WATER LOG

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Special Oil Spill Issue

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Water Log

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BP Oil Spill Lecture Series
Tulane Law School
Beginning August 27, 2010, New Orleans, LA
(contact editor for more information)

The ABA Section of Environment, Energy, and Resources Law Fall Meeting
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September 29-October 2, 2010, New Orleans, LA

Clean Gulf Oil Spill Training Event
http://www.cleangulf.org/
October 19-20, 2010, Tampa, FL

From the Editor's Desk

Welcome to the redesigned *Water Log*! We hope you enjoy the new look and welcome your comments, negative as well as positive. We would also like to introduce our two summer law clerks, both from the University of Mississippi School of Law. Lindsey Etheridge, a 3L, and April Hendricks, a 2L, are working with the Mississippi-Alabama Sea Grant Legal Program this summer, providing research and contributing to *Water Log.*

This special edition of *Water Log* focuses on legal issues surrounding the Deepwater Horizon oil spill. Articles in this edition address the impact of multidistrict litigation on oil spill lawsuits, legal maneuvering surrounding the drilling moratorium, vessel of opportunity contracts, and possible criminal charges arising from the oil spill.

We also look at the implications of an unusual Fifth Circuit decision, *Comer v. Murphy Oil*, on future oil spill litigation. In Florida, a court decision favoring commercial fishermen provides a new means of recovery for pollution to marine life. Lastly, we provide an overview of the U.S. Supreme Court's decision in *Stop the Beach Renourishment*.

Thank you for reading *Water Log*. We hope you enjoy this special edition.

Niki Pace

Cover photograph courtesy of the U.S. Navy, photographer Mass Communication Specialist 2nd Justin E.Stumberg/Released.

Federal Judge Blocks Moratorium on Deepwater Drilling

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In the wake of the Deepwater Horizon explosion, the federal government ordered an evaluation of the safety of deepwater drilling operations in the Gulf of Mexico. In order to improve the safety of such operations and provide more substantial environmental protection, the Department of the Interior (DOI) and the Minerals Management Service (MMS) issued a six-month moratorium on deepwater drilling in the Gulf. A federal district court in Louisiana has since set aside the moratorium, noting that the suspension of deepwater drilling demonstrated the federal government's arbitrary exercise of authority. The U.S. Court of Appeals for the Fifth Circuit later rejected the federal government's request to stay the lower court's ruling pending the full appeal of the decision.

Background

To evaluate safety measures for offshore drilling rigs, a one-month drilling moratorium was established on May 6, 2010; however, on May 27, President Obama extended the moratorium by six months, concurring with Secretary of the Interior Kenneth Salazar's determination that a longer moratorium was necessary to ensure safe drilling procedures in the Gulf of Mexico. In extending the moratorium, DOI characterized offshore deepwater drilling as "an unacceptable threat of serious and irreparable harm to wildlife and the marine, coastal, and human environment."[1] MMS's order imposing the moratorium defined deepwater drilling as any operation occurring at depths greater than 500 feet. This moratorium ordered 33 existing drilling rigs to cease operation and prohibited MMS from granting additional deepwater drilling permits.[2]

Hornbeck Offshore Services filed suit to challenge the moratorium, alleging that the federal suspension of deepwater drilling threatened its continued ability to provide vessel support to the offshore exploration and deepwater drilling industries. In June, a federal district court agreed with Hornbeck's argument and blocked the moratorium, holding that the suspension of all deepwater drilling in the Gulf was arbitrary and capricious and, moreover, had a negative impact on both the plaintiffs and the local economies dependant on the oil and gas industry.[3]

District Court Ruling

Though the federal government may have the authority to impose a drilling moratorium in the Gulf, the court noted that such an order may not be arbitrarily handed down without valid explanations as to its breadth. The Outer Continental Shelf Lands Act (OCSLA) grants DOI the authority to temporarily suspend any activity that poses "a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment."[4] In finding for Hornbeck, the court noted that, under the Administrative Procedure Act, DOI's decision to impose the moratorium under the OCSLA could not be set aside unless this decision was "arbitrary, capricious, [or] an abuse of discretion."[5] Because DOI failed to clearly explain the reasoning behind issuing such an expansive drilling suspension, the court found that no clear relationship existed between the proposed threats of injury and the "immense scope of the moratorium."[6]

The court noted that DOI's report regarding increased safety measures in the Gulf offered valuable recommendations for offshore drilling; however, because DOI failed to address the actual danger posed by the 33 operating rigs affected by the moratorium, the court found that the moratorium arbitrarily suspended a vast amount of drilling. Moreover, the court took issue with the lack of coordination between DOI and MMS in actually defining the breadth of the moratorium. DOI's report never explicitly defined "deepwater" drilling, noting only that drilling at depths greater than 1,000 feet presents dangers not experienced in shallow waters; however, MMS's Notice to Lessees specifically suspended drilling at any depth greater than 500 feet, with no explanation as to why drilling at this depth presents greater risks to the coastal environment than in deeper waters. In an attempt to explain its rationale for recommending the moratorium, DOI described various studies which noted faulty equipment used on the offshore rigs;

however, the court dismissed this argument as irrational, characterizing the government's decision to impose a moratorium based on the failure of a single rig as "heavy-handed, and rather overbearing."[7]

The court also noted that Hornbeck and similar companies stand to lose contracts and business opportunities if drilling is restricted in the Gulf. Though DOI claims the moratorium will have only a minor impact on these businesses, the court maintained that the moratorium will cause oil companies to move their rigs outside of the Gulf, ultimately leading to lost jobs and business failures which will negatively impact the entire coastal region.[8] Though DOI's report substantially supports implementing new regulations to govern offshore drilling, the court held that a blanket moratorium, based on the failure of a single deepwater rig, is not warranted and unnecessarily punishes the other drilling companies operating in the Gulf without regard for their safety records.[9]

DOI's Response

In response to the lower court's decision to end the moratorium, DOI appealed to the Fifth Circuit, requesting that the court enforce the deepwater drilling suspension. Because the court will not hear DOI's full appeal of the lower court's decision until August 30th, DOI requested that the Fifth Circuit stay the lower court's injunction lifting the moratorium pending the resolution of the appeal. In making this request, DOI noted that the suspension did not arbitrarily target certain rigs and emphasized that the affected rigs posed similar threats as the Deepwater Horizon. DOI claimed that, because each of the 33 rigs affected by the suspension used similar technology and techniques as the Deepwater Horizon, suspending their operations was key to preventing further damage to the Gulf in the event of another explosion.[10] Though the possibility of another blowout is unlikely, DOI contended that the potential for further damage necessitated the temporary suspension to provide time to implement new safety measures.

While acknowledging that economic impacts to the drilling industry are a valid short-term concern, DOI further asserted that its priority is ensuring the long-term security of the nation's coastal economy and marine environment. During the moratorium, DOI intended to assess the safety protocols for drilling in the Gulf and implement new safety regulations if necessary. Accordingly, DOI maintained that enforcing the moratorium was essential to promote the "Gulf's economic, social, and ecological health" by ensuring that no further spills occur.[11]

On July 8th, the Fifth Circuit Court of Appeals, in a 2-1 decision, denied the federal government's request to temporarily stay the lower court's decision while the appeal is pending. To qualify for a stay, DOI needed to establish that irreparable injury would occur if the stay were not granted. Noting that DOI failed to show irreparable injury was likely, the court refused to restore the ban on deepwater drilling in the Gulf. Specifically, the court found that DOI failed to show that drilling activities would resume while the appeal was pending; however, DOI may seek emergency relief from the court should drilling commence.[12]

Conclusion

Although the Fifth Circuit denied DOI's motion for a stay, the appeal remains on an expedited track; the Fifth Circuit is scheduled to hear the matter the week of August 30th. On July 12, DOI issued a second moratorium on deepwater drilling based on growing evidence that the oil industry cannot properly respond to and contain a deepwater blowout.[13] Unlike the drilling suspension lifted by the district court in Louisiana, the new moratorium is not based strictly on depth; rather, DOI's new decision suspends drilling operations based on the type of blowout prevention technology being used. DOI has indicated that the moratorium will last until November 30 in order to allow for new safety regulations to be implemented for deepwater operations.

