Volume 26, Number 4
February, 2007

WATER LOG

A Legal Reporter of the Mississippi-Alabama Sea Grant Consortium

Federal Judge Rules Against State Farm in Katrina Case

***Broussard v. State Farm Fire and Casualty Co.*, 2007 WL 113942 (S.D. Miss. 2007)**

Rick Silver, 3L, University of Mississippi School of Law

On January 17, 2007, U.S. District Court Judge L.T. Senter granted a directed verdict in favor of a couple who sued State Farm for refusing to pay for any damage to their home caused by Hurricane Katrina. The ruling captured much attention not only around the region, but also nationally because of the potential impact on the insurance industry.

Background

Like so many other families along the Gulf Coast, Biloxians Norman and Genevieve Broussard suffered the complete destruction of their home during Hurricane Katrina. After the storm, all that remained of their house was a concrete slab. Since then, the Broussards and others like them have been insisting that the damage caused by Katrina should be covered by their homeowner's insurance policy.

However, under the terms of State Farm's and other insurers' homeowner policies, damage from wind is covered, but damage caused by water is not. The insurers argue that the policies exclude damages that could have been caused by a combination of both, even if the winds preceded the water.[1]

After having their claim refused by State Farm, the Broussards sued the insurer in federal court. In addition to the full insured value of their home ($211,222), the Broussards also sought $5 million in punitive damages against State Farm for unreasonably denying their claim.

The District Court's Decision

U.S. District Court Judge L.T. Senter found that under the terms of the homeowner's insurance policy, State Farm is liable for the full insured valued of the Broussards' home, unless it can prove that some or all of the loss was caused by water damage.

Both parties stipulated that the Broussards' home was completely destroyed by Hurricane Katrina. Judge Senter held that since it was clear that the Broussards' home sustained wind damage during the hurricane, the burden of proof shifted to State Farm to establish, by a preponderance of the evidence, what portion of

See State Farm, page 2

In This Issue . . .

Federal Judge Rules Against State Farm in Katrina Case 1

Fifth Circuit Reverses Course on Wreck Act 3

Mississippi Supreme Court Affirms CAFO Permit 5

D.C. Circuit Vacates FERC Pipeline Orders . 7

Injured Seaman Wins Some, Loses Some Before Fifth Circuit 9

Eleventh Circuit Rules in Scrap Metal Case . . 11

Fifth Circuit Allows Seaman the Forum of His Choice 13

Interesting Items 15

Upcoming Conferences 16

State Farm, from page 1

the loss was attributable to flood damage and therefore not covered by the policy.[2]

State Farm argued that 100% of the damage to the Broussards' home was caused by rising water. However, State Farm's own expert witness testified that it was more probable than not that the property incurred at least some wind damage to its roof prior to the arrival of the storm surge. The key issue the court had to determine was how much damage was caused by the wind before the storm surge arrived. It did not matter that the storm surge was powerful enough to destroy the property regardless of the preceding wind damage.

Under its homeowners policy, State Farm must establish, by a preponderance of the evidence, that portion of the loss that was attributed to water damage. State Farm is liable for all losses that it does not prove to have been caused by water.

At the conclusion of all the evidence presented by both sides, Judge L.T. Senter was asked by both parties for a judgment as a matter of law. Under Rule 50 of the Federal Rules of Civil Procedure, the court must grant a directed verdict "if the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable jurors could not arrive at a contrary verdict."[3] Granting a Rule 50 motion takes the decision out of the jury's hands and assigns it to the judge.

Sea Grant

WATER LOG is a quarterly publication reporting on legal issues affecting the Mississippi-Alabama coastal area. Its goal is to increase awareness and understanding of coastal problems and issues.

To subscribe to WATER LOG free of charge, contact: Mississippi-Alabama Sea Grant Legal Program, 262 Kinard Hall, Wing E, P. O. Box 1848, University, MS, 38677-1848, phone: (662) 915-7775, or contact us via e-mail at: **waterlog@olemiss.edu** . We welcome suggestions for topics you would like to see covered in WATER LOG.

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

Publication Design: Waurene Roberson

Contributors:
Rick Silver, 3L
Allyson L. Vaughn, 3L

For information about the Legal Program's research, ocean and coastal law, and issues of WATER LOG, visit our homepage at
http://www.olemiss.edu/orgs/SGLC

Judge Senter granted the Broussards' motion for a directed verdict. The court felt that State Farm failed to meet its burden of proof as to the extent of the damage caused by water and therefore was liable to the Broussards for the full insured value of their home.

Mississippi law requires an insurer to act reasonably and in good faith when investigating and paying legitimate claims under its policies.

Judge Senter also found that under Mississippi law and the terms of the policy, State Farm should have made an unconditional offer to the Broussards for the wind damage that their own expert estimated. Mississippi law requires an insurer to act reasonably and in good faith when investigating and paying legitimate claims under its policies.[4]

Judge Senter found that State Farm was unreasonable in trying to shift its burden of proof to the Broussards, when even its own expert believed that their property sustained at least some wind damage. The court found that State Farm did not act in good faith and left the Broussards no choice but to file a lawsuit in order to recover their losses. For that reason the court held that punitive damages against State Farm were appropriate and submitted the issue to the jury.

