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Fifth Circuit Considers Migratory Bird Treaty Act Violations

Also,

Rigsby v. State Farm: Katrina, Whistleblowers, & "Some Additional Discovery"

Swim at Your Own Risk: Royal Caribbean Wins Cloudy Pool Case

Pearl River Polluter Pays Price

Inside This Issue . . .

Cover photograph of a white pelican; courtesy of David Mitchell.

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• UPCOMING EVENTS •

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Fifth Circuit Considers Migratory Bird Treaty Act Violations

Amanda Nichols

Photograph of white pelicans; courtesy of Don Dearing.

On September 4, 2015, the U.S. Court of Appeals for the Fifth Circuit reversed a lower court's holding in a Migratory Bird Treaty Act case. The lower court had found that oil from uncovered oil-separator tanks led to the "taking" of numerous birds, in violation of the Migratory Bird Treaty Act of 1918 (MBTA). CITGO appealed that decision to the Fifth Circuit. The question raised on appeal was whether the illegal "taking" of a migratory bird can occur absent any intentional conduct by the violator. In other words, can unintentional actions that result in a migratory bird death still lead to a violation of the MBTA.[1] This is the first time the Fifth Circuit has considered this issue.

Background

Following a surprise inspection in March 2002, Texas environmental inspectors discovered that CITGO's Corpus Christi refinery housed two large uncovered equalization tanks that were collecting wastewater from the facility. Each tank was 30 feet tall and 240 feet wide. The inspectors classified the tanks as oil-water separators. Refineries use oil-water separation tanks to collect wastewater and allow the mixture to settle so that the oil and water separate. The oil will then rise to the top of the tank. Through this process, CITGO's facility is able to remove about 70 percent of the oil from the wastewater.[2]

At the time of the inspection, 130,000 barrels of oil floated on the top of the two uncovered tanks.

The Clean Air Act requires that the oil-water separation tanks be covered. Because the tanks were uncovered, unsuspecting birds had landed in the tanks, some eventually dying. According to government allegations, those birds included five White Pelicans and thirty ducks of various species.[3] As a result of the uncovered tanks, the inspectors cited CITGO with violations of both the Clean Air Act (for the uncovered oil-water separator tanks) and the MBTA (for the deaths of the birds). After the Texas inspection, the U.S. Department of Justice (DOJ) brought suit against CITGO for the violations.

At trial, the United States argued that the migratory bird deaths were foreseeable takings prohibited by the language of the MBTA. State evidence presented at trial established that the migratory birds at the CITGO refinery died as a direct result of being exposed to waste oil in uncovered tanks. Additionally, evidence showed that CITGO employees were aware of these bird deaths and had even previously suggested measures that could be taken by the refinery (such as covering the open tanks with nets) to help prevent birds from landing in the oil. Despite this, CITGO never took any mitigating measures that would help to reduce the migratory bird deaths at its refinery.

Through a series of decisions, the district court found CITGO guilty of Clean Air Act and MBTA violations. CITGO was fined $2 million for Clean Air Act violations and $15,000 per "taking" for three violations of the MBTA.[4] CITGO appealed this decision to the Fifth Circuit.

MBTA Violations

The Migratory Bird Treaty Act of 1918 was created almost a century ago in order to "sav[e] from indiscriminate slaughter and [to] insur[e] the preservation of such migratory birds as are either useful to man or harmless."[5] This act makes it "unlawful at any time, by any means or in any manner to pursue, hunt, take, capture, kill, attempt to take, capture, or kill…any migratory bird."[6] The MBTA employs strict liability, which punishes violators with a maximum $15,000 fine as well as six months imprisonment.

In analyzing CITGO's appeal of its MBTA convictions, the Fifth Circuit was called upon to address a question of law that had yet to be resolved within the circuit – whether a valid "taking" under the MBTA must be intentional. There is a split of opinion on this issue among the federal circuit courts. The Eighth and Ninth circuits hold that "a 'taking' is limited to deliberate acts done directly and intentionally to migratory birds."[7] In contrast, the Second and Tenth Circuits have held that indirect and unintentional actions by a party can still lead to a "taking" under the MBTA.

The district court had adopted the position of the Tenth Circuit. According to the district court, CITGO could be held liable for violations of the MBTA if CITGO was the proximate cause of the birds' deaths, whether intentional or not.[8] The district court determined that it was reasonably foreseeable that CITGO's operation of open-air tanks would result in bird deaths based on the evidence presented. Therefore, CITGO had violated the MBTA by proximately and indirectly causing the deaths of migratory birds.

On appeal, CITGO urged the Fifth Circuit to adopt the position of the Eighth and Ninth Circuits. Specifically, CITGO alleged that the MBTA only criminalizes deliberate takings such as hunting or poaching, not omissions that unintentionally kill birds. To answer this question, the Fifth Circuit turned to the plain language of the MBTA and the history of its implementation.