Endnotes

1. Press Release, DOI, Interior Issues Directive to Guide Safe, Six-Month Moratorium on Deepwater Drilling (May 28, 2010) (on file with author).
2. *Id.*
3. Order at 22, Hornbeck Offshore Services v. Salazar, No. 10-633 (E.D. La. June 22, 2010).
4. 43 U.S.C. § 1334(a)(1).
5. 5 U.S.C. § 706(2)(A).
6. Order, *supra* note 3 at 17.
7. *Id.* at 19.
8. *Id.* at 21.
9. *Id.*
10. Motion for a Stay at 14, Hornbeck Offshore Services v. Salazar, No. 10-30585 (5th Cir. June 25, 2010).
11. *Id.* at 21.
12. Order at 2, Hornbeck Offshore Services v. Salazar, No. 10-30585 (5th Cir. July 8, 2010).
13. Press Release, DOI, Secretary Salazar Issues New Suspensions to Guide Safe Pause on Deepwater Drilling (July 12, 2010) (on file with author).

Streamlining Oil Spill Litigation in Federal Court

S. Beth Windham, J.D.[1]

BP Exploration and Production Inc. ("BP") moved to centralize 70 lawsuits filed in federal court against them and others arising out of the April 20, 2010 explosion and fire onboard Transocean's Deepwater Horizon drilling rig and the resulting oil spill before one Multidistrict Litigation Court.[2] The cases filed against BP range from claims for personal injuries, to claims for injury to business or commercial interests, to claims for injury to real or personal property and have been filed in more than seven jurisdictions including the Western District of Louisiana, the Eastern District of Louisiana, the Northern District of Florida, the Southern District of Mississippi and the Southern District of Alabama. According to BP, at least 59 of these oil spill cases are styled as class actions.[3]

The Multidistrict Litigation Panel is empowered by federal statutory authority to transfer civil actions involving one or more common questions of fact pending in different districts for coordinated or consolidated pretrial proceedings.[4] Since its inception in 1968, the Panel has centralized 323,258 civil actions.[5] After making the determination that there are common questions of fact in civil actions pending in different districts, the Panel selects which judge or judges and court will conduct the proceedings.[6] Prior to transferring any actions, the Panel must first determine that the transfers will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.[7] The Panel can conduct proceedings for the transfer of an action upon its own initiative or by motion of a party in any action in which transfer may be appropriate.[8] Notice of hearings on whether the transfer is to be made is given to the parties in all actions in which transfers are contemplated. At the hearing, material evidence may be offered by any party to an action that would be affected by the proceeding, and the Panel's order of transfer is supported by findings of fact and conclusions of law based upon the record at the hearing.[9]

Transfer of the actions has the effect of placing them before a single judge whose role is to ensure that discovery on any non-common issues proceed at the same time as discovery on common issues and to conduct pretrial proceedings in a streamlined manner.[10] Centralization eliminates duplicate discovery, prevents inconsistent pretrial rulings and conserves the resources of the parties, their counsel and the judiciary.[11] Once the pretrial proceedings are completed, each action is remanded to the district court from which it was transferred, unless it was previously terminated.[12]

BP requested that the Panel transfer the oil spill cases filed against it and others to the Southern District of Texas, Houston Division, with Judge Lynn N. Hughes presiding. According to BP, Judge Hughes was assigned the first oil spill case to be filed in the Southern District of Texas, Houston Division and is experienced in managing multidistrict litigation. The principle places of business of BP and Defendants Transocean, Halliburton Energy Services, Inc. and Cameron International Corporation are also within that district.[13] Interestingly, Plaintiff Nova Affiliated, S.A. has likewise moved for centralization of certain oil spill actions in the U.S. District Court for the Southern District of Texas, while some plaintiffs have moved for centralization of certain oil spill actions in the U.S. District Court for the Eastern District of Louisiana.[14]

Situating the oil spill cases in the Southern District of Texas could present a challenge to all parties seeking to appeal issues in the pretrial proceedings. On May 28, 2010, the U.S. Court of Appeals for the Fifth Circuit, the appellate court for the Southern District of Texas, held that it was unable to hear an appeal of a dismissal by the U.S. District Court for the Southern District of Mississippi in a class action by owners of lands and property along the Mississippi Gulf Coast. The action was against oil companies, including BP, and energy companies and the plaintiffs were alleging the companies' operations caused emission of greenhouse gasses that contributed to global warming and added to the ferocity of a hurricane that destroyed their

Photograph of controlled burn courtesy of USCG, photographer Petty Officer First Class John Masson.

property. Specifically, the Fifth Circuit held that it did not have a quorum to decide the case, after recusal of one of the nine judges, who had properly vacated the panel opinion and judgment.[15] [For more information on this case, see *Fifth Circuit Dismisses Climate Change Lawsuit* on page 14]. It is unknown whether the same recusal would occur regarding cases in the oil spill litigation, but if so, the Fifth Circuit would be unable to address any appeals coming out of the Southern District of Texas.

While the situs may be in dispute, the Panel will likely consolidate the federal oil spill actions to streamline the proceedings, which will presumably result in a quicker and more economic resolution to the federal claims. The consolidated proceedings will also affect some cases filed in state courts where there is diversity of citizenship between the parties, and cases with certain types of claims, such as those involving a federal question, which may lead to removal to federal court, and thus transfer to the consolidated proceedings.[16]

Endnotes

1. Associate at the law firm of Aultman, Tyner & Ruffin, Ltd., in Hattiesburg, Mississippi.
2. BP's Motion to Transfer, In RE: Deepwater Horizon Incident Litg., MDL Docket No. ___.
3. BP's Motion for Stay of Proceedings Pending Transfer, Parker v. Transocean, No. 1:10CV174-HSO-JMR (D. Miss. May 7, 2010).
4. 28 U.S.C. §1407(a).
5. Judicial Panel on Multidistrict Litigation, Annual Statistics of the U.S. Judicial Panel on Multidistrict Litigation (2009).
6. Judicial Panel on Multidistrict Litigation, An Introduction to the Judicial Panel on Multidistrict Litigation.
7. 28 U.S.C. §1407(a).
8. *Id.* §1407 (c).
9. *Id.*
10. In Re Vonage Marketing and Sales Practices, Litigation, 505 F. Supp. 2d 1375 (J.P.M.L. 2007).
11. In re Imagitas, Inc., Drivers' Privacy Protection Act Litigation, 486 F. Supp. 2d 1371, 1372 (J.P.M.L. 2007).
12. 28 U.S.C. §1407(a).
13. Motion to Transfer, *supra* note 2, at 2.
14. U.S. Judicial Panel on Multidistrict Litigation, Notice of Hearing Session, June 23, 2010.
15. Comer v. Murphy Oil USA, —-F.3d —-, 2010 WL 2136658 (5th Cir. May 28, 2010).
16. 28 U.S.C. §§1332 and 1331.