The Afterward

The jury punished State Farm for refusing to pay the claim by awarding the Broussards $2.5 million in punitive damages.[5] This award grabbed national attention and is the key part of the case. The punitive damages award was instrumental in encouraging State Farm to enter into settlement negotiations involving a class action suit brought by 640 policyholders in Mississippi whose claims have also been denied. The initial agreement called for State Farm to pay the 640 claimants $80 million. The agreement also called for State Farm to allocate at least $50 million to the settlement in order to reopen the claims of thousands of policyholders whose claims were denied but did not sue.

See State Farm, page 14

Fifth Circuit Reverses Course on Wreck Act

Photograph of shipwreck courtesy of Marine Photobank, © Wolcott Henry 2005.

***Fuesting v. Lafayette Parish*, 470 F.3d 576 (5th Cir. 2006)**

Allyson L. Vaughn, 3L, University of Mississippi School of Law

Background

Around sunset on July 3, 2001, Michael Fuesting's small pleasure boat collided with a sunken shrimp boat owned by Keith Griffin, resulting in substantial injury to Fuesting. The allision occurred near the bank of the Vermilion River in Lafayette Parish, Louisiana.

Approximately eight years prior to the incident Griffin reached an agreement with Alfred and Joyce Hatch to dock his shrimp boat along their dock. The boat became so deteriorated over the years that half of the ship was submerged in the riverbed while the rest remained visible above the waterline.

After the Lafayette Parish Bayou Vermilion District (the District) received complaints from numerous citizens regarding this eyesore, they obtained permission from Griffin to refloat and remove the boat. In 2001 the District attempted to remove the ship but failed. Neither the District nor the boat's owner ever marked the submerged boat with buoys or lights.

Fuesting brought suit against the District alleging it was a responsible party under the Wreck Act[1] and was negligent in removing the vessel. Fuesting claimed that the District was an operator of the shrimp boat because it undertook the task of removing it from the river.

The Wreck Act

The provisions of the Wreck Act apply to owners, lessees, and operators of sunken crafts. The Act places the burden on these individuals to immediately mark a wrecked and sunken vessel in a navigable channel with buoy or beacon and a light. These marks must remain on the vessel unless a waiver is obtained by the U.S. Coast Guard or the vessel is removed. The owner or operator must make immediate efforts to remove the sunken ship from navigable waterways.

The Lower Court Decision

The U.S. District Court for the Western Division of Louisiana granted summary judgment for the District on all claims. The court found that Fuesting did not present enough evidence to support a finding that the District was an operator of the vessel under the Wreck Act. While the court found that the District might be liable for its negligence in removing the ship under general maritime law,[2] it later determined that the District was protected by La.Rev.Stat. § 9:2798.1(B), which grants statutory immunity to public entities for "policymaking or discretionary acts." The District qualifies as a public entity. According to the lower court, the action of removing the vessel arose from discretionary acts. Fuesting appealed this judgment to the U.S. Court of Appeals for the Fifth Circuit.

The Fifth Circuit's Holding

The Fifth Circuit rejected the district court's narrow application of the term "operator" under the Wreck Act. The Court turned to previous cases to support the finding that Congress intended to "ensure that navigable waterways remained free of obstructions, including sunken vessels."[3] Furthermore, towing vessels can violate the Wreck Act and have responsibility for the removal of a sunken vessel.

The Court rejected the District's claim that a towage contract did not exist because there was no language of towing in the liability release agreement between Griffin and the District; in admiralty law, oral contracts are valid. The court also rejected the lower court's finding that even if a towing contract existed, the District was not an "operator" under the Wreck Act because the towing attempt failed. This finding was contrary to the Congressional intent of the Wreck Act

See Wreck Act, page 4

Wreck Act, from page 3

to allow for recovery by the government from numerous sources and to expand the pool of persons responsible for keeping the waterways navigable. The court held that "an entity that enters a towing contract but subsequently fails to tow the vessel as far as intended does not escape operator status because of its failure."[4]

The Court of Appeals also rejected the lower court's finding that the District was protected under La.Rev.Stat. § 9:2798.1(B).The appeals court examined the threshold question of whether a state statute limiting the liability of a municipal entity prevents a cause of action arising under admiralty law. The U.S. Supreme Court held in *Workman v. City of New York* that admiralty law is not replaced by local law because that would undermine the uniformity desired in maritime law; furthermore, municipalities do not have the Eleventh Amendment sovereign immunity that is enjoyed by the states.[5] The exception to this general rule applies when the municipality acts as "an arm of the State, as delineated by the Supreme Court's precedents."[6]

The Court of Appeals remanded to the district court to decide if the *Workman* principle applies, because the District's status as a public entity along with satisfying the criteria of Louisiana law does not create immunity from suit.

Conclusion

The Court of Appeals reversed the lower court's grant of summary judgment. The court held that the granting of immunity solely based on Louisiana's governmental immunity statute was incorrect. The lower court also incorrectly found that the District was not an operator under the Wreck Act. Because of these errors, the Court of Appeals remanded to the lower court for new proceedings.˅

. . . furthermore, municipalities do not have the Eleventh Amendment sovereign immunity that is enjoyed by the states.

Photograph of docked fishing boats courtesy of ©Nova Development Corp.

Endnotes

1. 33 U.S.C. § 409.
2. The court found negligence could exist against the District according to *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).
3. *Fuesting,* 470 F.3d at 580 (*quoting Univ. of Tex. Med. Branch v. United States*, 557 F.2d 438, 441 (5th Cir. 1977)).
4. *Id.* at 580.
5. *Workman v. City of New York*, 179 U.S. 552 (1900).
6. *N. Ins. Co. of New York v. Chatham County*, 126 S.Ct. 1689 (2006).

