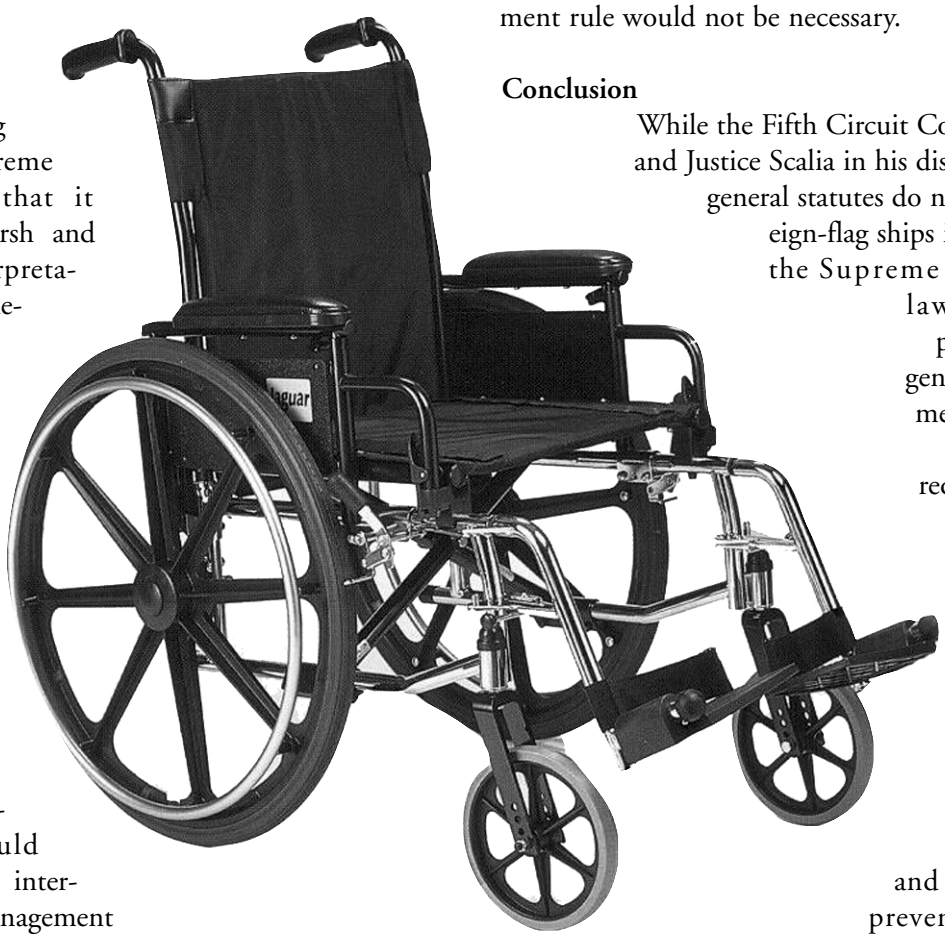
Further, the Court's previous case law supported the finding that general statutes are presumed to apply to conduct that takes place aboard a foreign-flag vessel in U.S. territory if the interests of the U.S. or its citizens, rather than interests internal to the ship, are at risk. Rejecting the Fifth Circuit's holding that Title III does not apply to foreign flag vessels, the Supreme Court decided that it would be a "harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled."[5]



The Court examined the petitioners' allegations and found that most of the Title III violations implicated a requirement that would interfere with the internal affairs and management of a vessel. The part of petitioners' allegations that appeared to involve the internal affairs of the vessel was found in the claim concerning physical barriers to access on board. The Court found that a requirement of removal of these barriers would mandate a permanent and significant alteration to the ship's basic construction, and therefore would likely interfere with the internal affairs of the foreign ship.

Title III requires barrier removal only if it is "readily achievable," and the statute further defines that term as "easily accomplishable and able to be carried out without much difficulty or expense."[6] The Court reasoned that Congress would not have intended for Title III's barrier removal requirement to have a substantial impact on its operation or to bring vessels into noncompliance with international legal obligations. Further, the Court concluded that a structural modification is not readily achievable within the statute's meaning if it would pose a direct threat to the health or safety of others. In light of this, the Court stated that it may follow that Title III does not require any permanent and significant structural modifications that interfere with the internal affairs of any cruise ship, foreign-flag or domestic; in that case, recourse to the clear statement rule would not be necessary.

Conclusion

While the Fifth Circuit Court of Appeals, and Justice Scalia in his dissent, agree that general statutes do not apply to foreign-flag ships in U.S. waters, the Supreme Court's case law stands for the proposition that general statutes are merely presumed not to impose requirements that would interfere with the internal affairs of foreign-flag vessels. They determined that "Title III's own limitations and qualifications prevent the statute from imposing requirements that would conflict with international obligations or threaten shipboard safety."[7] Therefore, the judgment of the Court of Appeals was reversed and the case remanded for further proceedings.

Endnotes

1. 42 U.S.C. §§ 12182(a), (b)(2)(A)(ii), (b)(2)(A)(iv)-(v); 12184(a), (b)(2)(A), (b)(2)(C).
2. *Spector v. Norwegian Cruise Line Ltd.*, 125 S.Ct. 2169, 2179 (2005).
3. *Id.*
4. *Id.* at 2175.
5. *Id.* at 2179.
6. 42 U.S.C. § 12181(9).
7. *Spector,* at 2184.

Seaman Slips; Common Sense Keeps Footing

Wet Boots on Slippery Staircase an "Obvious Danger"

***Patterson v. Allseas USA, Inc.*, No. 04-40949, 2005 WL 1350594 (5th Cir. June 8, 2005)**

Emily Plett-Miyake, 3L, Vermont Law School

In June, the U.S. Court of Appeals for the Fifth Circuit found that Allseas Marine Contractors SA (AMC) did not have a duty to warn Eddie Patterson, an AMC superintendent, of the dangers of walking down slippery stairs on a ship in wet boots. They reversed the judgment of the District Court, which awarded the plaintiff damages for injuries sustained at work, and rendered judgment for AMC.