As previously mentioned, the MBTA makes it "unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill…any migratory bird" in violation of current regulations and permits.[9] The Fifth Circuit noted that, in interpreting the meaning of an ambiguous term, courts generally presume that Congress intended to adopt the common definition. Common law defines "taking" as, "reduc[ing] those animals, by killing or capturing, to human control."[10] Using this definition, the Fifth Circuit reasoned that one can only reduce an animal to human control through affirmative actions—not by omissions or unintentional actions.

Additionally, the court noted that when the MBTA was implemented in 1918, "take" was a term of art under the common law when applied to wildlife, and

Photograph of white pelicans; courtesy of Frank Schulenburg.

this interpretation of the term was widespread and well understood. In contrast, other, more recent regulations like the Endangered Species Act encompass negligent acts or omissions through language prohibiting "harassing" or "harming." If the terms "harass" or "harm" were present in the language of the MBTA, they would serve to modify the term "take." This would allow for an expanded interpretation of takings that could also encompass negligent acts or omissions. In this case, however, the court reasoned that the MBTA contains no such "modifiers" that would allow the MBTA to be applied to such unintentional occurrences.

Furthermore, the Fifth Circuit rejected the government's allegation that, because the MBTA imposes strict liability, it must forbid acts that accidentally or indirectly kill birds. In deciding this issue, the court reasoned that it must balance the objectives of the MBTA with "a reluctance to charge anyone with a crime which he does not know he is committing."[11] The court also cautioned that recognizing these kinds of negligent takings could open up the door to potentially unlimited liability. The Fifth Circuit further explained its reasoning by stating that, "If the MBTA prohibits all acts or omissions that 'directly' kill birds where bird deaths are 'foreseeable,' then all owners of…cars, cats, and even church steeples may be found guilty of violating the MBTA."[12] In this way, the "absurd" outcome of a ruling in CITGO's favor must be avoided at all costs in order to escape liability so widespread that it could, essentially, render the entire act ineffective. Accordingly, the Fifth Circuit reversed the district court's holding and held that unintentional omissions resulting in the death of migratory birds *could not* be violative of the MBTA.

Conclusion

The Fifth Circuit's opinion adopts the interpretation of the Eighth and Ninth Circuits. This decision furthers the national federal court split on the meaning of "take" under the MBTA. Because of the split, the case is primed for appeal to the U.S. Supreme Court.

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Endnotes

1. U.S. v. CITGO Petroleum Corp., No. 14-40128, 2015 WL 5201185 (5th Cir. Sept. 4, 2015).
2. *Id.* at *2.
3. *Id.* at *14 n.4.
4. U.S. v. CITGO Petroleum Corp., 893 F.Supp.2d 841 (S.D. Tex. 2012).
5. *U.S. v. CITGO Petroleum*, 2015 WL 5201185 at *9.
6. *Id.*
7. *Id.*
8. *U.S. v. CITGO Petroleum Corp.*, 893 F. Supp. 2d at 847.
9. *U.S. v. CITGO Petroleum Corp.*, 2015 WL 5201185 at *9.
10. *Id.* at *10.
11. *Id.* at *12.
12. *Id.* at *14.

Rigsby v. State Farm:

Katrina, Whistleblowers, & "Some Additional Discovery"

John Juricich

The Rigsby sisters are still at it, and a recent Fifth Circuit decision has fueled their fire. In 2006, just a year removed from Hurricane Katrina's devastating landfall, Cori and Kerri Rigsby, sisters who were certified, experienced claims adjusters employed by a State Farm contractor, blew the proverbial whistle on State Farm Fire and Casualty Company by filing a false claims action against them. The Rigsbys alleged that State Farm submitted false claims to the government for payment on flood insurance policies arising out of damage caused by Hurricane Katrina. After years of litigation and a successful jury verdict by the Rigsbys on a *single* false claim, the U.S. Court of Appeals for the Fifth Circuit recently reversed a lower court decision and ruled that the Rigsby sisters are entitled to "at least some additional discovery" on *the rest* of the alleged false claims submitted by State Farm.[1] This litigation is complex, both procedurally and substantively, and carries with it the possibility of closure of another chapter in Katrina's book. But first, the Rigsbys need additional discovery.