Mississippi Supreme Court Affirms CAFO Permit

***Sierra Club v. Miss. Envtl. Quality Permit Bd.,* 943 So.2d 673 (Miss. Nov. 30, 2006)**

Rick Silver, 3L, University of Mississippi School of Law

On November 30, 2006, the Mississippi Supreme Court affirmed an administrative decision by the Mississippi Environmental Quality Permit Board (Permit Board) to issue a pollution control permit to a swine feeding operation.

Background

This dispute involves a swine concentrated animal feeding operation (CAFO) located in Oktibbeha County, Mississippi. The facility is owned and operated by Bill Cook and houses up to 7,040 swine. When Cook began operation of the CAFO in 1996, the Permit Board did not require air pollution permits for swine CAFOs. The Permit Board only required Cook's facility to comply with state and federal requirements with respect to the control of water pollution. Cook's facility met such requirements and as a result, the Permit Board issued him a National Pollutant Discharge Elimination System (NPDES) permit.[1]

The decision by the Permit Board not to require Cook to obtain an air pollution permit was appealed to the Chancery Court of Oktibbeha County by Everett Kennard and other neighbors of the CAFO. The chancellor sided with the neighbors and held that Cook should be required to obtain an air pollution permit. Both the Permit Board and Cook appealed this decision. However, while the matter was on appeal, the Mississippi Legislature passed an amendment which allowed the Mississippi Environmental Quality Commission (Commission) to establish a list of sources that are exempted from having to obtain air pollution permits.[2] Unfortunately for Cook, CAFOs were not one of the listed categories. As a result, Cook agreed to apply for an air pollution permit.

In determining whether an air pollution permit should be issued, the Permit Board relied on recommendations by the Mississippi Department of Environmental Quality (MDEQ) which included, among other things, the construction of a windbreak wall behind the exhaust fans of each housing unit in order to reduce off-site odor transfer. The Permit Board followed MDEQ's recommendations and issued a multimedia permit to Cook.[3]

Both Cook and the objectors (Kennard and the Mississippi Chapter of the Sierra Club) were unhappy with the recommendations so they petitioned the Permit Board for an evidentiary hearing on the multimedia permit. The Permit Board conducted the hearing and at its conclusion, voted to affirm the permit as written.

Both parties appealed to the Chancery Court of Oktibbeha County. The chancellor denied both appeals and Kennard appealed to the Mississippi Supreme Court.

Mississippi Supreme Court Decision

The court was quick to point out that this was an administrative appeal and not a nuisance action. Therefore, the court was "only concerned with the reasonableness of the administrative order, not its correctness."[4] Thus, the Permit Board's decision would not be disturbed on appeal "absent a finding that it (1) was not supported by substantial evidence, (2) was arbitrary and capricious, (3) was beyond the power of the agency to make, or (4) violated some statutory or constitutional right of the complaining party."[5]

On appeal, Kennard raised a number of issues. First, Kennard took issue with the Permit Board's interpretation of Mississippi Air Quality Standard APC-S-4, which lists factors to be considered by the Commission when determining ambient air quality standards. The factors listed include the number of complaints about the odorous substance, the frequency of such odors in the ambient air as confirmed by the MDEQ staff, and the land use of the affected area. Kennard argued that the Permit Board relied too heavily on the fact that the MDEQ staff could not confirm the existence of the offsite odor and ignored the complaints made by neighbors of the CAFO. The court, however, found that there was sufficient evidence in the record to indicate that the Permit Board considered the complaints of the neighbors and that its interpre-

See CAFO, page 6

CAFO, from page 5

tation and application of APC-S-4 was not contrary to the plain language of the statute.

Kennard also argued that the Permit Board's decision to issue the permit was arbitrary and capricious because it ignored technical evidence and expert testimony that was submitted to it regarding the odor and human health effects of hog farms. The court, however, rejected this argument, stating that the Permit Board provided ample discussion of its findings, including a discussion of why further measures were refused. Accordingly, the court found that the Permit Board's decision was supported by substantial evidence, and not arbitrary and capricious as argued by Kennard.

Finally, Kennard asserted that the Permit Board's failure to require a program to monitor odor as a term in Cook's permit was arbitrary and capricious. This argument was also rejected by the court. The court noted that the Permit Board directed the MDEQ staff to study the odor situation further and allowed for the permit to be revised based on the results of their study. The court felt that this issue was adequately considered by the Permit Board and was therefore not arbitrary and capricious.

Conclusion

The Mississippi Supreme Court held that the decision by the Permit Board to issue a multimedia permit to Cook's CAFO was supported by substantial evidence and, therefore, should be affirmed.˅

Photograph of swine facility courtesy of the National Resources Conservation Service Photo Gallery.

Endnotes

1. The facility's water pollution standards were not in dispute here.
2. Miss. Code Ann. Section 49-17-29 (Rev. 2002).
3. A multimedia permit combines control standards for water pollution and air pollution.
4. *Sierra Club v. Miss. Envtl. Quality Permit Bd.*, 943 So.2d 673, 678 (Miss. Nov. 30, 2006).
5. *Id.* (citing *McDerment v. Miss. Real Estate Commn.,* 748 So.2d 114, 118 (Miss. 1999)).

D.C. Circuit Vacates FERC Pipeline Orders

***Williams Gas Processing – Gulf Coast Co., L.P. v. Fed. Energy Reg. Commn.*, 475 F.3d 319 (D.C. Cir. 2006)**

Josh Clemons

In December the U.S. Court of Appeals for the D.C. Circuit vacated two orders by the Federal Energy Regulatory Commission (FERC) concerning natural gas pipelines off the Louisiana coast, sending the agency back to the drawing board.