Federal Court Invalidates One-Sided Vessel Charter Agreement

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Following the April 20, 2010 Deepwater Horizon drilling rig explosion and resulting oil spill, British Petroleum (BP) offered fishermen, shrimpers and oystermen (collectively fishermen) in Louisiana payment to voluntarily participate in oil spill clean-up and mitigation efforts. BP, however, required that the volunteer fishermen sign a Master Vessel Charter Agreement (the Agreement) before it allowed the fishermen to provide the emergency clean-up services. The Agreement contained several provisions that compromised the fishermen's existing and future rights and potential legal claims against BP and its affiliated entities.

Fisherman George Barisich sought emergency relief from a federal court to stop BP from forcing volunteer fishermen to enter into an agreement that limited their claims against BP. After an emergency hearing, the U.S. District Court for the Eastern District of Louisiana ruled that the language of certain provisions of the Agreement was overbroad, after which BP agreed to enter into a stipulated judgment that deleted those provisions from the Agreement, making them null and void.[1] The court also enjoined BP from seeking to enforce any such agreements already executed.

Background

On May 2, 2010, Barisich filed an Emergency Motion for Temporary Restraining Order (Motion for TRO) with the U.S. District Court for the Eastern District of Louisiana seeking a judgment (1) enjoining BP from requiring that he and others sign the Agreement before assisting in clean-up efforts, and (2) declaring the Agreement unconscionable and that any such Agreements already executed be null and void, and/or enjoining BP from seeking to enforce any such Agreements already signed.[2]

The controversial Agreement, drafted by BP, required the fishermen to provide clean-up efforts using their own boats. Article 13(A) of the Agreement mandated that BP be added as an "additional assured" on the volunteers' insurance policies,[3] effectively transferring financial responsibility for any damage to the volunteers' vessel or for other injuries, such as to crew members, to the volunteers' insurance carrier. Article 13(F) of the Agreement provided that the vessel owner "defend, indemnify and hold [BP] harmless from all claims … related to, any loss or damage to any property or any injury to or death of any person" arising from the vessel owner's performance under the contract, providing the claim arose from any willful misconduct, gross negligence or negligence by the vessel owner or its crew.[4] Additionally, Article 13(I)(1) stated that if a vessel owner had a claim against BP, the vessel owner would provide BP with written notice within thirty days of learning of the claim,[5] presumably relieving BP of any liability as to the number and kind of claims filed outside of or after one month's time from a vessel owner's knowledge of such a claim.

Furthermore, Article 22, regarding Publicity Releases and Marketing, essentially prohibited vessel owners and their employees from making any "news releases, marketing presentation, or any other public statements" without BP's prior written approval. BP retained sole discretion over grants of approval.[6] In effect, this article impeded the fishermen's free speech rights. Similarly, an attached Agreement Regarding Propriety and Confidential Information required the vessel owner to "keep confidential and not disclose to others … all Data developed, discovered, found or learned by it or disclosed to it."[7]

Resolution

Barisich and BP agreed to a Consent Judgment (Judgment) which amended the terms of the Agreement to: (a) delete Article 13(I)(1) in its entirety; (b) delete Article 13(F) in its entirety; (c) delete Paragraph 5 in its entirety; (d) delete Article 22 in its entirety; and (e) to modify Article 13(A) by deleting it in its entirety except for the beginning of the first sentence (which requires the vessel owner to maintain any insurance policies it was car-

rying prior to entering into the Agreement).[8] The deleted provisions became null and void, and the court enjoined BP from enforcing the Agreement against any volunteers who had agreed to the deleted or modified provisions in identical or substantially similar documents. Additionally, the Judgment required BP to inform those volunteers who had agreed to the deleted or modified provisions that the language had been deleted or modified and declared null and void. Likewise, the Judgment enjoined BP from requiring any volunteer to sign an Agreement containing the deleted or modified, null and void language.[9]

Conclusion

Though oil spill litigation will continue, the court's decision bodes well for Gulf Coast fishermen. The judgment mandated that BP abide by the amended Agreement, regardless of the state in which the document is entered and regardless of the domicile or residence of the volunteer who signs it.[10] In other words, the Judgment applies the same protections to any U.S. citizen, not just those fishermen in Louisiana.[11] The court also clarified that Barisich reserved all rights to challenge the remaining provisions within the Agreement (or any other BP document requiring signature) on any basis available under law, while similarly reserving all rights and defenses to BP.[12] Such explicit reservation of rights foreshadows that litigation awaits.

Endnotes

1. Barisich v. BP, P.L.C., No. 10-1316 (E.D. La. May 4, 2010). On June 22, 2010, this case was transferred and consolidated with other cases in Section "J" of this court awaiting a decision of the Judicial Panel on Multidistrict Litigation.
2. Complaint at 8, Barisich v. BP, No. 10-1316 (E.D. La. May 2, 2010).
3. Master Vessel Charter Agreement, attached to Complaint as Exhibit A, at 5.
4. *Id.* at 6.
5. *Id.*
6. *Id.* at 8.
7. *Id.* at Exhibit C.
8. Consent Decree at 1-2, Barisich v. BP, No. 10-1316 (E.D. La. May 4, 2010).
9. *Id.* at 2-3.
10. *Id.* at 2.
11. The Court, however, specified that the Judgment does not apply to those commercial enterprises that own or operate multiple vessels that were in the business of oilfield support or oilfield clean-up or mitigation prior to Apr. 20, 2010. Nor does the Judgment apply to vessels contracted for purposes other than mitigation or clean-up of oil from the Deepwater Horizon explosion, or to any contracts entered into before Apr. 20, 2010. *Id.* at 3.
12. *Id.*

Photograph of a "vessel of opportunity" courtesy of the U.S. Air Force, photographer Bryan Nealy.

Florida Fishermen May Recover Damages from Pollutant Spill

Photograph of shrimper courtesy of NOAA.

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The Supreme Court of Florida recently held that commercial fishermen may seek damages for lost income resulting from spilled pollutants. The fishermen sought to recover monetary losses that occurred when a company spilled pollutants into Tampa Bay, damaging marine and plant life. The court allowed the fishermen to recover damages despite the fact that they had suffered no property damage from the spill.[1] As oil from the Deepwater Horizon oil spill begins washing ashore in Florida, this decision may provide an additional avenue of recovery for commercial fisherman in Florida.

Background

Mosaic Fertilizer, L.L.C. (Mosaic), managed a phosphogypsum[2] storage area near Archie Creek in Hillsborough County, Florida. A portion of the storage area consists of a pond enclosed by dikes, which contained wastewater from a phosphate plant. The wastewater was contaminated with pollutants and hazardous substances. The Florida Department of Environmental Protection (FDEP) warned Mosaic in the summer of 2004 that the pond did not meet its minimum size requirements. Additionally, both the FDEP and the Hillsborough County Environmental Protection Commission alerted Mosaic that the amount of wastewater in the pond was on the verge of exceeding the safe storage level.[3]

On September 5, 2004, the wastewater in the pond rose to the top of the dike; the dike gave way and spilled pollutants into Tampa Bay. Howard Curd and several other commercial fishermen (the fishermen) claimed that the spilled pollutants caused the loss of underwater plant life, fish, baitfish, crabs, and other marine life. They did not claim any property damage or ownership interest in the injured marine life. Instead, they sought damages for loss of income and lost profits resulting from "damage to the reputation of the fishery products the fishermen are able to catch and attempt to sell."[4] Damages such as lost income and profits are considered "purely economic damages" because the damages occur without simultaneous property or bodily injury damages.