Background

Eddie Patterson began working for AMC in September 1997 as a superintendent on *Solitaire*, the largest pipe-laying vessel in the world. Two years later he was transferred to the *Lorelay*, where he was one of the highest ranking members of the ship's crew, answering only to the captain. Patterson controlled all aspects of pipe construction and pipe-laying aboard the *Lorelay*, supervised about 75 percent of the vessel's four hundred-person crew, and was a member of both the Vessel Management Team, which was responsible for the safety of the ship, and the Safety, Health and Environmental Committee, with duties including touring the ship to look for potential safety hazards. The position that Patterson held as superintendent is highly specialized, and based on the degree of experience required, only an estimated fifty people in the world are qualified to hold the post.

On July 12, 2000, as part of his AMC Safety, Health and Environmental Committee duties, Patterson, along with the captain and safety representatives from the contracting oil company, conducted a safety tour of the vessel. The group was inspecting the vessel's stern deck, requiring them to ascend the starboard crossover stairway, where the accident giving rise to this lawsuit took place. While on the deck, Patterson observed standing water on the port crossover deck and decided to inspect it. After the tour, Patterson and one of his subordinates, a barge foreman named Jerry Williamson, inspected the standing water. In order to reach the crossover deck they used the port stairway. While the stairway originally had both inboard and outboard handrails, the outboard handrail was removed before the accident in 1999 to allow access to the outrigger deck.

After reaching the standing water, the men walked around in it in order to determine the best way to remove it from the deck. With dripping wet boots they began descending the port stairway. Williamson was in the lead, using the inboard handrail. Patterson followed but did not use the handrail in his descent. Patterson slipped and fell into Williamson about halfway down the stairs. Williamson managed to remain upright and, making good use of the handrail, prevented the pair from tumbling down the remainder of the stairs. Patterson went to see the ship's medic, complaining of back pain. He left the *Lorelay* and sought treatment from a chiropractor who had seen him in the past, and who testified that while Patterson suffered from significant back problems in the past, they were significantly worse after the fall. Patterson has undergone several surgeries in connection with his condition.

District Court Decision

Patterson filed suit in the U.S. District Court for the Eastern District of Texas against Allseas USA, Inc., Allseas Marine Services, NV, and AMC under the Jones Act (46 U.S.C. § 688) and general maritime law, and asserted an action *in rem* against the *Lorelay*.[1] He argued that his injuries were caused by AMC's negligence in the construction and maintenance of the *Lorelay*'s port crossover deck and stairway, and that the dangerous condition of the port crossover deck and stairway rendered the vessel unseaworthy.

The district court dismissed Patterson's claims of unseaworthiness entirely, finding that it was common practice to descend stairs using only one handrail, that the stairs were not excessively worn to the point of creating a dangerous condition, and, significantly, noting Williamson's ability to stay afoot while blocking the fall of his less surefooted boss. The court also dismissed all parties except AMC and *Lorelay*, the only two parties that could be held liable under the Jones Act.

The next question that the court addressed was whether Patterson could recover under the Jones Act. Because the court had already found that AMC was not negligent in designing, constructing, or maintaining the port crossover deck and stairway, it examined whether there was a duty to warn Patterson. The court imposed liability against AMC for failure to warn, finding that Williamson had a "very high duty with regard to safety"[2] and should have warned Patterson of "the

dangers associated with descending the port stairway with wet boots."[3] Assessing the comparative fault in the situation, the court decreased the judgment against AMC by 65 percent after finding that "Patterson descended the stairway with less caution than a reasonably prudent seaman."[4] Patterson was awarded $368,010.23 after accounting for his comparative fault. AMC appealed.

Court of Appeals Decision

The Court of Appeals found that the District Court erred in concluding that Williamson had a duty to warn Patterson of the dangers associated with walking down a steep vessel stairway in wet boots. AMC properly argued that under the Jones Act, "a shipowner only has a duty to warn seamen of 'dangers not reasonably known' and cannot be liable for failing to warn of an 'open and obvious danger.'"[5] The court here agreed with AMC that the dangers in the situation leading to Patterson's injury were of an open and obvious nature, and that there was therefore no duty to warn. Patterson, Williamson's superior, was the main safety official under the captain on the vessel, and was very familiar with the vessel. He should have known, as both a safety official and a man of common sense, of the dangers of the activity upon which he chose to embark.

Conclusion

The court recognized that "[n]othing Williamson knew or could have told Patterson regarding the dangers of descending the stairway in wet boots would have armed Patterson with any more knowledge than he had when he walked out of the standing water toward the stairway,"[6] found that the district court erred as a matter of law in finding Williamson and AMS negligent and vicariously liable, respectively, and reversed the judgment against them.

Endnotes

1. An action *in rem* determines the title to property (here, the *Lorelay*) and the rights of the parties with respect to that property.
2. *Patterson v. Allseas USA, Inc.*, No. 04-40949, 2005 WL 1350594 at *3 (5th Cir. June 8, 2005).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at *4.

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Court Grants No Leniency for Maritime Lien Claim

***Sweet Pea Marine, LTD. v. APJ Marine, Inc.*, 411 F.3d 1242 (11th Cir. 2005)**

Jonathan P. Lew, 2L, Roger Williams University School of Law

In June the U.S. Court of Appeals for the Eleventh Circuit refused to apply a maritime lien to a yacht after a contract dispute, finding that such liens encumber commerce and should be strictly construed. In a case involving the remodeling of the yacht *Sweet Pea,* the court found that the party enforcing the lien failed to prove that the prices it was charging the vessel owner for products were reasonable. This reasonable price element was also necessary to prove the breach of a maritime contract claim, which failed as well.