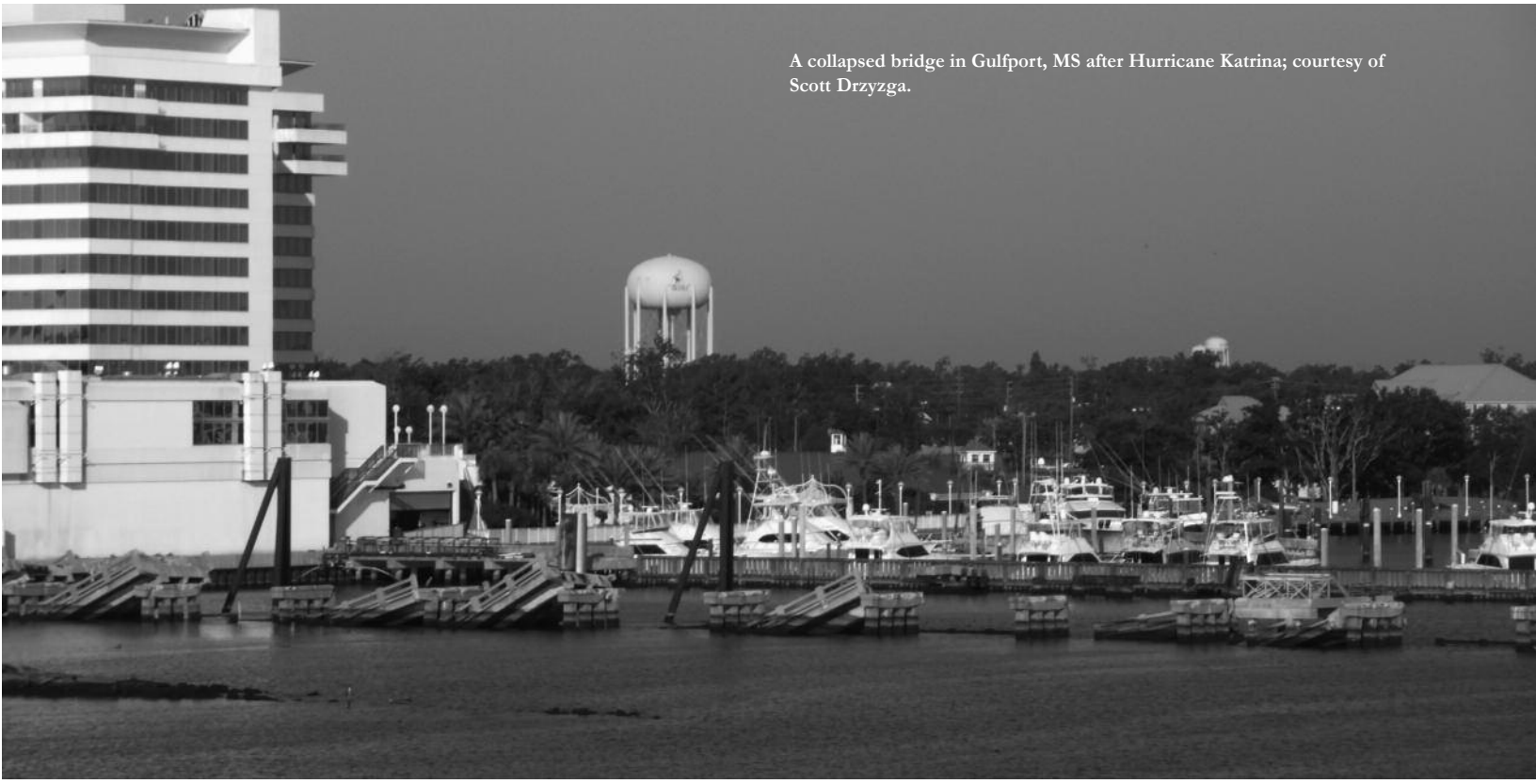
Factual and Procedural History

On August 29, 2005, Hurricane Katrina struck the Gulf Coast. Shortly thereafter, State Farm set up an office in Gulfport, Mississippi, to address claims involving its policies. Gulf Coast residents whose homes were damaged or destroyed looked to their insurance companies for compensation. Many of these homeowners were covered by at least two insurance policies, often provided by the same insurance company: a flood policy excluding wind damage, and a wind policy excluding flood damage. Private insurance companies frequently administer both policies, but wind insurance claims are paid by the company while flood insurance claims are paid with government funds. This arrangement generated the conflict of interest State Farm faced and allegedly fell victim to: the private insurer has an incentive to classify hurricane damage as flood-related to limit its economic exposure.

The Rigsbys brought suit under the False Claims Act in April 2006. The Rigsbys, while under contracted employment with State Farm at the time, claimed that State Farm sought to unlawfully shift its responsibility to pay wind damage claims on homeowner's insurance policies to the government, through the National Flood Insurance Program, by classifying damage to properties covered by both a homeowner's policy and a flood policy as flood damage instead of wind damage.[2] During the trial, the district court focused the case on a single policy violation rather than evaluating all of the policy violations alleged by the Rigsbys. The district court essentially utilized this policy as a "test case." If the Rigsbys were successful on this single claim, the district court would consider letting the Rigsbys bring additional alleged violations to trial.