Factual Background

This case arose from the difficulty that a government agency, in this case FERC, has in applying its relatively simple statutory mandate to the complexities of the physical world.

Williams Gas Processing-Gulf Coast Co. (Williams) and Transcontinental Gas Pipe Line Corp. (Transco) operate natural gas pipelines off the coast of Louisiana. Congress has given FERC jurisdiction over natural gas pipelines in the Natural Gas Act.[1] However, FERC's jurisdiction extends only to pipelines that "transport" natural gas, and not to those that merely "gather" it. FERC is obligated to use a defensible rationale to distinguish between these two types of pipeline.

In 2001 FERC determined that it lacked jurisdiction over a Transco pipeline that lies downstream of Jupiter Energy Corp.'s pipeline facilities. Two years later the agency determined that it did have jurisdiction over a Jupiter Energy pipeline that fed into that Transco pipe. As a result of these two decisions, FERC was in the strange position of having jurisdiction over a pipeline that flowed into a pipeline over which it lacked jurisdiction. For this reason the Fifth Circuit vacated FERC's order with respect to the Jupiter pipeline. FERC subsequently issued a decision concluding that it had jurisdiction over Transco's pipeline because it served a transportation function.

In 2005 FERC issued two decisions in an attempt to settle the situation. The first decision affirmed jurisdiction over the Jupiter pipeline. The second affirmed jurisdiction over the Transco pipeline. This Transco decision was being challenged in this case. (The Jupiter decision is being challenged in the Fifth Circuit.)

Williams and Transco argued before the D.C. Circuit that FERC could not lawfully reconsider its original jurisdictional finding because it had issued its decision in final orders that were affirmed by a court. They also argued that FERC had based the finding on an incorrect interpretation of the facts, and the agency had therefore failed to support its findings adequately.

Evolution of the "Primary Function" Test

Under the Natural Gas Act, FERC is charged with regulating "the transportation [transmission] of natural gas in interstate commerce" but cannot regulate "the production or gathering of natural gas."[2] In general, a "gathering" pipeline is one that collects gas from its source (a well or wells). The gathering pipeline then delivers the gas to a pipeline that will transport the gas in interstate commerce.

The complexity of pipeline systems can make it difficult to draw this deceptively simple jurisdictional line. At one time FERC embraced the "primary function test," which utilized six fairly simple factors to assess a pipeline's physical characteristics. The Fifth Circuit rejected that test as overly simplistic.[3] FERC then modified the test to take into account important nonphysical criteria. The Fifth Circuit remained unsatisfied, and rejected the test again.[4]

FERC went back to the drawing board and devised a test that it believed would allow it to consistently and accurately identify the point at which "gathering" ends and "transportation" begins. The first key change to the test was a decrease in emphasis on the pipeline's physical location relative to the processing plant. The second change was the addition of an inquiry into whether a "central location" exists where gas is "aggregated for further transportation to shore."[5]

Using this new and improved "primary function" test, FERC in 2001 made a series of determinations that resulted in a "muddle" of gathering pipelines that fed into transportation pipelines that fed into gathering pipelines.[6] The Fifth Circuit overturned these determinations as being arbitrary and capricious because FERC had acted against its own principle that there is an identifiable single point at which gathering ends and transportation begins. As a result of this decision, FERC classified a 24-inch lateral owned by Transco as a "transportation" pipeline.

Transco, believing that FERC's 2001 decision disclaiming jurisdiction should have stood, petitioned FERC for a rehearing. FERC denied this petition on

See Pipeline, page 8

Pipeline, from page 7

the grounds that the 2001 decision was based "on the basis of incomplete information" and "no gas is collected along the length of Transco's downstream line."[7]

Photograph of gas pipeline being buried courtesy of the Federal Energy Regulation Commission.

Legal Analysis

When a court reviews an agency decision, the standard of review is simple: the agency's decision must not have been "arbitrary and capricious," which means that the agency must have had a reasonable basis for its decision. The agency should also have clearly expressed its rationale. Underlying this deferential standard is the principle that specialized agencies are generally more qualified than courts to address complicated factual situations in their areas of expertise.

The core issue, as Transco and Williams saw it, was that FERC had purportedly applied the same test to the 24-inch lateral pipeline in 2005 as it did in 2001 yet reached an entirely different conclusion. The agency, Transco and Williams argued, did not have adequate reasoning to support this switch.

"Incomplete Information"

When FERC reclassified the 24-inch lateral in 2005, it claimed that the 2001 decision was based on "incomplete information" about the lateral's location relative to other transportation pipelines. FERC claimed that it obtained additional information later, but the court opined that the agency did not adequately explain how this information mandated reclassification in light of apparently conflicting policy: whereas FERC had previously claimed that jurisdiction over an upstream facility does not determine jurisdiction over a downstream facility, the agency now argued the opposite.

The inconsistency in FERC's policy did not end there. The court isolated two jurisdictional principles that FERC seemingly abandoned in its reclassification of the 24-inch lateral. The first principle, which FERC asserted in 1996, was that there is a definite, determinable point at which gathering ends and transportation begins. The second was that a transportation facility cannot feed into a gathering facility.

The court found that FERC defied these principles without convincingly establishing its basis for doing so. The agency's "incomplete information" rationale was insufficient to sustain its deviation from policy. Thus, the decision reclassifying the 24-inch lateral was ruled to be arbitrary and capricious.