Background

Sweet Pea Marine, Ltd. (Sweet Pea) contracted with APJ Marine, Inc. (APJ), to outfit and remodel the 127-foot pleasure yacht *Sweet Pea*. The contract included pay scales for labor, including skilled laborers at $56/hour, semi-skilled laborers at $36/hour, and unskilled laborers at $26/hour. In addition, the contract authorized APJ to add a 15 percent mark-up to the cost of materials and supplies bought for the job. Problems arose when Sweet Pea discovered that unskilled workers were used and billed as skilled workers at a much higher cost. As a result, Sweet Pea terminated the contract in November 2001. In March 2002, APJ sent Sweet Pea a bill for outstanding costs; Sweet Pea refused to pay and this lawsuit commenced.

Sweet Pea filed a complaint in federal court against APJ for breach of contract, negligent misrepresentation, fraud, and breach of fiduciary duties. APJ responded, claiming breach of an oral maritime contract and requesting a maritime lien be placed on the *Sweet Pea*. The district court found for APJ and awarded the company $244,000 for the 15 percent mark-up for goods and materials it purchased. The district court also imposed a maritime lien on the vessel in the same amount.

On appeal, the Eleventh Circuit reversed the district court's holding for APJ, finding that the company failed to prove that the prices it paid for the marked-up materials were reasonable. According to the court, by granting APJ's claims the district court overlooked the reasonable price element, which is essential to both the breach of contract claim and the maritime lien.

Maritime Lien Claim

The Federal Maritime Lien Act provides a maritime lien on a vessel to a person that provides necessaries at a reasonable price to a vessel if the services are maritime in nature and facilitate the "vessel's use in navigation or maritime commerce."[1] Here, APJ's contract to remodel the *Sweet Pea* is sufficient because "there is no question that necessaries as defined in the Federal Maritime Act specifically include vessel repairs."[2] However, APJ failed to prove that the materials it purchased for remodeling the *Sweet Pea* were purchased at a reasonable price.

The Eleventh Circuit viewed the district court's judgment as "clearly erroneous" because APJ failed to prove that the prices it had paid for materials used on the *Sweet Pea* were reasonable according to industry custom and in accord with prevailing charges for the work done and the materials furnished.[3] APJ did not present any evidence to show that the prices submitted to Sweet Pea were reasonable. In its defense, APJ argued that Sweet Pea waived its ability to contest reasonableness by agreeing to the 15 percent mark-up on materials purchased. But the circuit court found this argument unpersuasive because an agreement to a mark-up does not indicate a reasonable price. Even though the 15 percent mark-up may be standard for the industry, this fact alone did not establish that the underlying prices were reasonable. Moreover, testimony that the labor rates used were industry standard also had no bearing on the reasonableness for the prices of the goods and materials. Thus, without any direct evidence of reasonable price (such as testimony that the price paid by APJ was industry standard for goods) the Eleventh Circuit refused to award APJ the maritime lien.

Maritime Contract Claim

The reasonable price element was essential to both of APJ's maritime claims. For APJ to recover on its claim that an oral contract regarding the repair of a vessel was breached it had to prove the terms of the maritime contract, the breach, and the reasonable value of the purported damages.[4] Consequently, APJ's failure to prove

reasonable price had a conclusive effect on its maritime lien claim.

Diversity of Jurisdiction

Finally, the court found that jurisdiction in the federal district court was proper. APJ invoked admiralty jurisdiction when it claimed its oral contract with Sweet Pea was breached. The U.S. Constitution grants federal courts original jurisdiction in all civil cases involving admiralty or maritime jurisdiction.[5] A maritime contract is defined to be one having reference to commerce or navigation. The particular element essential to give it a maritime character is direct connection with commercial transactions or navigation.[6] Because APJ's contract involved the repairing of the *Sweet Pea,* the admiralty jurisdiction requirement was met.[7]

Conclusion

Maritime liens were created to grant a vessel credit in order for her to complete her voyage; thus the lien was created for the benefit of the vessel, not the benefit of the creditor.[8] The completion of her voyage remained paramount to any individual debt a vessel might accrue.

Here, the Eleventh Circuit strictly construed the Federal Maritime Lien Act because the maritime lien was not offered as credit to Sweet Pea so it could continue on its voyage. Rather, the lien acted as an insurance policy for APJ so the company could be guaranteed compensation. APJ's failure to proffer any direct evidence in regard to the reasonable price element of both maritime claims was clearly erroneous and granting an award and a maritime lien would impede the vessel's ability to participate in commerce.

Endnotes

1. 46 U.S.C. § 31342; *E.S. Binnings, Inc. v. M/V Saudi Riyadh*, 815 F.2d 660, 666 (11th Cir. 1987).
2. *Boland Marine & Mfg. Co., Inc. v. M/V HER AN*, 1998 U.S. Dist. LEXIS 6809 (D.La. 1998).
3. *Ex parte Easton,* 95 U.S. 68, 77 (U.S. 1877); *Shelley Tractor & Equip. Co. v. The Boots,* 140 F.Supp. 425, 426 (E.D.N.C. 1956).
4. *See Exxon Corp. v. Cent. Gulf Lines, Inc.,* 500 U.S. 603, 605-06 (U.S. 1991).
5. U.S. Const. art. III, § 2, cl. 1.
6. *See Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848, 850 (11th Cir. 1988).
7. Repair of a ship is distinguished from construction of a ship because until a vessel is completed and launched it does not become a ship in the legal sense and cannot become in "direct connection with commercial transactions or navigation." *Id.*
8. *In re Hydraulic Steam Dredge*, 80 F. 545 (7th Cir. 1897).