The Test Case

On September 20, 2005, a few weeks after Katrina, Rigsby and Cody Perry, another State Farm adjuster, inspected the home of Thomas and Pamela McIntosh in Biloxi, Mississippi. The McIntoshes had two insurance policies with State Farm: a Standard Flood Insurance Policy (SFIP) excluding wind damage, and a homeowner's policy excluding flood damage. Using a program that generates estimates for flood damages, and thereby foregoing a line-by-line estimate, Rigsby and Perry presumed that flooding was the primary cause of damage to the McIntoshes' home. On September 29, 2005, State Farm supervisor John



A collapsed bridge in Gulfport, MS after Hurricane Katrina; courtesy of Scott Drzyzga.

Conser approved a maximum payout of $350,000 ($250,000 for the home, $100,000 for personal property) under the SFIP. Three days later, State Farm sent checks to the McIntoshes.

State Farm later retained an engineering company, Forensic Analysis Engineering Corporation (Forensic), to analyze the damage. Forensic engineer Brian Ford concluded that the damage was primarily caused by wind, and prepared a report noting as much. But the Rigsbys presented evidence that after State Farm received Ford's report, the company refused to pay Forensic and withheld Ford's report from the McIntosh National Flood Insurance Program file. A note on Ford's report from Alexis King, a primary Gulfport supervisor for State Farm, read: "Put in Wind [homeowner's policy] file—DO NOT Pay Bill DO NOT discuss." State Farm commissioned a second report, written by another Forensic employee, John Kelly. Kelly's report determined that while there had been wind damage, water was the primary cause of damage to the McIntosh home. There was evidence that King pressured Forensic to issue reports finding flood damage at the risk of losing contracts with State Farm. Ford was subsequently fired. These events led the Rigsbys to believe State Farm was wrongfully seeking to maximize its policyholders' flood claims to minimize wind claims.

Whistleblowers Receive Further Discovery

The Rigsbys prevailed at trial. The jury concluded that the residence involved in the single-claim test case, sustained no compensable flood damage and that the government therefore suffered damages of $250,000 under the False Claims Act as a result of State Farm's submission of false flood claims for payment on the property. The jury also found that State Farm "knowingly" presented a false claim to the U.S. government for payment.[3] In other words, the jury found that State Farm submitted a "false record" in direct violation of the False Claims Act.[4] After the trial, the Rigsbys requested the court's permission to pursue the additional instances of false claims that were part of the alleged general scheme, but the district court denied that motion. The court concluded that the Rigsbys had failed to provide sufficient facts and details about the additional claims in their lawsuit. The Rigsbys appealed the denied motion and State Farm appealed the jury verdict.

As the Fifth Circuit points out, this case is unique in comparison to other False Claims Act cases. The False Claims Act allows private parties, referred to as "relators," to bring a suit (called a "qui tam" suit) on behalf of the United States against anyone who has submitted false or fraudulent claims to the government. However, this case is unique because of the district court's treatment of the Rigsbys' claims—focusing the discovery and trial on one single policy claim as opposed to considering all of the policy claim violations alleged by the Rigsbys. The Fifth Circuit paid particular attention to the lower court's statement that it would consider allowing additional investigation of the other claims if the Rigsbys succeeded on the test case.[5] But after succeeding, the Rigsbys were denied the lower court's permission to further investigate the other alleged claim violations.

The FCA requires that all allegations of fraud be set out "with particularity of the circumstances constituting fraud or mistake."[6] In considering whether this standard was met for the additional claims, the Fifth Circuit reviewed several procedural matters unique to this case but returned to the essential purpose of the requirement – "to provide the defendant with fair notice of the claim, to safeguard defendant's reputation, and to protect defendant against the institution of strike suits."[7] Noting that State Farm was "all too aware" of the Rigsbys' claims in this instance, the Fifth Circuit concluded that the purpose of the rule had been achieved.

For these reasons, the Fifth Circuit ultimately ruled that the Rigsbys were entitled to further pursue discovery on the additional claims violations set forth in their complaint. Interestingly, the Fifth Circuit also noted that the Rigsbys had a weapon in their arsenal that most (if not all) plaintiffs seeking discovery in False Claims cases do not have: a jury's finding of a false claim and a false record. The court states that this fact "[c]oupled with the allegations in the final pretrial order . . . 'amounts to more than probable, nigh likely, circumstantial evidence' that additional false claims might have been submitted."[8]