The fishermen filed suit under Florida Statute § 376.313(3), which provides for individual causes of action for pollution of surface and ground waters. Additionally, the fishermen argued that Mosaic's actions constituted negligence and triggered Florida's common law strict liability in that Mosaic used its property for an ultrahazardous activity. The trial court ruled that the language of the statute did not permit the fishermen to claim monetary losses unless they also suffered property damage from the pollution. For the same reason, the court found that the strict liability and simple negligence claims were not allowed.[5] The fishermen appealed to Florida's Second District Court of Appeal, which affirmed the trial court's order dismissing the fishermen's case against Mosaic. The Second District certified the following questions to the Florida Supreme Court:

> (1) Does Florida recognize a common law theory under which commercial fishermen can recover for economic losses proximately caused by the negligent release of pollutants despite the fact that the fishermen do not own any property damaged by the pollution?
>
> (2) Does the private cause of action recognized in section 376.313 permit commercial fishermen to recover damages for their loss of income despite the fact that the fishermen do not own any property damaged by the pollution?[6]

Statutory Cause of Action

The court began its analysis with the statutory claim. Florida Statutes Chapter 376 governs pollutant discharge prevention and removal. Section 376.302 prohibits the discharge of pollutants or hazardous substances into or upon surface or ground waters. Any person in violation is liable for any damage caused.[7] The fishermen filed suit under § 376.313(3), which allows individual causes of action for damages under certain sections in Chapter 376.

The section states, in pertinent part, "nothing contained in [the sections regarding pollution of surface and ground waters] prohibits any person from bringing a cause of action…for all damages resulting from a discharge or other condition of pollution…"[8] At issue here was whether or not this provision allowed the commercial fishermen to recover lost income resulting from the pollution even though they suffered no property damage.

To determine whether the statutory provision allowed for this recovery, the court looked first to the plain language of the statute. When the language of a statute is clear and unambiguous, the court does not need to look further to determine legislative intent. After examining the statute and several other provisions regarding pollution of surface and ground waters, the court determined that the language was clear and unambiguous; § 376.313(3) allows any person to recover for all damages suffered as a result of pollution.[9] The statute calls for the liberal construction of its provisions and defines damages as "the documented extent of any destruction to or loss of any real or personal property, or the documented extent…of any destruction of the environment and natural resources, including all living things except human beings, as the direct result of the discharge of a pollutant."[10]

The court concluded that the legislature deliberately omitted any language requiring ownership of property as a prerequisite to recover damages resulting from pollution. The only defenses to a cause of action under § 376.313(3) are "acts of war, acts by a governmental entity, acts of God, and acts or omissions by a third party," with no mention of a lack of property ownership as a defense.[11] Section 376.313(3) also states that "in any such suit… [a] person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred." In addition, the Florida Supreme Court previously held that the cause of action does not require the plaintiff to plead or prove negligence in any form, only that the discharge occurred.[12]

After liberally construing the language of the statute and surrounding provisions, the court found that § 376.313 allows for private causes of action by any individual able to demonstrate damages within the context of the statute. The court concluded that nothing in the statute prevents commercial fishermen from bringing an action pursuant to § 376.313(3) for purely economic losses.[13]

Common Law Causes of Action

The court next considered whether Florida recognizes a common law theory under which the fishermen could recover economic losses "proximately caused by the negligent release of pollutants despite the fact that the fishermen [did] not own any real or personal property damaged by the pollution."[14] The lower court had found that the fishermen's common law claims were barred by two legal principles: (1) the economic loss rule and (2) duty of care. In reviewing the lower court's decision, the court first addressed whether the economic loss rule applied to this situation. The economic loss rule is a judicially created doctrine that bars a negligence action to recover solely economic damages. The rule is applicable in only two situations: (1) where the parties are in contractual privity, or (2) where the defendant is a manufacturer or distributor of a defective product that damages itself. Finding that neither scenario applied to the facts of this case, the court determined that the economic loss rule did not apply.[15] Instead, the claims are governed by traditional negligence law (including proof of duty, breach, and proximate cause) and principles of strict liability.

To that end, the court next turned to the issue of duty of care, specifically whether Mosaic owed the fishermen a duty of care to protect their economic interests. A duty of care refers to the legal obligation to maintain a certain standard of conduct to protect others against unreasonable risks and is a necessary element of negligence.[16] In conducting its analysis, the court initially considered whether the fishermen were altogether excluded from the class of persons owed a duty of care by the lack of personal or bodily injury damages. In some jurisdictions, a person cannot recover for economic losses based on negligence when that person has not sustained bodily injury or property damage. This requirement was designed to prevent a possible negligent act from leading to countless unforeseeable claims of lost economic opportunities.

The fishermen contended that their position is an exception to this general rule because they are licensed by the state and have a "protectable economic expectation in the marine life that qualifies as a property right."[17] The court looked at several analogous cases where commercial fishermen were allowed to recover for injuries to marine life as a result of activities that occurred on land. In these cases, courts found that fishermen suffer a peculiar or special harm when waters are polluted in that they suffer a diminution or loss of livelihood.[18] The court agreed and concluded that Mosaic did owe the fishermen a duty of care.

Finally, the court considered whether the fishermen fell within the foreseeable zone of risk for which Mosaic owed a duty. Under Florida law, the concept of foreseeability is linked to the question of whether a duty is owed. A person is not obligated to protect others from unforeseeable risks, only from reasonably foreseeable risks. The court has held that duties may arise from four general sources: (1) legisla-

tive enactments or administrative regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of a case. The fourth category encompasses "that class of cases in which the duty arises because of a foreseeable zone of risk arising from the acts of the defendant."[19]

According to the court, the duty Mosaic owed the fishermen arose out of the nature of Mosaic's business and the special economic interest of the fishermen in the use of the public waters. Mosaic's business of storing pollutants and hazardous contaminants created a foreseeable zone of risk, and Mosaic had a duty to protect those within the zone who might be harmed. The fishermen were within the zone of risk because they were licensed to fish in Tampa Bay, and they depended upon those waters to earn their livelihoods. It was foreseeable that, were the pollutants to spill into Tampa Bay and damage the marine and plant life, the fishermen's special economic interest in the waters would be harmed. The court declared the spilling of the pollutants a "tortious invasion that interfered with the special interest of the commercial fishermen to use those public waters to earn their livelihood."[20] This breach of duty allowed the fishermen to pursue an action in negligence against Mosaic.

The court declared the spilling of the pollutants a "tortious invasion . . .

Dissent

One Florida Supreme Court Justice dissented in part with the majority opinion. Justice Polston agreed with the majority that the fishermen had a statutory cause of action under § 376.313, but disagreed that they could recover for purely economic losses under a negligence action. The justice argued that the fishermen did not have a special interest that created a duty on Mosaic's part to protect them. He contended that if the fishermen were allowed to recover in this case, then liability would be limitless. Other entities could begin claiming a special interest in the use of public waters, such as hotels and restaurants near beaches, seafood truck drivers, and beach community realtors. Justice Polston would have affirmed the lower court's decision that Mosaic did not owe the fishermen an independent duty of care to protect their purely economic interests.[21]

Conclusion

The court's decision to allow recovery for purely economic damages resulting from pollution is of particular significance in light of the Deepwater Horizon oil spill. Although the Florida Supreme Court limited recovery to those commercial fishermen whose livelihoods depend upon the polluted waters, the potential class of impacted commercial fishermen arising from the oil spill is daunting. However, to prevail on negligence, fishermen will need to prove that they possess a unique interest in the marine life affected by the spill (separate from the interest of the general public) and that they belong in the responsible parties' foreseeable zone of risk.