Photograph of a yacht from the ©Nova Development Corp. Collection

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tion of the rest of the city."[2] The plan envisioned a "small urban village" with a waterfront conference hotel, restaurants, and shopping; marinas for recreational and commercial use; a "riverwalk" connecting the various areas of the development; approximately eighty new residences; a U.S. Coast Guard Museum; office space; and parking.[3]

Unfortunately for the planners, the ninety acres were neither vacant nor unowned. The city therefore authorized the NLDC to acquire the property either by outright purchase or exercise of the city's eminent domain (condemnation) power. NLDC was able to negotiate for the purchase of most of the property from willing sellers; however, nine property owners refused to sell voluntarily. Some of these owners occupied homes on their properties, while others held lots for investment purposes. One woman, Wilhelmina Dery, had lived in her house since she was born there in 1918. Her husband Charles had lived there with her since they married sixty years ago. The landowners were holding out not for more money, but because they wanted to keep their property.

To overcome the landowners' refusal to sell voluntarily, the NLDC exercised the eminent domain power to take the land upon payment of just compensation. The landowners sued on the grounds that the anticipated economic development of the Fort Trumbull area was not a "public use" for eminent domain purposes. The trial court ruled in favor of the landowners with respect to some of the properties, and in favor of the City with respect to the rest. The case was appealed to the Connecticut Supreme Court, which ruled in favor of the City and upheld the exercise of eminent domain on all the properties.

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The Law

The Fifth Amendment to the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." This "Takings Clause" gives rise to two kinds of legal conflicts: whether the compensation is just, and whether the use is public. *Kelo* involved the latter conflict.

Historically there has been little genuine controversy over the government's power to exercise eminent domain over (i.e., condemn) property for such obviously public uses as roads, parks, and airports. In those instances the land remains owned and managed by the government or a quasi-governmental entity and is not transferred into private ownership. The public also has the right to use the property.

Sometimes, however, a government plan involves condemned property being transferred to private ownership. This situation is far more problematic. Since 1798 it has been a legal maxim that the government cannot pass a "law that takes property from A and gives it to B."[4] In other words, the Takings Clause limits the government's power to exercise eminent domain over one person's private property and transfer it to another private party, even if just compensation is paid. The Supreme Court has stated that "the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party."[5]

Yet the clause does not *entirely* prohibit transfers of condemned property to private parties. In the 19th century, for example, the government condemned a great deal of private land to facilitate the building of railroads. The land was transferred to privately-owned railroad companies. Nonetheless, the purpose of the transfer was to benefit the public; the railroads were common carriers that would be available for use by all. So, while the transfer was from private party A to private party B, the use to be made of the land was considered public. It was at this time that the meaning of "public use" began to be broadened to encompass what would be more accurately thought of as "public purpose."

Problems arise when condemned land is transferred to private ownership for purposes that are less straightforwardly public than railroad lines. The two landmark Supreme Court cases in this area are *Berman v. Parker*[6] and *Hawaii Housing Authority v. Midkiff*.[7] In *Berman* the District of Columbia authorized the condemnation of private property for the redevelopment of blighted urban areas, with some property going to plainly public uses like schools and streets and other property going to private developers for, among other things, the construction of low-cost housing. Berman was a department store owner who challenged the condemnation of his store, which was not itself considered "blighted," on the grounds that redeveloping the surrounding blighted community was not a valid public use.

A unanimous Supreme Court disagreed. The Court's opinion expressed two principles: first, that the concept of "public use" encompasses a wide range of possible activities; and second, that legislatures are the appropri-

ate bodies to decide whether a use is public or not, and courts should refrain from second-guessing them.

Midkiff dealt with a very unusual fact situation in Hawaii. The feudal land ownership system in place prior to statehood had resulted in land ownership being concentrated in an astonishingly small group of owners: 47 percent of the state's land was owned by seventy-two individuals. On Oahu, the most populous of the state's islands, 72.5 percent of all fee simple titles were in the hands of only twenty-two owners. The state legislature determined that this land oligopoly was powerfully detrimental to the public welfare and passed a statute that would enable the vast estates to be condemned and passed to other private owners.

The Court upheld this statute as well. In her majority opinion Justice O'Connor reaffirmed the principles of *Berman*: in these cases courts should defer to legislatures "where the exercise of the eminent domain power is rationally related to a conceivable public purpose" unless "the use be palpably without reasonable foundation."[8] On the spectrum of judicial deference to legislatures, this standard is as deferential as it gets. As for whether a use is adequately public, the bar is also set very low: it need only be "conceivable" that the purpose is a public one.

Berman and *Midkiff*, and a few similar cases, provided the legal underpinnings for *Kelo*.

The *Kelo* Decision

The principles expressed in *Berman* and *Midkiff* posed an enormous obstacle to the holdout landowners of Fort Trumbull, who were in the position of attempting to convince the Court that economic redevelopment of the area could not conceivably be a public purpose. Not surprisingly, in light of its earlier cases, the Court rejected the landowners' arguments. The Court, noting the extensive deliberation that went into the plan and the state statute that authorized it, held that the "plan unquestionably serves a public purpose" and that economic development in general is no less a public purpose than the government activities the Court had upheld before.[9] The fact that private parties would also benefit did not render the purpose of the condemnation nonpublic. The Court also rejected the landowners' request that there be a "reasonable certainty" that public benefits will accrue from the plan, noting that such a heightened standard of review would be incongruous with *Midkiff*.[10] Ultimately, the Court noted, it is up to the state legislatures to rein in their states' use of eminent domain.

In short, the majority made a straightforward decision that is in line with its established precedent. Nonetheless, four of the nine justices dissented. The nationwide controversy generated by this case, the outcome of which to many defies common sense, makes it worthwhile to examine the two written dissents, by Justices O'Connor and Thomas, in some detail.

Justice O'Connor's Dissent

It may be surprising that Justice O'Connor, author of the *Midkiff* decision, dissented from an opinion that drew so heavily upon her earlier opinion. Why did she reason differently in *Kelo*?