False Claim Act Violation Upheld

The Fifth Circuit also upheld the jury's verdict against State Farm for violating the False Claims Act in regards to the single claim litigated before the district court. The Fifth Circuit held that the Rigsbys put on enough evidence at trial to lead a reasonable jury to believe the falsity of State Farm's single claim, State Farm's intent in filing the claim, and that State Farm knowingly filed the false claim. However, the Fifth Circuit made clear that by its ruling to allow additional discovery for the remaining false claim allegations, it is not making any "judgments about the actual existence of other potential false claims or records." The case is now back with the district court, and the Rigsbys are seeking additional information about the other alleged violations.[9]

Conclusion

In sum, the Fifth Circuit's decision in *Rigsby v. State Farm* upholds a jury verdict against State Farm for filing a fraudulent insurance claim during the aftermath of Hurricane Katrina, and opens the door for the Rigsby sisters to scour for more instances of this type of fraud. This decision also serves as a warning to other insurance providers who are tempted by the trap of fraudulently classifying types of damages. Currently, the Rigsbys are back at the trial level utilizing "some additional discovery" to pursue the rest of their false claims allegations against State Farm.

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Endnotes

1. U.S. ex rel. Rigsby v. State Farm Fire & Cas. Co., 794 F.3d 457, 468 (5th Cir. 2015).
2. *Id.* at 463.
3. 31 U.S.C. § 3729(a)(1).
4. The district court awarded the Rigsbys the maximum possible share under the False Claims Act for relators pursuing claims without the government as a party—30 percent of $758,250 (the court trebled damages on the $250,000 false claim and added a civil penalty of $8,250), or $227,475. The district court also awarded the Rigsbys $2,913,228.69 in attorney's fees and expenses.
5. *Rigsby*, 794 F.3d at 466.
6. *Id.*
7. *Id.* at 467.
8. *Id.* at 469.
9. This decision was rendered by a three-judge panel for the Fifth Circuit. In August 2015, the Fifth Circuit denied State Farm's petition for a full-panel rehearing.

Swim at Your Own Risk:
Royal Caribbean Wins Cloudy Pool Case

Autumn Breeden

Royal Caribbean's *Liberty of the Seas* cruise ship; courtesy of John Steadman.

Several years ago, Donald Smith and his wife set out for a vacation cruise. Somewhere along the way, Smith went out for a swim in one of the many pools on board. He found his pool of choice to be murky and cloudy but continued on with his swim. The swim ended with injuries to Smith and, ultimately, a lawsuit against the cruise line. In this case, the Eleventh Circuit was called upon to consider what duty of care a cruise line owes to its passengers when the passenger in question knowingly enters a murky pool for a swim.

Background

In February 2012, Donald Smith and his wife were aboard the Royal Caribbean's *Liberty of the Seas* cruise ship. During the cruise, Smith, a self-proclaimed recreational swimmer, went to one of the outdoor pools on the ship to swim laps. Upon arriving at the pool, Mr. Smith noticed that the water looked "green, cloudy, and murky."[1] Despite the appearance of the pool and the option to swim in 10 other pools on board, Smith decided to swim in this murky pool.

Smith swam in the pool for 20 minutes without incident, but admitted that he could not see clearly underwater almost immediately upon entering the pool. During this time, Smith swam underwater with his eyes open; he was not wearing goggles.

Despite the appearance of the pool and the option to swim in 10 other pools on board, Smith decided to swim in this murky pool.

According to Smith, the murkiness of the water remained at the same level throughout his swim. On his third attempt to swim the length of the pool underwater, Smith swam directly into the pool wall face first, hitting his forehead. Immediately after the impact, Smith exited the pool using the nearest ladder, and noticed his right arm was not working properly, causing him to rely on his left arm to climb the ladder. He also suffered neck pain. Smith, accompanied by his wife, immediately sought medical attention from the ship's medical staff.

In February 2013, Mr. Smith filed a lawsuit against Royal Caribbean. In his complaint, Smith alleged that Royal Caribbean "was negligent in its maintenance and operation of the swimming pool, and in failing to warn … Smith about the dangers associated with the use of the pool."[2] Royal Caribbean denied the claim and the trial court agreed with the cruise ship owner, dismissing Smith's lawsuit. Smith appealed the lower court's decision to the Eleventh Circuit.

Maritime Torts

Smith's claim of negligence falls under federal maritime law because the incident took place aboard a ship sailing in navigable waters.[3] Under maritime law, the ship owner owes its passengers a duty of reasonable care. In order for Smith to be successful in his claim against Royal Caribbean, Smith must prove that: (1) Royal Caribbean had a duty to protect him from a particular injury, (2) Royal Caribbean breached that duty, (3) the breach "actually and proximately" caused Smith's injury, and (4) Smith suffered actual harm.[4] The appropriate standard of care in this case is that of ordinary reasonable care, meaning that Smith would need to prove that Royal Caribbean had "actual or constructive" knowledge of the risk. The court added that this was particularly appropriate in this instance, where "the risk is one just as commonly encountered on land … and not clearly linked to a nautical adventure."[5]

However, notice of the risk only applies if the condition is deemed an "open and obvious danger," in which case the ship owner has a duty to warn its passengers.[6] In this instance, Smith was aware of the danger by his own admission. He noticed the murkiness of the pool but still proceeded to swim. Even when he was unable to see while swimming underwater, Smith continued to swim until his injury on the third lap. Because a reasonable person would have been aware of the condition, Royal Caribbean did not breach its duty to Smith.