Conclusion

The D.C. Circuit vacated FERC's 2005 orders and sent the issue back to the agency for further consideration. The agency is now obligated to provide a decision based on clearly articulated reasoning.˅

Endnotes

1. 15 U.S.C. §§ 717-717z.
2. *Id*. § 717(b).
3. *EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989).
4. *Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997).
5. *Id*.
6. *Williams Gas Processing – Gulf Coast Co., L.P. v. Fed. Energy Reg. Commn.*, 475 F.3d 319, 325 (D.C. Cir. 2006).
7. *Id*. at *6.

Injured Seaman Wins Some, Loses Some Before Fifth Circuit

***Jauch v. Nautical Services, Inc.*, 470 F.3d 207 (5th Cir. 2006)**

Allyson L. Vaughn, 3L, University of Mississippi School of Law

The U.S. Court of Appeals for the Fifth Circuit recently heard a maritime case involving an injured seaman who failed to disclose previous back injuries. While the court affirmed the denial of maintenance and cure under general maritime law, the seaman was permitted recovery for damages according to the Jones Act.

Background

In October 1999, Nautical Services, Inc. hired Jon Jauch to serve as a member of the crew on the M/V *Madonna*, an oceangoing tug. Jauch was required to complete a physical examination as well as a medical history questionnaire prior to securing employment. On the questionnaire, Jauch failed to inform Nautical Services of his prior back injuries and treatment received from a chiropractor. He also failed to disclose a previous workers' compensation claim and psychiatric treatment. According to Nautical Services' physician, had Jauch disclosed this information additional documentation and medical evaluation would have been required prior to hiring.

A week after Jauch began his employment he was injured while working with the captain of the tug and two other crew members to move a johnboat ashore for maintenance. He received no formal training as to the proper method for such a procedure, but instead imitated the captain. Jauch complained of back pain after the incident but continued to work and performed some weightlifting later that afternoon.

After several days of complaining about the pain, Jauch was diagnosed with lumbosacral strain by an orthopedist referred by Nautical Services. In May 2002 Jauch would undergo lumbar disc fusion surgery.

In April 2001, Jauch brought suit against Nautical Services in the U.S. District Court for the Eastern District of Louisiana. He sought damages under the Jones Act as well maintenance and cure under maritime law. The district court denied the maintenance and cure claim, found Jauch and Nautical Services equally liable and awarded past medical expenses. Nautical Services was ordered to pay Jauch almost two hundred thousand dollars. Jauch then appealed the district court's decision to the Fifth Circuit Court of Appeals based on four grounds. He maintained that the court misapplied the *McCorpen* rule in denying his maintenance and cure claim, he denied any fault in the accident, and he claimed that the court erred in calculating his medical expenses and also erred in denying prejudgment interest. Nautical Services also appealed the finding of fault and the awarding of medical expenses despite the denial of maintenance and cure.

Fifth Circuit Review

Upon review, the Fifth Circuit held that maintenance and cure recovery are barred because Jauch intentionally concealed previous injuries and mental health conditions, in accordance with principles the court had previously described in the *McCorpen* case: maintenance and cure is provided in maritime law to compensate seamen who fall ill or are injured while in the service of a vessel; the liability of the vessel owner does not depend on fault, but is a contractual agreement implied in the contract of employment; however, if a seaman knowingly or fraudulently conceals a pre-existing condition at the time of employment, the vessel owner is not responsible to compensate for additional injury.[1]

A seaman only has to disclose a previous condition under two circumstances: (1) if the seaman believes the owner would consider the injury important or (2) if the shipowner requires a medical examination as part of the hiring process.[2] If a seaman conceals his condition to the vessel owner he will not be barred from recovery unless the owner can prove that (1) the injured claimant intentionally misrepresented or concealed important medical facts, (2) that were material to the employer's decision to hire the seaman, and (3) there is a connection between the withheld information and the injury that serves as the basis for the lawsuit.[3]

Had Jauch revealed his previous condition he would likely not have obtained employment and would

See Injured Seaman, page 10

Injured Seaman, from page 9

not have been present on the M/V *Madonna* at the time of the accident. The Court of Appeals found that the district court properly applied the *McCorpen* rule and barred Jauch from recovering maintenance and cure for his injuries because Jauch had concealed his previous medical history during a medical examination designed to reveal such injuries.

The court discussed the apportionment of fault claim next. An appellate court overturns a lower court's finding of apportionment of fault only if it finds clear error. The district court did not err in finding both parties equally responsible for the accident, according to the Fifth Circuit. There was sufficient evidence that Jauch was negligent in failing to remain attentive and failing to secure his rope while lowering the boat and Nautical Services was negligent for failing to instruct him on the proper method for completing the task.

Photograph of an ocean-going tug courtesy of the Marine Photobank and photographer © Wolcott Henry 2005.

Finally, the Fifth Circuit reviewed the damages award from the district court. Nautical Services cross-appealed the award contending that because Jauch's claim for maintenance and cure was denied the lower court erred in awarding damages for past medical expenses. The court rejected this argument because "the seaman's right to receive, and the shipowner's duty to pay, maintenance and cure is independent of any other source of recovery for the seaman."[4] Therefore, the district court's dismissal of the claim for maintenance and cure had no legal effect on Jauch's entitlement to recover medical expenses under the Jones Act.