Endnotes

1. Curd v. Mosaic Fertilizer, L.L.C., 2010 Fla. LEXIS 944 (June 17, 2010).
2. Phosphogypsum is a by-product of processing phosphate rock with sulfuric acid to produce phosphoric acid used in fertilizer.
3. *Curd v. Mosaic*, 2010 Fla. LEXIS at *3.
4. *Id.*
5. *Id.* at *4.
6. *Id.* at *4-5.
7. FLA. STAT. § 376.302 (2010).
8. *Id.* § 376.313(3).
9. *Curd v. Mosaic*, 2010 Fla. LEXIS at *6-10.
10. FLA. STAT. § 376.315, § 376.031(5).
11. *Id.* § 376.308.
12. Aramark Uniform & Career Apparel, Inc. v. Easton, 894 So. 2d 20 (Fla. 2004).
13. *Curd v. Mosaic*, 2010 Fla. LEXIS at *14.
14. *Id.*
15. *Id.* at *17-18.
16. *Id.* at *30.
17. *Id.* at *20.
18. *Id.*
19. *Id.* at *31.
20. *Id.* at *31-33.
21. *Id.* at *33-50.

A Look at Possible Criminal Charges Arising From the Gulf Oil Spill

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On June 1, 2010, U.S. Attorney General Eric Holder assured the American people that the Department of Justice (DOJ) would "prosecute to the full extent any violations of the law" committed by BP and others involved, namely, Transocean and Halliburton, in the Deepwater Horizon oil spill.[1] To that end, DOJ is reviewing the actions of all parties involved (collectively responsible parties) for any possible violations or illegal behavior. The investigation includes a look into potential violations of the Clean Water Act, the Migratory Bird Treaty Act, and the Endangered Species Act, as well as the Oil Pollution Act of 1990. This article provides a look at likely criminal sanctions responsible parties may face under environmental laws.

Clean Water Act

In passing the Oil Pollution Act of 1990, Congress amended the Clean Water Act's (CWA) list of criminal violations to include negligent discharge of oil.[2] As amended, § 311 of the CWA carries specific liability provisions related to oil spills and contains an express prohibition against harmful discharges of oil into navigable waters of the United States. Those discharging the oil may also face prosecution for failure to report an oil spill or providing false information regarding the spill.[3] Additionally, the CWA prohibits the unauthorized discharge of pollutants into U.S. waters and violations of established water quality standards. Those found in violation of the Act may face criminal penalties.

In assessing a potential violation, the CWA distinguishes among negligent violations, knowing violations, and knowing endangerment, with increasing penalties, respectively.[4] A negligent violation is an act of ordinary negligence which leads to a discharge of a pollutant. Ordinary negligence occurs when one fails to use such care as a reasonably prudent and careful person would use under similar circumstances.[5] A knowing violation requires the government to prove that the defendant knew the nature of his acts and performed them intentionally. It is not necessary to prove that the defendant knew his actions were unlawful.[6] To show knowing endangerment, the defendant must possess actual knowledge or belief that his conduct placed another person in imminent danger of death or serious bodily injury.[7]

The CWA imposes a range of criminal penalties from fines as low as $2,500 and/or imprisonment for up to one year for negligent violations to fines as high as $250,000 and/or imprisonment for up to 15 years for knowing endangerment. In addition, when an organization, as opposed to an individual, is convicted of knowing endangerment, the organization can be subject to a fine of up to $1 million.[8] The decision to bring criminal charges by the federal government is discretionary, not mandatory. In deciding whether to pursue criminal prosecution, the government may consider factors such as prior history of the violator, the preventative measures taken, the need for deterrence, and the extent of cooperation.

Endangered Species Act

The Endangered Species Act (ESA) provides legal protection for endangered and threatened species along with the ecosystems on which they depend (termed "critical habitat" by the ESA). The Act achieves these protections primarily through two provisions: § 7 (consultation) and § 9 (take prohibitions). Section 7 requires consultation by federal agencies to ensure that their actions (including the issuance of permits) do not jeopardize endangered species.[9] While this provision is unlikely to trigger enforcement actions against responsible parties, the Center for Biological Diversity has issued its "Notice of Intent to Sue" several federal agencies, alleging agency failure to comply with § 7 with regard to oil spill related activities.

Responsible parties, however, may face substantial penalties for violations of § 9. Section 9 forbids the taking of an endangered species; the provision extends to the territorial sea as well as the high seas.[10] The ESA

defines take as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[11] Regulations further break down the provision by defining harm as "an act which actually kills or injures wildlife," and explaining that "[s]uch act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."[12] The ESA places criminal penalties on any person who knowingly violates any provision. Criminal penalties consist of a maximum fine of $50,000 and/or imprisonment for not more than one year, or both. Additionally, lessees of federal lands could face potential revocation of their leases if convicted of criminal violations of the ESA.[13]

In the Gulf of Mexico, the U.S. Fish & Wildlife Service has identified 38 protected plant and wildlife species that may be impacted by the oil spill, including 29 endangered species. The species range from birds to reptiles and include the West Indian manatees, whooping cranes, Mississippi sandhill cranes, gulf sturgeon, and four species of sea turtles.[14] The National Marine Fisheries Service also lists the endangered sperm whale as potentially impacted by the oil spill.

Marine Mammal Protection Act

Marine mammals receive additional protection under the Marine Mammal Protection Act (MMPA). Enacted in 1972, the MMPA prohibits the taking of a marine mammal without a permit, much like the ESA, and defines take to mean "harass, hunt, capture or kill…."[15] The Act extends beyond U.S. waters to include the high seas as well. However, the MMPA includes three statutory exceptions. Most notably, the Act permits, upon request, the authorization of the unintentional taking of "small numbers of marine mammals" incidental to activities such as outer continental shelf oil and gas development.[16] This exception is limited, however, to instances that will have only a "negligible impact" on the species and its habitat. The MMPA carries substantial penalties. Individuals face civil penalties of up to $10,000 for each violation. Knowingly violating the act may garner an individual a fine as high as $20,000 per violation and/or one year imprisonment.[17]

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) prohibits the hunting, taking, capturing, killing, selling, and transporting of any native U.S. migratory bird, nest, or egg, at any time and by any means or in any manner.[18] A violation of the MBTA is a misdemeanor. Anyone convicted is subject to a maximum fine of $15,000 or maximum imprisonment of six months, or both.[19]

While the MBTA is primarily concerned with intentional hunting and capturing of migratory birds, many courts have held that a person may violate the Act without intent or knowledge; therefore a violation is, in effect, a strict liability crime.[20] Courts have similarly held that a person's activities, though not expressly directed at the taking of any wildlife, violate the Act if they have the incidental effect of killing protected species.[21] The language of the MBTA supports this interpretation with its use of the phrase "by any means or in any manner" and including "kill" among the prohibited actions, which does not necessarily indicate intent.[22] However, a Louisiana district court ruled in 2009 that the MBTA is not intended "to apply to commercial ventures where, occasionally, protected species might be incidentally killed as a result of totally legal and permissible activities."[23] In reaching this conclusion, the district court distinguished its holding from other cases where

Photograph courtesy of the USCG, photographer Petty Officer 2nd Class John Miller.

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Fifth Circuit Dismisses Climate Change Lawsuit

Niki L. Pace, J.D., LL.M.

On May 28, 2010, the U.S. Court of Appeals for the Fifth Circuit issued an unusual procedural decision in *Comer v. Murphy Oil*. Lacking a quorum to decide the case, the court dismissed the appeal and reinstated the district court's dismissal on the grounds that the earlier decision to hear the case en banc had vacated the original Fifth Circuit panel decision.[1] The case was decided 5-3 with two dissenting opinions.