Conclusion

In reaching its conclusion, the court noted that Royal Caribbean maintained the pools on the *Liberty of the Seas* within national standards and industry practices. The court found that Royal Caribbean had no duty to warn Smith of conditions that, by his own admission, he was already aware of – the murky pool. By disregarding the cloudy pool and continuing with his swim, Smith assumed responsibility for his own actions. So next time you decide to swim in a murky pool, remember to swim at your own risk!

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Endnotes

1. Smith v. Royal Caribbean Cruises, Ltd., No. 15-10658, 2015 WL 4546202 *1 (11th Cir. Jul 29, 2015).
2. *Id.* at *1.
3. *Id.* at *6.
4. *Id.* at *3.
5. *Id.*
6. *Id.*

Pearl River Polluter Pays Price

John Juricich

Doing construction near a state waterway? It pays to get your permits before beginning construction. Just ask Morris Gray. The Mississippi Court of Appeals recently upheld the Mississippi Commission on Environmental Quality's fine of $62,500 against Gray for his continued violations of Mississippi's Air and Water Pollution Control Law.[1] The law makes it unlawful for any person to pollute any waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state *unless that person has a permit*.[2] In other words, if you are causing pollution, including sediment, to run into a state waterway, you should consult with state agencies to obtain the necessary permits. Morris Gray disturbed seven acres of land near the Pearl River through extensive dirt work without first obtaining the required permit. He persisted in these activities, even after being warned that doing so would further violate the law. The consequence of his failure: a $62,500 fine.

The Facts

Morris Gray owns thirteen acres on the east bank of the Pearl River in Rankin County, Mississippi. On September 23, 2008, an engineer with the Mississippi Department of Environmental Quality (MDEQ) saw construction activities taking place on Gray's property. On closer inspection, the inspector noticed seven acres of Gray's property were undergoing heavy dirt work. When the engineer checked the MDEQ database, he found no work permits had been issued for this site. Three weeks later, MDEQ sent Gray a notice-of-violation letter informing Gray it was unlawful to dispose of wastes—such as sediment—that may be discharged into state waters without a stormwater permit. When a project like Gray's involves clearing, grading, or excavating activities on more than five acres, a permit ensures the amount of sediment leaving the construction site is minimized through a Storm Water Pollution Prevention Plan.[3] MDEQ told Gray he needed such a plan and also needed to place controls on his property immediately to keep sediment from leaving his site.

Two weeks later, Gray submitted an application for a stormwater permit, along with a proposed Storm Water Pollution Prevention Plan, drafted by Gray's engineering consultant. MDEQ advised Gray that he would need to contact the U.S. Army Corps of Engineers to see if a federal wetlands permit was also needed. Once Gray had obtained all necessary approvals from the Corps, MDEQ would process Gray's application. Until then, MDEQ warned Gray that any unpermitted land-disturbing construction activities would violate the law.

Ultimately, the Corps determined Gray violated the federal Clean Water Act by filling in two-and-a-half acres of wetlands without first obtaining a federal permit. The Environmental Protection Agency consequently stepped in and imposed a restoration order. A MDEQ inspector revisited the site in November 2008, and he noticed the land had recently been disturbed. MDEQ then sent another notice-of-violation letter. This time, the letter also included an invitation to an administrative conference to discuss Gray's violations and a potential resolution.

The Fine

Although Gray attended the conference and considered MDEQ's settlement offer, the matter was left unsettled. MDEQ inspectors visited Gray's site three more times in February, March, and April 2009.

During each visit, the inspectors noticed new disturbances and dump trucks entering and leaving Gray's property. MDEQ notified Gray that the Mississippi Commission on Environmental Quality (Commission) would hold a hearing on Gray's multiple violations. This hearing took place on November 18, 2010. Gray represented himself at the hearing and called his engineering consultant as a witness, while MDEQ called the three engineers who had inspected Gray's property and also submitted photographs and other evidence documenting Gray's violations.

The Commission determined Gray had violated the law by continuing construction on his property without a permit and by continuing to dump fill material on his property even after MDEQ warned him that to do so would violate the law. Each violation carried a potential penalty of up to $25,000.[4] After considering the relevant penalty factors, the Commission assessed Gray $12,500 for each of the five days MDEQ observed a violation, for a total of $62,500. Gray appealed the Commission's decision to the local county court, which affirmed. Gray then appealed to the Mississippi Court of Appeals, which also affirmed the Commission's decision.