On Jauch's claim that the district court erred in computing the award of medical expenses, the court found that the formula applied was unclear. The district court awarded Jauch only a portion of the total amount of medical expenses incurred as a result of the accident. However, there was no clear standard set forth in the record. On this claim, then, the court found that reviewing for error was impossible and the district court would have to resolve the matter and create a more detailed record.

The final issue addressed involved the district court's ruling on prejudgment interest. Prejudgment interest is interest that accrues on a loss during the time prior to the court's award of damages. Prejudgment interest may be appropriate in Jones Act cases depending on the circumstances of each case. The district court denied prejudgment interest without providing any explanation, so the appeals court could not review the denial and remanded for a more detailed analysis.

Conclusion

The Fifth Circuit affirmed the denial of maintenance and cure as well as the apportionment of fault between Jauch and Nautical Services. The award of past medical expenses and the denial of prejudgment interest was vacated and returned to the district court to reconsider the claims and provide the appeals court with a more detailed record for review.˅

Endnotes

1. *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968).
2. *Jauch*, 470 F.3d at 212.
3. *Id.*
4. *Id.*(quoting *Bertram v. Freeport McMoran, Inc.*, 35 F.3d 1008, 1013 (5th Cir. 1994)).

Eleventh Circuit Rules in Scrap Metal Case

***Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733 (11th Cir. 2006)**

Josh Clemons

The U.S. Court of Appeals for the Eleventh Circuit recently issued an opinion in a case that pitted a landowner against her neighbor, a scrap metal processing plant, who she accused of violating an array of state and federal environmental laws including the Clean Water Act and the Resource Conservation and Recovery Act.

Background

Quebell Parker and her family, the plaintiffs in this case, have lived for approximately fifty years in the same location in the town of Covington, Georgia. For much of that time the neighboring property has been the site of a junk and scrap metal yard, which is currently owned by J. Wayne Maddox.

In 2002 the Parker family filed suit against Maddox and the scrap yard's previous owners, alleging various state tort and environmental law violations as well as violations of the federal Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA). The Parkers won before the trial court and were awarded a million dollars in damages. In addition to the Parkers' award, the defendants were ordered to pay civil fines, develop a stormwater plan, and obtain a solid waste handling permit from the state.

The defendants appealed that verdict, and were rewarded for that effort by having the damages reversed on account of the fact that the Parker children, who were among the plaintiffs, did not actually own or occupy the Parker property during the time the damages accrued. The appeals court sent the case back to the district court to re-try the damages issue. This time, the Parkers sought damages only for Mrs. Parker, who occupied the property at the relevant time.

The district court required the parties to brief it on whether it had subject-matter jurisdiction over the state law damage claim. After consideration of the issue the court decided not to exercise jurisdiction, leaving the damages issue to the state courts.

In addition, the Parkers asked the court to hold the defendants in contempt for failing to implement an adequate stormwater plan, as ordered in the first trial in 2003. The court denied this request on the grounds that the defendants had a "permit-by-rule" under RCRA, and that the plaintiffs had not provided sufficient evidence under the CWA that the defendants were not in compliance with the court's order.

The Appeal

The Eleventh Circuit weighed three issues on appeal: (1) whether the district court erred in denying the Parkers' request that it hold the defendants in contempt, (2) whether the district court erred in its holding on the stormwater plan, and (3) whether the district court erred in choosing not to exercise jurisdiction over the damages claim.

The first issue involved the defendants' violation of RCRA, the federal statute governing transportation, storage, and disposal of hazardous waste. In the original trial the district court ordered the defendants to obtain a RCRA permit for the handling of its scrap metal, which qualifies as a "solid waste" under Georgia's implementation of the statute. The defendants were of the opinion that their stock-in-trade consisted of "recovered materials," the handling of which is exempt from the permit requirement unless they are "accumulated speculatively."[1] They had obtained no permit despite the court's finding that the materials were, in fact, accumulated speculatively, and that a permit was necessary.

The defendants argued in this appeal that they had a "permit-by-rule" under the Georgia regulations . . .

The defendants argued in this appeal that they had a "permit-by-rule" under the Georgia regulations, and that the state had implicitly affirmed it in letters and an affidavit. The appeals court responded by reasoning

See Scrap Metal, page 12

Scrap Metal, from page 11

that an affirmation by the state, even if valid, did not supersede a court's mandate.

The next issue was the stormwater plan that the district court in 2003 ordered the defendants to develop and implement. The defendants argued that they could not afford to construct a stormwater detention pond, as required by the stormwater plan, but had been able to take interim measures to divert stormwater.

The court sympathized with the defendants on this issue, reasoning that the measures they had taken, while not necessarily sufficient in the long term, at least showed that they were making a good faith effort to comply. The Parkers had not shown evidence to the contrary. For this reason, the appeals court chose not to find the defendants in contempt of court.

The final issue was subject-matter jurisdiction. The district court had chosen *not* to exercise subject-matter jurisdiction over the state law damages claims, despite its ability to do so under the doctrine of supplemental jurisdiction.[2] A district court has discretion to make this choice if at least one of the following situations applies: "(1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."[3]

The appeals court analyzed each possible situation, and determined that none of them existed. The tort issues were not novel or complex; the state law claims did not predominate over the federal law claims; the federal claims had not been dismissed; and the "compelling reasons" that can convince a court to decline jurisdiction – judicial economy, convenience, fairness to the parties, and the expectation that all claims should be tried together – were not present. The appeals court therefore held that the district court abused its discretion by choosing not to exercise jurisdiction over the state law claims.