O'Connor distinguishes *Berman* and *Midkiff* from *Kelo* by noting that the condemnation in each of the earlier cases was undertaken to cure an "affirmative harm on society" – urban blight in *Berman*, the corrosive results of oligopoly in *Midkiff*.[11] In her view a taking that alleviates a public harm provides a **direct** benefit to the public and is constitutional, whereas a taking that is merely intended to provide **indirect** benefits by increasing the economic productivity of the condemned property is unconstitutional. She argues that allowing the condemnation of property for transfer to private parties for nothing more than economic development does not adequately constrain the eminent domain power; in her words, "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[12] While this statement is a bit of an exaggeration – takings that provide purely private benefits for private parties remain unconstitutional – her core point is a compelling one. If a government body can justify any taking with some indirect, incidental, and possibly even uncertain public benefit, then the "public use" requirement imposes very little limit on the exercise of eminent domain. While O'Connor acknowledges that *Berman* and *Midkiff* laid the groundwork for *Kelo*, she also contends that the reasoning in those cases should not have led to this result.

Justice Thomas' Dissent

Justice Thomas, who in his career has not written prolifically, penned a lengthy dissent that digs deeper into the constitutional fundamentals than the other written opinions. Thomas is known for having less respect for the principle of adhering to precedent than other justices and here he makes a case for rejecting the established idea that "public use" may be defined as "public purpose." The crux of Thomas' argument is that "public use" is limited to situations where "the government owns, or the public has a legal right to use, the property."[13]

Thomas begins his argument with a discussion of the text and common law background of the Constitution, and the use of eminent domain in the early days of the

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republic. These factors, according to Thomas, demonstrate that the original intent of the Public Use Clause was to describe a much smaller universe of public uses than is included under the current "public purpose" definition.

While persuasive, this argument is not ultimately conclusive because original intent is notoriously difficult, if not impossible, to identify. Thomas is on firmer ground when he exposes the flaws in the lines of cases that led up to *Berman* and *Midkiff*. He asserts that the expansive "public purpose" definition has developed from misuse of non-legally binding language in an 1896 case,[14] an error which has compounded over time in subsequent cases. Likewise, Thomas declares that the notion that it is up to the legislature to decide whether a use is public has grown from overbroad language in a different 1896 case[15] that has been incorporated into later decisions without proper examination.

Thomas' strongest argument may be that there is no reason to believe that the Supreme Court should defer to legislative determinations of "public use" when it does not, and should not, defer to the legislature on the reach of other constitutional protections. For example, the Court will not defer to a legislative determination that a search or seizure is reasonable (4th Amendment), or a punishment is not cruel and unusual (8th Amendment), or a citizen is receiving due process of law (5th and 14th Amendments). If the Bill of Rights was intended to be a judicially-protected limit on the power of the legislative branch to infringe upon certain inalienable rights, why should courts defer to legislatures with respect to this one? Thomas believes that such an outcome is illogical.

Conclusion

Kelo began generating controversy as soon as the decision was issued. Many people were outraged at the notion that their government could take their homes simply because the land upon which they sit could be utilized in a way that is more economically beneficial to the public, compensation notwithstanding. In their dissenting opinions Justices Thomas and O'Connor both warn that the consequences of this decision may fall most heavily on poor and/or minority communities that lack the political clout of large corporations and real estate developers. These fears may be well-founded; time will tell.

Nonetheless, much of the rhetoric this decision has spawned has inaccurately represented it as a bizarre legal aberration. That is to be expected given the vitriolic modern political climate and the particularly stark facts of the case. Yet nothing could be further from the truth. *Kelo* is a logical continuation of the reasoning of *Berman* and *Midkiff*, opinions written, respectively, by Justices William O. Douglas and O'Connor – neither of whom could reasonably be considered a wild-eyed radical.[16]

Kelo may square with Supreme Court precedent, but the public attention it has focused on the eminent domain issue is likely to have effects at the state level nonetheless. As Justice Stevens, who acknowledged the "hardship that condemnations may entail, notwithstanding the payment of just compensation," noted, state legislatures have the authority to restrict the exercise of eminent domain by state and local government entities.[17] Prior to *Kelo*, eight states - Arkansas, Florida, Illinois, Kentucky, Maine, Montana, South Carolina and Washington - already forbade the use of eminent domain for economic redevelopment purposes unless necessary to remove blight. The public outcry in response to *Kelo* is pushing other state legislatures to follow suit.[18]

Endnotes

1. *Kelo v. City of New London*, 125 S.Ct. 2655, 2658 (2005).
2. *Id.* at 2671 (O'Connor, J., dissenting) (internal quotes and citations omitted).
3. *Id.* at 2659.
4. *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798).
5. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).
6. 348 U.S. 26 (1954).
7. 467 U.S. 229 (1984).
8. *Midkiff*, 467 U.S. at 241.
9. *Kelo* at 2665-66.
10. *Id.* at 2667.
11. *Id.* at 2674 (O'Connor, J., dissenting).
12. *Id.* at 2676 (O'Connor, J., dissenting).
13. *Id.* at 2679 (Thomas, J., dissenting).
14. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).
15. *U.S. v. Gettysburg Elec. R. Co.*, 160 U.S. 668 (1896).
16. Adherence to precedent is a keystone of our legal system. It is ironic that the *Kelo* majority, generally considered the more politically liberal justices, followed this most conservative of legal principles while a leading member of the politically conservative wing of the Court, Justice Thomas, advocated overturning established precedent and weakening legislative power in favor of the judiciary – an approach often decried by political conservatives as "judicial activism."
17. *Kelo* at 2668.
18. *See e.g.* Ala. H. 186, Reg. Sess. 2005 (Feb. 1, 2005) (bill sponsored by Rep. Jack Venable, D-Tallassee, prohibiting municipalities from condemning property for commercial retail development, which failed to pass the Senate).