Conclusion

In sum, not having the correct permits before you begin a land-disturbing construction project near state waters can be costly. Especially if you continue your activities after agencies have specifically instructed you to stop. Permitting schemes are in place to adequately strike a balance between commercial expansion and environmental protection, accomplished by recognizing society's need for commercial expansion and growth while also protecting the environment through monitoring and restricting the growth. Gray's fines should serve as a reminder for developers who wish to construct near the state's waterways. If in doubt, consult with state agencies before beginning construction and avoid costly fines.

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Endnotes

1. Gray v. Miss. Comm'n on Envtl. Quality, No. 2014-SA-00052-COA (Miss. Ct. App. Sept. 22, 2015).
2. Miss. Code Ann. § 49-17-29(2).
3. *See* Miss. Admin. Code 11-6:1.1.1(B)(3).
4. Miss. Code Ann. § 49-17-43(1).

Resilient Residences: Diversity of Housing Can Improve Local Policy

Stephen Deal

Residential land uses are the glue that binds a city together. A city cannot have commercial activities without people. However, several decades of sprawl have diluted the rich range of housing choices that were once prevalent throughout the United States. Examine an aerial photo of some of the country's great urban neighborhoods and you will find a rich mixture of accessory units, duplexes, low-rise apartment buildings and townhouses. These types of housing, that span the gap between single-family homes and large apartment complexes, have been identified by one builder as "Missing Middle Housing" and they can be a critical component in creating more resilient cities.[1]

Shotgun Houses: A Gulf Coast Icon

Though tiny homes are not exactly a distinct housing type, in the American South the tiny house is a treasured component of Southern Vernacular architecture. While other regions of the U.S. pursued more elaborate variations on the multi-family structure, the south largely stayed within the confines of the single-family form. In cities like New Orleans, where space is at a premium, the answer came in the form of a small, narrow house, popularly known as a shotgun house. The shotgun house, so named because one could presumably fire a bullet right through the house and not hit anything, is a small structure, generally three to five rooms deep, with each room opening out onto the other.[2]

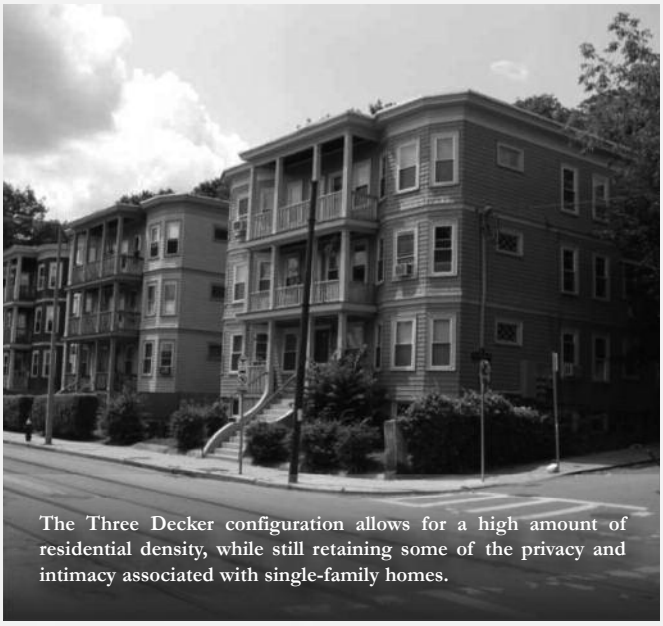
In the moist and humid climate of the deep South, shotgun houses have a number of adaptations that make them ideal for subtropical living. The interior ceilings of the shotgun house are high, allowing warm air to rise, which keeps the living quarters cool. The open breezeway going through each room keeps fresh air circulating in the house.[3] Persistent rain and possible flooding are also accounted for in the house's design. Front porches and deep overhangs offer protection from the rain; homes are generally raised a few feet off the ground to take into account the potential for flooding.

The basic shotgun home can be tweaked and expanded in a number of unique ways. Shotgun double homes and Camelback homes are two distinct variants of the basic building pattern. Shotgun double houses are two shotgun houses attached at the side and camelback homes can be identified by the second floor addition in the rear. These different iterations may be an important factor in explaining the persistent popularity of the humble home as they can be easily modified to fit different economic circumstances.

Though small houses continue to be built in modern America, the quality of design in these homes leaves something to be desired. Mobile homes, for example, are an efficient and affordable option for many in the rural South, but these structures generally have trouble recouping their value and land ownership may not be an option for many mobile home residents.[4] By comparison, the Rural Studio Program at Auburn University recently constructed a small shotgun home for an affordably priced $20,000.[5] The low cost of construction would make land ownership possible for working class residents, which means there is further incentive to grow in place. Historic shotgun examples, with their double and camelback additions, also provide us with hints about how such a structure could evolve if they became a staple of city building once again.