The lawsuit originated from property claims following Hurricane Katrina. Residents of the Mississippi Gulf Coast who suffered property damage during the hurricane filed suit against numerous members of the energy, fossil fuel, and chemical industries. The residents alleged the oil companies contributed to climate change through their greenhouse gas emissions which increased global surface temperatures causing sea level rise and contributing to the ferocity of Hurricane Katrina. The residents claimed these events culminated in the destruction of private and public property.[2]

The case was originally dismissed by the district court on grounds of standing and political question. On appeal to the Fifth Circuit, a three-judge panel reversed the district court and recognized a plausible link between greenhouse gas emissions and climate change sufficient for residents to establish standing. The panel also found that the claims did not present non-justiciable political questions.[3] In March, a quorum of nine members of the court voted to rehear the case en banc, meaning the case would be reheard by the full membership of the Fifth Circuit. When issued, the en banc ruling would replace the decision of the three-judge panel.[4]

Following the decision to hear the case en banc, circumstances changed. One of the nine judges comprising the quorum for this case was disqualified and removed. This left only eight judges, on a court of sixteen, who were not disqualified from this case. With only eight judges, the court was left without a quorum; without a quorum, the court lacks authority to transact judicial business.[5]

In reaching its decision to reinstate the district court's opinion, the court considered and rejected five other options: 1) asking the Chief Justice to appoint a judge from another circuit, 2) declaring a quorum under the Federal Rules of Appellate Procedure 35(a), 3) adopting the rule of necessity which would allow disqualified judges to participate, 4) "dis-enbancing" the case and ordering the panel opinion reinstated; and 5) holding the case in abeyance until the composition of the court changes.[6] For various reasons, the court considered each of these options inadequate. Instead, the court chose to strictly apply Local Rule 41.3 which states: "Unless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court stays the mandate."[7] Relying on this rule, the court determined that the original panel decision was vacated at the time the court, with a quorum, voted to re-hear the matter en banc. Therefore, the court reasoned, the previously vacated panel decision could not be reinstated.

Judge Eugene Davis, joined by Judge Carl Stewart, expressly objected to the majority's strict application of Local Rule 41.3, arguing that the rule was misapplied in this instance. Providing a separate analysis, Judge Dennis argued in his dissent that, under the appropriate definition, the en banc court did have a quorum. He further opined that dismissal of the case "violates the rule that federal courts have an absolute duty to render decisions in cases over which they have jurisdiction."[8]

While the ruling itself deals with procedural issues within the Fifth Circuit, the broader implications of the opinion have led to speculation over its impact on future oil spill litigation. Some commentators argue that many of the Fifth Circuit judges have financial and/or personal interests in the oil industry which may result in their recusal in future lawsuits arising from the Deepwater Horizon oil spill. This may lead to an inadequate pool of judges to hear appeals. Should such circumstances occur,

it is unclear following *Comer* how the court will handle appeals in the future. Already, one federal judge has faced criticism for hearing a challenge to the drilling moratorium while owning stock in certain oil companies.

Endnotes

1. Comer v. Murphy Oil USA, —- F.3d —-, 2010 WL 2136658 (5th Cir. May 28, 2010) (en banc).
2. Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009) (vacated).
3. *Id.*
4. *Comer v. Murphy Oil USA*, 2010 WL 2136658 at *3.
5. *Id.*
6. *Id.* at *3-*4.
7. *Id.* at *4.
8. *Id.* at *8 (Dennis, J., dissenting).

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the taking occurred as a result of prohibited acts, implying that the higher standard of strict liability would still apply to violations resulting from the oil spill.

Oil Pollution Act of 1990

While criminal charges for violating the OPA are found in CWA § 311 (discussed above), the OPA provides for a range of other penalties. In addition to cleanup costs and other financial obligations, the OPA imposes civil penalties for failure to satisfy OPA's financial responsibility requirement. This requirement obligates responsible parties to provide financial assurance to the federal government of their ability to meet potential financial obligations under the OPA. These obligations include the ability to pay for cleanup costs, damages to natural resources, and other costs.[24]

The statutorily defined obligation for an offshore facility located in federal waters is $35 million. However, the President may require a higher amount, up to $150 million, where he determines the amount is justified "based on the relative operational, environmental, human health, and other risks" posed by the operation.[25] Failure to comply with this provision may result in a maximum civil penalty of $25,000 per day and/or judicial action against the responsible party, including a judicial order terminating operations.[26] The act also preserves the authority of state and federal governments to impose fines or penalties (both criminal and civil) for violations of other laws relating to the oil spill.[27] Texas, Louisiana, and Florida each have state specific oil spill laws that may apply.

Conclusion

DOJ continues to investigate responsible parties for any potential violations of these acts along with other criminal statutes. Attorney General Eric Holder has vowed to prosecute those responsible to the fullest extent of the law, claiming "We will not rest until justice is done."[28] Meanwhile, the presidentially created BP Deepwater Horizon Oil Spill and Offshore Drilling Commission began proceedings mid-July in New Orleans. The Commission is tasked with providing recommendations on preventing and mitigating any future offshore drilling oil spills.

Endnotes

1. Eric Holder, U.S. Attorney General, Remarks on the Gulf Oil Spill (June 1, 2010) (transcript available at http://www.justice.gov/ag/speeches/2010/ag-speech-100601.html).
2. 33 U.S.C. § 1319(c) (2010).
3. *Id.* § 1321(b)(3), (5).
4. *Id.* § 1319(c).
5. *See* United States v. Ortiz, 427 F.3d 1278 (10th Cir. 2005); United States v. Hanousek, 176 F.3d 1116 (9th Cir. 1999).
6. United States v. Hopkins, 53 F.3d 533, 539 (2nd Cir. 1995).
7. 33 U.S.C. § 1319(c)(3)(B)(i).
8. *Id.* § 1319(c).
9. 16 U.S.C. § 1536.
10. *Id.* § 1538(a).
11. *Id.* § 1532(19).
12. 50 C.F.R. § 17.3 (2010).
13. 16 U.S.C. § 1540(b), (c) (2010).
14. U.S. Fish & Wildlife, Wildlife Threatened by Gulf Oil Spill, (June 2010), available at http://www.fws.gov/home/dhoilspill/pdfs/FedListedBirdsGulf.pdf.
15. 16 U.S.C. §§ 1372 & 1362(13).
16. *Id.* § 1371(a)(5).
17. *Id.* § 1375.
18. 16 U.S.C. §§ 703-712 (2010).
19. *Id.* § 707(a).
20. *See, e.g.*, Rogers v. United States, 367 F.2d 998, 1001 (8th Cir. 1966); United States v. Corbin Farm Serv., 444 F. Supp. 510, 534 (E.D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978); United States v. Moon Lake Elec. Ass'n, Inc., 45 F. Supp. 2d 1070, 1073 (D. Colo. 1999).
21. *See* United States v. FMC Corp., 572 F.2d 902 (2d Cir. 1978); United States v. Apollo Energies Inc., 2009 U.S. Dist. LEXIS 6160, 2009 WL 211580 (D. Kan. 2009).
22. 16 U.S.C. § 703(a) (2010).
23. United States v. Chevron USA, Inc., 2009 U.S. Dist. LEXIS 102682, 2009 WL 3645170 (W.D. La. 2009).
24. 33 U.S.C. § 2716
25. *Id.* § 2716(c)(1)(C).
26. *Id.* § 2716a.
27. *Id.* § 2718(c).
28. Eric Holder, *supra* note 1.