Housemates Do Not a Household Make

Insurance Company Liable for Boyfriend's Injuries

Continental Ins. Co. v. Roberts, No. 04-12566, 2005 WL 1313692 (11th Cir. June 3, 2005)

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Emily Plett-Miyake, 3L, Vermont Law School

In June, the Eleventh Circuit Court of Appeals found that the term "household" as found in an insurance policy's family member limitation clause is ambiguous. Applying the Florida legal principle that "an ambiguous insurance contract is construed against the insurer,"[1] the court affirmed the trial court and held that the insured boat operator and her injured passenger were entitled to an interpretation requiring a relationship by blood, marriage, or adoption in order for the claim amount to be limited.

Background

In July of 2001, Stephen Gimopoulos dove headfirst off Polly Roberts' boat into shallow water. He suffered severe spinal injuries and became a quadriplegic. Gimopoulos filed a claim under Roberts' Continental Insurance Company boater's insurance policy. The policy's liability provision provided $100,000 in coverage for "bodily injuries arising out of operation of the boat." Coverage was limited, however, to $25,000 for "any member of the named insured's household." The term "household" was not defined in the policy, and Gimopoulos filed for the full $100,000.

Continental Insurance Company investigated Gimopoulos' claim and discovered that he and Roberts had been living together in an intimate relationship for twenty months. They shared meals and expenses, and Gimopoulos carried a cellular phone and a credit card in Roberts' name. Continental believed that Gimopoulos was a member of Roberts' "household," and that his claim was therefore subject to the family member limitation clause. Based on this belief, Continental offered $25,000 for the claim. Gimopoulos believed otherwise, however, and did not accept Continental's offer.

District Court Decision

In June of 2003, Continental filed a lawsuit against Gimopoulos and Roberts, seeking, among other things, a declaration that Gimopoulos was entitled to the limited amount under the policy because he had been a member of Roberts' "household" at the time of the accident. Continental based its claim on the premise that the word "household," as used in the policy, "included all people living together in one dwelling regardless of whether they were related by blood, marriage, or adoption." Continental argued that since it was undisputed that Gimopoulos and Roberts lived together, then it clearly followed that Gimopoulos was a member of Roberts' household.

Roberts and Gimopoulos disagreed, however, responding that the word "household," as used in the insurance contract, was limited to people who shared a dwelling "who were also related by blood, marriage, or adoption." As Gimopoulos is not related to Roberts in any of those ways, they argued that he was not a member of her "household" and was thus entitled to full coverage.

The district court granted Gimopoulos and Roberts' motion for summary judgment. It found that both interpretations of "household" were reasonable in light of dictionary definitions. However, because of Florida common law and the context of the term's use in an insurance policy, the court found that the contract term was ambiguous and as a result had to be construed in favor of the insured. Based on this, the court ruled that Gimopoulos and Roberts were not members of a "household" and thus not subject to the limitation clause of the insurance policy. Continental appealed.

Court of Appeals Decision

The Court of Appeals affirmed the District Court. At the outset, both parties agreed on several things: that Florida law governs the interpretation of "household" in this context, that if the term "household" is ambiguous it must be construed against Continental, that the term "household" is ambiguous if more than one reasonable interpretation exists, and that Continental's interpretation of the term "household" is reasonable. The only question before the court, then, was "whether the interpretation of 'household' offered by Gimopoulos and Roberts is also reasonable."

See Continental, page 14

Are Mississippi's Oxbow Lakes Public Waters?

Josh Clemons

If you have ever looked out the window during an airplane flight over one of the South's many meandering rivers, you have probably seen an oxbow lake. An oxbow lake is formed when a meander – one of the "hairpin curves" - in a river or stream is cut off from the main channel by an avulsion. Oxbow lakes are common in Mississippi on rivers including the Mississippi and the Pearl. Typically they are hydrologically connected to, and seasonally rise and fall with, the river that birthed them.

Oxbow lakes can provide outstanding fishing and hunting opportunities; for that reason, private individuals and groups sometimes seek to exclude the public from oxbows that they claim are private property. Can they do this, or are the state's oxbow lakes public waters?

The Law Pertaining to Public Waters

The public has the right to use public waters for boating, fishing, and other uses. The Mississippi statutes define "public waterways" in such a way that it appears that only flowing streams can be public.[1] However, the Mississippi Supreme Court in *Dycus v. Sillers* observed that the statutory definition does not necessarily exclude other types of waters, such as lakes, from the legal status of "public waters."[2] While discussing the oxbow Lake Beulah in Bolivar County in that case, the court suggested that *all* oxbow lakes are public waters, and that members of the public accordingly have the right to use them "to [their] heart's content, subject only to a like use by others and reasonable regulation by the state."[3] The court even went so far as to declare that "the public right to waters formed by an avulsion is as great as any other public waters."[4]

Other cases, as well as opinions of the Mississippi Attorney General, support the *Dycus* view that oxbow lakes are public waters. In *State Game and Fish Commission v. Louis Fritz Co*. the Mississippi Supreme Court held that the private riparian owner of over 90 percent of the lands beneath a lake could not exclude a state contractor, who gained lawful access to the lake from another riparian landowner, from clearing the lake of predatory fish.[5] While the case appears to involve an oxbow lake (South Horn Lake in DeSoto County), the court did not explicitly address the public/private status of the lake; rather, it held that anyone who gains lawful access to a lake (that is, who does not trespass to get there) may make use of the surface of the lake for boating and fishing so long as they do not interfere with similar use by others who are entitled to use the lake. A riparian landowner may own the bed and banks of a natural lake, but he does not own the water or the fish in it.[6] The

Photograph of oxbow lakes courtesy of USFG

state owns the water and fish for the common benefit of all its citizens.