One recent example of this in New Orleans is a double shotgun structure that was converted into a single-family home with nearly 2,000 square feet of living space.[6] Not massive necessarily, but a good indicator of how this type of housing has aggressive expansion possibilities.

Above all else though, the shotgun house demonstrates that different social and geographic circumstances can result in radically different approaches to the issue of affordable housing. In New England, there is another unique example of a local building form that can easily be adapted to a number of different living arrangements: the Three Decker.



The Three Decker configuration allows for a high amount of residential density, while still retaining some of the privacy and intimacy associated with single-family homes.

The Three Decker Home

Even as present-day planners pursue a wide range of housing options, some historic building patterns continue to elude the modern planning process. Consider New England's Three Decker. Conceived in the late 1800s, the three decker home was a fairly ingenious solution at housing New England's burgeoning immigrant population.[7] Three deckers are unique because they are essentially vertically stacked apartments, each accessed by a common stairway that leads out to the street.[8] The major benefit of this design is that you have a multi-family dwelling that looks and functions more like a single-family home. The apartments in this arrangement occupy a single floor, which means every apartment gets windows on all four sides and every unit has the potential to open out on a front porch. These types of structures are very flexible and are conducive to a number of different ownership arrangements: they could be maintained as condos, operated by a landlord or perhaps owned by an extended family. Two decker and four decker homes are not uncommon, and the three deckers may be attached on one side to become a six family apartment, a configuration which can greatly increase the potential density of a neighborhood.

The design philosophy behind the three decker may also impart valuable lessons in coastal Alabama and Mississippi, where the need for storm resistant building can make the simple single-family home more expensive. By sharing costs among two or three owners, developers may be more likely to build structures that meet higher building standards. At the same time, homeowners can retain a level of privacy by having an entire home level to occupy. Practical applications aside, the three decker is a great example of the rich variety and complexity that is possible in residential buildings and how urban areas can adapt in unconventional ways that codes may not always fully catch on to.

Live-Work Units and The Story of Southside

Located in downtown Greensboro, North Carolina, Southside is a great revitalization success story and an example of how one can create a compelling place with predominately residential land uses. There are several distinct housing types within the neighborhood and they range from single-family homes, either rehabilitated homes or new construction, townhouses, live-work units and even multi-story apartment buildings.[9] Perhaps the most interesting housing type is the live-work unit. Live-work units are essentially buildings where homes and businesses exist in the same unit.[10] These types of structures were quite common before World War II and they still perform a valuable role in cities today. The chief appeal of these types of housing is their potential as a flexible workspace. If retail or office uses fail to take hold in the live-work unit, then the space can easily be adapted exclusively for residential needs.

The live-work concept is also highly relevant to coastal communities, where commercial fishing and residential living can go side by side. For example, in the North Carolina town of Wanchese, traditional town businesses, such as crabbing and boat building, are allowed as a commercial accessory use to a primary residence.[11] By recognizing the historic link between small commercial fishing businesses and personal residences, and tailoring their zoning accordingly, the town is able to

preserve its unique working waterfront character. Whether it's a seaside town or a mixed-use community, the live-work unit is a time-tested form of building that allows for a wide range of home and business combinations. That is why Greenboro's Southside community deserves acclaim and recognition as a modern day example of how these configurations can be incorporated into present-day society.

Today Greensboro's Southside neighborhood continues to function primarily as a residential district, but it is no longer a single urban redevelopment project. It is a fully formed neighborhood. Subsequent developments have employed the Southside brand, resulting in a unique blend of traditional and contemporary design styles. The end result has been something many new infill projects struggle to attain, a genuine sense of community and the perception of a place that has grown gradually over the decades, rather than a few years.

By combining residential and commercial activities in one structure, Live-Work units serve as a flex space where residents may be able to pursue retail and office activities concurrent with their everyday living.

Conclusion

As the dominant land use, residential housing will never have a shortage of types and configurations. Unfortunately, many of our current housing options tend to fall into one of two extremes: single-family cul-de-sac developments and large apartment developments and high rises. This is especially true in coastal towns where additional density often is construed as an additional high-rise or hotel tower. An appraisal of the urban form before the 1950s suggests that there are a number of different housing types, which can give rise to high-density development while still retaining a high amount of charm and intimacy. Three Decker Houses, Live-Work Units and tiny homes are just a few examples of a kind of "missing middle" that is just waiting to be fully developed. As planners, it is incumbent upon us to tap into the roots of the past to build the more resilient neighborhood for tomorrow!

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