U.S. Supreme Court Finds No Taking

in Florida Beach Renourishment Challenge

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In June, the U.S. Supreme Court ruled on beachfront property owners' challenge to a beach renourishment project, finding for the State of Florida. The property owners, through the organization Stop the Beach Renourishment, claimed the state had taken their property rights without compensation in violation of the U.S. Constitution. Because the restored portion of the beach became state owned land, the homeowners argued that they lost their right to have their property touch the water.[1] Rejecting this argument, the Supreme Court unanimously ruled that no taking occurred. The Court remained divided, however, on the issue of judicial takings.

Background

In 1995, Hurricane Opal caused significant damage to local beaches around Walton County, Florida. To repair the damaged beaches, Walton County and the City of Destin (collectively Walton County) decided to undertake a restoration project in 2003. Walton County planned to restore approximately 6.9 miles of beach using 75 feet of newly added sand and sought the appropriate permits from the Florida Department of Environmental Protection (FDEP) under the Beach and Shore Preservation Act (BSPA).

Concerned that the project would alter their property rights, local beachfront property owners formed Stop the Beach Renourishment, Inc. (STBR) to voice their concerns. After unsuccessfully challenging the permits through the FDEP administrative process, the group filed suit and a lengthy legal battle ensued. The lower court agreed with STBR's contention that the beach restoration project infringed upon their right to have their property touch the water as well as their right to receive accretions to their property through gradual accumulations of land.[2] The Florida Supreme Court reversed the lower court, finding that, as long as landowners can access, use, and view the water, littoral owners have no specific right for their property to remain in continual contact with the ocean.[3] Accordingly, the renourishment plan proposed by Walton County did not amount to a taking of the landowners' beachfront properties.[4] The members of STBR considered the Florida Supreme Court's decision to be an unconstitutional taking of their littoral rights and appealed to the U.S. Supreme Court, which granted the petition for review.

Littoral Property Rights

Under Florida law, the state owns in trust for the public any land submerged beneath navigable waters, and the mean high-water line generally separates state-owned lands from littoral property (land abutting the ocean, sea, or lake).[5] The state holds title to any property seaward of the mean high-water line, while littoral owners hold title to land above (inland of) that line. Littoral owners may receive title to dry land added to their property by accretion, a process by which new land gradually emerges; however, when the new land is the result of sudden changes, this new land belongs to the state, not the littoral owners. Sudden events that cause a change in the surrounding land are known as avulsions.

In Florida, beach restoration activities are governed by the Beach and Shore Preservation Act. When a renourishment project is undertaken, the BSPA provides that an erosion control line (ECL) will serve as the boundary between privately owned property and lands owned by the State. After the ECL is established, the common law rule that upland property owners are entitled to accretions ceases to operate. Any newly created beach below the ECL becomes the property of the state.

Takings Claim

The Takings Clause of the Fifth Amendment of the U.S. Constitution prohibits private property from being "taken for public use, without just compensation."[6] In other words, the government cannot take private property

without paying the owner fair market value for that property. The Supreme Court notes that the Takings Clause applies as readily to littoral rights, as discussed in the present case, as to estates in land. Though takings claims generally involve the state or a private entity receiving title to land through eminent domain, any state action that constitutes the taking of private property without compensation violates the Takings Clause of the Fifth Amendment.[7]

STBR contended that the ruling of the Florida Supreme Court comprised an unconstitutional taking of their littoral rights without just compensation. They pointed to two littoral rights in particular: the right to future accretions and the right to have their property line remain in contact with the water. The Supreme Court determined that the Florida Supreme Court could only violate the Takings Clause by nullifying established property rights. Since the landowners failed to show that the Florida Supreme Court's decision was contrary to well-established common law principles, no judicial taking occurred.[8]

To determine if these two alleged rights are established property rights in Florida, the Court discussed two basic tenets of Florida property law. First, the state has the right to fill the area with sand to restore the beach under the BSPA because the state owns the land seaward of the mean high-water line. Second, if a sudden change, or avulsion, uncovers land seaward of the landowners' properties, the state holds the title to this newly exposed land, regardless of whether the land separates the water from upland property. Florida law provides no exception to the principle of avulsion for situations where the state, as owner of the newly exposed beach, actually caused the avulsion to occur by physically filling the area with dredged sand.[9] In other words, Florida law authorizes the state to restore its beaches, and the state, in doing so, suddenly exposes land as is typical of avulsive processes. Thus, the Court found that under traditional common law principles the landowners' right to future accretions was subordinate to the state's right to fill its seabed.[10]

In discussing the landowner's assertion of the right to have their property touch the water, the Court stated that the landowners misinterpreted the dicta on which they so heavily relied from *Board of Trustees of Internal Improvement Trust Fund v. Sand Key Assoc.*, which states that property owners have "the right to have the property's contact with the water remain intact."[11] The Court noted that this right is always included in the right of an upland landowner to access the water, and the state's ownership of the restored beach does not disrupt the landowner's ability to access, use, and view the ocean.[12] Thus, neither this right nor the right to receive future accretions supercede the state's right to maintain its own land. Accordingly, the Florida Supreme Court's decision to allow the state to restore the beaches adjacent to these properties does not constitute the taking of these landowners' littoral rights.

Judicial Takings

In deciding the present case, the Supreme Court for the first time addressed whether a court's ruling can result in a judicial taking. A judicial taking refers to the concept that a court decision that deprives someone of his or her property rights without compensation could constitute a taking under the Fifth Amendment. No justice questioned that the Florida Supreme Court had not effectuated a judicial taking; however, the eight justices participating in this opinion could not agree as to whether defining the concept of a judicial taking was essential to resolving this dispute.

. . . the Supreme Court for the first time addressed whether a court's ruling can result in a judicial taking.

The plurality, which included Justices Scalia, Thomas, and Alito as well as Chief Justice Roberts, maintained that, in order to articulate when a judicial taking occurs, the actions that constitute such a taking must be properly defined.[13] The plurality went on to note that the Takings Clause is directed more toward the action of taking, rather than the party initiating the taking. Thus, this clause prohibits the state from taking private property without just compensation, regardless of the branch effectuating the taking.[14] Accordingly, the plurality determined that the judiciary is fully capable of violating the Fifth Amendment by taking private property without compensating the property owner.

The plurality explored and rejected each of the varying standards for judicial takings proposed by the parties, ultimately finding that if a court "declares that what was once

an established right of private property no longer exists, it has taken that property," just as the state may take private property through regulation or eminent domain.[15] Applying this standard to the present case, the plurality determined that the actions of the Florida Supreme Court did not constitute a taking of the littoral owners' properties.