In 1991 the Mississippi Supreme Court decided in *Ryals v. Pigott* that the Bogue Chitto River is a public waterway.[7] The portion of the river in question did not meet the statutory mean annual flow requirement; nonetheless, the court found it to be a public waterway because it is "navigable in fact."[8] The court rejected as too restrictive the obsolete "steamboat carrying two hundred bales of cotton" definition of navigability found in Miss. Code § 51-1-1. Instead, a water body is "navigable in fact" if it can be navigated by "loggers, fishermen and pleasure boaters."[9] The court indicates that lakes, as well as streams, can be navigable waters under the law.[10] Waters that are navigable in fact are subject to public use under the Equal Footing and Public Trust doctrines.

Under the Equal Footing Doctrine (erroneously referred to in *Ryals* as the "Equal Footings Doctrine"), the title to the beds and banks of navigable streams passed to newly-formed states at statehood.[11] States may, with some restrictions, pass title to these lands to private landowners, but the public retains the right to use the navigable waters for commerce, fishing, and boating under the Public Trust Doctrine.[12] The *Ryals* court observed that this public right cannot be withdrawn "by legislative enactment or judicial decree."[13] In other words, the legislature can sell or give away the land under navigable waters but it cannot sell or give away the public's right to use those waters.

None of these cases explicitly decided the public/private status of an oxbow lake. However, when the cases are read together their reasoning suggests very strongly that the Mississippi Supreme Court, if squarely presented with the issue, would consider oxbow lakes to be public waters. This view seems to be shared by the Mississippi Attorney General's office, which has issued several opinion letters on the subject. In a 1993 letter to the Mississippi Department of Wildlife, Fisheries and Parks the Attorney General quoted with approval the language in *Dycus* that indicates that all oxbow lakes are public.[14] In separate opinions for the Mississippi Gaming Commission, the Attorney General declared that oxbow lakes are navigable.[15] These letters provide additional strong support for the position that oxbow lakes are public waterways.

Prescription

The *Dycus* court declared that, even if they are not otherwise "navigable" or "public," oxbow lakes may become public waters by the doctrine of prescription.[16] Under the doctrine of prescription, private property may become public if it is used "under a claim of right, openly, notoriously, peacefully, continuously and uninterruptedly for in excess of ten years."[17]

Conclusion

The relevant law strongly indicates that oxbow lakes that were formed by navigable rivers or public waterways are public waters. Therefore, a member of the public has a right to use them for, at the very least, boating and fishing, provided he or she does not have to trespass across private land to get there.

Endnotes

1. Miss. Code § 51-1-4.
2. 557 So.2d 486, 499, n. 65 (Miss. 1990).
3. *Id*. at 501. This statement is not binding law because the public/private status of oxbow lakes was not the issue before the court in that case. However, the statement does signal how the court might rule if that *were* the issue.
4. *Id*. at 503.
5. 187 Miss. 539 (1940).
6. This rule does not apply to man-made lakes, such as catfish farms.
7. 580 So.2d 1140 (Miss. 1991).
8. *Id*. at 1152.
9. *Id*.
10. *Id*. at 1151 ("At the time the constitution was adopted commerce by navigable waters, such as rivers, *lakes*, bayous and canals was much more common than now…") (emphasis added).
11. *Pollard v. Hagan*, 44 U.S. 212 (U.S. 1845).
12. *Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (U.S. 1892).
13. *Ryals* at 1149.
14. Miss. Atty. Gen. Op. 1993-0836 (Dec. 6, 1993).
15. Miss. Atty. Gen. Ops. 1992-0036 (May 18, 1992), 1993-0539 (July 14, 1993).
16. *Dycus* at 501.
17. *Id*.

Continental, from page 11

The court found ample evidence in Florida case law to support Gimopoulos and Roberts' interpretation of "household." The reasonableness of their interpretation was further supported by dictionary definitions and common usage. The court found that "Gimopoulos and Roberts do not need to show that their interpretation of the term 'household' in this insurance contract is the correct one. All they need to show is that the term is ambiguous, and the existence of two competing, reasonable interpretations establishes ambiguity." Florida legal principles hold that when there is ambiguity in an insurance contract, the ambiguity should be construed against the insurer.

Continental then asked that the court certify to the Florida Supreme Court the question of what "household" means under Florida law. The court declined to do so, finding that the actual definition was not the question on which the appeal turned. "The question is not what the term truly means, but whether there was enough doubt about its true meaning to bring into play the principle that where there is ambiguity the insured wins."

One member of the court disagreed. In his dissent Judge Hill chose to look at the broader picture and the purpose behind the limitations clause of the insurance policy, along with the nature of Roberts and Gimopoulos' relationship, and found it unreasonable to decide that they did not exist as a "household." In contrast Judge Carnes, for the majority, decided the case based on state legal principles and a close examination of the language itself.

Conclusion

The court ruled that the term "household" in Roberts' family member limitations clause was ambiguous, entitling her and her passenger, Gimopoulos, to an interpretation requiring relationship by blood, marriage or adoption. Continental Insurance Company is not entitled to extend the definition of "household" to cover the relationship between Gimopoulos and Roberts in determining whether the family liability coverage clause applies.

Endnotes

1. Page references are not available for this case. All quotations are from the court's opinion.

2005 Alabama Legislative Update

Josh Clemons

The following is a summary of legislation enacted by the Alabama Legislature during the 2005 session that may be of interest to *Water Log* readers.

2005 Alabama Laws 118 (H.B. 762) *Enacted May 5, 2005*

Authorizes the incorporation of the Conecuh County Reservoir Management Area Authority as a public corporation and political subdivision of the state, for the development of that portion of Murder Creek in Conecuh County and within the Conecuh County Reservoir Management Area, its tributaries and watershed area, for the purposes of water conservation and supply, dam construction and reservoir development, industrial development, flood control, navigation, irrigation, public recreation and related purposes. The Authority is given the powers necessary to achieve those purposes, including eminent domain, rate setting, bond issuance, and zoning, but not taxation.