Conclusion

The Eleventh Circuit returned the case to the district court to decide the issues of damages and the solid waste handling permit. The appeals court affirmed the lower court's decision about the stormwater plan. ˇ

Endnotes

1. Ga. Comp. R. & Regs. R. 391-3-4-.01(55), .04(7)(b).
2. Supplemental jurisdiction enables a federal court to decide state law claims that arise from the same common nucleus of operative facts as the federal law claims over which it has original jurisdiction.
3. *Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 743 (11th Cir. 2006).

Photograph of a scrap yard courtesy of ©Nova Development Corp.

Fifth Circuit Allows Seaman the Forum of His Choice

***Inland Dredging Co., LLC v. Sanchez*, 468 F.3d 864 (5th Cir. 2006)**

Josh Clemons

In October the U.S. Court of Appeals for the Fifth Circuit ruled on a novel question in its jurisdiction: whether a seaman filing a claim in federal court under the Jones Act, who has stipulated that the shipowner's rights to limitation of liability will be protected under the Limitation of Liability Act, can proceed with his claim in the federal court of his choice after the shipowner has obtained an injunction in federal court.

Background

Ricardo Sanchez worked as a seaman aboard the M/V *Ms. Paula*, which is owned by Inland Dredging Co., LLC. He suffered an injury during his employment. Inland Dredging, mindful of its potential liability to Sanchez under the Jones Act, quickly proceeded to the U.S. District Court for the Northern District of Mississippi to have that liability limited under the federal Limitation of Liability Act.[1] Inland Dredging also declared the value of the *Ms. Paula* and her cargo to be no more than $235,000. The court approved Inland Dredging's request for limitation of liability and declaration of value. The court also enjoined claims against Inland Dredging or the *Ms. Paula* in any other forum.

Sanchez wanted to file a claim in the U.S. District Court in Galveston, so he filed a motion asking the Mississippi court to dissolve the injunction. Sanchez offered to stipulate that jurisdiction over the right to, and amount of, any liability would remain with the Mississippi court. Sanchez argued that, in light of his stipulations, he should be allowed to proceed with his claims in the Galveston court, which was more convenient for him.

The court denied his request and sustained the injunction. Sanchez appealed that decision to the Fifth Circuit.

Legal Issues

The Jones Act (also known as the Merchant Marine Act) allows a seaman who is injured in the course of his employment to sue the owner of his vessel for money damages.[2] The injured seaman, if he prevails in court, may be entitled to recover for maintenance and cure (cost of medical care and financial support during recovery), lost wages (past and future), and pain and suffering. These damages can add up to a very considerable sum of money.

The Limitation of Liability Act works to limit the amount of damages to no more than the value of the vessel and her cargo. The last sentence of the Limitation Act reads: "[u]pon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease."[3] At issue in this appeal was the precise effect of that sentence, which could be read as meaning either that proceedings about the limitation itself are restricted to the limitation court, or alternatively, that no other proceeding on the subject of the shipowner's liability could occur at all.

The Court's Analysis

The appeals court approached the issue with concern over the implications for the rights of both parties – plaintiff and defendant – to protect their interests in the appropriate forum. A plaintiff like Sanchez traditionally has the right to pursue his claim in the forum of his choice; in this case, the district court in Galveston. Any attempt by Congress to limit this traditional right would need to be clearly stated.

The Limitation of Liability Act, in the court's estimation, was not intended to restrict Sanchez' right to choose his forum, as the defendants asserted. Rather, the Act serves only to protect the shipowner from excessive liability. Quoting the U.S. Supreme Court, the court noted that "to expand 'the Act to prevent [a claimant] from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights'" to choose their forum.[4] By this reasoning (which had also been adopted in the Second Circuit) the district court had made an error in its interpretation of law, and had to be overruled.

See Jones Act, page 14

Jones Act, from page 13

Conclusion

The court declared that the defendant's rights under the Limitation Act were adequately protected by Sanchez' stipulations, and that there was no reason to uphold the injunction. The Fifth Circuit vacated the injunction, leaving Sanchez free to pursue his Jones Act claim in the district court in Galveston.

Endnotes

1. 46 U.S.C. app. § 185.
2. 46 U.S.C. § 688(a).
3. 46 U.S.C. app. § 185.
4. *Inland Dredging Co., LLC v. Sanchez*, 468 F.3d 864, 867 (5th Cir. 2006) (quoting *Lake Tankers Corp. v. Henn*, 282 U.S. 531, 541 (1931)).

Photograph of of dredging operation courtesy of NOAA's Photo Library.

State Farm, from page 2

On January 26, 2007, Judge Senter rejected the initial settlement offer because he wanted more information from the parties before he would agree to a deal that could affect up to 35,000 policyholders. This settlement negotiation is still pending. However, by agreeing to settle, Jim Hood, Mississippi's Attorney General, has agreed to drop a civil suit and a criminal probe related to allegations that State Farm fraudulently denied claims related to Hurricane Katrina. Because State Farm is the largest insurer in Mississippi, its decision to settle could encourage other insurers to do the same.