In addition to the plurality, the Court issued two separate concurrences on the issue of judicial takings. Justices Kennedy and Sotomayor suggested that the issue of judicial takings would be better addressed under the Due Process Clause. Kennedy contended that establishing a standard for judicial takings is unnecessary, on the grounds that the Due Process Clause provides a simpler way of preventing courts from depriving landowners of their property, without reaching the issue of just compensation. In particular, Kennedy noted that, under the Due Process Clause, court decisions that change the property rights that owners expect to retain are "arbitrary or irrational" and should be discarded.[16]

Justices Breyer and Ginsburg simply indicated that, because the Florida Supreme Court had not executed a taking of the property at issue, the standard for judicial takings need not be defined at this time. Breyer notes that the plurality's proposed standard for evaluating judicial takings could flood federal courts with litigation seeking to overturn state court property law decisions, an area that is generally unfamiliar to federal judges. Because deciding what constitutes a judicial taking is not required to determine the outcome of the instant case, Breyer's concurrence takes a cautious approach that refuses to subject federal courts to a large number of potentially complex lawsuits.[17]

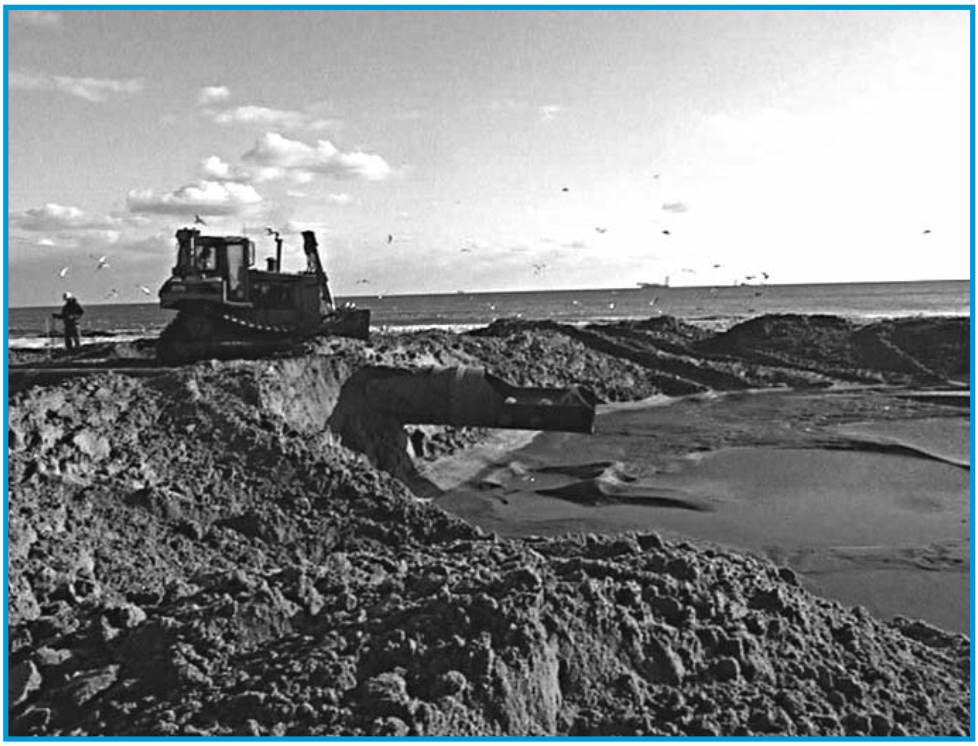
Conclusion

This case marks the first time that the U.S. Supreme Court has addressed the issue of whether a court decision can constitute a taking of property without just compensation. Though the Court unanimously decided that the decision of the Florida Supreme Court did not amount to a judicial taking, the Court remained badly divided on the issue of whether it was necessary to specifically define a judicial taking. Because the Court split 4-4 on this issue, the plurality's proposed standard is not a binding precedent. Consequently, the issue of whether a judicial taking can actually occur remains open for debate. Despite the Court's split on judicial takings, this decision is a clear victory for Florida's beach renourishment authority.

Endnotes

1. Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection, 2010 WL 2400086, *17 (June 17, 2010).
2. Save Our Beaches, Inc. v. Florida Dept. of Envtl. Protection, 27 So. 3d 48, 57 (Fla. Dist. Ct. App. 2006).
3. Walton County v. Stop Beach Renourishment, Inc., 998 So.2d 1102, 1120. (Fla. 2008).
4. *Id.*
5. *Id.* at 1105 n.3.
6. U.S. Const. amend. V.
7. *Stop the Beach Renourishment, Inc.,* 2010 WL 2400086, at *7
8. *Id.* at *19.
9. *Id.* at *16.
10. *Id.* at *17.
11. 512 So.2d 934, 936 (Fla.1987).
12. *Stop the Beach Renourishment, Inc.*, 2010 WL 2400086, at *18.
13. *Id.* at *9.
14. *Id.* at *8.
15. *Id.*
16. *Id.* at *21 (Kennedy, J., concurring in part and concurring in the judgment).
17. *Id.* at *25 (Breyer, J., concurring in part and concurring in the judgment).

Photograph of beach renourishment courtesy of USACE.



Interesting Items

Around the Gulf…

Florida Governor Charlie Crist has called for a special session of the state legislature to consider a ban on offshore oil drilling in Florida by constitutional amendment. If approved, the amendment would allow voters to decide if they want a permanent ban on offshore oil drilling in state waters. Already, offshore drilling is banned by Florida statute but could be repealed by legislative action. By adopting the ban as a constitutional amendment, legislators would be unable to alter the ban without voter approval amending the constitution. The special session is scheduled for late July.

In June, the U.S. Fish and Wildlife Service (FWS) proposed the designation of critical habitat for the Mississippi gopher frog after two environmental groups announced their intent to sue over the issue earlier this spring. The gopher frog has been listed as endangered under the Endangered Species Act (ESA) since 2001 but critical habitat was not designated at that time. Critical habitat is defined by the ESA to include areas essential to the conservation of the species. Once an area is designed critical habitat, section 7(a)(2) of the ESA affords the habitat legally enforceable protections which include prohibitions against the destruction or adverse modification of the critical habitat. The proposed critical habitat designation consists of 1,957 acres located in Forrest, Harrison, Jackson, and Perry Counties, Mississippi. Although the frog is currently found only in Mississippi, the historical range of the Mississippi gopher frog extends over Alabama, Mississippi, and Louisiana. Typical habitat consists of sandy longleaf pine forest and isolated temporary wetlands used for breeding. The proposed rule is available at 75 Fed. Reg. 31387.

Photograph of oiled turtles brought in for treatment and rehabilitation courtesy of USFWS.

On June 30th, the Center for Biological Diversity and other environmental groups filed suit against BP, alleging that the oil corporation violated the ESA by burning various species of sea turtles alive during cleanup efforts in the Gulf of Mexico. The Deepwater Horizon explosion occurred as newly hatched turtles, including the critically endangered Kemps Ridley sea turtle, were migrating to sea. After the explosion, BP began using controlled burns to prevent the oil from spreading further throughout the Gulf; however, these burning operations began before rescuers could evacuate the endangered turtles from the area. According to the Center for Biological Diversity, many turtles have been harmed or killed by the burns, adding to the approximately 435 turtles already killed due to the oil spill. The conservation groups sought a temporary restraining order preventing further burns until greater protections for the turtles were achieved. On July 2nd, the conservation groups reached an agreement with BP and the Coast Guard to ensure that measures will be taken to rescue sea turtles prior to burning the oil slicks. *Animal Welfare Institute v. BP*, No. 2:10-cv-01866 (E.D. La. 2010).

The U.S. Court of Appeals for the Fifth Circuit ruled that a vessel's master has a duty to prudently monitor and interpret available weather information and that failure to do so may constitute negligence. This litigation arose from a vessel breaking free during Hurricane Katrina and colliding with barges and tugboats along the Mississippi River. The vessel master mistakenly believed that Hurricane Katrina was near the Virgin Islands and sailed the vessel to New Orleans, directly into the hurricane's path. Here, the court declined to apply the *in extremis* negligence standard to the operators behavior where the facts demonstrated that the vessel master "had ample time and information to know not to endanger the vessel by bringing it into the Port of New Orleans." Under the *in extremis* standard, an operator is afforded greater discretion when destructive natural forces force the operator to make immediate hard choices between competing options. However, the standard does not apply where, as here, the captain had ample time to avoid the peril. *Crescent Towing v. Chios Beauty*, 2010 WL 2510126 (5th Cir. June 23, 2010).

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