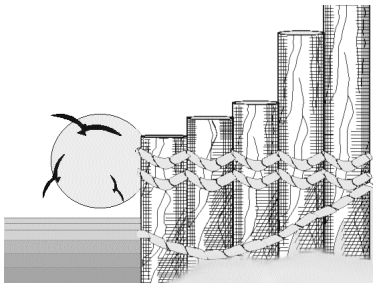
2005 Alabama Laws 176 (H.B. 709) *Enacted May 5, 2005*

The Tennessee River Preservation Act. In Marshall County, prohibits the withdrawal of water from the Tennessee River Basin for transfer to any other river basin outside of the Tennessee River Basin in an amount greater than the amount being withdrawn on the act's effective date; for the purpose of the act, the amount of the existing transfer of water from the Tennessee River is 150 percent the average daily amount calculated for the highest continuous 90-day period from January 1, 2000, until the act's effective date.

2005 Alabama Laws 180 (H.B. 134) *Enacted May 16, 2005*

Makes a supplemental appropriation from the Alabama Capital Improvement Trust Fund in the State Treasury to the Alabama State Port Authority, in the amount of $80,000,000 for the fiscal year ending September 30, 2005.

Lagniappe *(a little something extra)*



Around the Gulf...

Alabama and Mississippi stand to benefit from the **Coastal Impact Assistance** amendment to the Energy Policy Act of 2005 (H.R. 6) (a.k.a. the "Energy Bill"). The amendment provides for $250 million to be paid each year from 2007 to 2010 to the coastal states that have Outer Continental Shelf (OCS) oil and gas production. Each state would receive a share of the funding proportional to the percentage of total OCS oil and gas revenues that is generated off its coast.

The prospect of **liquified natural gas (LNG) terminals** in the Gulf continues to generate controversy, and Alabama governor Bob Riley and Mississippi governor Haley Barbour have recently stepped into the fray. Under the Deepwater Port Act governors have the ability to veto proposed LNG terminals in their states' waters. In a June 16 letter to the administrator of the U.S. Maritime Administration, Riley and Barbour expressed disapproval of the "open-loop" system that some companies propose because of the costly toll such systems may take on marine life.

The Gulf of Mexico Fishery Management Council has placed a ten-year moratorium on new **offshore shrimp licenses**. A license obtained from NOAA Fisheries (previously the National Marine Fisheries Service) prior to December 6, 2003 is now required to shrimp federal waters. While new licenses will not be issued, old licenses are transferable.

The Mississippi Department of Environmental Quality (MDEQ) has issued the state's **2004 list of impaired water bodies**, as required by § 303(d) of the Clean Water Act. The new list will be used for, among other things, the development of total maximum daily loads (TMDLs) of pollutants. The list replaces the 2002 list. The list may be viewed at and downloaded from the MDEQ website at http://deq.state.ms.us/ under the topic "TMDLs."

The U.S. Environmental Protection Agency (EPA) has been active in recent months:

- EPA announced that each state will receive an additional $172,000 in **federal funding for water quality monitoring** in fiscal year 2005. The EPA awards the states water pollution control grants under § 106 of the Clean Water Act. For more information, please visit http://www.epa.gov/owm/cwfinance/altformula.htm.
- The agency has published a technical guidance and reference document entitled *National Management Measures to Control Nonpoint Source Pollution from Forestry* to help industry, government, and the public reduce the **water pollution impacts of forestry activities**. More information, along with the guidance document itself, is available at http://www.epa.gov/owow/nps/forestrymgmt/.
- In an effort to curb excessive water use, EPA is increasing its focus on **water efficiency**. The agency's website at http://www.epa.gov/owm/water-efficiency/ contains a wealth of information on ways to use water more wisely in the home, in your yard, and at your business, as well is advice for industries and communities.
- EPA, along with the National Endowment for the Arts, is funding the **Governors' Institute on Community Design** to help the states with "smart growth." Over the coming year the Institute will conduct workshops at which state leaders will consult with planning experts on smart growth strategies. The goal is development that benefits (or at least does minimal damage to) public health, the economy, and the environment. More information about the Institute is available at http://www.epa.gov/smartgrowth/gov_institute.htm.

The world's first **commercial "wave farm"** is scheduled to go on-line off the coast of Portugal in 2006. The wave farm turns tidal energy into electricity by raising and lowering large floating cylinders that pump high-pressure fluids to drive hydraulic motors. The motors will produce 2.25 megawatts of electricity in three generators, enough to power about 1,500 Portuguese homes. The plant will be located about three miles from shore. If this wave farm is successful, similar facilities could be built in coastal areas worldwide to provide a safe, clean, renewable, and reliable source of energy.

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... *Upcoming Conferences* ...

•SEPTEMBER 2005 •

2005 Plastic Debris, Rivers to Sea Conference
September 7, 2005, Redondo Beach, CA
http://www.plasticdebris.org

2005 Alabama Water Resources Conference
September 7-9, 2005, Orange Beach, AL
http://www.auei.auburn.edu

Ocean 2005 Conference: One Ocean
September 19-23, 2005, Washington, D.C.
http://www.oceans2005.org

Dam Safety 2005
September 25-28, 2005, New Orleans, LA
http://www.damsafety.org

•OCTOBER 2005 •

2nd Int'l Sustainable Marine Fish Culture Conference &Workshop
October 19-21, 2005, Fort Pierce, FL
http://www.sustainableaquaculture.org

1st Int'l Congress on Marine Protected Areas
October 23-27, 2005, Geelong, VIC, Australia
http://www.impacongress.org

WEFTEC.05: The Water Quality Event
October 29, 2005, Washington, DC
http://www.weftec.org

WATER LOG
Mississippi-Alabama Sea Grant Legal Program
Kinard Hall, Wing E, Room 262
P.O. Box 1848
University, MS 38677-1848

University, MS 38677

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