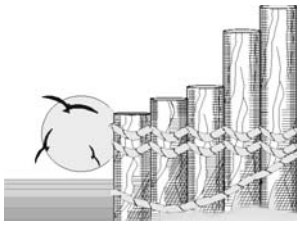
Conclusion

Having determined that State Farm did not meet its burden of proof with respect to the amount of damage caused by water, it is liable to the Broussards for the full value of their insured home. Also, because State Farm acted unreasonably in denying the plaintiffs' claim and left them no choice but to file a lawsuit, punitive damage were appropriate.˅

Endnotes

1. Gary Mitchell, *State Farm Loses Katrina Claim Case*, ABC News, January 12, 2007.
2. *Broussard v. State Farm Fire and Casualty Co.*, 2007 WL 113942 (S.D. Miss. 2007).
3. *Id.*
4. *Gregory v. Continental Insurance Co.*, 575 So.2d 534 (Miss. 1990).
5. Judge Senter later reduced the punitive damages from $2.5 million to $1 million because he felt that an award of four to five times the value of the Broussards' home was more appropriate.

Interesting Items



Around the Gulf…

Two conservation groups in Alabama, the Alabama Rivers Alliance and the Southern Environmental Law Center, have published the ***Alabama Water Agenda*** as part of their work "to ensure that Alabama's waters are pure and plentiful for generations to come." The Agenda identifies the six greatest threats to the state's waters, and describes actions that can be taken to address those threats. The groups will be presenting the Agenda to legislators, agencies, the governor's office, business and industry, and the public. The Agenda may be downloaded at <http://www.southernenvironment.org/cases/al_water_agenda/casepage.htm>.

A federal court in Jacksonville, Florida rejected a legal challenge to the U.S. Army Corps of Engineers' **Regional General Permit** for 48,150 acres in Walton and Bay counties, which are located on Florida's northern Gulf coast. The permit was controversial because it will allow the St. Joe Company, which owns much of the land in the area, to fill thousands of acres of wetlands for development without having to apply for individual permits for each project. The Natural Resources Defense Council and the Florida Sierra Club sought to have the general permit set aside for violating the Clean Water Act. The groups are appealing the court's ruling.

The National Oceanic and Atmospheric Administration (NOAA) has released the "**Final Regional Restoration Plan for Region 2,**" which is the first of nine regional plans addressing discharges and substantial threats of discharge of oil in Louisiana. The plans are a component of the Louisiana Regional Restoration Planning Program, which is intended to help restore and protect state trust resources. The Region 2 plan may be downloaded at <http://www.darrp.noaa.gov/pdf/Final_Regional_Restoration_Plan_for_Region_2.pdf>.

President Bush has lifted a presidential moratorium on **energy leasing** in part of the eastern Gulf of Mexico. The Department of the Interior is now free to offer the area for oil and gas leases. The next five-year leasing cycle begins this year.

Around the country…

The U.S. Environmental Protection Agency (EPA) recently announced the availability of **$10 million in grant money** to states, territories, and tribes for water quality monitoring efforts at the nation's beaches, including the Great Lakes. The funding is authorized by the Beaches Environmental Assessment and Coastal Health Act of 2000 (BEACH Act). Applications for this money must be submitted by April 11, 2007. More information is available online at <http://www.epa.gov/waterscience/beaches/grants/>.

Maine officials have approved over a million dollars to help the state's **working waterfronts** survive and prosper. The money will be used to fund six projects that protect commercial fishing facilities and access to fishing areas. One proposed project will enable the members of a fishing co-op to purchase the land on which it sits, thus providing some insurance against development by other interests. The grant money, which was approved by Mainers in 2005, is part of the state's ongoing work to protect its working waterfronts. The Pine Tree State's innovative efforts in this area may serve as a model for working waterfront protection in other coastal states.

NOAA has reported that 2006 was the **warmest year on record** based on preliminary data. The average temperature was 55 degrees F, which is more than two degrees over the twentieth-century average. In addition to a general global warming trend, El Niño may have contributed to the record temperatures. The temperature data were collected at a network of over twelve hundred U.S. Historical Climatology Network stations. For more information please visit <http://www.noaanews.noaa.gov/stories2007/s2772.htm>.˅

WATER LOG (ISSN 1097-0649) is supported by the National Sea Grant College Program of the U.S. Department of Commerce's National Oceanic and Atmospheric Administration under NOAA Grant Number NA16RG2258, the Mississippi-Alabama Sea Grant Consortium, State of Mississippi, Mississippi Law Research Institute, and University of Mississippi Law Center. The views expressed herein do not necessarily reflect the views of any of those organizations. The U.S. Government and the Mississippi-Alabama Sea Grant Consortium are authorized to produce and distribute reprints notwithstanding any copyright notation that may appear hereon. Graphics and/or photographs by ©Nova Development Corp., U.S.D.A., Florida State University, Washington State Treasurer's Office and NOAA.

MASGP-06-009-04

This publication is printed on recycled paper.

February, 2007

... Upcoming Conferences ...

•APRIL 2007 •

American Association of Blacks in Energy
April 10, 2007, Washington DC
http://www.aabe.org

Environmental Protection Worldwide Conference
April 2007, Los Angeles, CA
http://www.hkc22.com/environmentaltechnology.html

International Coastal Symposium
April 16-20, 2007, Gold Coast, Queensland, Australia
http://www.griffith.edu.au/school/eng/ics2007/

•MAY 2007 •

National Water Access and Waterfronts Symposium
May 9-11, 2007, Norfolk, VA
http://www.wateraccess2007.com/

Coastal Development Strategies Conference
May 9-10, 2007, Biloxi, MS
http://www.griffith.edu.au/school/eng/ics2007/

•JUNE 2007 •

Water 2007
June 25-26, 2007 London, United Kingdom
http://www.marketforce.eu.com/water

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

Non-Profit Org.
U.S. Postage
PAID
Permit No. 6